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U. S. Supreme court

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

DECEMBER TERMS, 1870-1871, IN

11, 12, 13, 14 Wallace,

WITH OTHERS,

BOOK 20,

LAWYERS' EDITION,

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

BY

STEPHEN K. WILLIAMS, LLD.

WITH

"NOTES ON U. S. REPORTS"

BY

WALTER MALINS ROSE.

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THE first republication, nearly twenty years ago, of the United States Supreme Court Reports in the Lawyers' Edition, was an event of public importance. It has resulted, not merely in the increase, but in the literal multiplication, of the number of lawyers and judges who own and use this great series of decisions. It has, therefore, materially extended the influence of those decisions upon the general jurisprudence of the country. Now the inclusion of Rose's Notes obviously adds great value to these reports.

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ALLOTMENTS, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AS THEY STOOD DURING THE TERMS OF 1870, 1871, TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND TERMS OF SERVICE, RESPECTIVELY.

NAMES OF JUSTICES, AND WHENCE APPOINTED.	BY WHOM APPOINTED.	CIRCUITS, 1868–1870.	COMMISSIONED.	SWORN IN.	TERMINATION.
ASSOCIATE JJ. NATHAN CLIFFORD, Maine.	President BUCHANAN.	FIRST. ME., N. H., MASS., RHODE ISLAND.	1858. (Jan. 12.)	1858. (Jan. 21.)	Died. 1881. (July 25.)
SAMUEL NELSON, New York.	President TYLER.	SECOND. VERMONT, CONN., NEW YORK.	1845. (Feb. 14.)	1845. (Mar. 3.)	Resigned. 1872. (Dec. 1.)
WILLIAM STRONG, Pennsylvania.	President GRANT.	THIRD. NEW JERSEY, PENN., DEL.	1870. (Feb. 18.)	1870. (Mar. 14.)	Resigned. 1880. (Dec. 14.)
CHIEF JUSTICE. SALMON P. CHASE, Ohio.	President LINCOLN.	FOURTH. MD., VA., N. C., W. VA., S. C.	1864. (Dec. 6.)	1864. (Dec. 15.)	Died. 1873. (May 7.)
ASSOCIATE JJ. JOSEPH P. BRADLEY, New Jersey.	President GRANT.	FIFTH. GA., ALA., FLA., MISS., LA., TEX.	1870. (Mar. 21.)	1870. (Mar. 23.)	Died. 1892. (Jan. 22)
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DAVID DAVIS, Illinois.	President LINCOLN.	SEVENTH. IND., ILL., WIS.	1862. (Dec. 8.)	1862. (Dec. 10.)	Resigned. 1877. (Mar. 4.)
SAMUEL F. MILLER, Iowa.	President LINCOLN.	EIGHTH. MINN., IOWA, MO., KAN., ARK., NEB.	1862. (July 16.)	1862. (Dec. 1.)	Died. 1890. (Oct. 13.)
STEPHEN J. FIELD, California.	President LINCOLN.	NINTH. CALIFORNIA, OREGON, NEVADA.	1863. (Mar. 10.)	1863. (Dec. 7.)	Retired. 1897. (Dec. 1.)

JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. SALMON P. CHASE.

ASSOCIATE JUSTICES,

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HON. ROBERT C. GRIER,
HON. NATHAN CLIFFORD,
HON. NOAH H. SWAYNE,
HON. SAMUEL F. MILLER,
HON. DAVID DAVIS,
HON. STEPHEN J. FIELD,
HON. JOSEPH P. BRADLEY,
HON. WILLIAM STRONG.

ATTORNEYS GENERAL,

HON. AMOS T. AKERMAN,
to Dec 14, 1871; after that
HON. GEORGE H. WILLIAMS.

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GENERAL TABLE OF CASES REPORTED

IN THIS BOOK.

VOLUMES 78, 79, 80, 81.

A.

Alexander v. Rodriguez..... 406
Alexander v. Roulet..... 564
Allen, Assignee, Hall v..... 458
Amy v. Barkholder..... 101
Amy, Bath County v..... 539
Amy, Pendleton County v..... 579
"Amy v. The Supervisors,"..... 101
"Ariadne, The," The Pentz v..... 542
Armstrong v. Morrill..... 765
Armstrong v. United States..... 614
Atkins, The Cooper v..... 881
Atkins, The Mabey v.....473, 881
Austin, Low v..... 517
Avery, United States v..... 610
Avery v. United States..... 405

B.

Bagnall v. Wisconsin..... 240
Bailey Co., Eureka Co. v..... 209
Bailey, Phœnix Life Ins. Co. v..... 501
Baker v. Morton..... 262
Ballard, Caperton v..... 885
Ballard, United States v..... 845
Bank v. Dows..... 65
Bank v. Lanier..... 172
Bank, First Nat. of Bethel, v. Nat. Pahquioque Bank 840
Bank, Citizens', of La., Bank of West Tennessee v. 514
Bank, First Nat. of Washington, v. Texas 550
Bank, Fourth Nat. of N. Y., v. Railroad Co., N. O. & C..... 82
Bank of Ashland, Junction Railroad Co. v. 385
Bank of Milwaukee, Hoffman v..... 366
Bank, Nat. Pahquioque, First Nat. Bank of Bethel v..... 840
Bank, The Rock Island, Mann v..... 188
Bank, Second Nat. of Leavenworth, v. Hunt 190
Bank, Traders' Nat. of Chicago, v. Campbell 832
Bank of Virginia, Knox v..... 287
Bank of West Tenn. v. Citizens' Bank of La. 514
Banks, Paige v..... 709
Barkholder, Amy v..... 101
Barling, Exr., The William H. Webb v... 774
Barnard, Welch, Admr. v..... 688
Bartemeyer v. Iowa..... 792
Barth v. Clise..... 393
Barton, Home Ins. Co. v..... 708
Bath County v. Amy..... 539
Bedford, Kitchen v..... 637

B.

Bethell v. Matthews..... 556
Bevans v. United States..... 531
Bigler v. Waller.....260, 891
Black v. Curran..... 849
Blatchford, Railroad & Coal Co. v..... 179
Bloom, Stewart v..... 176
Bloomshire, Edmonson v..... 44
Blyew v. United States..... 638
Boudinot v. United States..... 227
Boutwell, Kentucky v..... 631
Bowyer, Caperton v..... 882
Boyce, The Patapsco, v.....457, 696
Boyden v. United States.....167, 527
Boykin, Ins. Co. v..... 442
Bradley, Admr., Noonan v..... 279
v. Fisher 646
Brainard v. Hubbard..... 272
"Bridgeport, The," v. Shaw..... 787
"Bronson's Executor v. Chappell,"..... 436
Brumagen, Chew v..... 663
Buffington v. Day..... 122
Burke, New Albany v..... 155
Burnley, Cook v..... 29
"Burnley, Cook v."..... 84
Burns, United States v..... 388
Butler, Lexington v..... 809
v. Watkins 629

C.

Cain, Dolton v..... 830
Campbell, Generes v..... 110
Traders' Nat. Bank of Chicago, v. 832
Canal Co., G. B. & M., Pumpelly v..... 557
Caperton v. Ballard..... 885
v. Bowyer 882
Carpenter v. Montgomery..... 698
Carroll v. United States..... 565
Case, Kearney v..... 395
v. Terrell 134
Caujolle v. Curtiss, Admr..... 507
"Cayuga, The," v. Hoboken Land Co..... 828
"Chappell, Bronson's Executor v."..... 436
Chappell, Townsend, Exr., v..... 436
"Cherokee Tobacco, The,"..... 227
Chew v. Brumagen..... 663
Chicago, Dows v..... 65
Child, United States v..... 360
Chouteau, Gibson v..... 534
Christmas v. Gaines..... 762
"Christmas v. Russell,"..... 762
Clark, Del. & Hud. Canal Co. v..... 581
Clinton v. Englebrecht..... 659
Clise, Barth v..... 393

C.

Clyde v. United States..... 479
Cockroft v. Vose..... 875
"Collector, The, v. Hubbard,"..... 272
v. Day,"..... 122
The, Sturges v."..... 255
"College Cases, Pennsylvania,"..... 550
Collier v. Washington & Jefferson College 550
Collins v. Riggs..... 723
Conrad v. Hazlett..... 821
"Continental, The," New Haven Steam Trans. Co. v..... 801
Cook v. Burnley..... 29
"Cook v. Burnley,"..... 84
Cook v. Porter..... 84
Cooley v. O'Connor..... 446
Cooper, The, v. Atkins..... 881
"Cooper and Mabey, The,"..... 881
Cousin v. Generes..... 240
Cowdrey, G. H. & H. Railroad Co. v..... 199
Cox v. Lott..... 370
Creevy v. Eclipse Towboat Co..... 873
Croft, Myers v..... 562
Cross v. United States..... 721
Crusell, United States v.....384, 821
Curran, Black v..... 849
Curtis v. Whitney..... 513
Curtiss, Admr., Caujolle v..... 507

D.

Davenport v. Lamb..... 655
Davis, Parker v..... 287
Day, Buffington v..... 122
"Day, The Collector v."..... 122
Defrees, Tyler v..... 161
"Delaware, The," v. Oregon Iron Co..... 779
Del. & Hud. Canal Co. v. Clark..... 581
Delmas v. Merchants' Ins. Co..... 757
Dent v. Emmeger..... 838
Denton, Jacoway v..... 645
Dewing v. Sears..... 189
Dirst v. Morris..... 722
"Distilled Spirits, The,"..... 167
Distilled Spirits, United States v..... 815
Doane, Hanauer v..... 439
Dolton v. Cain..... 830
Dooley v. Smith..... 547
Downer, Western Transportation Co. v..... 160
Dows v. Chicago..... 65
Dows, Union Nat. Bank v..... 65
Draper, Sturges v..... 255
Dreville, Walker v..... 429
Dubois, Railroad Co. v..... 265
Dunham, Ins. Co., Marine v..... 90
Dunlop v. Zunts..... 181
Dunphy v. Kleinschmidt..... 223

E.

Easley v. Kellom..... 890
"East Saginaw, Salt Co. v."..... 611
Eclipse Towboat Co., Creevy v..... 873
Edmonson v. Bloomshire..... 44
Edwards, French v..... 702
v. Tanneret..... 415
"Ellen Forrester, The," The Fannie v..... 114
Emmeger, Dent v..... 838
Englebrecht, Clinton v..... 659
Erlandson, The Ocean Spray v..... 286
Erskine v. Hohnbach..... 745
Eureka Co. v. Bailey Co..... 209
"Eutaw, The,"..... 278

E.

Ewin v. Houston, Admr..... 484
Ex parte McNiel..... 624
Ex parte Newman..... 877
Ex parte Russell..... 632
Exchange Bank, Knox v..... 414

F.

"Fannie, The," v. The Ellen Forrester..... 114
Farr v. Thompson..... 102
Farwell, Yeager v..... 476
Fernandez, N. O. & B. S. Mail Co. v..... 249
Ferry Co., Wiggins, St. Louis v..... 192
Fisher, Bradley v..... 646
Fitzpatrick, United States v..... 707
Flint, N. & N. Y. Trans. Co. v..... 556
Forsyth v. Woods..... 207
Foulke, Admr., v. Hubert..... 785
v. Zimmerman..... 785
Fowler v. Rathbone..... 281
Francis, Insurance Co. v..... 77
Franklin County, Steines v..... 846
Freeborn v. "The Protector,".....47, 463
French v. Edwards..... 702
v. Shoemaker.....270, 852

G.

Gaines, Christmas v..... 762
Galceran, Leon v..... 74
Gardiner, Phœnix Insurance Co. v..... 112
Garnett v. United States..... 79
"Gay's Gold,"..... 606
Gay v. United States..... 606
Generes v. Campbell..... 110
Cousin v..... 240
Germain v. Mason.....392, 689
Gerson, Slaughter v..... 627
Gibson v. Chouteau..... 534
v. Warden..... 797
"Gold, Gay's,"..... 606
Gordon, The Mary J. Vaughan v..... 807
The Telegraph v..... 807
Gorham Mfg. Co. v. White..... 731
Gregg v. Moss..... 740
Gruninger, Philpot v..... 743

H.

Hall v. Allen, Assignee..... 458
v. Nash. & Chat. R. Co..... 594
Halliburton v. United States..... 533
Halliday v. Hamilton..... 214
Hamilton, Halliday v..... 214
Phœnix Ins. Co. v..... 729
Hammond, Thorp v..... 419
Hampton v. Rouse..... 593
Hanauer v. Doane..... 439
Harrington v. United States..... 167
Harris. B. & O. Railroad Co. v..... 354
Wheeler v.....278, 531
Hart, Mason v..... 527
White v..... 685
"Hartford Ins. Co., Semmes v."..... 490
Hasbrouck, The St. John v..... 645
Haskell, Admr., Sevier, Admr., v..... 827
Hazlett, Conrad v..... 821
Heinekin, Peyton v..... 679
Henderson, United States v..... 235
"Henderson's Distilled Spirits,"..... 815
"Henderson's Tobacco,"..... 235
Hennessy v. Sheldon..... 446
Hoboken Land Co., "The Cayuga" v..... 828
Hoffman v. Bank of Milwaukee..... 366
Hohnbach, Erskine v..... 745

H.

Holladay v. Kennard..... 390
Holmes v. Sevier, Admr..... 876
Hook v. Payne..... 887
Houston v. Jefferson College..... 550
Admr., Ewin v..... 484
Admr., Rice v..... 484
Howell, United States v..... 195
Hubbard, Brainard v..... 272
"Hubbard, The Collector v."..... 272
Hubert, Foulke, Admr., v..... 785
Hunt, Second Nat. Bank of Leavenworth v..... 190
United States v..... 739
Huntington v. Texas..... 550
Hurley v. Street..... 786
Hutchberger, Ins. Co. v..... 364

I.

Improvement & R. Co. v. Munson..... 867
Ins. Co. v. Boykin..... 442
v. Francis..... 77
v. Hutchberger..... 364
Brooklyn Life, v. Miller..... 398
Great Western, v. Thwing..... 607
of Hartford, Semmes, Admr., v..... 490
Home, v. Barton..... 708
Home, Packet Co. v..... 463
Home, v. Weide..... 197
Howard Fire, v. N. & N. Y. Trans. Co..... 378
Marine v. Dunham..... 90
Merchant's, Delmas v..... 757
Phœnix, v. Gardiner..... 112
Phœnix, v. Hamilton..... 729
Phœnix, v. Slaughter..... 444
Phœnix, Life v. Bailey..... 501
Relief Fire, Steinbach v..... 615
Union M. Life, v. Wilkinson..... 617
Western Mass., v. N. & N. Y. Trans. Co..... 380
Iowa, Bartemeyer v..... 792

J.

Jacoway v. Benton..... 645
"Java, The," v. Judd Oil Co..... 834
Jefferson College v. Washington & Jefferson College..... 550
Jefferson College, Houston v..... 550
Jenkins, Nicholson Pavement Co. v..... 777
Johnson v. Towsley..... 485
Jones, Watson v..... 666
Judd Oil Co., "The Java" v..... 834
Justice, United States v..... 753

K.

Kahn, Stewart v..... 176
Kearney v. Case..... 395
Kellom, Easley v..... 890
Kennard, Holladay v..... 390
Kentucky v. Boutwell..... 631
Missouri v..... 116
"Key City, The," Young v..... 896
Kimbal, United States v..... 503
Kingsbury, Shoemaker v..... 432
Kirby, Whiteley v..... 32
Kirtland, Williams v..... 683
Kitchen v. Bedford..... 637
Klein, United States v..... 519
Kleinschmidt, Dunphy v..... 223
Klinger v. Missouri..... 635
Knox v. Bank of Virginia..... 287
v. Exchange Bank..... 414
v. Lee..... 287

L.

Lamb, Davenport v..... 655
Langley, The Syracuse v..... 382
Lanier, Bank v..... 172
Latey, Parker v..... 404
"Laura, The," Norcross v..... 813
Lawrence, Parmalee v..... 48
Leary v. United States..... 756
Le Claire, May v..... 50
Lee, Knox v..... 287
Legal Tender Cases..... 287
Leon v. Galceran..... 74
v. Pijuan..... 74
v. Oliver..... 74
Levy v. Stewart..... 86
Lexington v. Butler..... 809
Lott, Cox v..... 370
Mobile Trade Co. v..... 376
Louisiana v. Wickliffe..... 365
Low v. Austin..... 517
The Western Metropolis v..... 394
Ludlow v. Ramsey..... 216
Lynde's Heirs, United States v..... 230

M.

Mabey, The, v. Atkins.....473, 881
"Mabey and Cooper, The,"..... 881
Mahan v. United States..... 764
Mail Co., N. O. & B. S. v. Fernandez..... 249
Mann v. Bank, The Rock Island..... 188
Mason v..... 527
Manning, United States v..... 706
"Maria Martin, The,"..... 251
"Marston, Palmer v."..... 826
Marston, Worthy, Exr., v..... 826
Martin v. Northern Trans. Co..... 251
Toof v..... 481
Mary J. Vaughan, The, v. Gordon..... 807
Maryland, Ward v.....260, 449
Mason, Germain v.....392, 689
Mason v. Hart..... 527
v. Mann..... 527
v. Rollins..... 527
Smith v..... 748
Matthews, Bethell v..... 556
May v. Le Claire..... 50
Mayes, United States v..... 381
McCormick, Pugh v..... 789
McGregor, Wells v..... 538
McNiel, *Ex parte*..... 624
McVeigh v. United States..... 80
Meader v. Norton..... 184
Mellen, N. O. & O. Railroad Co. v..... 434
"Merrimac, The,"..... 873
Miller v. New York..... 259
"Miller v. The State,"..... 259
v. United States,"..... 135
Miller, Brooklyn Life Ins. Co. v..... 398
United States v..... 705
Missouri v. Kentucky..... 116
Klinger v..... 635
Monger v. Shirley..... 635
"Montello, The," United States v..... 191
Montgomery, Carpenter v..... 698
Morgan v. Thornhill..... 60
v. United States..... 738
Morrill, Armstrong v..... 765
Morris, Dirst v..... 722
Morton, Baker v..... 262
Moss, Gregg v..... 740
Mowry v. Whitney.....858, 860
Munson, Improvement & R. Co. v..... 867
Myers v. Croft..... 562
Mynderse, United States v..... 241

N.

Napoleon III., "The Sapphire" v..... 127
New Albany v. Burke..... 155
Newman, *Ex parte*..... 877
"New Orleans Railroad, United States v." 434
New York v. Cent. R. Co. of N. J..... 458
New York, Miller v..... 259
Northern Railroad Co. v..... 412
Nicholson Pavement Co. v. Jenkins..... 777
Osburn v..... 689
Nock, Philp v..... 567
Noonan v. Bradley, Admr..... 279
Norcross v. The Laura..... 813
Northern Trans. Co., Martin v..... 251
Norton, Meader v..... 184

O.

Ocean Spray, The, v. Erlandson..... 286
O'Connor, Cooley v..... 446
O'Dowd v. Russell..... 857
Officers, Ships of War v. United States.... 505
O'Keefe, United States v..... 131
Oliver, Leon v..... 74
Oregon Iron Co., The Delaware v..... 779
Osborn v. Nicholson..... 689
Osborne, Seymour v..... 33

P.

Packet Co. v. Home Ins. Co..... 463
Page, Exr., v. U. S..... 135
Paige v. Banks..... 709
"Palmer v. Marston,"..... 826
Pargoud v. United States..... 646
Parker v. Davis..... 287
v. Latey..... 404
Parmalee v. Lawrence..... 48
"Patapsco, The," v. Boyce.....457, 696
Payne, Hook v..... 887
Pendleton County v. Amy..... 579
"Pennsylvania College Cases,"..... 550
Pentz v. "The Ariadne,"..... 542
People of Utah, Stout v..... 512
Perin v. United States..... 412
Peyton v. Heinekin..... 679
Philp v. Nock..... 567
Philpot v. Gruninger..... 743
Pijuan, Leon v..... 74
Plant v. Stovall..... 538
Porter v. Cook..... 84
Powell, United States v..... 726
Presbury, Willard v..... 719
Propeller Co. v. United States..... 760
"Protector, The," Freeborn v.....47, 463
Pugh v. McCormick..... 789
v. United States..... 711
Pumpelly v. G. B. & M. Canal Co..... 557

R.

R. R. Co., Junction, v. Bank of Ashland... 385
N. O. & C., Fourth Nat. Bank of N. Y., v..... 82
Railroad & Coal Co. v. Blatchford..... 179
R. R. Co., G. H. & H., v. Cowdrey..... 199
v. Dubois..... 265
Nash. & Chat., Hall v..... 594
B. & O., v. Harris..... 354
P. & K., K. & P. R. Co. v..... 850
N. O. & O., v. Mellen..... 434
Cent of N. Y., New York v..... 458
Northern, v. New York..... 412
K. & P., v. P. & K. R. Co..... 850
R. & G., v. Reid..... 570
Wil. & W., v. Reid..... 568

R.

R. R. Co., M. & M., v. Soutter..... 543
Hannibal & St. Jo., v. Swift..... 422
Chicago & N. W., v. Whitton..... 571
Ramsey, Ludlow v..... 216
Rankin v. Tennessee..... 175
Rathbone, Fowler v..... 281
Reed v. United States..... 220
Reiche v. Smythe..... 566
Reid, R. & G. R. Co. v..... 570
Wil. & W. R. Co. v..... 568
Rice v. Houston, Admr..... 484
Richey v. Williams..... 238
Richmond, Thomas v..... 453
Riggs, Collins v..... 723
Ritter, Rogers v..... 417
Robinson v. United States..... 653
Rodriguez, Alexander v..... 406
"Rodriguez, Villa v."..... 406
Rogers v. Ritter..... 417
Rollins, Mason v..... 527
Roulet, Alexander v..... 564
Rouse, Hampton v..... 593
"Russell, Christmas v."..... 762
Russell, *Ex parte*..... 632
O'Dowd v..... 857
United States v..... 474

S.

Sac County, Smith v..... 102
St. John, The, v. Hasbrouck..... 645
St. Louis v. Wiggins Ferry Co..... 192
"Salt Co. v. East Saginaw,"..... 611
Salt Mfg. Co. v. East Saginaw..... 611
Samson v. Smiley..... 489
"Sapphire, The," v. Napoleon III..... 127
"Scotia, The," Sears v..... 822
Scott v. United States..... 438
Seaman, "The Thames" v..... 804
Sears, Dewing v..... 189
Sears v. "The Scotia,"..... 822
Semmes, Admr., v. Ins. Co. of Hartford... 490
Sevier, Admr., v. Haskell, Admr..... 827
Admr., Holmes v..... 876
Seymour v. Osborne..... 33
Sharp, Webb v..... 478
Shaw, "The Bridgeport" v..... 787
Sheeley, Smith v..... 430
Sheldon, Hennessy v..... 446
Shirley, Monger v..... 635
Shoemaker, French v.....270, 852
v. Kingsbury..... 432
"Siren, The,"..... 505
Slaughter v. Gerson..... 627
Phœnix Ins. Co. v..... 444
Smiley, Samson v..... 489
Smith, Dooley v..... 547
v. Mason..... 748
v. Sac County..... 102
v. Sheeley..... 430
Turner v..... 724
Smythe, Reiche v..... 566
Soutter, M. & M. R. Co. v..... 543
Spalding, Tucker v..... 515
"Spirits, Henderson's Distilled,"..... 815
"Spray, The,"..... 286
"State, The," Miller v..... 259
"State Tonnage Tax Cases,".....370, 376
Steinbach v. Relief Fire Ins. Co..... 615
v. Stewart..... 56
Steines v. Franklin County..... 846
Stewart v. Bloom..... 176
v. Kahn..... 176

S.

Stewart, Levy v. 86
Steinbach v. 56
Stockwell v. United States 491
Stout v. People of Utah 512
Stovall, Plant v. 538
Street, Hurley v. 786
"Sturges v. The Collector," 255
Sturges v. Draper 255
"Supervisors The." Amy v. 101
Swift, Hannibal & St. Jo. Railroad Co. v. 442
"Syracuse, The," v. Langley 382

T.

Tanneret, Edwards v. 415
Tarble, United States v. 597
"Tarble's Case," 597
Telegraph, The, v. Gordon 807
"Telegraph and Vaughan, The," 807
Tennessee, Rankin v. 175
Terrell, Case v. 134
Texas, First Nat. Bank of Washington v. .. 550
Huntington v. 550
"Thames, The," v. Seaman 804
Thomas v. Richmond 453
Thompson, Farr v. 102
Thornhill, Morgan v. 60
Thorp v. Hammond 419
Thwing, Great Western Ins. Co. v. 607
Toof v. Martin 481
Townsend, Exr., v. Chappell 436
Towsley, Johnson v. 485
Trade Co., Mobile, v. Lott 376
Trans. Co., New Haven Steam v. The Continental 801
N. & N. Y., v. Flint 556
N. & N. Y., Ins. Co. v. 378
N. & N. Y., Ins. Co. v. 380
N. & N. Y., v. Wright 585
Trebilcock v. Wilson 460
Tucker v. Spalding 515
Turner v. Smith 724
"Twenty per Cent cases," 705, 706, 707
Tyler v. Defrees 161
Tynen, United States v. 153

U.

Union Nat. Bank v. Dows 65
United States, Armstrong v. 614
v. Avery 610
Avery v. 405
v. Ballard 845
Bevans v. 531
Blyew v. 638
Boudinot v. 227
Boyden v. 167, 527
v. Burns 388
Carroll v. 565
v. Child 360
v. Clyde 479
Cross v. 721
v. Crusell 384, 821
v. Distilled Spirits 815
v. Fitzpatrick 707
Garnett v. 79
Gay v. 606
Halliburton v. 533
Harrington v. 167
v. Henderson 235
v. Howell 195
v. Hunt 739
v. Justice 753
v. Kimbal 503

U.

United States v. Klein 519
Leary v. 756
v. Lynde's Heirs 230
Mahan v. 764
v. Manning 706
v. Mayes 381
McVeigh v. 80
v. Miller 705
"United States, Miller" v. 135
United States v. The Montello 191
Morgan v. 738
v. Mynderse 241
"United States v. New Orleans Railroad," 434
United States, Officers, Ships of War v. 505
v. O'Keefe 131
Page, Exr., v. 135
Pargoud v. 646
Perin v. 412
v. Powell 726
Propeller Co. v. 760
Pugh v. 711
v. Reed 220
Robinson v. 653
v. Russell 474
Scott v. 438
Stockwell v. 491
v. Tarble 597
v. Tynen 153
v. Vigil 602
Ward v. 792
v. Wilder 681
v. Wiley 211
v. Wormer 530
v. Wright 188

V.

Van Slyke v. Wisconsin 240
"Vaughan and Telegraph, The," 807
Vigil, United States v. 607
"Villa v. Rodriguez," 406
Virginia v. West Virginia 67
Vose, Cockroft v. 875

W.

Wadsworth v. Warren 402
Walker v. Dreville 429
Waller, Bigler v. 260, 891
Ward v. Maryland 260, 449
v. United States 792
Warden, Gibson v. 797
Warren, Wadsworth v. 402
Washing Machine Co., Wringing Machine Co. v. 209
Washington & Jefferson College, Collier v. 550
Jefferson College v. 550
Watkins, Butler v. 629
Watson v. Jones 666
Webb v. Sharp 478
Weide, Home Ins. Co. v. 197
Welch, Admr., v. Barnard 688
Wells Fargo & Co. v. McGregor 538
"Western Metropolis, The," v. Low 394
Western Trans. Co. v. Downer 160
West Virginia, Virginia v. 67
Wheeler v. Harris 278, 531
White, Gorham Mfg. Co. v. 731
v. Hart 685
Whiteley v. Kirby 32
Whitney, Curtis v. 513
Mowry v. 858, 860
Whitton, Chicago & N. W. Railroad Co. v. 571
Wickliffe, Louisiana v. 365
Wilder, United States v. 681

W.

Wiley, United States v..... 211
Wilkinson, Union M. Life Ins. Co. v..... 617
Willard v. Presbury..... 719
William H. Webb, The, v. Barling, Exr.... 774
Williams v. Kirtland..... 683
Richey v..... 238
Wilson, Trebilcock v..... 460
Wisconsin, Bagnall v..... 240
Van Slyke v..... 240
Woods, Forsyth v..... 207
Wormer, United States v..... 530
Worthy Exr. v. Marston..... 826

W.

Wright, N. & N. Y. Trans. Co. v..... 585
United States v..... 188
Wringing Machine Co. v. Washing Machine Co..... 209

Y.

Yeager v. Farwell..... 476
Young v. "The Key City,"..... 896

Z.

Zimmerman, Foulke, Admr., v..... 785
Zunts, Dunlop v..... 181

CITATIONS

IN OPINIONS OF THE JUDGES CONTAINED IN THIS BOOK.

CASES CITED.

A.

Ableman v. Booth, 21 How. 506.....599, 601
Ackerley v. Parkinson, 3 M. & S. 411..... 651
Adams v. Robinson, 1 Pick. 461..... 261
v. Roy S. P. Co. 5 C. B. (N. S.) 492 783
v. Warren Ins. Co. 22 Pick. 163.... 784
Agawam Co. v. Jordon, 7 Wall. 596..... 37
Agra, etc., Bank v. Leighton, L. R. 2 Exch. 61 107
Ainsworth v. Dean, 1 Fost. 400..... 704
Alabama v. Georgia, 23 How. 505..... 71
Alexander v. Milwaukee, 16 Wis. 248.... 561
v. Muirhead, 2 Desaus. 162..... 503
v. Railroad Co. 3 Strob. 598....373, 375
Allbretcht v. Sussman, 2 Ves. & B. 323.... 82
Allen v. Blunt, 3 Story, 744, 745.....38, 188
v. McKeen, 1 Sum. 299..... 555
Almonester v. Kenton, 9 How. 9..... 759
Almy v. California, 24 How. 169..... 519
Alston v. Herring, 11 Exch. 822..... 783
Amedie, The, 1 Acton, 240..... 695
Amer. Ins. Co. v. Canter, 1 Pet. 511, 545, 546 .....179, 662, 663
Amer. Fur Co. v. U. S. 2 Pet. 364..... 496
Ames v. Howard, 1 Sum. 487..... 42
Amoskeag Man. Co. v. Spear, 2 Sandf. 599 583
Amy v. Barkholder, 11 Wall. 136..... 102
Warwick, The, 2 Spraige, 123, 145.. 150
Anderson v. Clark, 2 Bing. 20..... 215
Andrews v. Brown, 3 Cush. 131..... 55
v. Brown, Prec. in Ch. 385..... 682
v. Hensler, 6 Wall. 254..... 694
Anglo. Af. Co. v. Lamzed, L. R. 1 C. P. 229 783
Ann Caroline, The, 2 Wall. 536..... 777
Anonymous, 1 Salk. 401..... 444
1 Vent. 330..... 394
Antelope, The, 10 Wheat. 66, 67.....694, 695
Arbouin v. Anderson, 1 Ad. & E. (N. S.) 498 .....107, 368
Armstrong's Foundry, 6 Wall. 766.....79, 144
Armstrong v. Toler, 11 Wheat. 258..... 441
v. Treas. of Athens Co. 16 Pet. 281.. 787
v. United States, 13 Wall. 154..... 646
Arundel v. Holmes, 4 Beav. 325..... 503
Aspdin v. Austin, 5 Ad. & E. (N. S.) 671.. 311
Assessors v. Osborne, 9 Wall. 572..... 274
Astor v. Miller, 2 Paige, 66–78..... 801
Attwood v. Small, 6 Cl. & Fin. 232..... 628
Atty. Gen. v. Clergy Soc. 10 Rich. Eq. 604 554
v. Lade, Park (Eng. Exch.) 57..... 144
v. Pearson, 3 Mer. 353.....675, 676

A.

Atty. Gen. v. Siddon, 1 Cromp. & J. 220.496, 501
v. Vernon, 1 Vern. 277..... 860
Aurora City v. West, 7 Wall. 82, 92..... 359
Avendano v. Gay, 8 Wall. 376..... 556
Ayres v. Hartford Ins. Co. 17 Ia. 176..... 623

B.

Babcock v. May, 4 Ohio, 346..... 783
Backhouse v. Harrison, 5 B. & Ad. 1105.. 107
Bacon, *Ex parte*, 2 Moll. 441..... 752
v. Hart, 1 Black, 38..... 261
v. Simpson, 3 Mees. & W. 78..... 791
Bagnell v. Broderick, 13 Pet. 436, 150.188, 537
Bags of Coffee, 1960, 8 Cr. 398..... 171
Linseed, 1 Black, 112..... 781
Bailey v. Hollister, 26 N. Y. 112..... 554
v. Miltenberger, 31 Pa. 41..... 694
v. Bidwell, 13 Mees. & W. 73....76, 107
Baker v. Holtpzaffell, 4 Taunt. 45..... 695
v. Kelley, 11 Minn. 480..... 685
Baldwin v. Mildeberger, 2 Wall. 176..... 439
Baltimore, The, 8 Wall. 382, 385.....130, 830
Balt. & O. R. R. v. Gallahue, 12 Grat. 658 358
v. Supervisors, etc., 3 W. Va. 319... 359
Bk. v. Supervisors, 7 Wall. 28, 31.....323, 335
Bk. of Augusta v. Earle, 13 Pet. 558, 588 194, 358
Bk. of Bengal v. Macleod, 7 Moo. P. C. 35 107
Bk. of Columbia v. Okely, 4 Wheat. 235... 396
Bk. of Commerce v. N. Y. 2 Black, 620.... 519
v. Union Bank, 3 N. Y. 234..... 369
Bk. of United States v. Davis, 2 Hill, 452.. 171
Bk. of Utica v. Utica, 4 Paige, 399..... 66
Bk. of W. Tenn. v. Cit. Bk. of La. 14 Wall. 9 .....759, 827
Bk. Tax Cases, 2 Wall. 200..... 113
Banks v. The Mayor, 7 Wall. 16..... 114
v. Moreno, 39 Cal. 233, 239, 240... 699, 700, 701
Barber v. Brace, 3 Ct. 13, 14..... 784
Bardons v. Selby, 3 Tyr. 430 (1 Cr. & M. 500) 748
Barley v. Walford, 9 Ad. & E. (N. S.) 197 630
Barnard v. Adams, 10 How. 270..... 284
v. Ashley, 18 How. 45..... 486
v. Kellogg, 10 Wall. 383.....654, 783
Barnes v. Williams, 11 Wheat. 416..... 109
Barney v. Baltimore, 6 Wall. 280..... 833

B.

Barr v. Gratz's Heirs, 4 Wheat. 220..... 709
Barrett v. Hall, 1 Mas. 447..... 40
Barrington v. Potter, Dyer, 81 *b*..... 311
Barrows v. Kindred, 4 Wall. 396..... 671
Barrs v. Jackson, 1 Phil. 582; 1 You. & C. Ch. 585 512
Barry v. Gamble, 8 Mo. 88..... 537
Bartlett v. The Governor, 2 Bibb. 586..... 728
v. King, 12 Mass. 537.....154, 178
Bates v. Todd, 1 Moo. & Rob. 106..... 783
Battin v. Taggert, 17 How. 83..... 38
Baxter v. Wales, 12 Mass. 365..... 439
Beal v. Park Ins. Co. 16 Wis. 241..... 623
Bean v. Brookmire, 10 Am. L. Reg. (N. S.) 181 800
v. Green, 12 Me. 422..... 359
Beard v. Federy, 3 Wall. 478, 493....187, 702
Bebee v. Hartford Ins. Co. 25 Ct. 51..... 623
Bedford v. Hunt, 1 Mas. 302..... 40
Bee, The, 1 Ware, 332..... 880
Beebe v. Russell, 19 How. 283..... 271
Belcher v. Oldfield, 6 Bing. N. C. 102..... 800
Belfast, The, 7 Wall. 624–637, 642, 644... 75, 76, 77, 98, 626
Bell v. Morrison, 1 Pet. 351..... 683
v. R. R. Co. 4 Wall. 598..... 158
Bellas v. Cleaver, 40 Pa. 260..... 872
Bend v. Hoyt, 13 Pet. 267..... 372
Benedict v. Vanderbilt, 1 Rob. (N. Y.) 200 375
Benner v. Porter, 9 How. 235.....263, 662
Bennett v. Judson, 21 N. Y. 238..... 501
Benyon v. Evelyn, O. Bridge. 324..... 682
Berkley v. Watling, 7 Ad. & E. 29..... 783
Bethell v. Demaret, 10 Wall. 537..240, 515, 759
Betts v. Menzies, 4 Best & S. 999.....39, 42
Bevans v. United States, 13 Wall. 56..... 534
Biddle, *Ex parte*, 2 Mas. 472..... 627
Bigelow v. Forest, 9 Wall. 350..... 149
Binghamton Bridge, The, 3 Wall. 51..... 553
Bird v. Montgomery, 6 Mo. 514..... 839
Bird of Paradise, The, 5 Wall. 555..... 781
Bischoff v. Wethered, 9 Wall. 814, 815..39, 517
Bissell v. Jeffersonville, 24 How. 287, 299 580, 813
v. Mich. S. & N. Ind. R. R. 22 N. Y. 258 359
Blackburn v. Crawfords, 3 Wall. 175..... 512
Blackett v. Roy. Ex. Ins. Co. 2 Crompt. & J. 250 784
Blackstone Manuf. Co. v. Blackstone, 13 Gray, 489 358
Blaikie v. Stembridge, 6 C. B. (N. S.) 907 783
Blanchard v. Putnam, 8 Wall. 426..... 43
Bland v. Haselrig, 2 Vent. 152..... 682
Blood v. Light, 38 Cal. 649..... 704
v. Wood, 1 Met. 528..... 772
Boardman v. Meriden Brit. Co. 35 Ct. 402 583
Boehen v. Ins. Co. 35 N. Y. 131..... 402
Boggs v. Merced Min. Co. 14 Cal. 367..... 659
Bonaker v. Evans, 16 A. & E. (N. S.) 170 81
Boone v. Chiles, 10 Pet. 177–211..... 412
Booth v. Clark, 17 How. 322..... 845
Booty in the Peninsula, 1 Hagg. 47..... 507
Bouchier v. Taylor, 4 Bro. P. C. 708..... 511
Boyce v. Grundy, 3 Pet. 210..... 502
Boyd v. McCann, 10 Md. 118..... 369
Bradley, *Ex parte*, 7 Wall. 364.....79, 649

B.

Bradley v. Dunnipace, 1 Hurl. & Colt. 525 783
Bradstreet, *Ex parte*, 7 Pet. 634, 648..879, 880
Bradstreet v. Huntington, 5 Pet. 402..... 772
Bragdon v. Ins. Co. 42 Me. 262..... 402
Braun v. Sauerwein, 10 Wall. 218....275, 276
Bray v. Hartshorn, 1 Clif. 541..... 40
Brewer v. Blougher, 14 Pet. 178..... 567
Brewster v. Wakefield, 22 How. 118..... 430
Bridge Prop. v. Hoboken Co. 1 Wall. 116, 144, 145, 146.....415, 759, 851
Bridgeport Bank v. N. Y. & N. H. R. R., 30 Ct. 270 175
Brinsfield v. Carter, 2 Ga. 143..... 772
Briscoe v. Bank of Ky. 8 Pet. 118..... 313
v. Bank of Ky. 11 Pet. 317, 337.... 334
Brobst v. Brobst, 2 Wall. 96..... 262
Brockett v. Brockett, 2 How. 238..... 635
Bronson v. Railroad Co. 2 Black, 524..... 271
v. Rodes, 7 Wall. 229, 245, 248.... 190, 335, 462, 463, 809
Brooklyn Lead. Co. v. Masury, 25 Barb. 416 584
Brooks v. Hunt, 17 Johns. 484..... 408
v. Oriental Ins. Co. 7 Pick. 259.... 784
Browder v. McArthur, 7 Wheat. 58..... 281
Brown v. Aspden, 14 How. 25..... 848
v. Byrne, 3 El. & Bl. 714..... 783
v. Cherry, 38 How. Pr. 352..... 666
v. Eastern R. Co. 11 Cush. 97..... 359
v. Maryland, 12 Wheat. 419, 441, 445, 448, 449.374, 377, 452, 518, 519
v. Pierce, 7 Wall. 214.....264, 856
v. U. S., 8 Cr. 122..... 148
v. Wilkinson, 15 Mees. & W. 391... 590
Browne v. Strode, 5 Cr. 303.....181, 484
Brunswick v. McKean, 4 Me. 508..... 872
Bryant v. Nix, 4 M. & W. 775..... 215
Buchan v. Sumner, 2 Barb. Ch. 165..... 265
Buck v. Colbath, 3 Wall. 334.671, 672, 679, 763
Buckingham v. McLean, 13 How. 150.... 250
Buff. & N. Y. R. v. Dudley, 14 N. Y. 354.. 553
Burbank v. Beach, 15 Barb. 326..... 665
Burr v. Des Moines Co., 1 Wall. 102..109, 110 396, 401
Bush v. The Alonso, 2 Clif. 550..... 253
Bushnell v. Kennedy, 9 Wall. 387..... 812
Butcher v. Porter, 1 Show. 400..... 444
Butler v. Haskell, 4 Desaus. 684..... 54
v. Horwitz, 7 Wall. 258, 259.190, 335, 809

C.

Cady v. Shepherd, 11 Pick. 405..... 800
Cahart v. Austin, 2 Clif, 536..... 39
Cahoon v. King, 1 Clif. 612..... 41
Calder v. Bull, 3 Dall. 388...81, 322, 350, 695
Calder v. Halket, 3 Moo. P. C. 28..... 651
Caldwell v. Ball, 1 D. & E. 205..... 806
v. Harrison, 11 Ala. 755..... 448
v. U. S., 8 How. 381..... 817
Callan v. May, 2 Black, 543..... 463
Calverley v. Williams, 1 Ves., Jr., 211.... 439
Cameron v. Campbell, 3 Hawks, 285..... 728
Campbell v. Boyreau, 21 How. 223, 224.. 396, 815
v. Perkins, 8 N. Y. 430..... 220
v. Wilcox, 10 Wall, 422..... 791
Campion v. Saville, 2 B. & Ald. 511..... 757
Canal Appraisers v. People, 17 Wend. 604. 561
Canham v. Jones, 2 Ves. & B. 218..... 584

C.

Cannan v. Bryce, 3 B. & Ald. 179..... 441
Cannan v. Meaburn, 1 Bing. 465..... 590
Canter v. Amer. Ins. Co., 3 Pet. 318..... 250
Capel v. Child, 2 Cromp. & J. 574..... 81
Caperton v. Bowyer, *infra*, 882..... 885
Carolus, The, 2 Curt. 69..... 874
Carondelet v. St. Louis, 1 Black, 179.. 839
840
Carpenter v. Bristol Co., 21 Pick. 258.... 880
Cary v. Cleveland & T. R. R., 29 Barb. 35.. 359
v. Curtis, 3 How. 250, 254.....275, 276
v. Hotailing, 1 Hill, 311..... 501
Case v. Terrell, 11 Wall. 201..... 844
Cassidy v. Conway, 25 Pa. 240..... 873
Castle v. Bullard, 23 How. 172..... 630
Castro v. U. S., 3 Wall. 49..... 635
Catharine, The v. Dickinson, 17 How. 170, 253..... 804
Catlett v. Brodie, 9 Wheat. 553.....262, 271
Caul v. Spring, 2 Watts, 390..... 873
Cayuga, The, 2 Ben. 125; 7 Blatchf. 389; 1 Ben. 171..... 830
Cent. Bank v. Copeland, 18 Md. 317..... 856
Chamberlain v. Ward, 21 How. 549, 566.. 543
803
Champion v. Bostwick, 18 Wend. 175.... 359
Chancellor, The, 4 Law Times (N. S.), 627 825
Chappedelaine v. Dechenaux, 4 Cr. 307.. 180
484
Chase v. Cheny, 58 Ill. 509..... 677
Cheang-Kee v. U. S. 3 Wall. 320.....462, 809
Chegaray v. Jenkins, 5 N. Y. 376..... 747
Cheriot v. Foussat, 3 Binn. 252..... 145
Cherokee Nat. v. Georgia, 5 Pet. 17..... 229
Chester v. Dorr, 41 N. Y. 282..... 105
Childress v. Emory, 8 Wheat. 669....180, 484
China, The, 7 Wall. 58..... 874
Chittenden v. Brewster, 2 Wall. 196..... 250
Chouteau v. Eckhart, 2 How. 345..... 839
Christie v. Lewis, 2 Brod. & B. 410...220, 756
Christy, *Ex parte*, 3 How. 311..... 64
Circassian, The, 2 Wall. 150..... 250
City v. Lamson, 9 Wall, 483..... 813
Clark v. Barnwell, 12 How. 272..161, 781, 783
v. Blything, 2 B. & C. 254..... 596
v. Crane, 5 Mich. 154..... 704
v. Mass. Ins. Co., 2 Pick. 108..... 222
v. Morey, 10 Johns. 69..... 82
v. Protection Ins. Co., 1 Story, 109. 818
v. Sohier, 1 Wood. & M. 368..... 627
v. Van Reimsdyk, 9 Cr. 153..... 54
Clarke v. Courtney, 5 Pet. 354..... 772
v. Mathewson, 12 Pet. 170..... 763
Clarkson v. Edes, 4 Cow. 470, 477.....220, 757
Clayton v. Fawcett, 2 Leigh, 19..... 764
Clearwater v. Meredith, 1 Wall. 42..... 359
Clement, The, 2 Curt. 363..... 384
Clementson v. Williams, 8 Cr. 72..... 682
Clifton v. U. S., 4 How. 248..... 817
Clinton Bridge, The, 1 Woolw. 155..... 229
Cliquot's Champagne, 3 Wall. 140..... 496
Coal Co. v. Blatchford, 11 Wall. 172..... 484
Coburn v. Hopkins, 4 Wend. 577..... 748
Coe v. Smith, 47 Ill. 225..... 850

C.

Coffin v. Landis, 46 Pa. 426..... 311
Coggs v. Bernard, 1 Sm. L. Cas. 386..... 654
Cohens v. Virginia, 6 Wheat. 414..... 306
Coles v. Bowne, 10 Paige, 534..... 439
Collector v. Day, 11 Wall. 113..... 332
Collins v. Smith, 18 Ill., 163..... 831
v. Martin, 1 B. & P. 648..... 107
Columbian Ins. Co. v. Ashby, 13 Pet. 331. 284
v. Lawrence, 2 Pet. 49..... 731
Combs v. Hannibal Ins. Co., 43 Mo. 148... 623
Com. Bk. of Alb. v. Can. Com., 10 Wend. 25 879
Commer. Ins. Co. v. Union Ins. Co., 19 How. 323.. 402
Com. v. Aves, 18 Pick. 215..... 694
v. Bonsall, 3 Whart. 566..... 555
v. Canal Commis., 9 Watts, 471.... 448
v. Comly, 3 Pa. St. 372.....v.... 529
v. Commrs. Alleghany Co., 37 Pa. 245 879
v. Cooley, 10 Pick. 37..... 154
v. Cullen, 13 Pa. 133..... 553
v. Ricketson, 5 Met. 419..... 626
v. Smith, 4 Bin. 123..... 305
v. Sutherland, 3 Serg. & R. 149.... 708
Commrs. of Pat. v. Whitely, 4 Wall. 522.. 879
Comstock v. Smith, 13 Pick. 116..... 659
Conard v. Atlantic Ins. Co., 1 Pet. 443, 445. 265
806
Conn. Ins. Co. v. N. Y. & N. Nav. R. R. 25 Ct. 265 596
Conner v. Elliott, 18 How. 593..... 452
Considerant v. Brisbane, 22 N. Y. 389.... 665
Cook v. Babcock, 11 Cush. 210..... 772
v. Burnley, 11 Wall. 676..... 539
v. Champ. Trans. Co., 1 Den. 98... 359
Cook Co. v. C. B. & Q. R. R. Co., 35 Ill. 465. 67
Cooley v. Port Wardens, 12 How. 312, 314. 375
626
Cooper v. Chitty, 1 Sm. L. Cas. 782..... 654
v. Reynolds, 10 Wall. 308..163, 165, 218
Cope v. Doherty, 2 De Gex & J. 626; 4 Kay & J., 367..... 825
Corbin v. Tracy, 34 Com. 326..... 791
Coromandel, The, 1 Swab. 208..... 814
Cousin v. Blanc, 19 How. 207..... 759
Cowen v. Banks, 24 How. Pr. 72..... 711
Cowperthwaite v. Sheffield, 3 N. Y., 243.. 764
Craig v. Missouri, 4 Pet. 432, 434....334, 353
v. Sibbett, 15 Pa. 240..... 369
Craigdallie v. Aikman, 2 Bligh, 529..... 676
Crane, *Ex parte*, 5 Pet. 194..... 880
Crane v. Bell, 38 Hen. VIII. (546)..... 100
Creery v. Holly, 14 Wend, 28..... 784
Crogate's Case, 8 Co. 66 *b*..... 748
Cromwell v. Charleston Ins. Co., 2 Rich. 512 194
Crowell v. Randell, 10 Pet. 368..637, 787, 848
Croxall v. Shererd, 5 Wall. 289..... 412
Culbertson v. Shaw, 18 How. 584..... 788
Cummings v. Missouri, 4 Wall. 277..... 636
v. Morris, 25 N. Y. 625..... 665
Cummins v. Barkalow, 4 Keyes, 514..... 665
Cunningham v. Ashley, 14 How. 377..... 537
Curtis v. Roch. & S. R. R. Co., 18 N. Y. 543. 161
Curtis v. Fiedler, 2 Black, 478, 479..275, 276
475

D.

Dalby v. India & Lon. Ins. Co., 15 C. B. 365. 502
Daniel v. Mitchell, 1 Story, 198..... 848
Daniel Ball, The, 10 Wall. 557..... 192
Daquin v. Coiron, 3 La. 392..... 88
Dart. Col. v. Woodward, 4 Wheat. 700, 708, 712 553
Davenport v. Fletcher, 16 How. 142..... 48
v. Peoria Ins. Co. 17 Ia. 276..... 623
Davidson v. Lanier, 4 Wall. 453..... 463
Davies v. Fairbairn, 3 How. 636..... 154
Davis, The, 10 Wall. 15..... 134
v. McCready, 17 N. Y. 232..... 108
Deal v. McCormick, 3 Serg. & R. 346..871, 873
Dean v. Nelson, 10 Wall. 158..... 219
De Forest v. Fulton Ins. Co., 1 Hall, 110.. 730
De Groot v. U. S., 5 Wall. 419..... 134
v. Van Duzer, 20 Wend. 390..... 441
De Haber v. Queen of Port, 17 Q. B. (N. S.) 171 130
Delafield v. Illinois, 2 Hill, 177..... 107
De Lovio v. Boit, 2 Gall. 398..... 101
Den v. Bolton, 7 Halst. 206..... 677
v. Morse, 7 Halst. 331..... 705
Deneale v. Stump, 8 Pet. 526..... 48
Dennistoun v. Draper, 5 Blatchf. 340..... 577
Dermott v. Jones, 2 Wall. 1..... 694
Desha v. Pope, 6 Ala. 690..... 215
De Sobry v. Nicholson, 3 Wall. 423..... 79
Dewing v. Sears, 11 Wall. 379..... 336
Dexter v. Arnold, 5 Mas. 315..... 848
Diana, The, 1 Dod. 95..... 695
Dickenson v. Phillips, 1 Barb. 461..... 764
Dickson v. Thompson, 2 Show. 126..... 682
Diggs v. Wolcott, 4 Cr. 179..... 672
Dirst v. Morris, *ante*, 722..... 724
Dispatch Line v. Bellamy Manuf. Co. 12 N. H. 234..... 800
Distilled Spirits, The, 11 Wall. 364..... 818
Dobbins v. Brown, 12 Pa. 75, 80.....311, 694
v. Com. of Erie Co. 16 Pet. 435.125, 126
Dobree v. Napier, 3 Scott, 225..... 145
v. Schroder, 2 Myl. & C. 489..... 590
Dodge v. Bartol, 5 Me. 286..... 784
v. Woolsey, 18 How. 331..... 613
Doe v. Godwin, 1 Dowl. & Ry. 259..... 448
v. Harris, 16 Mees. & W. 517..... 770
Donahoe v. Kettell, 1 Cliff. 135, 137..220, 756
Doner v. Stauffer, 1 Pa. 198..... 83
Doremus v. Walker, 8 Ala. 194..... 800
Dorr v. N. Jer. S. Nav. Co. 11 N. Y. 485, 4 Sand. 136..... 359
Dorsey v. Kyle, 30 Md. 512–522..... 82
Dos Hermanos, The, 10 Wheat. 306, 310.. 262
506
Doswell v. De La Lanzo, 20 How. 29..... 709
Douglass v. Howland, 24 Wend. 47..... 178
Doyle v. Blake, 2 Sch. & Lef. 239..... 770
Dresser v. Norwood, 17 C. B. (N. S.) 466, 482.....170, 171
Drinker v. Holliday, 2 Yeates, 89..... 872
Drinkwater v. The Spartan, 1 Ware, 149, 153, 154.....220, 756
Dubois v. Lord, 5 Watts, 49..... 872
Duchess of Kingston's case, 2 Sm. L. Cas. 648..... 510
Duke of Brunswick v. King of Hanover, 2 H. of L. Cas. 1; 6 Beav. 1..... 130
Dumfries, The, 1 Swab. 63..... 825
Dunn v. Clarke, 8 Pet. 1..... 763

D.

Dunn v. Sayles, 5 Ad. & E. (N. S.) 685... 311
Dunlap v. Stetson, 4 Mas. 349..... 763

E.

Eadie v. Slimmon, 26 N. Y. 12..... 856
Earl v. Camp, 16 Wend. 563..... 747
Eddy, The, 5 Wall. 494, 495.....781, 783
Edmonson v. Bloomshire, 7 Wall. 306.... 45
Eidom, *In re*, 3 Bank. Reg. 39..... 63
Eliza, The, Davies, 318..... 222
Elliott v. Piersol, 1 Pet. 335, 336..... 30
v. Rossell, 10 Johns. 7..... 781
v. Swartwout, 10 Pet. 150..... 372
Ellis v. Paige, 1 Pick. 43..... 178
v. Welch, 6 Mass. 246..... 694
v. Willard, 9 N. Y. 529..... 783
Ells v. Tousley, 1 Paige, 280..... 265
Elsebe, The, 5 C. Rob. 173..... 506
Emerson v. Davies, 1 Wood. & M. 21..... 848
v. Howland, 1 Mas. 50..... 694
v. Slater, 22 How. 41..... 783
Emp. of Aus. v. Day, etc. 3 De Gex, F. & J. 217..... 130
Emp. of Brazil v. Robinson, 6 Ad. & E. 801. 130
Erwin v. Lowry, 7 How. 181..... 143
Esposito v. Bowden, 4 El. & B. 963..... 89
Estrada v. Murphy, 19 Cal. 272.....537, 701
Evans v. Eaton, 1 Pet. C. C. 323..... 351
v. Marlett, 1 Ld. Raym. 271..... 806
Evelyn v. Lewis, 3 How. 472..... 679
Ewin, *In re*, 1 Cromp. & J. 156..... 194
Ewing v. Burnett, 11 Pet. 41, 53.....109, 772
Eyre v. Potter, 15 How. 42..... 857

F.

Fairfield v. Adams, 16 Pick. 381..... 807
Falkner v. Earle, 3 Best. & Sm. 363..... 783
Farina v. Silverlock, 39 E. L. & E. 514... 583
Farnam v. Brooks, 9 Pick. 212..... 159
Farr v. Hollis, 9 B. & C. 332..... 728
Faw v. Marsteller, 2 Cr. 20, 29.....311, 348
Fenn v. Holme, 21 How. 481..... 537
Ferraria v. Vasconcelles, 23 Ill. 456..... 677
Fetridge v. Wells, 4 Abb. Pr. 144..... 583
Field v. Taylor, 4 Ves. 396..... 83
Filor v. U. S. 9 Wall. 48..... 476
Finley v. Lynn, 6 Cr. 252..... 52
v. Philadelphia, 32 Pa. 381..... 194
v. Williams, 9 Cr. 164..... 487
Fire Dep. v. Wright, 3 E. D. Smith, 478.. 452
First Bap. Ch. v. Ins. Co. 18 Barb. 69, 19 N. Y. 305..... 402
Fisher v. Blight (U. S. v. Fisher), 2 Cr. 358..... 308
v. Boody, 1 Curt. 206..... 857
v. Horicon Iron Co. 10 Wis. 353.... 561
Fisk v. Newton, 1 Den. 45..... 806
Fitch v. Jones, 5 El. & B. 238.....108, 368
Flanders v. Ætna Ins. Co. 3 Mas. 158.... 359
v. Tweed, 9 Wall. 425.....396, 397
Fletcher v. Morey, 2 Story, 555..... 800
v. Peck, 6 Cr. 87, 132, 135, 136..306, 322
553
Florenzo, The, Blatch. & H. 60..... 171
Florida v. Georgia, 17 How. 478..... 71
Floyd v. Barker, 12 Co. 25..... 650
Foley v. Hill, 1 Phil. 399; 2 H. of L. C. 28 45
503
Fontaine v. Phœnix Ins. Co. 11 Johns. 293. 171
817
Forgay v. Conrad, 6 How. 202..... 271

F.

Foshay v. Ferguson, 5 Hill. 158..... 856
Fortuna, The, 1 Dod. 81..... 695
Foster v. Davenport, 22 How. 245..... 373
v. Neilson, 2 Pet. 253, 309, 314.229, 232
Fox v. Ohio, 5 How. 433..... 334
Fray v. Blackburn, 3 Best, & S. 576..... 650
Fraser v. Marsh, 13 East, 238..... 220
Freeman, The, v. Buckingham, 18 How. 187. 783
Freeman v. Howe, 24 How. 450..671, 672, 679
763
French v. Carhart, 1 N. Y. 102..... 59
Frost v. Coal Co. 24 How. 283..... 844
v. Earnest, 4 Wheat. 86..... 694
Furman v. Nichol, 8 Wall. 44, 56.....415, 848

G.

Galbraith v. Smith, 15 Shaw. & D. Cas. 808. 676
Gales v. Hailman, 11 Pa. 515.....596
Galloway v. Finley, 12 Pet. 298..... 657
v. Hughes, 1 Bai. 553..... 806
Galt v. Galloway, 4 Pet. 345..... 657
Galveston R. R. v. Cowdry, 11 Wall. 459.. 436
Garcia v. Lee, 12 Pet. 511, 521..... 233
Gardner v. Newburgh, 2 Johns. Ch. 162.. 561
Garland v. Davis, 4 How. 131..... 394
v. Wynn, 20 How. 8..... 487
Garnett v. U. S. *infra*, 256..... 163
Gayler v. Wilder, 10 How. 498..... 41
Gelpcke v. Dubuque, 1 Wall. 176, 203.105, 107
813
Gelston v. Hoyt, 3 Wheat. 311, 324....687, 817
Gen. Mut. Ins. Co. v. Sherwood, 14 How. 366..... 379
Gen. Smith, The, 4 Wheat. 438..... 627
Generes v. Bonnemer, 7 Wall. 564..... 556
Genesee Chief, The, 12 How. 443, 454, 457. 97
98, 543
Genoa & its Dependencies, 2 Dod. 446.... 507
Gen. Ref. Ch. v. Seibert, 3 Pa. St. 291.... 677
Gibbons v. Ogden, 9 Wheat. 1, 193, 199, 202,
212.....312, 373, 374, 452
Giblin v. McMullen, L. R. 2 P. C. 335.....872
Gibson v. Armstrong, 7 B. Mon. 481..... 677
v. Chouteau, 39 Mo. 588..... 537
v. Stevens, 8 How. 384.....215, 806
Gildart v. Gladstone, 12 East, 668..... 444
Gilman v. Philadelphia, 3 Wall. 713..... 626
Glaize v. S. Car. R. R. Co. 1 Strob. 72.... 194
Gleason v. Florida, 9 Wall. 779..... 463
Gloucester Ins. Co. v. Younger, 2 Curt. 332,
333..... 101
Goddard v. Merch. Bank, 3 N. Y. 234..... 369
Goit v. Ins. Co. 25 Barb. 189..... 402
Goldson v. Buck, 15 East, 377..... 238
Goodall v. Milwaukee, 5 Wis. 39..... 561
Goodman v. Harvey, 4 Ad. & E. 870..... 106
v. Simonds, 20 How. 359, 364, 365. 105
106, 872
Goodwin v. Hardy, 57 Me. 145..... 277
Goodyear v. Prov. Rubber Co. 2 Cliff. 375. 38
Gordon v. Appeal Tax Ct. 3 How. 133..... 613
v. Scott, 2 Bank. Reg. 28..... 63
v. U. S. 2 Wall. 561..... 525
Goshorn v. Supervisors, etc. 1 W. Va. 308. 358
Goss v. Nugent, 5 B. & Adol. 65..... 783
Gould v. Oliver, 4 Bing. N. C. 142, 2 Man.
& G. 208.....782, 783
Gracie v. Palmer, 8 Wheat. 605..... 220

G.

Graham v. Pocock, L. R. 3 Priv. C. 345.. 496
500
v. U. S. 1 Nott & H. 380..... 708
Gram v. Seton, 1 Hall. 262..... 800
Granite State, The, 3 Wall. 310..... 788
Grant v. Norway, 10 C. B. 665..... 783
v. Vaughn, 3 Burr. 1516..... 107
v. Whitwell, 9 Ia. 156..... 478
Grapeshot, The, 9 Wall. 129..... 698
Gratz v. Beates, 45 Pa. 495..... 872
Graves v. Bos. Ins. Co. 2 Cr. 444..... 503
Gray Eagle, The, 9 Wall. 505, 510....543, 803
Great W. R. Co. v. Blake, 7 H. & N. 987.. 359
Green v. Liter, 8 Cr. 229.....487
Greve v. Coffin, 14 Minn. 355..... 684
Grigby v. Oakes, 2 B. & P. 528..... 318
Grignon v. Astor, 2 How. 339..... 148
Griswold v. Hepburn, 2 Duv. 20..... 329
v. Sedgwick, 1 Wend. 131..... 748
v. Sheldon, 4 N. Y. 581..... 191
v. Waddington, 16 Johns. 438..... 89
Grosvenor v. Danforth, 16 Mass. 74..... 261
v. Phillips, 2 Hill, 147..... 215
Grove v. Brien, 8 How. 429, 439.....215, 808
Groves v. Clark, 21 La. Ann. 567..... 826
v. Slaughter, 15 Pet. 449..... 694
Guild v. Frontin, 18 How. 135..... 396
Guilbeau v. Mays, 14 Tex. 391; 15 Tex. 410. 31
Gwin v. Breedlove, 2 How. 38....323, 334, 346

H.

Hadden v. Collector, 5 Wall. 112..... 258
Hagan v. Lucas, 10 Pet. 400, 402....671, 679
Haille v. Smith, 1 B. & P. 563..... 215
Haines v. Stouffer. 10 Pa. 363..... 872
Hale v. Branscum, 10 Gratt. 418..... 768
v. Wash. Ins. Co. 2 Story, 183..... 101
Hall v. Featherstone, 3 H. & N. 284, 287.. 104
108, 368
v. Gittings, 2 Har. & J. 112 772
v. Jackson. 20 Pick. 194 764
Hallet v. Columbian Ins. Co. 8 Johns. 272. 422
Hamilton Co. v. Mass., 6 Wall. 636..... 848
849, 885
Hanauer v. Doane, 12 Wall. 342 457
v. Woodruff, 10 Wall. 482 759
Hanger v. Abbott, 6 Wall. 532, 534..... 89
178, 179, 213, 884
Hardeman v. Anderson, 4 How. 640 271
Hardman v. Boardman, 4 Leigh, 382 772
Harvey v. Crabham, 5 Ad. & E. 61..... 783
Harmon v. Dreher, 1 Speers, Eq. 87 677
Harriman, The, 9 Wall. 161 529
Harrison v. Nixon, 9 Pet. 483, 484 52
250, 394
Hart v. Farm. & Mech. Bank, 33 Vt. 252... 171
v. Newland, 3 Hawks, 122 198
v. White, 13 Wall. 646, 650 ... 759, 760
v. Western R. Co. 13 Met. 99 596
Harvey v. Towers, 6 Exch. 656 108
Hascall v. Madison Univ. 8 Barb. 174 555
Hastings v. Pepper, 11 Pick. 42..... 783
Hathaway v. Clark, 5 Pick. 490 872
Havens v. Dale, 18 Cal. 362, 366 ..... 58, 59
Havelock v. Geddes, 10 East, 555 222
Hawkins v. Twizell, 5 El. & Bl. 883 222
Hayes v. Bona, 7 Cal. 154 58
Hays v. Pacif. S. S. Co. 17 How. 598, 599.. 195
373
Heath v. Ross, 12 Johns. 140 537

H.

Heebner v. Eagle Ins. Co. 10 Gray, 143 ... 380
Henderson v. Moore, 5 Cr. 11 709
Hepburn v. Ellzey, 2 Cr. 445 359
v. Griswold, 7 Wall. 614–625 328
v. Griswold, 8 Wall. 603, 606, 608, 618, 632 .... 290, 306, 313, 318, 319 320, 327, 333, 339, 343, 347, 348, 349 353
Hern v. Nichols, 1 Salk. 289..... 501
Herndon v. Howard, 9 Wall. 664.....287, 414
Hewitt v. Templeton, 48 Ill. 367..... 850
Heywood v. Buffalo, 14 N. Y. 534..... 66
Hill v. Davis, 2 N. H. 384..... 55
v. Epley, 31 Pa. 334..... 269
v. The Golden Gate, Newb. 308.... 194
Hills v. Evans, 6 Law Times (N. S.) 90... 42
Hine, The, v. Trevor, 4 Wall. 555..... 76
Hinson v. Lott, 8 Wall. 148, 151.....452, 519
Hipp v. Babin, 19 How. 271..... 502
Hiriart v. Ballon, 9 Pet. 156..... 396
Hobart v. Drogan, 10 Pet. 120..... 626
Hodge v. Williams, 22 How. 87..... 48
Hodgson v. Temple, 5 Taunt. 181..... 441
Hoffman v. Ætna Ins. Co. 32 N. Y. 405... 731
Hogan v. Ross, 11 How. 295, 296..... 271
Hoge v. Lansing, 35 N. Y. 137..... 108
Hd's Sugar, 30, v. Boyle, 9 Cr. 198..... 506
Holbrook v. Wight, 24 Wend. 169..... 215
Holdsworth v. M'Crea, L. R. 2 App. Cas. H. L. 388..... 737
Holliday v. Batson, 4 How. 645..... 48
Holmes v. Grant, 8 Paige, 245..... 413
Home of Friendless v. Rouse, 8 Wall. 430. 613
Homer v. The Collector, 1 Wall. 486..... 567
Hoogscarpel, The, cited 2 Dod. 446..... 507
Hooker v. N. Hav. N. Co. 14 Ct. 146..... 561
Hoop, The, 1 C. Rob. 200.....88, 89
Hope v. State Bank, 4 La. 212..... 784
Hopkins v. Beebe, 26 Pa. 85..... 764
v. Ward, 6 Munf. 38..... 771
Hornthall v. Collector, 9 Wall. 560, 564... 251, 274
Horwitz v. Equitable Ins. Co. 40 Mo. 557. 623
Household Co. v. Neilson, Web. Pat. Cas. 719 42
Houseman v. The N. Carolina, 15 Pet. 49 807, 808
Hovey v. Blanchard, 13 N. H. 145..... 171
Howell v. Maryland, 3 Gill, 14..... 373
Howard Ins. Co. v. Bruner, 23 Pa. 50..... 623
Howell v. Crane, 12 La. Ann. 126..... 369
Hoyt v. Commissioners, 23 N. Y. 228..... 194
Hoyt, *Ex parte*, 13 Pet. 290..... 879
v. Story, 3 Barb. 263..... 764
Hudgins v. Kemp, 18 How. 530..... 635
Huff v. Hutchinson, 14 How. 586..... 484
Hughes v. Stevens, 43 Pa. 197.....871, 873
Hull v. Marshall Co. 12 Pa. 142..... 107
Hullet v. King of Spain, 2 Bligh, N. S. 31 1 Dow & Cl. 169..... 130
Hunley v. Scott, 19 La. Ann. 161..... 515
Hunt v. Carlisle, 1 Gray, 257..... 874
v. Loucks, 38 Cal. 375..... 704
v. Mickey, 12 Met. 346..... 626
v. Palao, 4 How. 589..... 663
v. Wickliffe, 2 Pet. 201..... 487
Hunter v. Wilson, 4 Exch. 489..... 369
Hyde v. Stone, 20 How. 170..... 577

I.

Illinois v. Delafield, 8 Paige, 533..... 107

I.

Infanta, The, Abb. Adm. 263..... 8
Insurance Co. v. Chase, 5 Wall. 509..... 7
v. Dunham, 11 Wall. 29..... 6
v. Treasurer, 11 Wall. 204..... 6
v. Tweed, 7 Wall. 44..... 3
v. Weide, 9 Wall. 677..... 8
International Ins. Co. v. Commrs. of Taxes, 28 Barb. 318..... 1
Irvine v. Lowry, 14 Pet. 298..... 4
v. Marshall, 20 How. 558..... 5
Irving v. Motly, 7 Bing. 543..... 5

J.

Jackson v. Bard, 4 Johns. 230..... 53
v. King, 4 Cow. 220..... 5
v. Lamphire, 3 Pet. 290..... 51
v. Lawton, 10 Johns. 24..... 86
v. Roberts, 11 Wend. 427–435..... 70
Jacob v. United States, 1 Brock. 520..... 49
Jacoway v. Denton, *infra*, 645..... 75
James v. Morgan, 1 Lev. 111..... 43
Jecker v. Montgomery, 18 How. 111..... 8
Jefferson Bank v. Skelly, 1 Black, 436.... 613, 75
Jenkins v. Banning, 23 How. 455..... 8
v. Eldredge, 3 Story, 299..... 84
Jewell v. Parr, 13 C. B. 916..... 87
Jewett v. Alton, 7 N. H. 253..... 44
John Gilpin, The, Colcott, 78..... 81
John's Isl. Ch. case, 2 Rich Eq. 215..... 67
Johnson v. McIntosh, 8 Wheat. 574..... 22
v. Root, 2 Clif. 123.....41, 43
v. Towsley, 13 Wall. 72....489, 537, 702
v. Vandyke, 6 McLean, 423..... 627
Jones v. Andrews, 10 Wall. 331..... 763
v. Morehead, 1 Wall. 155..... 866
Jordan v. Young, 37 Me. 276..... 194
Joseph, The, 1 Gall. 545, 555–8..... 506
Joy v. Jackson & Mich. P. R. Co. 11 Mich. 155 553

K.

Kaine, *In re*, 14 How. 134..... 394
Kalorama, The, 10 Wall. 204..... 698
Kearney v. Case, 12 Wall. 276..... 556
Keeler, *In re*, Hemp. 306..... 602
Kelsey v. Forsyth, 21 How. 85..... 396
Kendall v. Mason, 7 Ohio St. 199..... 800
v. United States, 12 Pet. 584..... 541
Kenna v. Quarrier, 3 W. Va. 212..... 772
Kennedy v. Strong, 14 Johns. 128....171, 817
v. Gibson, 8 Wall. 506..... 844
Kilby v. Wilson, 1 Ry. & M. 178..... 501
King v. Beeston, 3 T. R. 592..... 448
v. Bethel, 5 Mod. 19..... 394
v. Butler, 3 Lev. 220..... 860
v. Davis, 1 Leach, C. C. 271..... 155
v. Huston, 19 La. Ann. 288..... 515
v. Manning, 2 Comyn, 616..... 496
v. Nichols, 16 Ohio St. 82..... 728
King of Greece v. Wright, 6 Dow. Prac. Cas. 12, 1 Jur. 944..... 130
of Spain v. Hullet, 1 Cl. & F. 333.. 130
of Spain v. Machado, 4 Russ. 225.. 130
of Spain v. Oliver, 2 Wash. C. C. 431 130
Kirby's Case, 3 Nott. & H. 265..... 708
Kirk v. Smith, 9 Wheat. 288..... 772
Klinger v. Missouri, 13 Wall. 257..... 851
Knapp v. Alvord, 10 Paige, 205..... 764
Knight v. Cheney, 5 Bank. Reg. 309, 310.. 752

K.

Knox v. Exchange Bank, 12 Wall. 379.... 406
Co. v. Aspinwall, 21 How. 539..580, 813
v. Lee, 12 Wall. 457..313, 339, 463, 809

L.

Lackland v. North Mo. R. Co. 31 Mo. 180.. 561
Lafayette Ins. Co. v. French, 18 How. 405.. 194
358, 359
Lambert v. Heath, 15 Mees. & W. 487.... 694
Lampriere v. Pasley, 2 T. R. 485..... 800
Lane v. Cotton, 1 Ld. Raym. 646..... 529
Co. v. Oregon, 7 Wall. 73, 76...126, 336
Langton v. Hughes, 1 M. & S. 593..... 441
Lapham v. Atlas Ins. Co. 24 Pick. 1..... 784
Lawes v. Purser, 6 Ell. & B. 930..... 694
Lawler v. Walker, 14 How. 152..... 49
Lawrence v. Minturn, 17 How. 100, 107,
114 .....782, 807, 808
v. Wright, 23 Pick. 129..... 566
Lawson, *In re*, 2 Bank. Reg. 125..... 63
v. Weston, 4 Esp. 56..... 107
Leather v. Simpson, L. R. 11 Eq. 398..... 369
Legal Tender Cases, 11 Wall. 682..... 331
12 Wall. 457..... 894
Le Louis, 2 Dod. 210, 250..... 695
Lemon v. West, 20 La. Ann. 427..... 89
Le Neve v. Le Neve, 2 White L. Cas. in Eq.
35 (Amb. 436)..... 54
Lenox v. United Ins. Co. 3 Johns. Cas. 178 784
Leonberger v. Rouse, 9 Wall. 353..... 240
Les Bois v. Bramell, 4 How. 449..... 839
L'Esperance, 1 Dod. 46..... 814
Lessieur v. Price, 12 How. 74..... 537
Lestrade v. Barth, 19 Cal. 671..... 537
Levy v. Arredondo, 12 Pet. 218..... 52
v. Stewart, 11 Wall. 249..... 884
Lewando v. Dunham, 1 Hilt. 114..... 666
Lewis v. Darling, 16 How. 1..... 52
v. Graham, 4 Abb. Pr. 106..... 665
Leycester v. Logan, 3 Kay & J. 446..... 590
License Cases, 5 How. 575..... 519
Lightfoot v. Tenant, 1 B. & P. 551–6..... 441
Lincoln v. Claflin, 7 Wall. 132..... 630
& Ken. Bank v. Richardson, 1 Me.
79 553
Lindo v. Rodney, 2 Doug. 613, *note*..... 506
Lindsey v. Hawes, 2 Black, 554, 559...487, 537
v. Miller, 6 Pet. 672, 673.....537, 772
Liter v. Green, 2 Wheat. 306..... 86
Lloyd v. Thursby, 9 Mod. 463..... 658
Locke v. Stearns, 1 Met. 560..... 501
Logan v. Patrick, 5 Cr. 288..... 763
Loomis v. Eagle L. & H. Ins. Co. 6 Gray,
396 502
v. Pingree, 43 Me. 311..... 704
Lord v. Dall, 12 Mass. 118..... 502
Lorman v. Clarke, 2 McLean, 568..... 627
Losh v. Hague. 1 Web. Pat. Cas. 207..... 40
Lott v. Morgan, 41 Ala. 250..... 375
Louisiana, The, v. Fisher, 21 How. 1..... 543
Louisville, etc., R. R. v. Letson, 2 How.
497 .....79, 358
Lovejoy v. Webber, 10 Mass. 104..... 408
Low v. Commrs. of Pilotage, 1 R. M. Charl.
307 626
Lowell v. Lewis, 1 Mas. 182..... 40
Lulu, The, 10 Wall. 192.....697, 698
Luther v. Borden, 7 How. 43, 47, 57...687, 689

L.

Lycoming Ins. Co. v. Schollenberger, 44
Pa. 259 623
Lynch v. Bernal, 9 Wall. 315..... 537
v. Crowder, 2 Law Rep. (N. S.) 355 880
Lytle v. Arkansas, 22 How. 193.....
v. Lee, 5 Johns. 112..... 748
Lyttleton v. Cross, 3 B. & C. 325–328..... 537

M.

Mackay v. Dillon, 4 How. 430..... 829
v. Dillon, 7 Mo. 7..... 839
Mackey v. Coxe, 18 How. 103..... 229
Madison v. Owens, Litt. Sel. Cas. 281.... 771
Madrazo v. Willis, 3 B. & Ald. 353..... 694
Magee v. Badger, 34 N. Y. 248..... 108
Maguire v. Tyler, 8 Wall. 650..... 637
Maguire v. Vice, 20 Mo. 431..... 537
Mallory v. Tioga R. Co. 39 Barb. 488..... 428
Mallory's Case, 3 Nott. & H. 257..... 708
Mandeville v. Burt, 8 Pet. 256..... 52
v. Wilson, 5 Cr. 15..... 86
Mankin v. Chandler, 2 Brock. 127..... 152
Many, *Ex parte*, 14 How. 24, 25.....879, 880
v. Jagger, 1 Blatchf. 372..... 40
Marbury v. Madison, 1 Cr. 175..... 879
Marcardier v. Ches. Ins. Co. 8 Cr. 39..220, 756
Marcellus, The, 1 Clif. 490..... 874
March v. Railroad, 43 N. H. 520..... 277
Maria Francoise, The, 6 Rob. 293.....506, 507
Martin, The, 12 Wall. 31..... 474
Marshall v. Balt. & O. R. R. 16 How. 329.. 358
v. Mitchell, 35 Me. 221..... 792
Marston v. Bank of Mobile, 10 Ala. 284.. 654
Martin v. Hilton, 9 Met. 371.....626, 874
v. Hunter, 1 Wheat. 326, 334, 355,.. 281
306, 336, 349, 577
v. United States, Hoff. L. Cas. 146 187
Mary, The, 9 Cr. 144..... 152
Caroline, The, 3 W. Rob. 101..... 590
Maryland v. Balt. & O. R. Co. 3 How. 534 155
Mason v. Sainsbury, 3 Doug. 61 (26 C. L.) 596
Mass. Gen. Hos. v. State Ins. Co. 4 Gray,
227 553
Massingill v. Downs, 7 How. 767..... 265
Masterson v. Herndon, 10 Wall. 416, 418.. 392
594, 858
Mather v. Maidstone, 1 C. B. (N. S.) 273.. 108
Mauro v. Almedia, 10 Wheat. 492..... 142
May v. LeClaire, 11 Wall. 232..... 412
McAndrew v. Bassett, 10 Jur. (N. S.) 550 584
McAndrews v. Thatcher, 3 Wall. 365..... 284
McArthur v. Browder, 4 Wheat. 488..... 487
McClung v. Silliman, 6 Wheat. 60..... 541
McCluny v. Silliman, 3 Pet. 270..... 683
McCollum v. Eager, 2 How. 61..... 430
McCoy v. Curtice, 9 Wend. 19..... 448
McCracken v. Poole, 19 La. Ann. 359..... 515
v. Beall, 3 A. K. Marsh, 210..... 657
M'Crea v. Holdsworth, L. R. 6 Ch. App.
418 .....736, 737
McCulloch v. Maryland, 4 Wheat. 316–
432....125, 127, 179, 194, 306, 308
309, 317, 318, 319, 332, 336, 338
341, 377, 451
McDonald v. Crandall, 43 Ill. 231....849, 850

M.

cDonald v. Smalley, 6 Pet. 261..... 657
v. Smalley, 6 Pet. 261..... 657
cDonough v. The Mary Ford, 3 Dall. 198..... 250
cGee v. Mathis, 4 Wall. 143..... 613
cGinnis v. Watson, 41 Pa. 21..... 678
cIntire v. Wood, 7 Cr. 504..... 541
'Iver v. Ragan, 2 Wheat. 29..... 772
cKinlay v. Morrish, 21 How. 355...807, 808
cLaren v. Pennington, 1 Paige, 107..... 553
cMicken v. Perin, 20 How. 135..... 85
cNutt v. Bland, 2 How. 10, 15.....181, 484
cVaughters v. Elder, 2 Brev. 313..... 566
cVeigh v. U. S. 11 Wall. 258.....141, 149
ellor v. Moore, 1 B. & P. 30..... 444
enard v. Massey, 8 How. 307, 313..... 839
enetone v. Gibbons, 3 Term, 269..... 98
ercer v. Hacket, 1 Wall. 83.....105, 812
ercurius, The, 1 Rob. 81..... 506
erle v. Mathews, 26 Cal. 455..... 59
etropolitan Bank v. Van Dyck, 27 N. Y. 400..... 331
ettelholzer v. Fullarton, 6 Ad. & E. (N. S.) 989..... 694
eyer v. Dresser, 16 C. B. (N. S.) 657... 783
v. Muscatine, 1 Wall. 384, 385..105, 580
iller v. Gable, 2 Den. 492..... 675
v. Race, 1 Burr. 452..... 107
v. United States, 11 Wall. 268..164, 166
illigan, *Ex parte*, 4 Wall. 120..... 338
illington v. Fox, 3 Myl. & Cr. 338..... 584
ills v. Barber, 1 L. & W. 425.....107, 108
ilton v. Mosher, 7 Met. 244..... 800
ilwaukee R. R. *Ex parte*, 5 Wall. 188.... 271
innesota v. Bachelder, 1 Wall. 109..... 488
inor v. Mech. Bank, 1 Pet. 73..... 728
v. Tillotson, 1 How. 287, 288....86, 278
v. Tillotson, 2 How. 392..... 430
inot v. Paine, 99 Mass. 106..... 277
inturn v. Brower, 24 Cal. 644..... 699
irehouse v. Rennell, 1 Cl. & F. 527..... 229
issouri v. Iowa, 7 How. 660..... 71
itchell v. Harmony, 13 How. 134..... 475
ixed Moneys, Davies (Jr.) 48.....317, 348
ock v. Astley, 13 Serg. & R. 382..... 873
onongahela Nav. Co. v. Coon, 6 Pa. 379.. 553
onroe v. Bordier, 8 C. B. 862..... 370
ontault v. United States, 12 How. 47.... 234
oran v. Commrs. Miami Co. 2 Black, 722..... 580
v. Jones, 7 El. & B. 532..... 285
v. Miami Co. 2 Black, 722.....105, 812
orewood v. Enequist, 23 How. 493..... 98
organ v. Thornhill, 11 Wall. 65.....458, 752
orning Light, The, 2 Wall. 556, 557..... 253
804, 882
orris v. Nixon, 1 How. 118..... 413
orse v. Aldrich, 19 Pick. 450..... 658
orsell v. Hall, 13 How. 212.....86, 848
orton v. Naylor, 1 Hill, 585..... 764
oses Taylor, The, 4 Wall. 411, 429..... 76
98, 577
ountford v. Scott, 1 Turn. & R. 274..... 170
ulford v. Le Franc, 26 Cal. 88, 108....58, 59
umford v. Wardwell, 6 Wall. 432, 435.....109, 565
umma v. Potomac Co. 8 Pet. 286..... 553
urphy v. Stewart, 2 How. 263..... 848
urray v. Lardner, 2 Wall. 110, 121...105, 107
use v. Yarborough, 11 La. 533..... 88
ussina v. Cavazos, 6 Wall. 355..... 392

M.

Muzzy v. Shattuck, 1 Den. 233..... 525

N.

Nace v. Boyer, 30 Pa. 110..... 412
Najac v. Bos. & L. R. Co. 7 Allen, 329.... 359
Nathan v. Louisiana, 8 How. 82..373, 377, 452
Nat. Bank v. Comm. 9 Wall. 468..... 240
Negro Case (Somersett), 20 How. St. Tr. 79..... 694
Neilson v. Lagow, 12 How. 110..... 637
Nelson v. Belmont, 21 N. Y. 38..... 284
v. Boynton, 3 Met. 402..... 783
Neptune, The, Alcott, 495..... 116
Nesmith v. Dyeing, etc., Co. 1 Curt. 130... 215
New Albany v. Meekin, 3 Ind. 481..... 195
Newell v. Norton, 3 Wall. 257..... 422
v. Smith, 15 Wis. 104..... 561
N. Jersey v. Wilson, 7 Cr. 164..... 613
N. Jer. Nav. Co. v. Merch. Bank, 6 How. 344, 383, 392.....98, 359
Newman v. Alvord, 49 Barb. 588..... 584
New York v. Miln, 11 Pet. 134..... 374
N. Y. Cen. Ins. Co. v. Protection Ins. Co. 20 Barb. 468..... 171
N. Y. Ins. Co. v. Adams, 9 Pet. 602..... 879
v. Delevan, 8 Paige, 422..... 503
v. Wilson, 8 Pet. 302, 304.....879, 880
N. Y. & N. H. R. v. Schuyler, 34 N. Y. 30.. 175
N. Y. S. S. Co. v. Rumball, 21 How. 384, 385.....804, 829
Niagara, The, v. Cordes, 21 How. 23...781, 783
Nichols v. Covey, 4 Rand. 365..... 771
v. Squire, 5 Pick. 168..... 178
v. United States, 7 Wall. 130..... 276
Nickerson v. Mason, 13 Wend. 64..... 626
Nicoll v. Mumford, 4 Johns. Ch. 522..... 83
Nieman v. Ward, 1 W. & S. 68..... 873
Noe v. Gibson, 7 Paige, 513..... 679
Noonan v. Bradley, 9 Wall. 399..... 280
v. Bradley, 12 Wall. 121..... 329
v. Lee, 2 Black, 501..... 280
Norris v. Crocker, 13 How. 429..... 154
155, 497, 498
v. Day, 4 You. & Coll. 475..... 503
v. Hamilton, 7 Watts, 91..... 873
v. Jackson, 9 Wall. 127..... 401
Norton v. Dawson, 19 La. Ann. 464..... 515
Noxon v. De Wolf, 10 Gray, 346..... 106

O.

O'Brien v. Gilchrist, 34 Me. 558..... 782
Oelricks v. Ford, 23 How. 63..... 783
Ogden v. Saunders, 12 Wheat. 265, 288, 303.....334, 351, 353
Ohio Ins. & T. Co. v. Debolt, 16 How. 416..... 613
Ohio & M. R. v. Wheeler, 1 Black, 286, 297.....79, 358, 576
Oliver v. Piatt, 3 How. 363.....53, 412
Oneida Bank v. Ontario Bank, 21 N. Y. 496..... 456
Orchard v. Hughes, 1 Wall. 73..... 663
O'Reilly v. Morse, 15 How. 111, 112..... 38
Ormsby v. Ihmsen, 34 Pa. 462..... 873
Osborn v. Bank of U. S. 9 Wheat. 738..... 180
v. Nicholson, 13 Wall. 654..... 876
v. U. S. Bank, 9 Wheat. 856..... 484
Owings v. Hall, 9 Pet. 625..... 387
v. Kincannon, 7 Pet. 399, 403...48, 594
Oyster v. Bellas, 2 Watts, 397.....872, 873

P.

Pacific Bank v. De Ro, 37 Cal. 542..... 792
Paine v. Meller, 6 Ves. 349..... 695
Palmer v. Donner, 7 Wall. 541..... 635
v. Lorillard, 16 Johns. 352..... 222
Paragon, The, 1 Ware, 329–331..... 784
Park v. Little, 3 Wash. C. C. 196..... 40
Bank v. Watson, 42 N. Y. 492..... 105
Parker v. Davis, 12 Wall. 457.....339, 463
v. Lake Cot. & W. Co. 2 Black, 545.. 502
Parkhurst v. Kinsman, 1 Blatchf. 494.... 41
Parsons v. Armor, 3 Pet. 425..... 396
v. Bedford, 3 Pet. 448..... 401
Partridge v. Forsyth, 29 Ala. 200..... 654
Passenger Cases, 7 How. 400, 402, 414, 447–481 . . ..373, 374, 453
Patten v. Merch. & F. Ins. Co. 40 N. H. 375 171
Patterson v. U. S. 2 Wheat. 222..... 394
v. Winn, 11 Wheat. 380..... 188
Paul v. Virginia, 8 Wall. 177.....452, 576
Paup v. Drew, 10 How. 218..... 462
Payne v. Drewe, 4 East, 523..... 679
v. Hook, 7 Wall. 425..... 577
Peabody v. Tarbell, 2 Cush. 233..... 55
Peacock v. Rhodes, 2 Doug. 633..... 107
Peck v. Jenness, 7 How. 612, 624, 625..... 671
672, 679, 800
v. Sanderson, 18 How. 42..281, 329, 848
Pennington v. Coxe, 2 Cr. 52..... 820
Pennock v. Dialogue, 2 Pet. 1..... 112
Penn v. Wheeling Bridge Co. 18 How. 429 525
Pa. R. Co. v. Canal Comrs. 21 Pa. 22..... 555
Penny v. Innes, 1 Comp. M. & R. 439..... 791
People v. Brooks, 4 Den. 476..... 374
v. Champion, 16 Johns. 61..... 880
v. Comrs. etc., 11 How. Pr. 89..... 880
v. Comrs. etc., 23 N. Y. 228..... 194
v. Gilbert, 18 Johns. 228..... 536
v. McKay, 18 Johns. 217..... 660
v. Manhattan Co. 9 Wend. 351..... 555
v. Waring, 3 Keyes. 374..... 452
v. N. Y. Police Board, 26 N Y. 316.. 879
v. Russell, 1 Abb. N. S. 230..... 879
v. Sar. & Rens. R. 15 Wend. 131.... 375
v. Supers. of Schuyler, 2 Abb. N. S. 78 879
People's Ferry Co. v. Beers, 20 How. 401.. 98
Peoria Ins. Co. v. Frost, 37 Ill. 333..... 596
Percival v. Frampton, 2 Comp. M. & R. 180 108
Perry v. Truefitt, 6 Beav. 66..... 583
Perrys v. Torrence, 8 Ohio, 524..... 373
Pettee v. Prout, 3 Gray, 503.....107, 108
Peyroux v. Howard, 7 Pet. 324..... 627
Peytona, The, 2 Curt. 21, 23.....782, 806
Peyton's Case, 1 Went. 346..... 394
Phalon v. Wright, 5 Phila. (Pa.) 464.... 583
Phila. v. Collector, 5 Wall. 728, 730, 731 . . ..274, 276
Phil. & T. R. v. Stimpson, 14 Pet. 458..... 38
39, 143
Phila. & Wil. R. v. Maryland, 10 How. 392 358
Philips v. Bury, Skin. 447..... 444
Phillips v. Page, 24 How. 166..... 40
v. Preston, 5 How. 290.....396, 397
v. Stevens, 16 Mass. 238..... 695
Pierpont v. Crouch, 10 Cal. 315..... 154
Piqua Br. Bank v. Knoop, 16 How. 369 380 . . ..553, 613, 614

P.

Piquinot v. Penn. R. 16 How. 104.....30, 251
Pitts v. Whitman, 2 Story, 619..... 42
Planters' Bank v. Sharp, 6 How. 301..... 553
of Geo. v. Allard, 8 Mart. (N. S.) 141 88
Plumb v. Cattaraugus Ins. Co. 18 N. Y. 392 623
Poage v. Chinn, 4 Dana, 50..... 831
Pollard v. Dwight, 4 Cr. 429..... 18
Porter v. Ferguson, 3 Yeates, 60..... 872
v. Foley, 21 How. 393..... 48
Post v. Ætna Ins. Co. 43 Barb. 351..... 402
Powhattan S. Co. v. Appomattox R. Co. 24 How. 255 729
Pratt v. Brown, 3 Wis. 603..... 561
v. Gardner, 2 Cush. 68..... 650
Prescott v. Nevers, 4 Mass. 327..... 627
Price v. Berrington, 7 Eng. L. & E. 254... 857
v. Neale, 3 Burr. 1355..... 369
Prigg v. Pa. 16 Pet. 611..... 695
Prioleau v. U. S. L. R. 2 Eq. Cas. 659.... 130
Pritt v. Fairclough, 3 Camp. 306..... 198
Prize Cases, 2 Black, 635, 673.....145, 146
Protector, The, 9 Wall. 687, 689..... 89
178, 213, 214, 884
Protector, The, 11 Wall. 82..... 594
Prop. of Monumoi Beach v. Rogers, 1 Mass. 160 448
Prouty v. Ruggles, 16 Pet. 341..... 43
Providence Bank v. Billings, 4 Pet. 563.... 194
Public Schools v. Walker, 9 Wall. 603.... 848
Pugh v. McCormick, 14 Wall. 361..... 760
Purviance v. Sutherland, 2 Ohio St. 479... 800
Putnam v. Wise, 1 Hill, 240, *note*..... 55
v. Wood, 3 Mass. 481..... 220

Q.

Quantock v. England, 5 Burn. 2628..... 682
Queen of Port v. Glyn, 7 Cl. & F. 466..... 130
Quickstep, The, 9 Wall. 665, 669, 670..... 253
384, 543, 874
Quimby v. Vanderbilt, 17 N. Y. 306..... 359

R.

Rabel v. Pourcia, 20 La. Ann. 131..... 89
R. Co. v. Bradley, 7 Wall. 575..... 635
v. Harris, 7 Wall. 574..... 858
v. Harris, 12 Wall. 65..... 576
v. Jackson, 7 Wall. 262..... 195
v. McClure, 10 Wall. 511.....415, 637
v. Reeves, 10 Wall. 176..... 392
v. Rock, 4 Wall. 177, 181...49, 415, 637
v. Trimble, 10 Wall. 367..... 779
Randall v. Cockran, 1 Ves. 98..... 596
v. Brigham, 7 Wall. 523..... 650
Ranger v. Cary, 1 Met. 369..... 107
Raphael v. Bank of Eng. 33 E. L. & E. 276 107
Rawls v. Am. L. Ins. Co. 36 Barb. 357.... 502
v. Am. L. Ins. Co. 27 N. Y. 282.... 502
Rebecca, The, 1 Ware, 187–194, 210...589, 784
The, 1 Rob. 227..... 506
Rector v. Ashley, 6 Wall. 142, 147....848, 851
Reed v. Harris, 7 Rob. 151..... 665
v. United States, 11 Wall. 591..... 739

R.

Reeside, The, 12 Sum. 570 784
Reeve v. Davis, 1 Ad. & E. 312 220
Regina v. Dean, 12 Mees. & W. 39 ....495, 500
Revell v. Hussey, 2 Ball & B. 287 694
Revere v. Bos. Cop. Co. 15 Pick. 351 553
Rex v. Almon, 5 Burr. 2686 501
v. Birch, etc., 2 East P. C. 980 197
v. Cator, 4 Burr. 2026 155
Rhode Island v. Mass. 12 Pet. 724 70
Richards v. Frankum, 9 Car. & P. 221 791
Richardson v. Boston, 19 How. 263 109
v. Duncan, 3 N. H. 508 264
Riddle v. Prop. of Locks & Can. 7 Mass. 185 553
Riggs v. Johnson Co. 6 Wall. 166 .....102, 265
Riley v. Wilcox, 12 Rob. (La.) 648 88
Ringgold v. Malot, 1 Har. & J. 316 772
Roach v. Hulings, 16 Pet. 319 394
Roberts v. Cooper, 20 How. 481 85
v. Witherhead, 12 Mod. 92 817
v. Witherall, 1 Salk. 223 817
Robinson v. Campbell, 3 Wheat. 223 627
v. Hardcastle, 2 D. & E. 252 705
v. Noble, 8 Pet. 198 336
v. Pett, 3 P. Wms. 251 770
v. Reynolds, 2 Q. B. 202, 210; 2 A. & E. (N. S.) 369
Rockingham Ins. Co. v. Bosher, 39 Me. 253 596
Rogers v. Burlington, 3 Wall. 666 107
v. Hosack, 18 Wend. 334 764
Roosevelt v. Meyer, 1 Wall. 512 461
Root v. French, 13 Wend. 570 501
Rose v. Himely, 4 Cr. 272, 277 ....145, 152, 687
Row v. Dawson, 1 Ves. 331 764
Rowe v. Granite Bridge Co. 21 Pick. 344 .. 561
Rowley v. Bigelow, 12 Pick. 307 783
v. Empire Ins. Co. 36 N. Y. 550 623
Roxbury v. Bos. & P. R. Co. 6 Cush. 424 .. 555
Rubber Co. v. Goodyear, 6 Wall. 153, 156, 788, 796, 797 .....38, 39, 211, 262, 269, 271
Ruse v. Mut. Ins. Co. 23 N. Y. 519 784
Russel v. Skipwith, 6 Binn. 241 82
Russell v. East Ang. R. Co. 3 McN. & G. 104 679
v. Southard, 12 How. 139 413
Ryder v. Woombwell, L. R. 4 Exch. 39 872

S.

Sack v. Ford, 13 C. B. N. S. 492 783
St. Cloud, The, Bro. & Lush. Adm. 4 782
St. Jago de Cuba, The, 9 Wheat. 409, 416 .....171, 698
St. John v. Am. Mut. Ins. Co. 11 N. Y. 519 379
v. Am. Ins. Co. 13 N. Y. 31 665
St. Lawrence, The, 1 Black, 522, 527, 529 .....97, 627
Saltmarsh v. Tuthill, 12 How. 389 271
Sandeman v. Scurr, L. R. 2 Q. B. 98 783
San Francisco v. Pixley, 21 Cal. 58 704
San Pedro, The, 2 Wheat. 132 430
Santa Maria, The, 10 Wheat. 442 281
Santissima Trinidad, The, 7 Wheat. 306 .. 145
Santos v. Illidge, 98 E. C. L. 861 694
Saxonia, The, 1 Lush. 410 825
Savacool v. Boughton, 5 Wend. 171 747
Saville v. Campion, 2 B. & Ald. 510 221
Sayward v. Stevens, 3 Gray, 101 784
Scammon v. Cole, 5 Bk. Reg. 257 483
Schen. & S. R. Co. v. Thatcher, 11 N. Y. 102 ..... 55[illegible]
Schuhardt v. Allens, 1 Wall. 369, 371 70[illegible], 87[illegible]
Scott v. Lon. Dock Co. 3 H. & C. 596 161
v. Ratliffe, 5 Pet. 86 ..... 77[illegible]
v. Scholey, 8 East, 474 142
v. Stansfield, L. R. 3 Exch. 220 650
Seavey v. Seymour, 3 Cliff. 439 602
Secretary, The, v. McGarrahan, 9 Wall. 311 541
Seixo v. Provezende, L. R. 1 Ch. App. 191 .. 584
Selby v. Bardons, 3 B. & Ad. 2 748
Sevier v. Haskell, 14 Wall. 12 759
Seward v. Jackson, 8 Cow. 412 109
Seybert v. Pittsburg, 1 Wall. 272 107
Seymour v. McCormick, 16 How. 480 866
Shackleford v. Wilcox, 9 La. 38 784
Shankland v. Washington, 5 Pet. 397 109
Shannon v. Frost, 3 B. Mon. 253 .....675, 677
Sheffield v. Parsons, 3 Stew. & P. 304 375
Sheldon v. Atlantic Ins. Co. 26 N. Y. 460 .. 402
Shepard v. Spaulding, 4 Met. 416 626
Sherman v. Fream, 30 Barb. 478 220
v. Smith, 1 Black, 587 554
Shields v. Barrow, 17 How. 130 .....84, 763
Sibbald v. U. S. 12 Pet. 492 .....281, 329
Sickles v. Evans, 2 Cliff. 203, 222 .....38, 39
Sigerson v. Mathews, 20 How. 496 478
Silsby v. Foote, 14 How. 218 86
v. Foote, 20 How. 386, 390 874
Silver v. Ladd, 7 Wall. 219 488
Simons v. Law, 3 Keyes, 219 783
Sims v. Guthrie, 9 Cr. 19 763
Singleton v. Bolton, 3 Doug. (26 E. C. L.) 293 583
Sinnickson v. Johnson, 2 Harr. (N. J.) 129 561
Sinnott v. Davenport, 22 How. 238 373
Siren, The, 7 Wall. 152 .....134, 506
Sistermans v. Field, 9 Gray, 336 107
Skillern v. May, 6 Cr. 267 .....85, 281
Slacum v. Pomery, 6 Cr. 221 394
Slater v. Cave, 3 Ohio St. 80 178
Slaughter-House Cases, 10 Wall. 273 271
Slee v. Bloom, 19 Johns. 474 553
Slocomb's Case, Cro. Car. 442 444
Slocum v. Barry, 34 How. Pr. 320 665
Smith v. Braine, 16 Ad. & E. (N. S.) 244 .....107, 368
v. Braine, 16 Q. B. (N. S.) 244 108
v. Bromley, 2 Doug. 696, *Note* 456
v. Clark, 12 How. 21 48
v. The Creole, 2 Wall. Jr. 485 422
v. Miln. Abb. Adm. 373 142
v. Nelson, 18 Vt. 511 675
v. Sheeley, 12 Wall. 358 563
v. Stewart, 21 La. Ann. 75 89
v. Swift, 8 Met. 329 626
v. Wheeler, 1 Vent. 128 770
v. Wright, 1 Cai. 43 783
Smyth v. Strader, etc., 12 How. 327 48
Snow v. Perry, 9 Pick. 542 336
Soc. for Savings v. Coite, 6 Wall. 604 377
v. New London, 29 Conn. 174 107
Spartali v. Benecke, 10 C. B. 222 783
Spencer v. Lapsley, 20 How. 264 86
Sprague v. Birchard, 1 Wis. 457 747
v. Ill. Riv. R. Co. 19 Ill. 174 553
Springfield v. Hampden. 10 Pick. 59 880
Sproat v. Donnell, 26 Me. 187 784

S.

Sproul v. Hemmingway, 14 Pick. 5..... 254
Staats v. Board, 10 Gratt. 400..... 768
Stacy v. Elph, 1 Myl. & K. 195..... 770
Stafford v. Union Bank of La. 16 How. 135, 17 How. 275..... 271
Stark v. Starrs, 6 Wall. 402, 419..188, 487, 537
Star of Hope, The, 9 Wall. 228, 232...283, 284
State v. Adams, 44 Mo. 570..... 555
v. **Bradshaw**, 10 Ired. 232..... 729
v. **Branin**, 3 Tab. 484..... 230
v. **Charleston**, 4 Rich. 286..... 375
v. **Harper**, 6 Ohio St. 607..... 529
v. **Miller**, 31 N. J. Law 521..... 555
v. **Minton**, 3 Tab. 529..... 230
v. **North**, 27 Mo. 467..... 452
Stead v. Course, 4 Cr. 403..... 704
Steamboat Co. v. Livingston, 3 Cow. 743.....374, 375
Steamboat Orleans v. Phœbus, 11 Pet. 184 627
Steamship Co. v. Joliffe, 2 Wall. 450..... 626
v. **Port Wardens**, 6 Wall. 34..... 375
Steinbach v. Stewart, 11 Wall. 572..... 884
Steines v. Franklin Co. 14 Wall. 15...851, 885
Stephens v. Foster, 6 Car. & P. 289..... 107
Stephenson v. Smith, 7 Mo. 610..... 537
Stevens v. Prop. of Middlesex Can. 12 Mass. 466..... 561
Stewart v. Kahn, 11 Wall. 493, 500, 502, 506.....214, 461, 687, 884
Stimpson v. Balt. & S. R. Co. 10 How. 329. 815
v. **West C. R. C. Co.** 4 How. 384, 404.....38, 39
Stockett v. Walkins, 2 Gill & J. 326-342.. 55
Stockton v. Bishop, 2 How. 74, 75..... 271
Stoney v. Ins. Co. 11 Paige, 635..... 110
Story, *Ex parte*, 12 Pet. 339..... 85
v. **Jer. City, etc., P. R. Co.** 16 N. J. Ch. 13..... 555
Stoughton v. Baker, 4 Mass. 526..... 772
Stratton v. Jarvis, 8 Pet. 4..... 250
Strawbridge v. Curtiss, 3 Cr. 267..... 180
Strother v. Lucas, 6 Pet. 763..... 418
v. **Lucas**, 12 Pet. 412..... 839
Sturges v. Crowninshield, 4 Wheat. 204, 205, 206.....334, 350
Sturgis v. Boyer, 24 How. 121, 122....254, 881
Sullivan v. Fulton S. Boat Co. 6 Wheat. 450..... 251
v. **Phil. & R. R. Co.** 30 Pa. 234..... 434
Sumner v. Hamlet, 12 Pick. 76..... 215
Supervisors v. Schenck, 5 Wall. 772, 780 784.....107, 110, 580, 813
Supervisors of Alb. v. Dorr, 25 Wend. 440, 7 Hill, 583..... 529
Surgett v. Lapice, 8 How. 48..... 430
Susquehanna Bank v. Broome Co. 25 N. Y. 312..... 67
Suydam v. Broadnax, 14 Pet. 67..... 577
v. **Moore**, 8 Barb. 358..... 553
v. **Williamson**, 20 How. 427, 432, 434, 440, 441.86, 109, 278, 396, 637, 815
Swainston v. Garrick, 2 L. J. (N. S.) Exch. 255..... 783
Sweet v. Jacocks, 6 Paige, 355..... 801
Swilley v. Low, 13 La. Ann. 412..... 88

T.

Taaffe v. Downes, 3 Moo. P. C. 41 (*note*).. 649
Taggard v. Loring, 16 Mass. 336..... 220
Tancred v. Christy, 12 M. & W. 323..... 110, 275, 401
Tapley v. Butterfield, 1 Met. 515..... 800
Tash v. Adams, 10 Cush. 252..... 107
Taunton Bank v. Richardson, 5 Pick. 444.. 792
Taunton Cop. Co. v. Merch. Ins. Co. 22 Pick. 108..... 784
Taylor v. Burnsides, 1 Gratt. 190..... 772
v. **Carryl**, 20 How. 594....671, 672, 679
v. **Morton**, 2 Curt. 454..... 229
v. **Morton**, 2 Black, 484.....86, 278
v. **Plumer**, 3 Maule & S. 562..... 55
v. **Porter**, 4 Hill, 146..... 695
Teese v. Huntingdon, 23 How. 10..... 37
Terrett v. Taylor, 9 Cr. 51..... 553
Texas v. White, 7 Wall. 700..313, 440, 457, 550
Thatcher v. Gammon, 12 Mass. 270..... 408
Theriat v. Hart, 2 Hill. 381..... 178
Thiedemann v. Goldschmidt, 1 De. Gex F. & J. 10..... 369
Thomas v. Harvie, 10 Wheat. 151..... 848
v. **Ketteriche**, 1 Ves. 333..... 511
v. **Osborn**, 19 How. 22..... 422
v. **Wyatt**, 25 Mo. 26..... 657
Thompson v. Dominy, 14 Mees. & W. 403.. 806
v. **Carper**, 1 Humph. 545..... 218
v. **Phillips**, Bald. 272-4..... 627
v. **Railroad Co's**, 6 Wall. 134..... 430
v. **Riggs**, 5 Wall. 678..... 336
Thomson v. Dean, 7 Wall. 342..... 271
v. **Lee Co.** 3 Wall. 327, 330, 331.. 105, 456, 812
v. **The Nanny**, Bee. 217..... 880
Thorington v. Smith, 8 Wall. 1..... 759
Thornborow v. Whitaere, 2 Ld. Raym. 1164..... 439
Thorndike v. United States, 2 Mas. 18.... 331
Thrale v. Ross, 3 Bro. Ch. 56..... 503
Thredgill v. Pintard, 12 How. 24..... 563
Thwing v. Great West. Ins. Co. 103 Mass. 401..... 610
Tobey v. Chipman, 13 Allen, 124..... 791
Toomey v. L. & B. R. Co. 3 C. B. (N. S.) 150..... 872
Town v. Stetson, 5 Abb. N. S. 218..... 583
Townsend v. Greeley, 5 Wall. 336.....565, 702
Towse v. Henderson, 4 Exch. 890.....609, 610
Trebilcock v. Wilson, 12 Wall. 687....317, 809
Trenton L. & F. Ins. Co. v. Johnson, 4 Zab. 576..... 592
Trueman v. Fenton, Cowp. 548..... 682
Tucker v. Morrill, 1 Allen, 528..... 108
Turnbull v. Bowyer, 40 N. Y. 460..... 105
Twitchell v. Com. 7 Wall. 321..... 463

U.

Union Bk., Tenn. v. Jolly, 18 How. 506.... 577
Union Ins. Co. v. U. S. 6 Wall. 759..... 144
Union S. S. Co. v. N. Y. & Va. S. Co. 24 How. 313.....253, 802, 882
Union Sugar Ref. v. Matthiessen, 2 Fish. Pat. Cas. 605..... 38
Union Towboat Co. v. Bordelon, 7 La. Ann. 195..... 375
U. S. v. Adams, 6 Wall. 101, 111.....109, 635
v. **Adams**, 7 Wall. 463....362, 363, 756
v. **Adams**, 9 Wall. 554.....362, 363
v. **Allen**, 4 Day, 474..... 493
v. **Anderson**, 9 Wall. 65, 68, 70..... 89, 562, 791

U.

U. S. v. Appleton, 1 Sum. 502–3..... 59
v. Arredondo, 6 Pet. 691, 737, 743.. 232
v. Ayres, 9 Wall. 608..... 385
v. Babbit, 1 Black, 61..... 179
v. Bags of Coffee, 8 Cr. 398..... 817
v. Bank of Metropolis, 15 Pet. 393.. 369
v. Belew, 2 Brock. 280..... 708
v. Booth, 21 How. 506.....599, 601
v. Bougher, 6 McLean, 277..... 493
v. Bradley, 10 Pet. 343..... 728
v. Breitling, 20 How. 254..... 872
v. Buford, 3 Pet. 12..... 86
v. Cantril, 4 Cr. 167..... 197
v. Castant, 12 How. 437..... 234
v. Child, 12 Wall. 232..... 480
v. Child, 12 Wall. 232..... 756
v. Colt, Pet. C. C. 145..... 493
v. Crane, 4 McLean, 317..... 499
v. Dashiel, 4 Wall. 182..... 529
v. D'Auterive, 10 How. 609..... 234
v. Dewitt, 9 Wall. 41..... 319
v. Eckford, 6 Wall. 484..... 134
v. Eliason, 16 Pet. 291..... 815
v. Freeman, 3 How. 565..... 178
v. Gooding, 12 Wheat. 468..... 496
v. Grundy, 3 Cr. 338.....171, 817
v. Hoar, 2 Mas. 312.....536, 772
v. Hodson, 10 Wall. 395, 406...241, 728
v. Keehler, 9 Wall. 83..... 530
v. Keene, 5 McLean, 509..... 499
v. Kimball, 13 Wall. 636..... 739
v. Kirkpatrick, 9 Wheat. 730..... 728
v. Klein, 13 Wall. 142..... 615
v. Knight, 1 Black, 488..... 848
v. Knight, 14 Pet. 315..... 627
v. Laub, 12 Pet. 1..... 109
v. Lawrence, 3 Dall. 42..... 879
v. The Lion, 1 Sprague, 399, 400... 143
151, 166
v. Lyman, 1 Mas. 482..... 493
v. Marigold, 9 How. 560, 567...307, 310
323, 333, 334, 347, 352
v. The Mars, 8 Cr. 417..... 817
v. Morillo, 1 Wall. 709..... 187
v. Ortega, Hoff. L. Cas. 135..... 187
v. Ortega, 11 Wheat. 467..... 642
v. Padelford, 9 Wall. 531.....524, 526
v. Palmer, 3 Wheat. 634, 635..145, 687
v. Peralta, 19 How. 343..... 699
v. Percheman, 7 Pet. 51, 86....148, 233
v. Peters, 5 Cr. 135..... 879
v. Phila. & N. Orleans, 11 How.
609..... 234
v. Prescott, 3 How. 578, 588....529, 533
v. Rathbone, 2 Paine, 578..... 396
v. Reynes, 9 How. 127..... 233
v. Rogers, 4 How. 572..... 229
v. Roselius, 15 How. 36..... 839
v. Rosenburgh, 7 Wall. 580....154, 611
v. Russell, 13 Wall. 623..... 505
v. Samperyac, Hemp. 118..... 848
v. Sanches, Hoff. Land Cas. 133.... 187
v. Stone, 2 Wall. 525..... 859
v. Tingey, 5 Pet. 127..... 728
v. Tynen, 11 Wall. 88..... 237
v. Vallejo, 1 Black, 541..... 605
v. Wagner, L. R. 2 Ch. App. 582... 130
v. Wiltberger, 5 Wheat. 95..... 229
U. S. Bank v. Bank of Ga. 10 Wheat. 347,
348.....336, 369
Uther v. Rich, 10 Ad. & E. 784..... 107

U.

Utica Manuf. Co. v. Supervisors, etc., 1
Barb. Ch. 432..... 66

V.

Vail v. Rice, 5 N. Y. 156..... 654
Valle v. Cerre, 36 Mo. 575..... 215
Van Hostrup v. Madison City, 1 Wall. 291. 580
Van Reimsdyk v. Kane, 1 Gall. 630..... 54
Vasquez v. Ewing, 42 Mo. 248..... 839
Vaughan's Case, 2 Salk. 635..... 146
Veazie v. Williams, 8 How. 134–7..... 501
Veazie Bank v. Fenno, 8 Wall. 533, 548.. 127
309, 320
Venice, The, 2 Wall. 253, 276.....89, 250
Venus, The, 8 Cr. 253..... 144
Vernard v. Hudson, 3 Sumn. 406..... 784
Vickroy v. Skelley, 14 S. & R. 377..... 872
Vincennes Univer. v. Indiana, 14 How. 268 553
Volunteer, The, 1 Sumn. 551.....220, 756
Von Hoffman v. Quincy, 4 Wall. 535,
552.....689, 693

W.

Wadleigh v. Veazie, 3 Sumn. 165..... 30
Wainwright v. Bridges, 19 La. Ann. 234.. 826
Wakefield v. The Governor, 1 Cliff. 97.... 875
Wakeman v. Hazleton, 2 Barb. Ch. 148... 413
Walcott v. Eagle Ins. Co. 4 Pick. 429..... 784
Waldo, The, Davies (2 Ware), 162..... 784
Walker v. Bos. Ins. Co. 14 Gray, 288..... 593
v. Shepardson, 4 Wis. 511..... 561
Wallen v. Williams, 7 Cr. 279..... 271
Walsh v. U. S. 3 Wood & M. 342..... 493
Walter v. Ross, 2 Wash. C. C. 283..... 806
Walthew v. Mavrojani, L. R. 5 Exch. 119.. 285
Ward v. Maryland, 12 Wall. 418..... 332
v. Soc. of Attorneys, 1 Coll. Ch. 377 555
Waring v. Clarke, 5 How. 462..... 97
v. Morse, 7 Ala. 343..... 783
Warrick v. Warrick, 3 Atk. 291..... 170
Washburn v. Gould, 3 Story, 122..... 41
Wash. Bridge Co. v. Stewart, 3 How. 424. 281
329
Watkins v. Baird, 6 Mass. 511..... 264
Watson v. Avery, 2 Bush, 332..635, 677, 678
679
v. Farris, 45 Mo. 183..... 677
v. Flanagan, 14 Tex. 354..... 369
Wattson v. Marks, 2 Am. Law Reg. 157.. 593
Way v. Richardson, 3 Gray, 413..... 107
Wayland v. Mosely, 5 Ala. 430..... 783
Webb v. Pierce, 1 Curt. 104..... 422
Weber v. Marshall, 19 Cal. 457..... 537
Weeks v. Milwaukee, 10 Wis. 242..... 561
Wells v. McGregor, *ante*, 538..... 689
West v. Brashear, 14 Pet. 51..... 85
v. Skip, 1 Ves. 239..... 83
West Riv. B'g Co. v. Dix, 6 How. 532.... 695
Weston v. Charleston, 2 Pet. 449, 466, 467. 125
377
Wheeler v. Guild, 20 Pick. 551..... 107
Wheelton v. Hardisty, 8 El. & Bl. 266, 296. 784
872
Whitaker v. Far. Ins. Co. 29 Barb. 319... 402
v. Wright, 2 Hare, 310..... 206
White v. Allen, 2 Cliff. 228, 230.....37, 41
v. Burnley, 20 How. 235.....30, 31
v. Carpenter, 2 Paige, 217..... 265

W.

White v. Fox, 22 Me. 341.....728, 729
v. Hart, 13 Wall. 646..... 693
v. R. R. Co. 21 How. 575.....105, 812
v. Syr. & U. R. R. Co. 14 Barb. 559. 555
v. Whitman, 1 Curt. 494..... 30
Whitfield v. Le Despencer, Cowp. 754.... 529
Whiting v. Bank of U. S. 13 Pet. 15..... 271
Whitridge v. Dill, 23 How. 453..... 829
Wilcox v. Jackson, 13 Pet. 516..... 537
Wilde v. Serpell, 10 Gratt. 405..... 768
Wilkins v. Despard, 5 T. R. 112..... 817
Wilkinson v. Conn. Mut. Ins. Co. 30 Ia. 119..... 621
v. Leland, 2 Pet. 657, 658.....351, 696
Willard v. Tayloe, 8 Wall. 568..... 336
Wm. Bagaley, The, 5 Wall. 405, 412..88, 250 253, 474, 874
Williams v. Bank of U. S. 11 Wheat. 414. 48 794
v. Benedict, 8 How. 111..... 265
v. Byrne, Hemp. 473..... 763
v. Gun; Fortesc. 177..... 682
v. Oliver, 12 How. 123..... 637
v. School Dis. 21 Pick. 82..... 448
v. Suffolk Ins. Co. 13 Pet. 420.... 687
Willink v. Morris Can. Co. 3 Green's Ch. 402..... 206
Wilmington R. R. v. Reid, 13 Wall. 264....613
Wilson v. Castro, 31 Cal. 420..... 701
v. Dickson, 2 B. & Ald. 2..... 590
v. Ins. Co. of N. Y. 12 Pet. 140.... 48
v. Leslie, 20 Ohio, 161..... 800

W.

Wilson v. Mayor of N. Y. 4 E. D. Smith, 678. 194
v. Stoner, 9 S. & R. 39..... 873
Wolfe v. Goulard, 18 How. Pr. 64..... 583
Wolff v. Koppel, 2 Den. 272..... 229
Wood v. Ins. Co. 32 N. Y. 619..... 402
v. Lowry, 17 Wend. 492..... 191
v. U. S. 16 Pet. 342..... 817
Woodbury Sav. Bk. v. Char. Oak Ins. Co. 31 Ct. 517..... 526
Woodman v. Thurston, 8 Cush. 157..... 792
Woodruff v. Parham, 8 Wall. 123, 139.. 452 519
Woodworth v. Stone, 3 Story, 753..... 39
Workman v. Mifflin, 30 Pa. 362..... 311
Worth v. Marston, 14 Wall. 10..... 759
Wright v. Campbell, 4 Burr. 2051..... 806
v. Fawcett, 4 Burr. 2041..... 880
v. Reed, 3 Term. 554..... 336
Wyman v. Fiske, 3 Allen, 238..... 107
Wynehamer v. People, 33 N. Y. 394..... 695

Y.

Yates v. Lansing, 5 Johns. 291..... 649
Yates v. Whyte, 4 Bing. N. Cas. 272..... 506
Yea v. Fouraker, 2 Burr. 1099..... 682
Yeates v. Groves, 1 Ves. Jr. 280..... 764
Young v. Martin, 8 Wall. 354..... 359

Z.

Zellner, *Ex parte*, 9 Wall. 244..... 96
Zipsy v. Hill, 1 Fost. & Fin. 573..... 783
Zolleverein, The, 1 Swab. 96..... 825

ACTS OF CONGRESS CITED.

Act of July 4, 1879, ch. 2 (1 Stat. 24) 325
Treaty Sep. 3, 1783 (8 Stat. 80)..... 326
Act of July 31, 1789, ch. 5 (1 Stat. 29) 325
Act of Aug. 7, 1789, ch. 9 (1 Stat. 54) 626
Act of Sep. 1, 1789, ch. 11 (1 Stat. 55) 194
Act of Sep. 2, 1789, ch. 12 (1 Stat. 65) 325
Judiciary Act Sep. 24, 1789, ch. 20 (1 Stat. 73–85)..48, 63, 64, 75, 97 109, 113, 175, 178, 180, 253, 261 263, 271, 278, 358, 359, 372, 377 396, 407, 450, 461, 486, 502, 527 539, 540, 577, 636, 662, 763, 787 812, 846, 879, 883, 886.
Act of Sep. 29, 1789, ch. 21 (1 Stat. 93) 539
Act of April 30, 1790, ch. 9 (1 Stat. 112) 307 497
Act of May 26, 1790, ch. 11 (1 Stat. 122) 886
Act of May 26, 1790, ch. 14 (1 Stat. 123) 661
Act of May 31, 1790, ch. 15 (1 Stat. 124) 711
Act of Aug. 4, 1790, ch. 34 (1 Stat. 138, 142)..... 337
Act of Aug. 12, 1790, ch. 47 (1 Stat. 187) 337
Act of Feb. 4, 1791, ch. 4 (1 Stat. 189) 118
Resolution of Congress of March 3, 1791 (1 Stat. 225)..... 323
Act of April 2, 1792, ch. 16 (1 Stat. 246, 250).....323, 326, 463
Act of Dec. 31, 1792, ch. 1 (1 Stat. 287) 194 374, 377
Act of Feb. 12, 1793, ch. 7 (1 Stat. 302, 303).....155, 497
Act of Feb. 18, 1793, ch. 8 (1 Stat. 305) 372 374, 377
Act of Mar. 2, 1793, ch. 22 (1 Stat. 334) 672
Act of Mar. 20, 1794, ch. 8 (1 Stat. 345) 337
Act of Dec. 12, 1794, ch. 3 (1 Stat. 404) 262 271
Act of Mar. 3, 1795, ch. 45 (1 Stat. 433) 337
Act of Mar. 3, 1797, ch. 20 (1 Stat. 512) 534
Act of April 7, 1798, ch. 28 (1 Stat. 549) 661
Act of July 16, 1798, ch. 79 (1 Stat. 607) 337
Act of Mar. 2, 1799, ch. 22 (1 Stat. 627, 695).....151, 166, 493
Act of Mar. 2, 1799, ch. 24 (1 Stat. 709) 507
Act of April 23, 1800, ch. 33 (2 Stat. 45) 507
Act of May 7, 1800, ch. 41 (2 Stat. 58) 661
Act of May 7, 1800, ch. 42 (2 Stat. 60) 337
Act of May 10, 1800, ch. 55 (2 Stat. 73) 532
Act of Feb. 27, 1801, ch. 15 (2 Stat. 106) 706
Act of April 29, 1802, ch. 31 (2 Stat. 156) 96
Act of Mar. 3, 1803, ch. 40 (2 Stat. 244) 48 178, 252, 253, 261, 278
Act of Nov. 10, 1803, ch. 2 (2 Stat. 245) 337

ACTS OF CONGRESS CITED — Continued.

Act of Mar. 26, 1804, ch. 38 (2 Stat. 283, 287.) 231, 234, 661
Act of Jan. 11, 1805, ch. 5 (2 Stat. 309) 661
Act of Mar. 3, 1805, ch. 38 (2 Stat. 338) 661
Act of Feb. 13, 1806, ch. 5 (2 Stat. 349) 337
Act of April 10, 1806, ch. 21 (2 Stat. 372) 213
Act of Feb. 3, 1809, ch. 13 (2 Stat. 514) 661
Act of May 1, 1810, ch. 45 (2 Stat. 610) 337
Proc. Oct. 27, 1810 (11 Stat. 761) 231
Act of Mar. 2, 1811, ch. 32 (2 Stat. 656) 337
Act of Mar. 14, 1812, ch. 41 (2 Stat. 694) 337
Act of April 8, 1812, ch. 50 (2 Stat. 701) 234
Act of April 25, 1812, ch. 67 (2 Stat. 713) 231
232
Act of June 4, 1812, ch. 95 (2 Stat. 743) 661
Act of June 13, 1812, ch. 99 (2 Stat. 748) 838
Act of June 24, 1812, ch. 106 (2 Stat. 758) 229
Act of June 30, 1812, ch. 111 (2 Stat. 766) 331
337, 339, 340
Act of Feb. 25, 1813, ch. 27 (2 Stat. 801) 331
339, 340
Act of Mar. 3, 1813, ch. 42 (2 Stat. 809) 153
154
Act of Mar. 4, 1814, ch. 18 (3 Stat. 100) 331
337
Act of Dec. 26, 1814, ch. 17 (3 Stat. 161) 337
Act of Feb. 17, 1815 (3 Stat. 211) 535
Act of Feb. 24, 1815, ch. 56 (3 Stat. 213) 337
Act of Mar. 3, 1815, ch. 87 (3 Stat. 227) 337
Act of April 10, 1816, ch. 44 (3 Stat. 266) 331
Act of April 27, 1816, ch. 119 (3 Stat. 315) 331
Act of April 29, 1816, ch. 151 (3 Stat. 325) 839
Act of Mar. 1, 1817, ch. 23 (3 Stat. 348) 234
Act of Mar. 3, 1817, ch. 59 (3 Stat. 371) 661
Act of Feb. 4, 1819, ch. 13 (3 Stat. 479) 337
Treaty of Feb. 22, 1819 234
Act of Mar. 2, 1819, ch. 47 (3 Stat. 489, 492) 234, 373, 376
Act of Mar. 2, 1819, ch. 49 (3 Stat. 493) 661
Act of Mar. 6, 1820, ch. 22 (3 Stat. 545) 118
Act of May 7, 1822, ch. 107 (3 Stat. 695) 845
Act of Mar. 3, 1823, ch. 58 (3 Stat. 781) 493
496, 497
Act of May 26, 1824, ch. 173 (4 Stat. 52) 233
234
Act of May 26, 1824, ch. 181 (4 Stat. 62) 183
Act of Mar. 3, 1825, ch. 64 (4 Stat. 114, 116) 497, 499
Act of Mar. 3, 1825, ch. 65 (1 Stat. 115) 307
Treaty with Prussia May 1, 1828 (8 Stat. 382) 878
Act of May 19, 1828, ch. 67 (4 Stat. 277) 328
541
Act of Jan. 27, 1831, ch. 12 (4 Stat. 435) 839
Act of Feb. 3, 1831, ch. 16 (4 Stat. 436) 711
Act of Mar. 2, 1831, ch. 85 (4 Stat. 476) 357
Act of July 3, 1832, ch. 162 (4 Stat. 559) 38
Act of July 9, 1832, ch. 180 (4 Stat. 565) 839
Act of Feb. 26, 1834, ch. 11 (4 Stat. 672) 358
Act of June 28, 1834, ch. 95 (4 Stat. 699) 312
327, 353
Act of Mar. 3, 1835, ch. 28 (4 Stat. 757) 358
Act of April 20, 1836, ch. 54 (5 Stat. 10) 662
Act of May 20, 1836, ch. 76 (5 Stat. 31) 657
Resolution of June 14, 1836, No. 7 (5 Stat. 133) 328
Act of June 15, 1836, ch. 100 (5 Stat. 50) 118
687
Act of July 2, 1836, ch. 270 (5 Stat. 81) 188
Act of July 4, 1836, ch. 352 (5 Stat. 107) 486
Act of July 4, 1836, ch. 357 (5 Stat. 117, 119, 122) 37, 38, 859
Act of July 4, 1836, ch. 361 (5 Stat. 127) 839
Act of Jan. 18, 1837, ch. 3, (5 Stat. 136) 327
462
Act of Mar. 2, 1837, ch. 22 (5 Stat. 153) 626
Act of Mar. 3, 1837, ch. 45 (5 Stat. 192) 43
Act of Oct. 12, 1837, ch. 2 (5 Stat. 201) 331
337
Act of May 21, 1838, ch. 82 (5 Stat. 228) 337
Act of June 12, 1838, ch. 96 (5 Stat. 235) 662
Act of July 7, 1838, ch. 191 (5 Stat. 304) 191
Act of Feb. 28, 1839, ch. 36 (5 Stat. 321) 763
Act of Mar. 2, 1839, ch. 37 (5 Stat. 323) 337
Act of Mar. 31, 1840, ch. 5 (5 Stat. 370) 337
Act of Feb. 15, 1841, ch. 5 (5 Stat. 411) 337
Act of Sep. 4, 1841, ch. 16 (5 Stat. 453) 486
488, 563
Act of Jan. 31, 1842, ch. 2 (5 Stat. 469) 331
337
Act of April 15, 1842, ch. 26 (5 Stat. 473) 337
Act of Aug. 31, 1842, ch. 287 (5 Stat. 581) 337
Act of Mar. 3, 1843, ch. 81 (5 Stat. 614) 337
Act of June 17, 1844, ch. 95 (5 Stat. 676) 233
Act of June 17, 1844, ch. 105 (5 Stat. 681) 337
Act of Mar. 3, 1845, ch. 48 (5 Stat. 743) 234
Act of Dec. 29, 1845, ch. 1 (9 Stat. 1) 85
Act of July 22, 1846, ch. 64 (9 Stat. 39) 337
Act of Aug. 6, 1846, ch. 90 (9 Stat. 59) 337
530, 532
Act of Jan. 28, 1847, ch. 5 (9 Stat. 118) 331
337
Act of Feb. 22, 1848, ch. 12 (9 Stat. 211) 263
Act of July 29, 1848, ch. 120 (9 Stat. 265) 381
382
Act of Aug. 14, 1848, ch. 177 (9 Stat. 323) 662
Act of Mar. 3, 1849, ch. 105 (9 Stat. 382) 804
Act of Mar. 3, 1849, ch. 108 (9 Stat. 395) 706
Act of Mar. 3, 1849, ch. 109 (9 Stat. 397) 327
462
Act of Mar. 3, 1849, ch. 121 (9 Stat. 403) 662
Act of Mar. 3, 1849, ch. 129 (9 Stat. 415) 221
Act of Sep. 9, 1850, ch. 49 (9 Stat. 446) 662
Act of Sep. 9, 1850, ch. 51 (9 Stat. 453) 662
Act of Sep. 18, 1850, ch. 60 (9 Stat. 462) 155
497
Act of Mar. 3, 1851, ch. 41 (9 Stat. 633) 186
Act of Mar. 3, 1851, ch. 43 (9 Stat. 635, 636) 422, 588
Act of Aug. 30, 1852, ch. 106 (10 Stat. 63, 73) 191, 626, 845
Act of Feb. 3, 1853, ch. 41 (10 Stat. 154) 381
382
Act of Feb. 21, 1853, ch. 79 (10 Stat. 160) 327
Act of Mar. 2, 1853, ch. 90 (10 Stat. 172) 662
Act of May 30, 1854, ch. 59 (10 Stat. 277, 780) 662, 263
Act of Feb. 24, 1855, ch. 122 (10 Stat. 612) 525
476, 481
Act of Feb. 28, 1855, ch. 126 (10 Stat. 615) 382
Act of Feb. 21, 1857, ch. 57 (11 Stat. 164) 85
Act of Mar. 3, 1857, ch. 114 (11 Stat. 249) 530
Act of Dec. 23, 1857, ch. 1 (11 Stat. 257) 331
337
Act of June 12, 1858, ch. 154 (11 Stat. 326) 486
Act of Mar. 3, 1859, ch. 82 (11 Stat. 425) 337
Act of June 22, 1860, ch. 188 (12 Stat. 85) 234
235
Act of Dec. 17, 1860, ch. 1 (12 Stat. 121) 337
Act of Feb. 18, 1861, ch. 37 (12 Stat. 130) 568

ACTS OF CONGRESS CITED — Continued.

Act of Feb. 28, 1861, ch. 59 (12 Stat. 172) 662
Act of Mar. 2, 1861, ch. 68 (12 Stat. 178, 193) 337, 567
Act of Mar. 2, 1861, ch. 83 (12 Stat. 200) 662
Act of Mar. 2, 1861, ch. 86 (12 Stat. 239) 662
Proclamation of Apr. 15, 1861 (12 Stat. 1258) 465
Proclamation of April 27, 1861 (12 Stat. 1259) 465
Act of July 13, 1861, ch. 3 (12 Stat. 255, 257, 258) 89, 145, 147, 606
Act of July 17, 1861, ch. 5 (12 Stat. 259) 337
Act of July 27, 1861, ch. 21 (12 Stat. 276) 632
Act of Aug. 5, 1861, ch. 45 (12 Stat. 292) 724
Act of Aug. 5, 1861, ch. 46 (12 Stat. 313) 337
Act of Aug. 6, 1861, ch. 60 (12 Stat. 319) 140
Act of Feb. 12, 1862, ch. 20 (12 Stat. 338) 337
Act of Feb. 25, 1862, ch. 33 (12 Stat. 345) 311 327, 339, 460, 462
Act of March 1, 1862 (12 Stat. 352) 113
Act of March 17, 1862, ch. 45 (12 Stat. 370) 113, 327, 462
Resolution of April 16, 1862 (12 Stat. 617) 706
Act of May 20, 1862, ch. 81 (12 Stat. 404) 606
Act of June 7, 1862, ch. 98 (12 Stat. 422) 724
Act of July 1, 1862, ch. 119 (12 Stat. 480) 789 790
Act of July 11, 1862, ch. 142 (12 Stat. 532) 311 327
Act of July 14, 1862, ch. 163 (12 Stat. 557, 561) 258, 259, 790
Act of July 15, 1862, ch. 178 (12 Stat. 576) 85
Act of July 17, 1862, ch. 195 (12 Stat. 589) 79 81, 140, 147, 148, 163, 522
Act of July 17, 1862, ch. 204 (12 Stat. 606) 507
Act of July 25, 1862 (12 Stat. 347) 196
Proclamation of July 5, 1862 (12 Stat. 1266) 522
Resolution Jan. 17, 1863, No. 9 (12 Stat. 822) 327
Act of Feb. 6, 1863, ch. 21 (12 Stat. 640) . 724
Act of Feb. 24, 1863, ch. 56 (12 Stat. 664) . 662
Act of Feb. 25, 1863, ch. 58 (12 Stat. 665, 675) 173, 174
Act of March 3, 1863, ch. 71 (12 Stat. 702) 188
Act of March 3, 1863, ch. 73 (12 Stat. 709) 311 327
Act of March 3, 1863, ch. 74 (12 Stat. 719, 725) 462, 790
Act of March 3, 1863, ch. 77 (12 Stat. 742) 259
Act of March 3, 1863, ch. 91 (12 Stat. 763) 750
Act of March 3, 1863, ch. 92 (12 Stat. 765) 525 682
Act of March 3, 1863, ch. 117 (12 Stat. 808) 662
Act of March 3, 1863, ch. 120 (12 Stat. 820, 821) 249, 250, 522
Act of March 12, 1863, ch. 120 (12 Stat. 820) 522, 566
Proclamation of Dec. 8, 1863 (13 Stat. 737) 523
Act of Feb. 29, 1864, ch. 16 (13 Stat. 12) 706
Proclamation of March 26, 1864 (13 Stat. 741) 523
Act of April 29, 1864, ch. 69 (13 Stat. 58–61) 255, 802, 804, 829
Act of May 6, 1864, ch. 83 (13 Stat. 69) 373
Act of May 26, 1864, ch. 95 (13 Stat. 85, 89) 226, 539, 662
Act of June 3, 1864, ch. 106 (13 Stat. 99–118) 173, 174, 842, 843
Act of June 8, 1864, ch. 120 (13 Stat. 120) 626
Act of June 11, 1864, ch. 118 (13 Stat. 123) 178 213, 884
Act of June 17, 1864, ch. 130 (13 Stat. 134) 845
Act of June 30, 1864, ch. 174 (13 Stat. 306) 507
Act of July 2, 1864, ch. 225 (13 Stat. 375, 377) 507, 712
Act of July 4, 1864, ch. 240 (13 Stat. 381) 476 505, 712
Act of Feb. 23, 1865, ch. 48 (13 Stat. 434) 720 721
Act of Feb. 28, 1865, ch. 70 (13 Stat. 444) 373 377
Act of March 3, 1865, ch. 78 (13 Stat. 481–493) . . . 257, 258, 275, 740, 790, 791
Act of March 3, 1865, ch. 80 (13 Stat. 491) 462
Act of March 3, 1865, ch. 86 (13 Stat. 500, 501) 106, 111, 396, 401, 448
Act of March 3, 1865, ch. 87 (13 Stat. 501) 194
Proclamation of May 29, 1865 (13 Stat. 758) 523
Act of March 17, 1866, ch. 19 (14 Stat. 9) 525
Act of Feb. 9, 1866 640–643
Proclamation of April 11, 1866 (14 Stat. 811) 465
Proclamation of April 20, 1866 (14 Stat. 814) 465
Act of May 9, 1866, ch. 75 (14 Stat. 44) 525
Act of May 16, 1866, ch. 82 (14 Stat. 48) 566
Act of June 30, 1864, ch. 173 (13 Stat. 215–306) . . . 170, 237, 257, 258, 275 276, 277, 790, 791
Act of July 13, 1866, ch. 177 (14 Stat. 93) . 626
Act of July 13, 1866, ch. 184 (14 Stat. 143-172) . . . 170, 275, 276, 462, 527, 790 815, 818, 819
Act of July 18, 1866, ch. 201 (14 Stat. 178, 179) 496
Act of July 23, 1866, ch. 210 (14 Stat. 209) 329
Act of July 25, 1866, ch. 227 (14 Stat. 227) 626
Act of July 25, 1866, ch. 227–234 (14 Stat. 228) 803, 804
Act of July 28, 1866, ch. 301 (14 Stat. 339) 328
Act of July 28, 1866, ch. 310 (14 Stat. 344) 416
Act of Feb. 5, 1867, ch. 28 (14 Stat. 385, 386) 177, 461, 486, 636, 827, 846 883
Act of Feb. 9, 1867, ch. 36 (14 Stat. 392) 264
Act of Feb. 21, 1867, ch. 57 (14 Stat. 397) 505
Act of Feb. 22, 1867, ch. 64 (14 Stat. 404) 478
Act of Feb. 25, 1867, ch. 83 (14 Stat. 412) 626
Act of March 2, 1867, ch. 153 (14 Stat. 429) 687
Act of March 2, 1867, ch. 167 (14 Stat. 466) 183, 184
Act of March 2, 1867, ch. 169 (14 Stat. 481, 483) 237, 815, 818
Act of March 2, 1867, ch. 176 (14 Stat. 517–541) . . . 62, 63, 64, 750, 752, 833
Act of March 2, 1867, ch. 185 (14 Stat. 545) 213, 884
Act of March 2, 1867, ch. 196 (14 Stat. 558, 559) 78, 575, 577, 811
Act of March 23, 1867, ch. 6 (15 Stat. 2) . 687
Proclamation of Sep. 7, 1867 (15 Stat. 699) 524
Act of June 25, 1868, ch. 70 (15 Stat. 73) 686 687
Act of June 25, 1868, ch. 71 (15 Stat. 75, 76) 481, 633

ACTS OF CONGRESS CITED — Continued.

Proclamation of July 4, 1868 (15 Stat. 702) 524
Act of July 20, 1868, ch. 186 (15 Stat. 125–167) 228, 229, 237, 238, 727, 728, 729
Proclamation of Dec. 25, 1868 (15 Stat. 711) 524, 646
Act of March 3, 1869, ch. 163 (15 Stat. 458) 839
Resolution of March 29, 1869, No. 5 (16 Stat. 52) 727
Act of April 10, 1869, ch. 22 (16 Stat. 44) 96, 269
Resolution of Dec. 23, 1869, No. 5 (16 Stat. 368) 505
Act of June 15, 1870, ch. 299 (16 Stat. 363) 686
Act of June 21, 1870, ch. 141 (16 Stat. 160) 649
Act of June 30, 1870, ch. 177 (16 Stat. 174) 62
Act of June 30, 1870, ch. 181 (16 Stat. 176) 259, 260
Act of July 8, 1870, ch. 230 (16 Stat. 206, 207) 39, 568
Act of July 12, 1870, ch. 251 (16 Stat. 235, 250) 522, 624, 632
Act of July 14, 1870, ch. 254 (16 Stat. 254) 154, 155
Act of July 14, 1870, ch. 255 (16 Stat. 257) 791
Act of July 15, 1870, ch. 299 (16 Stat. 363) 687

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

DECEMBER TERM, 1870.

Vol. 78.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

DECEMBER TERM, 1870,

AND REPORTED HEREIN,

VOLUME 78,

AS HAVE ALSO BEEN REPORTED IN

11 WALLACE.

11 Wall.	Title.	Here in.	11 Wall.	Title.	Here in.
1	Insurance Company v. Dunham,	90	146–147	Smith v. Sac County,	104
21–22	" "	96	147–151	" "	105
22–26	" "	97	151–154	" "	106
26–29	" "	98	154–156	" "	107
29–32	" "	99	157–160	" "	108
32–35	" "	100	160–163	" "	109
35–36	" "	101	163–164	" "	110
36	Parmelee v. Lawrence,	48	164	The Sapphire,	127
38–39	" "	49	167–169	"	130
39	Virginia v. West Virginia,	67	169–171	"	131
53	" "	70	172	Coal Company v. Blatchford,	179
53–57	" "	71	174–175	" "	180
57–60	" "	72	175–178	" "	181
60–63	" "	73	178	United States v. O'Keefe,	131
63–65	" "	74	182–184	" "	133
65	Morgan v. Thornhill,	60	184	" "	134
73–74	" "	62	185	Leon v. Galceran,	74
74–77	" "	63	187–189	" "	75
77–80	" "	64	189–192	" "	76
80–81	" "	65	192	" "	77
82	The Protector,	47	193	Generes v. Campbell,	110
86–88	"	48	197–198	" "	111
88–91	United States v. Tynen,	153	198–199	" "	112
92–93	" "	154	199–201	Case v. Terrell,	134
93–95	" "	155	201–203	" "	135
96	New Albany v. Burke,	155	204	Ins. Co. v. The Treasurer,	112
102–105	" "	158	208–210	" "	114
105–108	" "	159	210	Insurance Company v. Francis,	77
108	Dows v. City of Chicago,	65	215–216	" "	78
109–111	" "	66	216	" "	79
111–112	" "	67	217	May v. Le Claire,	50
113	The Collector v. Day,	122	227–229	" "	52
123–124	" "	125	229–232	" "	53
124–127	" "	126	232–235	" "	53
127–129	" "	127	235–238	" "	54
129	Trans. Co. v. Downer,	160	238	The Fannie,	114
133–135	" "	161	239–242	"	115
135–137	Amy v. The Supervisors,	101	242–243	"	116
137–139	" "	102	244	Levy v. Stewart,	86
139	Fort v. Thomas,	102	249	" "	87
139	Smith v. Sac County,	102	249–252	Levy v. Stewart,	88

11 Wall.	Title.	Here in.
252-255	Levy v. Stewart,	89
256-259	Garnett v. United States,	79
259	McVeigh v. United States,	80
266-267	" "	81
267-268	" "	82
268	Miller v. United States,	135
292-293	" "	140
293-296	" "	141
296-300	" "	142
300-303	" "	143
303-306	" "	144
306-309	" "	145
309-312	" "	146
312-315	" "	147
315-318	" "	148
318-321	" "	149
321-324	" "	150
324-327	" "	151
327-331	" "	152
331	Tyler v. Defrees,	161
344	" "	163
344-347	" "	164
347-350	" "	165
350-354	" "	166
354-356	" "	167
356	The Distilled Spirits,	167
364-366	" "	170
366-369	" "	171
369	Bank v. Lanier,	172
374	" "	173
374-377	" "	174
377-378	" "	175
379	Dewing v. Sears,	189
380	" "	190
380-382	Rankin v. The State,	175
382-384	Edmondson v. Bloomshire,	44
384-387	" "	45
387-390	" "	46
390-391	" "	47
391-394	Bank of Leavenworth v. Hunt, Assignee,	190
394-395	" "	191
395	Missouri v. Kentucky,	116
401	" "	118
401-404	" "	119
404-407	" "	120
407-411	" "	121
411	The Montello,	191
414-416	"	192
416	Moncure v. Zunts,	181
421-422	" "	183
422-423	" "	184
423	St. Louis v. The Ferry Company,	192
428-431	" "	194
431-432	" "	195
432	United States v. Howell,	195
435-436	" "	196
436-438	" "	197
438	Insurance Company v. Weide,	197
440-441	" "	198
441-442	" "	199
442	Meader et al. v. Norton,	184
451	" "	185
451-455	" "	186
455-458	" "	187
458	" "	188
459	Galveston Railroad v. Cowdrey,	199
473-476	" "	204
476-479	" "	205
479-482	Galveston Railroad v. Cowdrey,	206

11 Wall.	Title.	Here in.
482-483	Galveston Railroad v. Cowdrey,	207
484	Forsyth v. Woods,	207
486-488	" "	209
488	Eureka Company v. Bailey Company,	209
491-492	"	211
493	Stewart v. Kahn,	176
500-502	" "	177
502-505	" "	178
505-507	" "	179
508	United States v. Wiley,	211
512-514	" "	213
515	" "	214
516	Seymour v. Osborne,	35
532-534	" "	35
534-537	" "	36
537-541	" "	37
541-544	" "	38
544-547	" "	39
547-550	" "	40
550-553	" "	41
553-556	" "	42
556-559	" "	43
559-560	" "	44
560	Halliday v. Hamilton,	214
563-565	" "	215
565-566	" "	216
566	Steinbach v. Stewart,	56
572-573	" "	57
573-576	" "	58
576-579	" "	59
579-581	" "	60
581	Ludlow v. Ramsey,	216
587-588	" "	218
588-590	" "	219
591-602	Reed v. United States,	220
602-605	" "	221
605-608	" "	222
608-609	" "	223
610	Dunphy v. Kleinsmith and Duer,	223
614-615	" " "	226
615-616	" " "	227
616	The Cherokee Tobacco,	227
617-619	" "	228
619-622	" "	229
622-624	" "	230
624	Bank v. Carrollton Railroad,	82
628-631	" "	83
631-632	" "	84
632	United States v. Lynde,	230
634-636	" "	231
636-640	" "	232
640-643	" "	233
643-646	" "	234
646-648	" "	235
648-650	United States v. Wright,	188
650	Mann v. Rock Island Bank,	188
651-652	" "	189
652	Henderson's Tobacco,	235
656-657	" "	237
657-659	" "	238
659	Cook v. Burnley,	29
667-669	" "	30
669-672	" "	31
672	Same Case,	84
674-675	"	85
675-677	"	86
678-680	Whiteley v. Kirby,	32
680-681	" "	33

THE DECISIONS

OF THE

Supreme Court of the United States

AT

DECEMBER TERM, 1870.

[Names of Counsel who actually appeared and argued the case, as shown by the Minute Book, are given in heavy faced type.]

WILLIAM COOK *et al.*, *Plff. in Err.*,
v.
ALBERT T. BURNLEY and Royal A. Porter.

(See S. C. 11 Wall. 659-672.)

Mexican title of Juan Cano, valid—insufficient adverse possession—plea in abatement, when too late—former suit—objection to deposition—continuous possession—Texas decisions as to innocent purchaser—decision on discretionary questions, not available as error.

Title of Juan Cano, a colonist, in the *empressario* grant of Martin De Leon, and to whom the commissioner of that colony conveyed the league of land Apr. 11, 1835, as decided in White *et al.* v. Burnley, 20 How. 235, is valid.

Where a defendant sets up title under a land-warrant, which he had located within the boundaries of the grant to plaintiff's grantor, and relied on adverse possession of three years under the junior title, such defense is insufficient.

A plea in abatement of a suit put in after the defendants had pleaded to the merits is too late.

Where the parties to a suit in a state court were not the same as in the present case, the suit in the state court cannot be pleaded in abatement.

Where, in a deposition taken under the 30th section of the judiciary act, there is no certificate by the magistrate that he reduced the testimony to writing himself, or that it was done by the witness in his presence, such omission is fatal to the deposition.

What is a continuous possession is a mixed question of law and fact.

Where a survey of a plat granted by the commissioner was laid down on the public map of the district, which was deposited in the general land office as a matter of record, this, according to the decisions in the courts of Texas, deprives the junior locator of the character of an innocent purchaser; so does actual notice of the prior grant.

Exceptions to the rulings of the court on motions to postpone the trial and to change the venue are not available on writ of error.

[No. 13. Dec. Term, 1867].

Submitted Dec. 6, 1867. Decided Dec. 23, 1867.

IN ERROR to the District Court of the United States for the Eastern District of Texas.

The case is further stated by the court.

The suit was brought by Burnley and Porter, to recover a league of land situate on the western shore of Matagorda Bay, near the mouth of the River Levaca, in Calhoun County, Texas.

Messrs. **W. & A. L. Merriman,** *George W. Paschal,* and *A. H. Evans* for plaintiffs in error.

Messrs. **Greene Adams** and **W. P. Ballinger,** for defendants in error:

The parcel in immediate controversy lies

NOTE.—*Plea in abatement of another suit pending, when good.*

The law abhors multiplicity of actions and, therefore, whenever it appears on record, that the plaintiff has sued out two writs against the same defendant for the same thing, the second writ shall abate. 9 H. 6; Mo. 418, 539,; 5 Co. 61; Doctr. Pl. 66, 67; Renner v. Marshall, 14 U. S. (1 Wheat.), 311; Johnston v. Bower, 4 H. & M. 487.

Plea of a prior action pending for the same cause between the same parties is a good plea in abatement, and, if true when filed, cannot be defeated by a subsequent discontinuance of the prior action. Frost v. Long, 3 Dana, 157; S. C. 28 Am. Dec. 69; 1 Cot. 443; 1 Salk. 329; 2 Raym. 1014.

Pendency of a suit in a foreign court or in a court of the United States is not pleadable in abatement or in bar of a proceeding in a state court. Mitchell v. Bunch, 2 Paige, 606; S. C. 22 Am. Dec. 664; Maule v. Murray, 7 Term. 470; Imlay v. Ellefsen, 2 East, 453; Trubee v. Alden, 6 Hun, 78; B'k of Australia v. Nias, 16 Q. B. 717; Ld. Dillon v. Alteros, 4 Ves. 357; Foster v. Vassall, 3 Atk. 587; Cox v. Mitchell, 7 C. B. N. S. 55; Eaton, &c. R. Co. v. Bent, 20 Ind. 457; Lyman v. Brown, 2 Curt. 559.

Pendency of an action for same cause in U. S. circuit court, having jurisdiction, is a good plea in abatement in the state courts for the same district. Smith v. Atl. Mut. F. Ins. Co. 22 N. H. 21; otherwise if it be for a district in another state. Sloan v. McDowell, 75 N. C. 29; Loyd v. Reynolds, 29 Ind. 299.

The pendency of an action in a state court is not a bar to a suit in U. S. circuit court or in supreme court of District of Columbia for same cause of action between same parties. Stanton v. Embry, 93 U. S. 548; White v. Whitman, 1 Curt. 494; Parsons v. Greenville, etc. R. Co. 1 Hugh, 279; Loring v. Marsh, 2 Cliff. 311.

The pendency of a suit in another state is not matter of abatement to a suit upon the same cause of action. West v. McConnell, 5 La. 424, 25 Am. Dec. 191; Chatzel v. Bolton, 3 McCord, 33; Salmon v. Wooton, 9 Dana, 422; Davis v. Morton, 4 Bush, 442; Bowne v. Joy, 9 Johns. 221; Walsh v. Durkin, 12 Johns. 199; Newell v. Newton, 10 Pick. 470; Telverton v. Conant, 18 N. H. 123; De Armond v. Bohn, 12 Ind. 607; Drake v. Brandues, 8 Tex. 351; Smith v. Lathrop, 44 Pa. St. 326; Humphries v. Davis, 38 Ala. 199; McJilton v. Love, 13 Ill. 486; Allen v. Watt, 69 Ill. 655; Trabee v. Short, 5 Cold. 293.

Pendency of a proceeding *in rem* in a foreign jurisdiction may be pleaded in abatement of the same cause of action, so also may a proceeding in a mixed action in which a specific thing as well as the performance of a personal obligation is de-

north and adjoining Powderhorn Bayou, comprising some one hundred and seventy nine acres.

Mr. Justice **Nelson** delivered the opinion of the court:

The plaintiffs derived their title in this case from Juan Cano, a colonist, in the *empressario* grant of Martin DeLeon, and to whom the commissioner of that colony conveyed the league of land on the 11th of April, 1835.

Several objections are taken to this deduction of title, but it is not material to notice them particularly, as they were before the court in the case of *White et al.* v. *Burnley*, 20 How. 235, 15 L. ed. 886, already reported, in which these several objections were overruled. The only difference between that case and the present is, that the plaintiffs, Burnley and Jones, there claimed under a deed by the commissioner **668***] to a colonist by the name of *Benito Morales for a league of land lying on the Matagorda Bay, north and adjoining this grant to Cano. Both these colonists conveyed to Leonardo Manso, one on the 27th, the other on the 20th May, 1835, from whom the present plaintiffs derived title to both tracts. Porter, in the present suit, represents the interests of Jones in the former, and Cook, the principal defendant in this, was a defendant in that one. We find no question here, as it respects the deduction of title under the grant of the commissioner, but was taken in the former case, fully considered and overruled. White, one of the defendants there, and who is a defendant here, set up title under a land-warrant, which he had located within the boundaries of the grant to Morales, and, besides his objections to the deduction of the plaintiffs' title, relied on adverse possession of three years under the junior title. In the present case, Cook sets up a like defense under the location of a head right and survey, which is within the boundaries of the grant to Cano.

Among other defenses relied on in the present case, not in the former, is a plea in abatement of a suit, commenced by Burnley & Jones, against certain defendants, for the same cause of action, including the defendant, Cook, in the district court for the county of Calhoun. This plea was stricken from the record on the ground that it was put in after the defendants had pleaded to the merits, upon general principles, and came too late. And, further, that if it had been pleaded in season it would have constituted no bar to the suit in this court. *White* v. *Whitman*, 1 Curt. 494; *Piquignot* v. *Penn. R. Co.* 16 How. 104, and *Wadleigh* v. *Veazie*, 3 Sum. 165. It also appears that the parties to the suit in the state court were not the same as in the present case.

The defendants, in the course of the trial, offered in evidence the deposition of H. Beaumont, taken under the 30th section of the judiciary act, which was objected to and excluded. There is no certificate by the magistrate that he reduced the testimony to writing himself, or that it was done *by the witness in his [***669** presence, which omission is fatal to the deposition. *Elliott* v. *Piersol*, 1 Pet. 335, 336.

The following portions of the depositions of Moore, Schwartz, and Howeston were excluded, on objections taken by the court. The testimony had reference to the possession of the *locus in quo*.

"Witness knows that said Cook and his tenants had continued possession of said land since the fall of the year 1849, or early part of the winter of 1849–50; say December, 1849, and down to the present time."

This is in the deposition of Moore; the portions of the testimony of the other two are substantially the same. The depositions had been taken *de bene esse*, without notice, in December, 1852. In January following the depositions of these same witnesses were taken on notice to the plaintiffs, and these were given in evidence by the defendants.

On looking at the testimony in the first depositions, it will be seen that the witnesses had testified to the fact of the possession of Cook, and of his tenants, naming them; and of the time the tenants held the possession; and when they left the premises; also, the fact of the tenancy under the agreement with Cook; and of the improvements made by the tenants. Whether or not these facts constituted a continuous pos-

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manded. Lowry v. Hall, 2 Watts & S. 129, 37 Am. Dec. 495.

Pendency of a suit in a state court of another state for same cause, in which property enough has been attached to satisfy the demand, is ground for abatement of a suit in U. S. circuit court. Lawrence v. Remington, 6 Biss. 44; Nelson v. Foster, 5 Biss. 44; U. S. v. Dewey, 6 Biss. 501.

To sustain the plea of a former action pending it must appear that the first action is for the same cause as the second. It is not enough that the property in controversy in both actions is the same. Dawley v. Brown, 79 N. Y. 390; Stowell v. Chamberlain, 60 N. Y. 272; Kelsey v. Ward, 16 Abb. Pr. 98.

The pendency of an action for goods sold at one date is not a defense to an action for goods sold at a subsequent date. Zimmerman v. Erhard, 83 N. Y. 74.

Both actions must be for the same cause and against the same parties. Owens v. Loomis, 19 Hun, 606; Gardner v. Clark, 21 N. Y. 403; Geery v. Webster, 11 Hun, 428; Harris v. Johnson, 65 N. C. 478; Prosser v. Chapman, 29 Conn. 515.

Where two suits are brought and the subject of the action and the parties are the same and the entire relief sought for in one can be obtained in the other, the last one brought should be stayed. Burlingame v. Parce, 12 Hun, 149; People v. Northern R. R. Co. 53 Barb. 98; McCarthy v. Peake, 18 How. Pr. 138.

Proceedings *in personam* and *in rem* to collect the same demand do not necessarily interfere until satisfaction is obtained in one. Nelson v. Couch, 15 C. B. (N. S.) 99; Harmer v. Bell, 7 Moore, 267; 22 Eng. L. & E. 62; The Kalorama, 10 Wall. 204, 19 L. ed. 941.

A statutory arbitration is a good defense in abatement to a subsequent action between the parties to recover a demand included in the submission. Fahy v. Brannagan, 56 Me. 42.

Party cannot defeat suit brought against him by pleading the pendency of a suit brought by himself against the other party. New England Screw Co. v. Bliven, 3 Blatchf. 240.

It is no ground for the abatement of an action at law, that a suit in equity is pending, in which the plaintiff asks for a decree of the same money, where the result of the action may be necessary for the perfecting of a decree in that suit. Kittredge v. Race, 92 U. S. 116. But see Williamson v. Paxton, 18 Gratt. 475.

Plea in abatement of pendency of suit for same cause of action will not be sustained, if such suit is a nullity, or where the first writ or complaint is so defective that no recovery could be had, or where court had no jurisdiction of former suit. Phillips v. Quick, 68 Ill. 324; Rogers v. Hoskins, 15 Ga. 270; Reynolds v. Harris, 9 Cal. 338.

session by Cook and his tenants from the time they entered into possession, within the meaning of the statute of limitations, can scarcely be regarded as a simple question of fact, especially in connection with the previous testimony of the witnesses on the subject of their actual possession. We are inclined to think the question was rather one for the jury under proper instructions from the court. All the facts as it respects the possession had already been testified to by the witnesses from the commencement to its termination. Whether they constitute a continuous possession would seem to be a mixed question of law and fact.

We come now to the charge of the court to the jury. The defendants put in four prayers for instructions.

670*] *1. "If L. Manso was an alien enemy at the time he executed the deed to Grayson, he conveyed no title through which the plaintiffs could recover."

This question was before the court in the case of *White et al.* v. *Burnley*, 20 How. 235, 15 L. ed. 886, already referred to, very fully considered, and overruled. We need only to refer to that case.

2. "If the plaintiffs' title was not on record in the county where the land lies, or in the General Land Office, at the time the defendant located his land-warrant, and completed his survey, and obtained his patent, he is in the position of an innocent purchaser, and entitled to recover."

The location of Cook under his land-warrant of the premises in question, was made on the 12th September, 1849, and the survey thereon the 15th May, 1850. The first location was under a land-warrant issued to Gwartney, certificate No. 990, and made 5th January, 1847. But this was abandoned, and a new one made at the time above mentioned, under a certificate to J. A. Wells, No. 5072. It appears from the testimony of E. Linn, who has been the legal surveyor of the district in which the premises are situate, from 1838 to 1840, and from 1847 to the time when his deposition was taken, that as early as 1838, this survey of the plat of eight leagues of L. Manso, Cano and Morales, granted by De Leon, the commissioner, was laid down on the public map of the district, and which was deposited in the General Land Office as a matter of record. This, according to the decisions in the courts of Texas, deprives the junior locator of the character of an innocent purchaser. So does actual notice of the prior grant, which is also proved in the present case. *Guilbeau* v. *Mays*, 15 Tex. 410, 14 Tex. 391.

3. "If the plaintiffs' title includes an island surrounded by water, it is bad as to the island."

There is no testimony in the case tending to prove the fact.

4. "If the jury, from the evidence, can fairly and justly construe both the plaintiffs' and defendants' title, so that each can stand, it is their duty to do so."

671*] *There is no evidence in the case warranting such an instruction. Besides, it was the duty of the court to construe the paper titles of the parties.

The court gave but one instruction to the jury, which was "that the diagram attached to plaintiffs' grant is evidence to show the designation and character of the land granted, and may be used by the jury for its shape and boundaries. It appears to have been surveyed by magnetic courses and, if the survey returned by Beaumont was not surveyed by the magnetic, but by the true, course, the jury must make allowance for the difference, and Beaumont's cannot be regarded as showing the original survey. The fourth call is from the end of the third line with the bend of the Laguna Madre of Matagorda, to the beginning."

The point of the objection to this charge is that the court permitted the jury to depart from the survey of the league of land by Beaumont, who had been appointed by an order of the court to make it according to the courses, distances, and landmarks in the original survey by the government at the time the grant was made. The survey on the ground was made by Beaumont in pursuance of this order, but a civil engineer, by the name of Thelipapa, made the map from field notes. He was examined as a witness, and stated that he made the map from field notes furnished him by Beaumont. But, on comparing these field notes with those accompanying the order of survey, they were found to be different. He states that he made the map from courses and distances without any call for corners. In this respect the field notes of Beaumont differed from the original field notes, as they specified, in addition to distances, the corners of the league in the survey by the government. There was, also, some evidence that the original survey was made by magnetic courses, and the one by Beaumont by the true course, which might account for the difference between the two surveys. The court, as will be seen, suggested this to the jury, but left the question to them to make an allowance for the difference. We perceive no objection to this instruction.

Upon the subject of this survey, it is quite apparent on the evidence, that the whole of the controversy between the parties consisted in a difference of opinion as to what line constituted a boundary upon the bay of Matagorda. The defendants insisting that there is a distinction to be made between the lagunas, some of them small, others of considerable magnitude, which are formed by tidal currents extending into the land from the bay, and sometimes connecting with each other along the greater part of this coast, and the waters of the bay itself, while the plaintiffs insist that these lagunas belong to the bay and are parts of it, and that *a [*672 line bounded on the lagunas is the same as bounded on the bay. It seems in this case quite plain that the grant to Cano was bounded or intended to be bounded on the bay, as the first line given in the description of the tract commences on the bay and terminates at the place of beginning, following down the bends of the Laguna Madre, which designates the bay or great lake of Matagorda.

There were other exceptions taken in the case to the rulings of the court in the progress of the trial, such as motions to postpone the trial, and to change the venue, which it is not material to notice further than to say that they are not available on a writ of error.

After the best consideration we have been able to give the case, we think there is no error in the judgment below, and it must be affirmed.

AM N. WHITELEY *et al.*,
Appts.,
v.
KIRBY and David Osborn.

C. 11 Wall. 678-681.)

n harvesters—infringement of.

ınd Alfred Churchill's patents for have no bearing upon the inven- for the peculiar device for which anted is not to be found in either

teley's machine embraces every ıt found in the construction and he Dinsmore machine, and is an eon.

[No. 98.]

1869. Decided Mar. 22, 1869.

the Circuit Court of the United ıe Southern District of Ohio.

is case was filed in the court efendants in error, for an in- making, using, or selling cer- machines. A decree having ıaid court in favor of the com- espondents took an appeal to

.ted by the court.

ı. Fisher for appellants.

'right for appellees.

elson delivered the opinion of

peal from the circuit court of ɛs for the southern district of

ıled in this case, to enjoin the v, Whiteley and others, from ɔmplainant's patent, originally Dinsmore February 10, 1852, omplainant, Kirby and Osborn, d surrendered in 1859, and re- ıary, 1862.

for improvements in harvesting chines, and consists chiefly in ıe construction and combination he one for supporting the driv- ıe other for supporting the cut- and hinging the same together that the driving-wheel and cut- ıay each follow the inequalities dependently of each other, and ılly together for supporting the s at any desired height. After .ion of the machine sufficiently to enable anyone skilled in the it, the claim is as follows:

of the driving-wheel in a sup- or its equivalent, which is d to the main frame, whilst its .y be adjusted and secured at or be left free, as desired, where- ıpparatus may be held at any r reaping, or be left free to odate itself to the undulations ɔr mowing, as substantially de-

of this patent was made by the ount of a defect in the claim, ing failed to embrace within it he driving-wheel in the supple- d its connections with the main the cutting apparatus is at- ıeans of which both the driving-wheel and cutting apparatus were made to follow the inequalities of the ground independently of each other. These devices were fully described in the specification, drawings, and model, and were embodied in the construction of the first machines. The patent, we have seen, was granted February 10, 1852. The first machine was built and successfully tried in the harvest of 1850. Twenty-one were made and sold the next year (1851), and fifty or sixty the year following, all entirely successful.

The defendants set up in their answer, and gave in evidence, two patents for harvesters, which they claimed antedated this invention of Dinsmore.

The first, Nelson Platt's of La Salle county, Illinois, June 12, 1849; the second, Alfred Churchill's, Kane county, same state, March 3, 1841. There is no proof in the record in respect to these patents. Whether any machine was ever constructed under either of them, or went into practical use if constructed, or whether each were but an imperfect and abandoned experiment, are matters apparently regarded by the counsel who introduced them as of no great importance. Nothing appears to be known in respect to them, except that they were found among the records of the patent office, and have relation to the subject of grain harvesters. Whatever may have been their merit, however, as harvesters, they can have no material bearing that we can perceive upon this invention of the complainants, for, as it respects the peculiar device for which the present patent was granted, it is not to be found in either of them; neither in the specification nor claims.

A rejected specification and drawing were also given in *evidence of E. P. Covett, [*680 of Philadelphia, on the part of the defendants, on the point of novelty; but this was an application made to the patent office as late as 1852, two years after the invention of Dinsmore.

This closes all the evidence in the case on the question of novelty, and which requires no further comment.

The only remaining question is as to the infringement. The defendant's answer itself goes far towards making out an infringement, stripped of the coloring generally given to a case stated in the pleadings. It is admitted, the defendant's harvester is constructed with a main frame which carries the working parts of the machine—that is, the cutting apparatus—and to this main frame is attached a secondary (supplemental) frame, which carries the driving-wheel. The secondary frame, it is said, is not left free to play up and down, but is prolonged beyond the driving-wheel to a standard in the form of an arc, that rises from the rear of the main frame. This standard is provided at various heights with holes, which secure said secondary frame, and with it, the axle of the driving-wheel, at certain fixed distances above the main frame. Defendants say that their driving-wheel is not hung upon a crank shaft, and that their main and secondary frames are hinged in the opposite direction from that in which they are attached in the machine patented to Dinsmore. We have a model of the defendant's machine before us, and the above is a pretty fair description of it; and it will be seen to embrace every substantial element found in

the construction and arrangement of the Dinsmore machine. There are the two frames, the main and secondary, or supplemental, the one supporting the cutting apparatus, the other the driving-wheel, hinging the two frames together in such a way that the driving-wheel and cutting apparatus may each follow the inequalities of the ground independently of each other, and may also be bolted rigidly together for supporting the cutting apparatus at any fixed height. Every advantage in reaping or mowing uneven or stony ground by the new and peculiar device of Dinsmore in the construction and arrangement of his machine, is found in that of the 681*] *defendants. The form in some parts is changed; their two frames are hinged at different ends, different names are given to the same things, and different mechanical arrangements in the gearings are used to produce corresponding results, and, as is claimed, better results, although we perceive no evidence of this in the record.

An expert, Mr. Young, an experienced machinist, engaged in building this class of machines, who had a model of the defendants before him, was inquired of if he found in its construction two powers—the one for supporting the driving-wheel, and the other for supporting the cutting apparatus. He answered that he did. He was inquired of if he found the two frames hinged together in such a manner that the driving-wheel and cutting apparatus may each follow the irregularities of the ground independently; and also, if they were bolted rigidly together for supporting the cutting apparatus at any desired height. He answered that he did. He was asked if he found the driving-wheel represented in the model as hung in a supplementary frame. He answered that he did. Also, if he found the supplementary frame hinged at one end to the main frame. He answered that he did, and that its opposite end could be adjusted at various heights, or left free as desired. Do you find these several parts so constructed and arranged that the cutting apparatus may be held at any desired height for reaping, or be left free to accommodate itself to the undulations of the ground, for mowing? He answered, he did.

Another witness, Mr. Dunning, supports in all respects the evidence above given; and there is no substantial contradiction of this account of the construction and arrangement of the defendant's machine.

There is a good deal of conflicting evidence on a point that is not at all controlling in the case, namely: whether the defendants' machine would work well in mowing without adjusting the wheel frame to the standard firmly at a given height. There are respectable witnesses on both sides of this question.

The decree below affirmed.

516*] *WILLIAM H. SEYMOUR *et al., Appts.*, *v.* DAVID M. OSBORNE *et al.*

(See S. C. 11 Wall. 516-560.)

Patent is evidence that patentee is original inventor — recital in, when evidence — claim, when sufficient — commissioner's decision, when final—re-issued patent, construction of —question for court in equity actions—new and useful improvement, what is—first inventor, who is—reaping machines—magazine as evidence.

A patent is of itself prima facie evidence that the patentee is the original and first inventor of that which is therein described and secured to him as his invention.

Recital in letters patent, that the required oath was taken before the same was granted, in the absence of fraud, is conclusive evidence that the necessary oath was taken by the applicant before the letters patent were granted.

Where inventions secured by letters patent embrace an entire machine, it is sufficient if it appear that the claim is coextensive with the invention.

Where inventions embrace only one or more parts of a machine, the part or parts claimed must be specified and pointed out.

Where the commissioner accepts a surrender of an original patent and grants a new patent, his decision in the premises, in a suit for infringement, is final and conclusive, and is not re-examinable in such a suit.

All matters of fact involved in the hearing of an application to reissue a patent, and in granting it, are conclusively settled by the decision of the commissioner granting the application.

Whether a reissued patent is for the same invention as that embodied in the original patent, or for a different one, is a question for the court in an equity suit to be determined as a matter of construction, on a comparison of the two instruments, aided, if necessary, by the testimony of expert witnesses.

The claim may be construed in connection with the explanations contained in the specifications.

The requirement of the patent act, that the improvement must be new and useful, is satisfied, if the combination is new and the machine is capable of being beneficially used for the purpose for which it was designed.

He is the first inventor and entitled to a patent for his invention, who first perfected and adapted the same to use; and until the invention is so perfected and adapted to use, it is not patentable under the patent laws.

Mere vague and general representations in a magazine, not sufficient to give the nature and operation of the invention, will not support a defense that the patentees are not the original and first inventors.

Bona fide inventors of a combination may suppress every other combination of the same ingredients to produce the same result, not substantially different from what they have invented and caused to be patented.

Seymour's and Palmer's and Williams's patents for improvements in reaping machinery, held valid.

[No. 65.]

Argued Nov. 23, 1870. Decided Jan. 9, 1871.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

The bill in this case was filed in the court below, by the appellants, to recover for an alleged infringement of a certain patent. A decree having been entered dismissing the bill, the complainants took an appeal to this court.

The case is very fully stated in the opinion of the court.

Messrs. **Geo. Gifford** and **E. W. Stoughton**, for appellants:

The law respecting the necessary quantity of invention to sustain a patent is well settled, and has been ever since the first administration of the patent laws in England. There has been one unbroken line of decisions, to the effect that, if the thing invented be new, the quantity of invention employed to produce it cannot be measured from the appearance of the thing itself, but that the change made must be taken in connection with the usefulness of the thing produced by the change.

In the case of Crane's patent, which was for the use of anthracite and hot air blast in the manufacture of iron. in the place of bituminous coal and hot air blast, the English court of common pleas said:

"We are of the opinion that, if the result produced by such a combination be either a new article or a better article or a cheaper article to the public than that produced before by the old method, such a combination is an invention or manufacture intended by the statute, and may well become the subject of a patent."

In the case of *Rex* v. *Arkwright*, Web. Pat. Cas. 71, Buller, J., said:

"If there be anything material or new which is an improvement of the trade, that will be sufficient to support a patent."

Mr. Curtis, in his book on patents, § 25, 3d ed.. says:

"There are many cases where the materiality and novelty of the change can be judged of only by the effect on the result."

Mr. Curtis, after a full examination of the English cases, on the subject of the sufficiency of invention to support a patent, at section 39, concludes thus:

"It appears, then, according to English authorities, that the amount of invention, as being sufficient or insufficient to support a patent, may be estimated from a compound view of the change effected and the consequences of that change. The change alone may be very slight or, in point of fact, accidental; yet, if it leads to consequences and results of great practical utility, and others above mentioned, the condition of a sufficiency of invention is satisfied."

The rule is the same in this country.

In *Furbush* v. *Cook*, 2 Fish. Pat. Cas. 668, it was held, Curtis, J.:

"If the patentee first made a new and useful combination, he is entitled to a patent for it."

It was also held in that case as follows:

"It is decisive evidence that a new mode of operation has been introduced if the practical effect of the new combination is either: a new effect or a materially better effect, or as good an effect more economically attained. And in such case it is not material how much study, thought, time, expense, or experiment was required to make the change."

The action of the Commissioner of Patents, in accepting a surrender of a patent and granting a reissue, is conclusive that the prerequisites to the surrender did exist unless fraud be shown.

Stimpson v. *Railroad Co.* 4 How. 380; *Railroad Co.* v. *Stimpson*, 14 Pet. 448; *Woodworth* v. *Stone*, 3 Story, 749, 753; *Allen* v. *Blunt*, 3 Story, 742, 743; *Carver* v. *Manufacturing Co.* 2 Story, 432; *Goodyear* v. *Day*, 2 Wall. Jr. 283; *O'Reilly* v. *Morse*, 15 How. 112; *Battin* v. *Taggert*, 17 How. 84, 15 L. ed. 41; *Allen* v. *Blunt*, 2 Wood. & M. 138; *French* v. *Rogers*, 1 Fish. Pat. Cas. 133.

In the case of *Woodworth* v. *Stone*, 3 Story, 749, and 2 Robb, Pat. Cas., Judge Story holds thus:

"I have already, in another cause, had occasion to decide that, where the Commissioner of Patents accepts a surrender of an old patent and grants a new one, under the act of 1836, chap. 357, his decision being an act expressly confided to him by law, and dependent upon his judgment, is not re-examinable elsewhere; and that the court must take it to be a lawful exercise of his authority, unless it is apparent upon the very face of the patent that he has exceeded his authority, and there is a clear repugnancy between the old and the new patent, or the new one has been obtained by collusion between the commissioner and the patentee."

A patent may be valid, and may have been held so to be by a court, without being broad enough to cover the whole invention. In such cases the act of Congress tenders the patentee relief by reissuing to make his claim broader.

The statute does not limit the right to reissue to cases where the surrendered patent was void, but it expressly gives this right also where the patent is inoperative; meaning, of course, inoperative to cover all the patentee has a right to.

Law, Am. Dig. 612, 616.

This has been repeatedly held, both by the Supreme Court and in the several circuits. In the case of *Goodyear* v. *Day*, 2 Wall. Jr. 283, in the district of New Jersey, the court expressed the principle in the following words:

"The mistake of claiming too little in the original patent has an equal claim to correction with that of claiming too much."

The decision in the Supreme Court in the case of *Battin* v. *Taggert*, 17 How. 83, 15 L. ed. 40, is also in point.

To determine whether or not a patent is good as a reissue, the court will look to only two things: First, to what was the invention actually made by the patentee and made known in the original patent; second, to what invention is covered by the patent which is sought to be enforced. The comparison of the court will be only between such invention and such patent, and when it finds that the patent is no broader than such invention, it will be found to be no broader than it ought to be. The comparison should not be between previous reissues nor between the existing patent and any previous reissue which has been surrendered, or between the original and any previous reissue which has been surrendered; but it should be only between the existing reissue and the invention made by the patentee and made known in the original patent.

In the case of *French* v. *Rogers*, 1 Fish. Pat. Cas. 138, Judge Kane and Justice Grier held thus:

"The surrender and the reissue, no matter how often they recur, are reciprocal—each in consideration of the other—forming together but a single act."

In an earlier case, that of *Sloat* v. *Spring*, Justice Grier, in charging the jury, said:

"A difference in the description of these two patents does not, necessarily, make them describe different inventions, as the inventor is authorized by law to correct, in the reissued patent, all the errors or deficiencies in the first, and make the second what he might have made the first."

See, also, *O'Reilly* v. *Morse*, 15 How. 112.

A very early and leading case on the subject of prior inventions, was that of *Bedford* v. *Hunt*, 1 Mason, 302, which was contested by two very able counsel on each side, and was before the most distinguished judge of his time.

On this question Judge Story instructed the jury that—

"The first inventor who has put the invention in practice, and he only, is entitled to a patent."

In speaking of the rights of the defendant he said:

"He may stand upon the defense, that the plaintiff is not the first inventor who put the invention in use."

"The intent of the statute was to guard against defeating patents by the setting up of a prior invention, which had never been reduced to practice. If it were the mere speculation of a philosopher or a mechanician, which had never been tried by the test of experience, and never put into actual operation by him, the law would not deprive a subsequent inventor, who had employed his labor and his talents in putting it into practice, of the reward due to his ingenuity and enterprise."

Much less would the law deprive him of his invention by virtue of a prior experiment, which proved only a failure.

See, also, *Reed* v. *Cutter*, 1 Story, 590; *Woodcock* v. *Parker*, 1 Gall. 438; *Washburn* v. *Gould*, 3 Story, 122; *Allen* v. *Blunt*, 2 Wood. & M. 121; Curt. Pat. § 43.

In the case of *Parkhurst* v. *Kinsman*, 1 Blatchf. 488, 494, the court says:

"Crude and imperfect experiments, equivocal in their results, and then given up for years, cannot be permitted to prevail against an original inventor, who has perfected his improvement."

Sickles v. *Borden*, 3 Blatchf. 535; Hindm. Pat., ed. printed at Harrisburgh, Pa., 1847, pp. 106-109.

Judge Leavitt, in the case of *Judson* v. *Moore*, 1 Fish. Pat. Cas. 544, tried in the district court of Ohio in 1860, in charging the jury, said:

"Neither will experiments defeat, even if known to the patentee, if it appear that he prosecuted such experiments to final success."

See, also, *Allen* v. *Hunter*, 6 McLean, 321; *Foote* v. *Silsby*, 2 Blatchf. 266; *Howe* v. *Underwood*, 1 Fish. Pat. Cas. 160, Sprague, J., 1854; *Ransom* v. *Mayor of New York*, 1 Fish. Pat. Cas. 252, Hall, J., 1856.

A leading case on this subject is that of *Cahoon* v. *Ring*, 1 Fish. Pat. Cas. 399, which was tried before Justice Clifford, in the district of Maine, in 1859. In that case the learned justice, in charging the jury and speaking of a machine set up against the patent, as a prior invention, said:

"Unless it appears to your satisfaction that such machine was actually used as a seed sower, in sowing seed for agricultural purposes, you are warranted in presuming that it was a mere experiment; and if so, you are instructed that it would not invalidate the plaintiff's patent, provided Cahoon was an original inventor of his improvements, without knowledge of that machine, and did not derive any of them from Lace."

Jones v. *Pearce*. 1 Web. Pat. Cas. 122.

Mr. **D. Wright** for appellees.

Mr. Justice **Clifford** delivered the opinion of the court:

Controversies respecting the infringement of letters patent possess, in many cases, a degree of importance much beyond the profits or damages claimed for the alleged unlawful use of the invention, as the pleadings usually put in issue, in one form or another, the validity of the letters patent alleged to be infringed, and frequently involve, directly or indirectly, the same inquiry in regard to the letters patent set up in defense as superseding the patent on which the suit is founded. Such being the state of the pleadings, the result, whatever it may be, whether for the party suing or for the party defending, must oftentimes determine rights of property of much greater value than the amount of the profits or damages claimed for the alleged infringement of the letters patent.

Inventions secured by letters patent are property in the holder of the patent, and as such are as much entitled to protection as any other property, consisting of a franchise, during the term for which the franchise or the exclusive right is granted.

Letters patent are not to be regarded as monopolies, created by the executive authority at the expense and to the prejudice of all the community except the persons therein named as patentees, but as public franchises granted to the inventors of new and useful improvements for the purpose of securing to them, as such inventors, for the limited term therein mentioned, the exclusive right and liberty to make and use and vend to others to be used their own inventions, as tending to promote the progress of science and the useful arts, and as matter of compensation to the inventors for their labor, toil, and expense in making the inventions, and reducing the same to practice for the public benefit, as contemplated "by the Consti- [*534 tution and sanctioned by the laws of Congress.

Five several letters patent were owned by the complainants when the present suit was commenced, and they allege in the bill of complaint that the respondents have infringed their exclusive rights as secured to them in each and every one of those letters patent. Four of the letters patent are reissued letters patent, and are numbered and described as follows: (1) Reissued letters patent No. 4, dated January 1, 1861, for a new and useful improvement in harvesters, being one in a second reissue of two separate patents, on amended specifications, as more fully explained in the pleadings and the patents annexed to the printed record. (2) Reissued letters patent No. 1682, dated May 31, 1864; also for a new and useful improvement in harvesters, being the second reissue from the before-mentioned reissue when the invention was divided into two parts. They both purport to be founded upon the original patent granted to Aaron Palmer and Stephen G. Williams, dated July 1, 1851, which was for a new and useful improvement in harvesters. and the reissued patents were duly extended for seven years from the expiration of the original term. (3) Reissued letters patent No. 72, dated May 7, 1861, being a reissue of one of three parts of a prior reissue of the original patent, dated July 8, 1851, which was granted to William H. Seymour for a new and useful improvement in reaping machines. (4) Reissued letters patent No. 1683, dated May 31, 1864, being a reissue of another of the three parts of the prior reissue of that patent, as more fully explained in the pleadings; the charge being that the respondents have infringed the first claim. (5) Superadded to those several charges against the respondents is the further one that they

ave also infringed certain original letters pat-nt owned by the complainants, dated January 4, 1854, which secures to them, as assignees of 'almer and Williams, certain other new and seful improvements in grain harvesters be-ides those embodied in the several reissued let-ers patent to which reference has been made.

[35*] *Founded upon those several letters atent, the bill of complaint, which is drawn in he usual form, alleges that the respondents ave unlawfully made, and used and vended to thers to be used, the respective inventions herein described, and the complainants pray for n account and for an injunction. Service was ade upon the respondents, and they appeared nd filed an answer, setting up several defenses o each of the patents described in the bill of omplaint. Responsive to the answer the com-lainants filed the general replication, and the ause being at issue they put in evidence the five everal letters patent on which the suit is ounded, the respondents consenting that copies f the same, and of the respective certificates of xtension mentioned in the pleadings, might be ubstituted in the record in the place of the riginals as introduced in evidence.

Other proofs were introduced and the parties ere fully heard, but the circuit court was of he opinion that the proofs introduced by the omplainants were not sufficient to show any nfringement of their rights and, accordingly, ntered a decree for the respondents, dismissing he bill of complaint. Dissatisfied with that onclusion the complainants appealed to this ourt and now seek to reverse that decree.

Separate defenses having been set up in the nswer to each of the five letters patent, it will e necessary to a clear understanding of the ontroversy, and to prevent any misunderstand-ng as to the views of the court, to describe omewhat more fully the nature of the several nventions and the objects which they were de-igned to accomplish.

I. Explained in general terms, the invention ecured in the first-mentioned reissued patent, umbered four, consists in arranging an auto-natic sweep rake in a harvesting machine in uch relation to a quadrant-shaped platform, pon which the cut grain falls as it is cut, that t shall vibrate over the same at suitable inter-als to discharge the cut grain in gavels upon he ground.

Specific description is given, in the first place, f the frame of the machine, which, as repre-[36*] sented, is composed *of three longitudi-al beams and two transverse beams securely astened to each other at their points of inter-ection. Next follows a reference to the driv-ng-wheel, which, as represented, is placed be-ween the outer longitudinal beam and the cen-ral beam, having its bearings on arched sup-orts or brackets rising from each of the beams omposing the frame. Guard fingers, through hich a sickle vibrates, are secured upon the ront edge of a platform shaped like a quadrant r sector of a circle, of which the arm or lever hat carries the rake head forms the radius, and he fulcrum pin on which the arm or lever ibrates constitutes the center, the whole oper-ting so that the grain is swept round, on an arc f a circle, and discharged in gavels upon the round behind the driving-wheel.

Minute details of all the other elements of the machine are also given in the subsequent parts of the specifications, and of their modes of operation, and the specification concludes with the claim which, in substance, is discharg-ing the cut grain from a quadrant-shaped plat-form on which it falls as it is cut, by means of an automatic sweep rake vibrating over the same, substantially as described, which must be understood as referring back to the description contained in the body of the specification.

II. Two combinations are mentioned in the specification of the reissued letters patent No. 1682, but it is only necessary to refer to the first, as it is not alleged that the respondents have infringed the second claim. Described separately, the ingredients of the first claim are as follows: (1) The cutting apparatus to sever the standing stalks of grain; (2) the quadrant-shaped platform arranged behind the cutting apparatus to receive the severed stalks of grain as they fall; (3) the sweep rake and the de-scribed mechanism to operate the same in such manner that the teeth shall move in circular curves over the platform when they are acting on the grain.

Reference must also be made to the other two reissued letters patent embraced in the plead-ings. Both have respect to an improvement made in reaping machines, and they were *both granted to secure material parts [*537 of an original invention once before surrendered and reissued because the letters patent were de-fective and inoperative. Before the term of the original patent expired, the patents were ex-tended for the further term of seven years.

III. Number seventy-two consists in con-structing the platform of a reaping machine, upon which the cut grain falls as it is cut, in the shape of a quadrant, or of a sector of a circle, placed just behind the cutting apparatus, and in such relation to the main frame that the grain, whether raked off by hand or by machin-ery located behind the cutting apparatus, can be swept around on the arc of a circle and be dropped, heads foremost, on the ground far enough from the standing grain to leave room for the team and machine to pass between the gavels and the standing grain without the ne-cessity of taking up the gavels before the ma-chine comes round to cut the next swath.

IV. They also acquired title to the invention secured in the remaining reissued letters patent mentioned in the bill of complaint, to wit, num-ber 1683; but it will be sufficient to refer to the first claim of the same, as the second is not the subject of controversy in this suit.

As described in the specification the ingredi-ents of the first claim are the cutting apparatus to sever the stalks, the reel to incline the heads of the stalks towards the cutting apparatus, and the quadrant shaped platform, located in the rear of the cutting apparatus, to receive the cut stalks as they fall before the operation of the sweep rake begins.

Designed as the improvements were to accom-plish the same object as the other two improve-ments previously described, the patentees or owners of the several letters patent elected to compromise rather than litigate, and the result was that the entire interest became ultimately vested in the appellants.

V. Patented improvements in the method of transferring motion from the driving wheel of

a reaping machine to the rake on the platform of the machine, and in the method of hanging the reel so as to dispense with any post on the 538*] side *of the machine next the grain, were also acquired by the appellants as a part of the same arrangement, and they charge in the bill of complaint that the second claim of the original letters patent, embodying that improvement, is also infringed by the respondents.

Power to grant letters patent is conferred by law upon the Commissioner of Patents, and when that power has been lawfully exercised, and a patent has been duly granted, it is of itself prima facie evidence that the patentee is the original and first inventor of that which is therein described, and secured to him as his invention. *White* v. *Allen*, 2 Cliff. 228.

Persons seeking redress for the unlawful use of letters patent, in which they have an interest, are obliged to allege and prove that they, or those under whom they claim, are the original and first inventors of the improvement embodied in the letters patent on which the suit is founded, and that the same have been infringed by the party against whom the suit is brought.

Undoubtedly, the burden to establish both of those allegations is, in the first place, upon the party instituting the suit, as they lie at the foundation of every such claim, but the law is well settled that the letters patent in question, where they are introduced in evidence in support of the claim, if they are in due form, afford a prima facie presumption that the first-named allegation is true, and the rule is equally well settled that that presumption, in the absence of satisfactory proof to the contrary, is sufficient to entitle the party instituting the suit to recover for the alleged violation of the exclusive rights secured to him in the letters patent.

Availing themselves of that rule of law, the complainants in this case introduced the five several letters patent on which the suit is founded, and they contend and well contend that their effect as evidence is to cast the burden of proof upon the respondents to show that the respective patentees are not the original and 539*] first inventors of the improvements *embodied in the several letters patent, as they have alleged in their answer.

Parties defendant, sued as infringers, are not allowed in an action at law to set up the defense of a previous invention, knowledge, or use of the thing patented, unless they have given notice of such a defense thirty days before the trial, and have stated in the notice "the names and places of residence of those whom they intend to prove to have possessed a prior knowledge of the thing, and where the same had been used;" and the settled practice in equity is to require the respondent, as a condition precedent to such defense, to give the complainant substantially the same information in his answer. *Agawam Co.* v. *Jordan*, 7 Wall. 596, 19 L. ed. 177; *Teese* v. *Huntingdon*, 23 How. 10, 16 L. ed. 482.

Notices of the kind were given by the respondents in this case, but it will be more convenient to examine certain special defenses set up in the answer before entering upon that inquiry, as the decree must be affirmed, in any event, if any one of those defenses is well founded, whether the issues of novelty and of infringement are determined in favor of the complainants or respondents.

All of the special defenses apply to the original patent, as well as to those which have been reissued, except such as are founded upon the acts or omissions of the commissioner in granting the reissues, which of course are not applicable to the former. They are eight in number, as exhibited in the answer, the respondents alleging in each that the letters patent are void and of no effect for the reasons therein set forth; and they will be briefly examined in the order in which they are pleaded.

1. That the letters patent are void and of no effect because the patentees did not make oath before the patents were granted, that they did verily believe that they were the original and first inventors of the improvements for which the letters patent were solicited.

Congress possesses the power to pass laws to secure to inventors, for limited times, the exclusive right to their inventions, *and [*540 Congress, in pursuance of that article of the Constitution, has conferred the power to grant letters patent for that purpose upon the Commissioner of Patents. Persons who have made an invention, and who desire to obtain an exclusive property therein, may make application in writing to the Commissioner of Patents, and the provision is that the commissioner, on due proceedings had, may grant a patent for the said invention.

Inventors of machines are required, before they receive a patent, to deliver a written description of their inventions, and of the manner and process of making, constructing, and using the same, in such "full, clear, and exact terms" as to enable any person skilled in the art or science to make, construct and use the same, and fully to explain the principle by which the invention may be distinguished from others of like kind; and they are also required to specify and point out the part, improvement or combination which they claim as their invention.

Doubtless these several requirements may be regarded as conditions precedent to the right of the commissioner to grant the application, as they must appear on the face of the letters patent, and are always open to legal construction as to their sufficiency.

Drawings are also required in certain cases, and where the invention is such that it may be represented by a model, the applicant for a patent is required to furnish a model of the same; and the further requirement is that he shall make oath or affirmation that he does verily believe that he is the original and first inventor of the improvement for which he solicits a patent, and that he does not know that the same was ever before known or used.

Importance, it is conceded, must be attached to the latter requirement, but it is certain that the oath or affirmation may be taken elsewhere than before the commissioner, as the same section provides that it "may be made before any person authorized by law to administer oaths." 5 Stat. at L. 119.

*Extended examinaton of the question, [*541 however, is unnecessary, as every one of the letters patent on which the suit is founded contains the recital that the required oath was taken before the same was granted, and the

court is of the opinion that those recitals, in the absence of fraud, are conclusive evidence that the necessary oaths were taken by the applicants before the letters patent were granted.

2. That the letters patent are void and of no effect because the patentees did not specify and point out in their specifications and claims the parts, improvements or combinations which they claim as their respective inventions.

Grant the theory of fact assumed in the proposition and the conclusion would follow, but the whole theory of the proposition as applied to the present case is founded in error.

Inventions secured by letters patent sometimes, though rarely, embrace an entire machine, and in such cases it is sufficient if it appear that the claim is co-extensive with the invention. Other inventions embrace only one or more parts of a machine, as the coulter of a plough, or the divider or sweep rake of a reaping machine; and in such cases the part or parts claimed must be specified and pointed out so that constructors, other inventors and the public may know how to make the invention, and what is withdrawn from general use.

Patented inventions are also made which embrace both a new ingredient and a combination of old ingredients embodied in the same machine. Even more particularity of description is required in such a case, as the property of the patentee consists, not only in the new ingredient, but also in the new combination, and it is essential that his invention shall be so fully described that others may not be led into mistake, as no other person can lawfully make, use or vend a machine containing such new ingredient, or such new combination. They may make, use or vend the machine without the patented improvements, if it is capable of such use, but they cannot use either of those improvements without making themselves liable as infringers.

542*] *Improvements in machines protected by letters patent may also be mentioned, of a much more numerous class, where all the ingredients of the invention are old, and where the invention consists entirely in a new combination of the old ingredients, whereby a new and useful result is obtained, and many of them are of great utility and value, and are just as much entitled to protection as those of any other class. *Union Sugar Ref.* v. *Matthiessen*, 2 Fish. Pat. Cas. 605.

Such a combination is sufficiently described if the ingredients of which it is composed are named, their mode of operation given, and the new and useful result to be accomplished pointed out, so that those skilled in the art and the public may know the extent and nature of the claim and what the parts are which co-operate to produce the described new and useful result. Tested by these rules, it is clear that the objection under consideration cannot prevail in respect to any one of the several letters patent on which the suit is founded.

3. That the re-issued letters patent are void and of no effect, because the Commissioner of Patents never obtained jurisdiction to receive the surrender of the originals, nor to grant the re-issues, as no evidence was produced before him to show that the originals were inoperative or invalid for any reason or cause whatsoever.

Whenever any patent is inoperative or invalid by reason of a defective or insufficient description or specification, if the error arose by inadvertency, accident or mistake, and without any fraudulent or deceptive intention, it is lawful for the commissioner, upon the surrender to him of such patent, and on the payment to him of a certain duty, to cause a new patent to be issued to the inventor for the same invention for the residue of the term then unexpired, in accordance with the patentee's corrected description and specification. 5 Stat. at L. 122.

Whether adjudged to be valid or invalid, it is clear that *the several re-issued let- [*543 ters patent are all in due form, and that they contain all the usual recitals asserting a compliance with the requirements specified in the Patent Act, and it is equally certain that the respondents did not introduce any proofs to establish the theory of fact assumed in the answer.

Authority to accept the surrender of the original patents in certain cases, and to grant new patents to the inventor, was conferred upon the commissioner by the act of the 3d of July, 1832, and in a case arising under that act it was held by this court, more than thirty years ago, that where an act was to be done or a patent granted, upon proofs to be laid before a public officer, upon which he was to decide, the fact that such public officer had done the act or granted the patent was prima facie evidence that the proofs had been regularly made, and that they were satisfactory even though the patent did not contain any recitals that the perquisites to the grant had been fulfilled; and such continued to be the rule until the question came up again for consideration under the existing Patent Act, when it was held by this court that the fact of the granting of the re-issued patent closed all inquiry into the existence of inadvertence, accident or mistake, and left open only the question of fraud for the jury.

R. R. v. *Stimpson*, 14 Pet. 458; *Stimpson* v. *R. R.* 4 How. 384; 4 Stat. at L. 559.

Since that time it has been definitively settled that neither re-issued nor extended patents can be abrogated by an infringer, in a suit against him for infringement, upon the ground that the letters patent were procured by fraud in prosecuting the application for the same before the commissioner. *Rubber Co.* v. *Goodyear*, 9 Wall. 797, 19 L. ed. 569, 2 Cliff. 375.

Where the commissioner accepts a surrender of an original patent and grants a new patent, his decision in the premises, in a suit for infringement, is final and conclusive, and is not re-examinable in such a suit in the circuit court, unless it is apparent upon the face of the patent that he has exceeded his authority, that there is such a repugnancy between *the [*544 old and the new patent that it must be held, as matter of legal construction, that the new patent is not for the same invention as that embraced and secured in the original patent. *Battin* v. *Taggert*, 17 How. 83, 15 L. ed. 40; *O'Reilly* v. *Morse*, 15 How. 111, 112; *Sickles* v. *Evans*, 2 Cliff. 222; *Allen* v. *Blunt*, 3 Story, 744.

4. That the re-issued letters patent are void and of no effect because they were not granted for the same invention as that embodied in the original letters patent, nor for any invention made by the patentees before the original letters patent were granted.

Re-issued letters patent must, by the express words of the section authorizing the same, be for the same invention and, consequently, where it appears on a comparison of the two instruments, as matter of law, that the re-issued patent is not for the same invention as that embraced and secured in the original patent, the re-issued patent is invalid, as that state of facts shows that the commissioner, in granting the new patent, exceeded his jurisdiction. Power is unquestionably, conferred upon the commissioner to allow the specification to be amended if the patent is inoperative or invalid, and in that event to issue the patent in proper form; and he may, doubtless, under that authority, allow the patentee to re-describe his invention and to include in the description and claims of the patent not only what was well described before, but whatever else was suggested or substantially indicated in the specification or drawings which properly belonged to the invention as actually made and perfected. Interpolations of new features, ingredients, or devices, which were neither described, suggested nor indicated in the original patent, or patent office model, are not allowed, as it is clear that the commissioner has no jurisdiction to grant a re-issue unless it be for the same invention as that embodied in the original letters patent, which, necessarily, excludes the right on such an application to open the case to new parol testimony and a new hearing as to the nature and extent of the improvement, except 545*] in certain special cases, as provided in* a recent enactment not applicable to the case before the court. 16 Stat. at L., 206; *Cahart* v. *Austin*, 2 Cliff., 536; Curt., Pat. (3d. ed.), 276; *Woodworth* v. *Stone*, 3 Story, 753.

Corrections may be made in the description, specification or claim where the patentee has claimed as new more than he had a right to claim, or where the description, specification or claim is defective or insufficient, but he cannot, under such an application, make material additions to the invention which were not described, suggested, nor substantially indicated in the original specifications, drawings or patent office model.

Prior to the decision of this court that a person sued as an infringer cannot abrogate a re-issued or extended patent by showing that the commissioner had been induced to grant it by fraudulent representations, it had sometimes been supposed that every such new patent was open to that defense and that the question was one of fact dependant upon evidence, but since it has been determined that such a party cannot be heard to make such a defense to the charge of infringement, it has come to be regarded as the better opinion that all matters of fact involved in the hearing of an application to re-issue a patent, and in granting it, are conclusively settled by the decision of the commissioner granting the application. Matters of construction arising upon the face of the instrument are still open, but all matters of fact connected with the surrender and re-issue are closed in such a suit by the decision of the commissioner in granting the re-issued patent. *Rubber Co.* v. *Goodyear*, 9 Wall. 796, 19 L. ed. 569; *Stimpson* v. *R. R. Co.*, 4 How. 404; *R. R. Co.* v. *Stimpson*, 14 Pet. 458.

Letters patent re-issued for an invention substantially different from that embodied in the original patent are void and of no effect, as no jurisdiction to grant such a patent is conferred by any act of Congress upon the commissioner, and he possesses no power in that behalf except what the acts of Congress confer. Whether a re-issued patent is for the same invention as that embodied in the original patent *or for a different one, is a question for [*546 the court in an equity suit to be determined as a matter of construction, on a comparison of the two instruments, aided or not by the testimony of expert witnesses, as it may or may not appear that one or both may contain technical terms or terms of art requiring such assistance in ascertaining the true meaning of the language employed. *Sickles* v. *Evans*, 2 Cliff. 203.

Where the specification and claim, both in the original and re-issued patents, are expressed in ordinary language, without employing any technical terms or terms of art, the question whether the re-issued patent is for the same invention as that described in the original patent or for a different one, is purely a question of construction, but where both or either contain technical terms or terms of art the court may hear the testimony of scientific witnesses to aid the court in coming to a correct conclusion. Cases, doubtless, arise where the language of the specification and claim, both of the surrendered and re-issued patents, is so interspersed with technical terms and terms of art that the testimony of scientific witnesses is indispensable to a correct understanding of its meaning. Both parties in such a case would have a right to examine such witnesses, and it would undoubtedly be error in the court to reject the testimony, but the case before the court is not of a character to render it expedient to pursue the inquiry. *Bischoff* v. *Wethered*, 9 Wall. 814, 19 L. ed. 830; *Betts* v. *Menzies*, 4 B. & S., Q. B., 999.

Apply the rule to the present case, that the question is one of construction, and it is clear that the defense under consideration is not open to the respondents, as they did not introduce in evidence the original letters patent from which the re-issued patents were derived.

Persons owning re-issued letters patent, and seeking redress from those who have invaded their exclusive rights, are not obliged to introduce in evidence the surrendered patent, and if the old patent is not introduced by the party sued, he cannot have the benefit of such a defense.

*5. That the several letters patent [*547 are void and of no effect because the claims therein patented are for an effect, and not for any particular machinery.

Founded, as the defense is, upon an obvious misconstruction of the claims of the several patents, it does not seem to require much explanation. Omit the words "substantially as described," or "substantially as set forth," and the question presented would be a very different one, but inasmuch as those words, or words of equivalent import, are employed in each of the claims, the defense is without merit. Where the claim immediately follows the description of the invention it may be construed in connection with the explanations contained in the specifications, and where

it contains words referring back to the specifications, it cannot properly be construed in any other way. Curt. Pat. (3d. ed.), §§ 225-227.

6. That the several re-issued letters patent are void and of no effect because the claims therein made are too broad and embrace that of which the patentees were not the original and first inventors prior to the granting of the original letters patent.

Properly understood the defense is substantially the same as that set up in the fourth defense, and it must be overruled for the same reasons, which need not be repeated.

7. That the several letters patent are void and of no effect because what is claimed therein as new was in public use, with the consent and allowance of the original patentees, more than two years before they applied for the several patents.

Such a defense set up in a case where the complainants file the general replication is of no avail unless sustained by proof, and the respondents did not introduce any proofs to sustain it, which is all that need be said upon the subject.

8. That the combination claimed in each of the several letters patent is a combination of old parts, the combining of which involved no invention, but merely the skill of an intelligent mechanic or other person skilled in the manufacture and use of harvesting machines.

548*] *Reduced to a proposition, the defense, as set up in the answer, is that the several improvements were old and not patentable on that account, as no improvements were made which required invention. Specific objection is made under this head to each of the four re-issued letters patent, but the grounds of the several objections are substantially the same, so that the several propositions may be considered together.

New and useful machines are the proper subjects of an application for a patent, and so, by the express words of the act of Congress, are new and useful improvements on any machine. All of the patents embraced in the suit fall under the second clause of the provision, and are of the fourth class of patents before described, that is, they consist of a new combination of old elements whereby a new and useful result is obtained.

Particular changes may be made in the construction and operation of an old machine so as to adapt it to a new and valuable use not known before, and to which the old machine had not been, and could not be, applied without those changes and, under those circumstances, if the machine, as changed and modified, produces a new and useful result, it may be patented, and the patent will be upheld under existing laws. *Bray* v. *Hartshorn*, 1 Cliff. 541; *Losh* v. *Hague*, 1 Web. Pat. Cas. 207; Hind. Pat. 95; *Phillips* v. *Page*, 24 How. 166, 16 L. ed. 640; Norm. Pat. 25.

Such a change in an old machine may consist merely of a new and useful combination of the several parts of which the old machine is composed, or it may consist of a material alteration or modification of one or more of the several devices which entered into its construction, and whether it be the one or the other, if the change of construction and operation actually adapts the machine to a new and valuable use not known before, and it actually produces a new and useful result, then a patent may be granted for the same, and it will be upheld as a patentable improvement. *Park* v. *Little*, 3 Wash. (C. C.) 196.

Improvements for which a patent may be granted must *be new and useful, with- [*549 in the meaning of the patent law, or the patent will be void, but the requirement of the Patent Act in that respect is satisfied if the combination is new and the machine is capable of being beneficially used for the purpose for which it was designed, as the law does not require that it should be of such general utility as to supersede all other inventions in practice to accomplish the same object. *Lowell* v. *Lewis*, 1 Mason, 182; *Bedford* v. *Hunt*, 1 Mason, 302; *Many* v. *Jagger*, 1 Blatchf. 372; *Barret* v. *Hall*, 1 Mason, 447.

Unsuccessful in those defenses, the respondents in the next place attack the respective inventions as destitute of originality, and allege that the patentees were not the original and first inventors of the several improvements supposed to be secured in the letters patent. Separate defenses of the kind are set up in the answer to each of the letters patent, but the nature and character of the objections are such that the whole series may properly be considered together.

Prior notice in the answer is required in such a case as a condition precedent to the right to introduce proofs to support such a defense, and it is certainly proper that the respondent should be allowed to comply with that requirement, but it is an abuse of the privilege to give such notices without some reason to suppose that such a defense can successfully be made, and that the proofs, if required, can be obtained, as it exposes the complainant to unnecessary expense and trouble in preparing his case for trial. Where no proofs were introduced in support of the answer no mention will be made of the notices, as a notice without proof to support it is of no avail.

Out of all the alleged prior inventions set up in the answer, only four were made the subject of proof to any substantial extent. Two of these are the inventions of Obed Hussey and of Thomas D. Burral, of the combination of the quadrant shaped platform located behind the cutting apparatus. Those patents were introduced as tending more particularly *to [*550 supersede the re-issued patent number seventy-two, before described.

Strong doubts are entertained whether any of the patents given in evidence by the respondents as superseding the particular patent of the complainants, involved in this issue, are of a character to have that effect, even if the inventions which they purport to secure were of prior date, but it is not absolutely necessary to decide that point, except as to one of the exhibits, as the court is of the opinion that none of the others antedate the invention secured in that patent. Conclusions are all that will be useful on this branch of the case, especially as the question is one of fact dependent upon the proofs, which are somewhat conflicting, and where a full analysis of the evidence would hardly be practicable, as it would extend the opinion to an unreasonable length.

Proofs entirely satisfactory to the court are

exhibited by the complainants showing that their invention, as described in the patent in question, was perfected early in the summer of 1849, as a material part of a harvesting machine, and that the same was reduced to practice as an operative machine during the harvesting season of that year.

Hussey, from 1839, or earlier, to the time of his death, in the summer of 1860, was much engaged in the manufacture of reaping machines of various kinds. Most of his machines, however, were constructed without any reel and with square platforms, so as to drop the cut grain at the rear of the platform, differing so widely from the patented machine of the complainants as to require no argument to show that they afford no support to the present defense. Other machines were constructed by him with a straight guide board on the platform, which was adjustable within certain limits, and the apparatus was, doubtless, capable, to a limited extent, of causing the cut grain to be moved sufficiently out of the path of the machine to give room for a single team.

Evidence to show that the invention of the complainants is embodied in those machines is entirely wanting, and it is quite clear that if any such had been introduced it could not have been credited, as the differences between them 551*] are too *palpable and material to be overcome by parol evidence. Machines were also made by him with two platforms, or with a platform in two parts, the one being attached to the rear of the other, but it required two men to do the work which, with the complainants' machine, is easily and much better accomplished by one, which is certainly all the explanation which need be given of those machines in the present case.

Apart from these he also made one experimental machine, with a square platform, to which was bolted an angular addition, giving the whole, when the addition was attached, an angular form. Examined when the addition is bolted to the main platform, irrespective of the other ingredients of the combination, it approaches much nearer to the invention of the complainants than any of the other exhibits introduced in evidence by the respondents. Conceding all that, still it would not be difficult to show that the two are substantially different in several respects; but it is unnecessary to enter that field of inquiry, as the proofs are entirely satisfactory to the court, that the machine, as constructed, was merely an experiment, and that it was never reduced to practice as an operative machine. Undoubtedly, it was built in the autumn of 1848, subsequent to the close of the harvest season; but the respondents' testimony shows that it was not used for cutting grain during that harvesting season.

Some obscurity surrounds its early history, nor is it of much importance that it should be better known. It appears that it was sent to the railroad depot to be transported to some other place for trial; but there is no positive evidence that it was ever forwarded or used, or that it was capable of any beneficial use. Where it was transported, if at all, from the depot does not appear; but it does appear that it was returned the next year to the shop of the maker, and that it was set against the wall by the side of the street, in front of the shop, where it remained for some time; that it was then removed to the new shop of the maker, where it remained until it was taken to pieces and broken up by his order, and never restored till long subsequent to the complainants' patent.

*Original and first inventors are en-[*552 titled to the benefit of their inventions if they reduce the same to practice, and seasonably comply with the requirements of the patent law in procuring letters patent for the protection of their exclusive rights. Crude and imperfect experiments are not sufficient to confer a right to a patent; but, in order constitute an invention, the party must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form.

Desertion of an invention consisting of a machine, never patented, may be proved by showing that the inventor, after he had constructed it, and before he had reduced it to practice, broke it up as something requiring more thought and experiment, and laid the parts aside as incomplete, provided it appears that those acts were done without any definite intention of resuming his experiments, and of restoring the machine with a view to apply for letters patent. *Johnson* v. *Root*, 2 Cliff. 123; *Gayler* v. *Wilder*, 10 How. 498; *Parkhurst* v. *Kinsman*, 1 Blatchf. 494; *White* v. *Allen*, 2 Cliff. 230.

He is the first inventor, in the sense of the patent law, and entitled to a patent for his invention, who first perfected and adapted the same to use, and it is well settled that until the invention is so perfected and adapted to use it is not patentable under the patent laws. *Washburn* v. *Gould*, 3 Story, 122; *Cahoon* v. *Ring*, 1 Cliff. 612.

Argument is hardly necessary to show that nothing else introduced in evidence by the respondents as having been constructed by that inventor is of a character to interfere, in any substantial respect, with the novelty of the invention held by the complainants, as the weight of the evidence plainly tends to disprove the allegations of the answer, and the inferences to be drawn from a comparison of the exhibits would establish the opposite theory even if the other proofs were less decisive to that effect.

Prior invention by Thomas D. Burrall is the next defense set up by the respondents to the particular patent under consideration. They attempt to show that he constructed a *harvesting machine having a square [*553 platform, to which he attached an apron, quadrant formed, which would deliver the cut grain, heads foremost, at the side of the machine and out of the way of the team in cutting the next swath.

Concede the fact that the machine, together with the circular apron, was constructed by the person named as alleged, and that the machine in that form antedates the invention held by the complainants, still the court is of the opinion that it is not of a character to defeat the complainants' patent, as it had no reel, was not a self raker in any view of the case, and consisted beyond doubt of a substantially different combination. Compared with that, the invention described in the complainants' patent is both new and useful, and is plainly sufficient to support a patent as a new arrangement.

Suppose it to be otherwise, still the conclu-

sion as to this defense must be the same, as the court is unhesitatingly of the opinion from the proofs that the supposed inventor did not construct the circular apron, and attach the same to the square platform, and use the two in conjunction until after the complainants' invention was perfected and reduced to practice as an operative machine.

Evidence was also introduced by the respondents respecting the invention of Nelson Platt, but extended discussion upon that topic is unnecessary, as it is hardly contended by the respondents that the machine contains a quadrant shaped platform with, and immediately behind, the cutting apparatus, and in such relation to the main frame as that described in the specification of the complainants' patent. They appear to shrink from that proposition, which is the only one involved in this defense, and seek shelter under another, of a very different character, which is that the difference between the two is so very slight that it required no invention to pass from the former to the latter, which is a matter appertaining to another head of the defense that has previously been fully considered and the point distinctly overruled.

Properly understood, that machine does not contain a combination of the quadrant shaped platform with the cutting apparatus in any 554*] practical sense. On the contrary, it *has a square platform combined with the cutting apparatus, and the quadrant shaped platform is combined with the square platform; nor does it contain any quadrant shaped platform to receive the grain as it falls, but the ingredients of the invention, as well as the combination, are different from those in the complainants' machine, and the mode of operation is also different, which is all that need be said in response to that defense.

Substantially the same defenses were also set up to the other re-issued letters patent, to the extent that those patents were put in issue in the pleadings, but it will not be necessary to restate the objections to their originality nor to present any response to the same, as to do so would only be to repeat what has been said in respect to the one more particularly assailed in argument.

Attempt is also made to show that the original letters patent described in the bill of complaint are also invalid, because the patentees are not the original and first inventors of the improvements therein secured. Whether they were or were not the original and first inventors of the improvement in the first claim is a matter of no importance in this case, as the pleadings do not put that claim in issue. They only put in issue the second claim, which embodies the described method of hanging the reel so as to dispense with any post or reel bearer next to the standing grain, to prevent the grain from getting caught between the divider and the reel supporter, and the only evidence introduced of prior invention is what is contained in an article published in London, in the Mechanics' Magazine. Expert witnesses were examined in respect to it by both sides. One examined by the respondents testified that he did not understand that it had any real support on the grain side of the machine, which in that respect is like the machine of the complainants; but three expert witnesses examined by the complainants testify that neither the description nor the drawings of the same, as exhibited in that magazine, show anything which is embodied in the complainants' patent, and the court is of the same opinion.

*Patented inventions cannot be super- [*555 seded by the mere introduction of a foreign publication of the kind, though of prior date, unless the description and drawings contain and exhibit a substantial representation of the patented improvement, in such full, clear and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct and practice the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent. Mere vague and general representations will not support such a defense, as the knowledge supposed to be derived from the publication must be sufficient to enable those skilled in the art or science to understand the nature and operation of the invention, and to carry it into practical use. Whatever may be the particular circumstances under which the publication takes place, the account published to be of any effect to support such a defense, must be an account of a complete and operative invention capable of being put into practical operation. Web. Pat. Cas. 719; Curt. Pat. (3d ed.) § 278, *a; Hill* v. *Evans*, 6 Law T. N. S. 90; *Betts* v. *Menzies*, 4 Best & S. Q. B. 999.

None of these defenses, however, were sustained in the court below, but the circuit judges were of the opinion that the proofs failed to show that the respondents had infringed the letters patent of the complainants.

Actual inventors of a combination of two or more ingredients in a machine, secured by letters patent in due form, are entitled, even though the ingredients are old, if the combination produces a new and useful result, to treat every one as an infringer who makes and uses or vends the machine to others to be used without their authority or license. *Pitts* v. *Whitman*, 2 Story, 619; *Ames* v. *Howard*, 1 Sumn. 487.

They cannot suppress subsequent improvements which are substantially different, whether the new improvements consist in a new combination of the same ingredients or of the substitution of some newly discovered ingredient, or of some old one performing some new function not known at *the date of the let- [*556 ters patent, as a proper substitute for the ingredient withdrawn from the combination constituting their invention. Mere formal alterations in a combination in letters patent, however, are no defense to the charge of infringement, and the withdrawal of one ingredient from the same and the substitution of another which was well known at the date of the patent as a proper substitute for the one withdrawn, is a mere formal alteration of the combination if the ingredient substituted performs, substantially, the same function as the one withdrawn.

Patentees, therefore, are entitled in all cases to invoke to some extent the doctrine of equivalents, but they are never entitled to do so in any case to suppress all other substantial improvements, and the rule which disallows such pretensions, if properly understood and limited, is as applicable to the inventor of a device, or

ren of an entire machine, as to the inventor f a mere combination, except that the inventor f the latter cannot treat anyone as an in-ringer whose machine does not contain all of he material ingredients of the prior combina-ion, as in that state of the case the subsequent nvention is regarded as substantially different rom the former one, unless the latter machine mploys as a substitute for the ingredient left ut, to perform the same function, some other ngredient which was well known as a proper ubstitute for the same when the former inven-ion was patented. *Prouty* v. *Ruggles*, 16 Pet. 41; *Johnson* v. *Root*, 2 Cliff. 123.

Bona fide inventors of a combination are as nuch entitled to suppress every other combi-nation of the same ingredients to produce the ame result, not substantially different from what they have invented and caused to be pat-ented, as any other class of inventors. All alike have the right to suppress every colorable in-vasion of that which is secured to them by their letters patent, and it is a mistake to suppose that this court ever intended to lay down any different rule of decision. Guided by these rules, the remaining question for the determina-tion of the court is whether the respondents 557*] *have infringed the several patents de-scribed in the bill of complaint.

Infringement is alleged by the complainants, and the burden is upon them to prove the alle-gation, as it imputes a wrongful act to the re-spondents. All controversy, as to the character of the machines made and sold by the respond-ents, is closed by their admission set forth in the record. Exhibit six, it is conceded by the re-spondents, is an accurate representation of the machines which they made and sold, and the complainants accept the admission as correct. Absolute certainty, therefore, attends that in-quiry, and there is very little, if any, more dif-ficulty in ascertaining the construction of the patented machines made and furnished to the public by the complainants, so that the only substantial inquiry is, whether the machines made and sold by the respondents infringe the patented machines of the complainants, as the latter embody all the inventions of the com-plainants except the claims pointed out as not infringed, and the proofs satisfy the court that the exhibits are constructed in accordance with the mechanism described in the several letters patent.

Properly construed the re-issued patent num-ber 4 is the combination of a quadrant shaped platform located behind the cutting apparatus of the harvester so as to receive the grain as it falls after it is cut, with an automatic sweep rake so constructed as to sweep over the plat-form in circular curves, and to move forward and backward, or towards and from the cutting apparatus, so as to seize upon the grain as it falls, after being cut, sweeping it over the plat-form in circular curves and delivering it upon the ground behind the machine with its stalks at right angles, or nearly so, with the line of progression of the machine, and to return by a forward movement towards the cutting appa-ratus to the original position when the first op-eration commenced.

Number 1682 is divided into two parts, the first of which may be used without the second, and it is not charged that the second part has been infringed by the respondents. Briefly de-scribed it consists of a combination of the cut-ting apparatus of a harvester with a quadrant shaped platform *arranged in the rear [*558 thereof, and with a sweep rake operated by mechanism in such a manner that its teeth are caused to sweep over the platform in curves when acting on the grain and to discharge the stalks crosswise in the direction of the swath and out of the way of the team on the return of the machine.

Two combinations are also contained in the re-issued patent 1683, but the respondents are not charged with infringing the second, so that it is only necessary in this connection to refer to the first and describe its operation. It con-sists of a combination of the cutting apparatus with a reel and with a quadrant shaped plat-form located in the rear of the cutting appara-tus, operating as follows: the cutting appa-ratus severing the grain, the reel bearing the grain against the cutting apparatus and insur-ing its delivery upon the quadrant shaped plat-form in the rear thereof, and the quadrant shaped platform receiving the grain from the cutting apparatus and reel, and supporting it in such a manner that it can be moved from the cutting apparatus, heads foremost, swept round in a curve and discharged upon the ground crosswise to the direction of the swath and out of the track of the horses when the machine comes round to cut the next swath.

Patent numbered 72 is also an arrangement of the quadrant shaped platform immediately behind the cutting apparatus of a reaping ma-chine, so that the platform will receive the grain as it falls from the cutting apparatus, and will support it in such a manner that it may be swept around in a curvilinear path and discharged, heads foremost, upon the ground at the side of the platform out of the path of the horses when they return.

Reference will only be made to the second part of the original patent embraced in the suit, as it is not charged that the respondents have infringed the other claim. Separated from the second claim the first consists in a mode of hanging the reel in a reaping machine so as to dispense with any post or reel bearer on the side next to the standing grain, with-out any projection of the reel shaft or bearing *therefor on that side of the machine, [*559 so that the reel overhangs the bearings on the one side and is without support on the other side.

Prior to the act of Congress allowing several patents to be issued for distinct and separate parts of the thing patented, it is not probable that a bill of complaint joining five several pat-ents in the same charge of infringement would have escaped objection from the respondent, but it will be noticed that all the claims appertain to the same general subject, and that it requires all of the inventions in question to constitute a complete self-raking harvester or reaping ma-chine, and that they are all embodied in the machines which the complainants make and furnish to the public. Viewed in that light the court is of the opinion that the objection, if it had been made, could not have been sustained. 5 Stat. at L. 192.

Where the invention or inventions are em-bodied in a machine, the question of infringe-

ment is best determined by a comparison of the machine made by the respondent with the mechanism described in the complainant's patent or patents, where more than one is embraced in the same suit. *Blanchard* v. *Putnam*, 8 Wall. 426, 19 L. ed. 435.

Comparisons of the kind have been carefully made by the court, aided by the evidence of the expert witnesses, as exhibited in the record, and the court is of the opinion that the several inventions of the complainants, excepting the claims pointed out as not infringed, are embodied in the machines made and sold by the respondents. Two of the expert witnesses testify to that effect without qualification, and the reasons which they assign for that conclusion are, in the opinion of the court, decisive of the question. Some attempt was made in the cross-examination of those witnesses to elicit an answer that the sweep rake employed by the respondents operated differently from the corresponding device of the complainants in the several reissued patents, but the attempt was wholly unsuccessful, and called forth explanations which confirm the conclusion that the two devices have substantially the same operation.

560*] *Special reference is made in the opinion of the district judge to the means employed by the respondents in supporting the reel as showing that the machines which they have made and sold do not infringe the second claim of the original patent. His view is that their machines do not infringe that claim because they do not employ but one reel post instead of two, as shown in the complainants' patent, but it is so obvious that the one post with the frame attached to the upper end is substantially the same thing that it is not deemed necessary to pursue the argument.

For these reasons we are all of the opinion that the complainants are entitled to a decree that their several patents are valid, and for an account and for a perpetual injunction, except as to such, if any, as have expired.

Decree reversed with costs, and the cause remanded for further proceedings, in conformity to the opinion of the court.

ELIZABETH W. EDMONSON, James A. Waddell *et al.*, *Appts.*,
v.
ADAM BLOOMSHIRE *et al.*

(See S. C. 11 Wall. 382-391.)

Construction of clause in will.

Where a testatrix made her last will and testament, in which she uses the phrase, "My certificates that are in the hands of my brother Ben;" held, that a certificate as to bounty lands, which had been surrendered to the register of the land office, and was never in the hands of the brother of the testatrix, was not included in such phrase.

[No. 55.]

Argued Jan. 10, 1871. Decided Jan. 23, 1871.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The bill in this case was filed in the court below, by the appellants, to obtain title to certain lands. That court having entered a decree dismissing the bill, the complainants took an appeal to this court.

A statement of the case appears in the opinion of the court.

Messrs. John B. Baldwin and **H. Stanbery** for plaintiff in error.

Messrs. **J. W. Robinson** and **T. W. Lawrence** for defendants in error.

Mr. Justice **Clifford** delivered the opinion of the court:

Volunteer forces for the public service in the war of the Revolution were, in many instances, furnished by the States, and all such, as well as the regular forces, were paid for their services to a large extent in continental money, which so depreciated in a short time as to become almost valueless.

Troops for that service were raised by the state of Virginia, known as the Virginia line on continental establishment, and they also were paid for their services in that currency; and in order to afford relief for the loss which the troops sustained in that way, the legislature of the state, at the November session, 1781, passed an act directing the auditor of public accounts to settle and adjust the pay and accounts of the officers and soldiers of that line, so as to make their claims for pay and subsistence equal to specie, such adjustment to cover the period from the first day of January, 1777, to the last day of December, 1781; and the directions to the auditor were that he should issue printed certificates to the respective applicants for the balance found due to them in such adjustment, payable on or before the first day of January, 1785, with interest at the rate of six per centum per annum. 10 Hen. Stat. (Va.) 462.

Directions were also given to the auditor in the same act that he should in like manner settle and adjust the accounts *of all of- [***384** ficers and soldiers of the said line who have fallen or died in the service during that period, and the provision was that their representatives should be entitled to such certificates, and all other benefits and advantages therein granted to the officers and soldiers in the line at the date of the act. *Ibid.* 463.

None of these matters are the subject of controversy, and it is also alleged and admitted that William Rickman, of Charles City, Virginia, was a deputy director-general in the Virginia line on continental establishment; that he served three years or more as such director, and that he thereby became entitled also to Virginia military bounty lands.

On the 7th of August, 1778, William Rickman made and published his last will and testament, by which he gave and bequeathed to his wife, Elizabeth Rickman, all his estate both real and personal, in fee simple, and appointed his wife, together with Benjamin Harrison, her father and her brother, Benjamin Harrison, Jr., the executors of his will so made and published. Three years afterwards the testator died, leaving the said last will and testament unrevoked and in full force, and the same was subsequently duly proved and admitted to record.

Application in behalf of Elizabeth Rickman, as the widow and executrix of her deceased husband, was afterwards made to the auditor

NOTE.—*Interpretation of wills; intention of testator to govern*—see note to Pray v. Belt, 7 L. ed. U. S. 309.

of public accounts to settle and adjust the pay and subsistence accounts of the testator as an officer in the Virginia line on continental establishment, and on the 28th of February, 1784, the requested adjustment was made. By that adjustment the auditor of public accounts found that there was a balance due to the deceased, or to his legal representatives, of one thousand seven hundred and twenty-two pounds nineteen shillings and two pence, and the record shows that the evidence of the indebtedness of the state to the deceased for that amount was delivered to B. Harrison on the same day the adjustment was made.

385*] *Prior to that adjustment, to wit, on the 29th of November, 1783, the House of Delegates of Virginia passed two resolutions which it becomes important to notice:

1. That the petition of Elizabeth Rickman praying that the auditor of public accounts should settle and adjust the pay and accounts of her late husband was reasonable, showing satisfactorily that the adjustment was largely influenced by the Legislature.

2. That Elizabeth Rickman, widow of William Rickman, be allowed such a portion of land as the rank and service of the deceased merit.

Pursuant to the second resolution the governor of the state, Benjamin Harrison, on the 12th of January, 1784, executed a certificate that Elizabeth Rickman, widow and executrix of William Rickman, director-general, is entitled to the proportion of land allowed a colonel in the continental line who has served three years, and on the following day a warrant for six thousand six hundred and sixty-six and two thirds acres was issued to her, signed by the register of the state land office.

Five years later she intermarried with John Edmondson, and they afterwards, during the succeeding year, united in executing a deed of trust or post-nuptial agreement to her brother, Carter B. Harrison, of all her estate, real and personal, or to which she was entitled under the will of her former husband, for her separate use and advantage, her heirs, executors and administrators, the husband stipulating therein that she might dispose of the same by her last will and testament as she should see fit to do.

On the 3d of May, 1790, Elizabeth Edmondson made her last will and testament, which was olographic, and on the first day of January, 1791, she died, leaving her will in full force, and on the twentieth of the same month the will was proved and admitted to record in the county where she resided at her decease.

Absolute title to the lands embraced in the warrant signed by the land register is claimed by the complainants, upon the ground that the same were devised in fee simple by Elizabeth 386*] *Edmondson to her husband, John Edmondson, by her last will and testament; but the respondents deny that her will, when properly construed, contains any such devise; and insist that the will, if it made any disposition of those lands, only devised to the husband a life estate in the same; and that the fee simple title to the same, inasmuch as the testatrix died without issue, descended to her brothers and sisters, under whom they claim, as alleged in the answer.

Unless the course of descent was broken by the will of the testatrix, it is clear that her brothers and sisters became the owners of the lands embraced in that warrant, as it is conceded that she died without issue.

Afterwards, in the year 1795, the said John Edmondson married again, and the record shows that he had three children by the second wife, one of whom died before the father without issue, leaving John and Elizabeth, the latter having since intermarried with Littleton Waddell, the other complainant and appellant in the case before the court.

Before his decease, John Edmondson, the father of the two appellants, John and Elizabeth, also made a will and devised all his property to his three children, one of whom, as before stated, died during the lifetime of the father. His will bears date on the 3d of October, 1802, and the pleadings show that he died on the first day of December following, leaving the two children before named as his principal devisees and sole heirs at law. They, together with the husband of Elizabeth, claim the lands in controversy upon the ground that the same were devised to the father of John and Elizabeth by the will of his first wife.

Defenses of various kinds are set up in the answer, but in the view taken of the case it is not necessary to enter into those details, as the court is of the opinion that the decision of the case must turn upon the construction of the will of Elizabeth Edmondson, deceased, it being conceded that she held the title to the lands in controversy under the warrant granted to her for the same by the state.

Proofs were introduced by both parties, but the circuit court was of the opinion that the complainants were not *entitled to re- [*387 cover, and entered a decree dismissing the bill of complaint. Whereupon the complainants appealed to this court, but the appeal was dismissed, it appearing on the face of the record that the transcript was not filed in this court during the term next succeeding the allowance of the appeal. *Edmonson* v. *Bloomshire*, 7 Wall. 306, 19 L. ed. 91.

Since that time a new appeal has been allowed to the complainants and they have removed the cause into this court, seeking to reverse the same decree from which the first appeal was taken. Pending the present appeal, a motion to dismiss was filed by the respondents, which was heard at the same time with the merits; but the questions involved in the motion will not be decided, as the court is of the opinion that the decree of the circuit court, dismissing the bill of complaint for the want of equity, is correct.

Motions of the kind are usually determined before proceeding to examine the merits of the controversy, but the court deems it proper to adopt a different course on the present occasion for the following reasons, among others which might be mentioned: (1) Because differences of opinion exist in the court as to the proper disposition to be made of the motion, irrespective of the fact that the case has been twice heard upon the merits; (2) because the respondents, when the case was here before, went to final hearing without making any objections to the regularity of the appeal.

Affirmative relief, it is true, could not be granted to the complainants without first disposing of some of the questions involved in the motion, but inasmuch as an affirmance of the

decree of the circuit court will effect substantially the same result as a dismissal of the appeal, the court is not inclined to decide the preliminary questions.

Letters of administration on the estate of Elizabeth Edmondson were granted to John Edmondson, the husband of the deceased, as no executor was named in the will. Several bequests to the husband were made by the testa- 388*] trix in *the will which need not be noticed, as they furnish no aid in the solution of the question presented for decision. Those clauses relate to certain articles of personal property which she gave to her husband forever, and to certain slaves which she gave to him "to dispose of as he may think proper." Preceding the clause disposing of the articles of personal property the will contains the following devise: "I give to my dear husband, John Edmondson, all the land I possess, during his life," but the will contains no residuary clause of a general nature. Enough appears to show that the testatrix owned real estate, as she devised the house and land where she lived, at the death of her husband, to one of her brothers, and to another brother she gave, at the decease of her husband, a certain other tract described in the will as having been purchased by her first husband, but the will does not, in terms, make any ultimate disposition of the lands devised to her husband during his life except those two parcels, and the complainants do not controvert the proposition that the lands in question, if they were devised to the husband under that clause of the will, descended at his decease to the brothers and sisters of the testatrix, as contended by the respondents. They deny, however, that the lands in controversy or any portion of the same were devised to him by that clause. On the contrary, they rely upon another clause in the will as the foundation of their claim, which follows the bequests before mentioned to her husband, and certain other bequests of like kind to her brothers and sisters and other relatives, specifying in each of the several bequests the name of the legatee.

Having devised all the land she possessed to her husband during his life, and made those bequests, the testatrix provides as follows: "My certificates that are in the hands of my brother Ben, I desire may be given to my husband, to dispose of as he may think proper." Founded on that clause in the will, the theory, of the complainants is, that the warrant signed by the land agent for the six thousand six hundred and sixty-six and two thirds acres of bounty lands was devised to their father, and that at 389*] the decease of the testatrix *he became the owner in fee simple of the lands surveyed and located under that warrant, and that they, as the devisees in his will and his sole heirs at law, are the lawful owners of the lands in controversy.

Support to that theory is attempted to be drawn from the fact that the governor, before the warrant was signed, granted a certificate in which he certificed that the widow and executrix of the deceased claimant was entitled to the proportion of land allowed to a colonel of the continental line who had served three years, but the decisive answer to any such attempt is, that the certificate of the governor was, on the following day, deposited in the proper office as the legal foundation of the land-warrant, where it has ever since remained.

Most of the introductory allegations of the bill of complaint are admitted by the respondents. They also admit that Elizabeth Rickman, before her marriage with John Edmondson, obtained the certificates for the balance due her first husband for pay and subsistence as director-general in the continental line, and also for the interest due on the same, and that she also obtained the warrant for the lands in controversy, but they utterly deny that the word "certificates," as used in the clause of the will under which the complainants claim, means or intends the warrant in question or the lands described in the pleadings.

Persons having claims to bounty lands were required at that time, by the laws of that state, to exhibit their vouchers to the executive, and if found to be correct and the claim was allowed, it was the duty of the governor to issue a certificate to that effect to the register of the land office, and the register, upon the filing of that certificate, was required to grant the warrant. 11 Hen. Stat. 83; Swan's Land Laws, 118.

More than six years before the testatrix made her last will and testament in which she uses the phrase "my certificates that are in the hands of my brother Ben," the certificate *as [*390 to the bounty lands had been surrendered to the register of the land office, and the land-warrant in question had been issued in its place, and there is no evidence that the land warrant or the certificate which preceded it was ever in the hands of any one of the brothers of the testatrix.

Undoubtedly the certificate for the balance due for pay and the subsistence accounts arising from the depreciation of the currency in which the original claimant was paid and the certificates for the interest on the same did pass by that clause in the will to the husband of the testatrix, and the proofs are satisfactory that those certificates were in the hands of her brother Benjamin at the date of the will. Those certificates bear date on the 28th of February, 1784, and they were immediately delivered to the brother named in the will as having them in his hands, where they remained to the date of the will of the testatrix and to the time of her death.

Certified copies of the certificate signed by the governor as the foundation for the land-warrant are exhibited in the record as given by the register of the land office, which shows that it could not have been in the hands of her brother at the date of the will, as it had been in the register's office more than six years before the will was executed. Suppose, however, that it appeared that the land-warrant had been in the possession of her brother, from its date to the time when the testatrix died, still it would be difficult, if not impossible, to hold that the signification of the word "certificates," as used in the will, is sufficiently comprehensive to include that instrument, as the word "certificate" seems to have an appropriate and direct reference to the instruments of evidence issued to the testatrix for the back pay and subsistence accounts of her former husband, as before explained.

Attempt is made in argument to show that the words "certificate" and "warrant" are sometimes used in the statutes of the state as words of equivalent import, but the examples put do

not relate to the same subject, and if they did it would not be difficult to show that the words 391*] are there used *rather as conferring an alternative authority than as words of synonymous signification. Be that as it may, still it is evident that the word "certificates" was used by the testatrix as referring directly to the instruments in the hands of her brother, which were given in the adjustment of her claim for the balance due to her former husband to make his pay as director-general equal to what it would have been if he had been paid in specie.

Strong confirmation of that view is derived from the course pursued in the settlement of her estate and the long acquiescence of the complainants in the pretensions of the respondents and those under whom they claim. Evidence, however, of the most satisfactory character was introduced by the respondents showing that the land-warrant never was in the hands of her brother prior to the date of the will, or at any other time; but it is not deemed necessary to enter into those details, as we are all of the opinion that the land warrant, if it passed to the husband by the will, passed under the devise which gave him during his life all the land which the testatrix possessed, that it did not pass to him by the other devise, and that the decree of the circuit court dismissing the bill of complaint is correct.

Decree affirmed.

82*] *WILLIAM A. FREEBORN *et al.*, as W. A. Freeborn & Company, *Appts.*,

v.

THE SHIP PROTECTOR, Her Tackle, etc., James C. Bell, *Claimant.*

(See S. C. *"The Protector,"* 11 Wall. 82-88.)

Defect in names of parties, when fatal to appeal.

Where the titles of the parties in the appeal as allowed is, William A. Freeborn & Co. v. The Ship Protector and Owners, this defect is fatal to the jurisdiction of the court.

The writ cannot be amended.

[No. 83.]

Argued Jan. 27, 1871. Decided Jan. 30, 1871.

APPEAL from the Circuit Court of the United States, for the Southern District of Alabama.

Motion to dismiss.

The libel in this case was filed in the district court of the United States for the southern district of Alabama, to recover the cost of certain repairs and supplies. A decree having been entered in that court dismissing the libel, the libelants took an appeal to the circuit court, by which the said decree was affirmed, whereupon the said libelants took a further appeal to this court.

The case is sufficiently stated by the court.

Messrs. **P. Phillips** and *P. Hamilton*, for appellees:

That it is necessary that the names of all the appellants and appellees should be set forth is decided by the following cases:

Deneale v. *Archer*, 8 Pet. 528; *Wilson's Heirs* v. *Ins. Co.* 12 Pet. 140; *Smyth* v. *Strader*, 12 How. 327; *Adams* v. *Law*, 16 How. 144.

In all these, as well as in subsequent cases, the writ of error has been dismissed, because the names of all the appellants or all the appellees were not given in the writ.

Is the rule different when applied to appeals?

In the case of *Owings* v. *Kincannon*, 7 Pet. 399, this court says:

"The appeal was given by the act of 1803, and this declares that such appeals shall be subject to the same rules, regulations and restrictions as are prescribed by law in cases of writs of error."

We have then a libel filed by William A. Freeborn, James F. Freeborn, and Henry P. Gardner, a decree against them as the libelants, and an appeal from that decree in the name of William A. Freeborn & Company.

In the case of the "heirs of Wilson," already cited, the Chief Justice says: "In both of the cases referred to it appears that the motions to dismiss were not made at the term, or at the time of appearance in this court; but each of the cases had been pending here for two years before the motion was made. The rule of this court, therefore, is: that where there is a substantial defect in the appeal or writ of error, the objection may be taken at any time before judgment, on the ground that the case is not legally before us, and that we have no jurisdiction to try it."

Messrs. J. Pyne, **S. F. Blount**, and *J. M. Carlisle*, for appellants:

The record in this cause was filed in this court Oct. 29, 1869. A motion was made at the December term, 1870, to dismiss the appeal in this cause, because it was taken after the lapse of five years from the date of the decree rendered in the court below.

This motion was denied.

At the present term of this court, the present motion is filed to dismiss this cause for the reason that the proceedings on appeal do not set forth the names of the parties appellant.

It is answered that this motion should have been made at the first term of this court, to which the said proceedings were returnable, and is now too late.

Carroll v. *Dorsey*, 20 How. 207 (15 L. ed. 804); *Chaffee* v. *Hayward*, 20 How. 209, 15 L. ed. 805; *The Commander-in-Chief*, 1 Wall. 43, 17 L. ed. 609; *Bk.* v. *Seton*, 1 Pet. 299.

The proceedings on appeal may be amended by the record and proceedings in the cause.

In admiralty, amendments are freely allowed.

It is the settled practice in admiralty proceedings, where merits appear upon the record, but the libel is defective, to allow the party to assert his rights in a new allegation.

The Adeline, 9 Cranch, 244; *The Caroline*, 7 Cranch, 496; *The Divina Pastora*, 4 Wheat. 52; *The Mary Ann*, 8 Wheat. 380.

In *Smith* v. *Jackson*, 1 Paine (C. C.) 486, in commenting upon the 33d section of the Act of 1789, the court says:

The statute gives to the circuit courts, on appeal from the district court, power to allow any amendments of defects of form occurring in the court below, which could have been amended there, or to disregard them in giving judgment.

In *Tibbs* v. *Parrot*, 1 Cranch (C. C.) 177, the court says:

"A declaration in the name of a firm may be amended by leave of the court, by inserting the names of the members of the firm. This does not touch the nature of the cause of action.

In the case of *The Venus*, 1 Wheat. it is decided that, "On an appeal to the Supreme Court

in an admiralty case, the cause is before that court, as if in the inferior court."

The whole record and proceedings being then before this court, and the trial being *de novo*, all the parties in the court below, whose names are in the records and proceedings, are before the court, the libel setting forth the names of the individuals composing the firm of William A. Freeborn & Co.

Penhallow v. *Doane*, 3 Dall. 54.

All the decisions cited by the counsel of appellee were upon writs of error and, therefore, governed by the rules of the common law.

By the 24th rule of this court, regulating the practice in courts of admiralty, it is among other things, provided as follows:

"And new counts may be filed, and amendments in matters of substance may be made upon motion at any time before the final decree, upon such terms as the court shall impose."

See, also, *Weaver* v. *Thompson*, 1 Wall. Jr. 343.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from the circuit court of the United States for the southern district of Alabama.

The suit was a libel against the ship for supplies and repairs. It was dismissed in the district court upon the pleadings and proofs, and the decree of dismissal affirmed on appeal, by the circuit court. It is now here on appeal from that decree. A motion has been made by the appellees to dismiss the case on the docket for want of jurisdiction.

The motion is grounded upon a defect of the title of the parties in the appeal as allowed. The title is, "*William A. Freeborn & Co.* v. *The Ship Protector and owners.*" This defect in a writ of error has been held fatal to the jurisdiction of the court since the case of *Deneale* v. *Archer*, 8 Pet. 526, down to the present time. *Smyth* v. *Strader*, 12 How. 327; *Wilson* v. *Ins. Co.* 12 Pet. 140; *Davenport* v. *Fletcher*, 16 How. 142. Nor can the writ be amended, according to repeated decisions of this court. *Porter* v. *Foley*, 21 How. 393, 16 L. ed. 154; *Hodge* v. *Williams*, 22 How. 87, 16 L. ed. 237. The only question before us is, whether the same rule applies to appeals in admiralty. Originally, decrees in equity and admiralty were brought here for re-examination by a writ of error, under the 22d section of the judiciary act (1 U. S. Laws, 84). This was changed by the act of March 3, 1803, by which appeals were substituted in place of the writs of error in cases of equity, admiralty, and prize; but the act 87*] *provides "that the appeals shall be subject to the same rules, regulations and restrictions as are prescribed in law in cases of writs of error." 2 Stat. at L. 244.

In *Owings* v. *Kincannon*, 7 Pet. 403, the appeal was dismissed because all the parties to the decree below had not joined in it. Chief Justice Marshall, in delivering the opinion of the court, referred to the case of *Williams* v. *Bk. of U. S.* 11 Wheat. 414, which was a writ of error, where it was held that all the defendants must join, and applied the same rule to the case of an appeal. He cited the Act of 1803, and observed that "the language of the act which gives the appeal appears to us to require that it should be prosecuted by the same parties who would have been necessary in a writ of error." But the case of *Smith* v. *Clark*, 12 How. 21, is more direct to the point before us. It was a motion to docket and dismiss in the case of an appeal, under the 43d rules of the court. The certificate of the clerk, upon which it was founded, described the parties as in the title above. Chief Justice Taney, in giving the opinion of the court, stated that the certificate conformed to the rule in all respects but one, and that was in the statement of the parties. The respondents were stated to be Joseph W. Clark and others, from which it appeared that there were other respondents, parties to the suit, who were not named in the certificate. He then referred to the case of a writ of error (*Deneale* v. *Archer*, 8 Pet. 526), where it was held that all the parties must be named in the writ, and the name of one or more of them, and others, were not a sufficient description; and, also, to the case of *Holliday* v. *Batson*, 4 How. 645, where the same principle was applied to a writ of error docketed under the 43d rule, and observed the same reason for requiring all the parties whose interests were to be affected by the judgment, to be named in the writ of error, applied with equal force to the case of an appeal from a decree. And the motion to docket and dismiss for the above defect was overruled. The opinion of the court in the present case is, that no distinction in respect *to the question [*88 before us can be made between the case of an appeal under the act of 1803 (2 Stat. at L. 244) and of a writ of error; and that the decisions referred to directing the dismissal of the latter from the docket for want of jurisdiction, apply with equal force to the former. This result disposes of the motions on the part of the appellant to amend the petition of appeal, citation and bond, and also the motion to amend the libel.

The motion to dismiss for want of jurisdiction granted.

Mr. Justice **Swayne**, dissenting:

I dissent from the conclusions announced by the court in this case. The defect objected to is, in my judgment, amendable under the 32d section of the judiciary act of 1789 (1 Stat. at L. 73), and I think an amendment should be permitted to be made.

I am authorized to say that Mr. Justice **Bradley** concurs in this dissent.

FRANKLIN PARMALEE *et al., Plffs. in Err.*,
v.
DANIEL LAWRENCE.

(See S. C. 11 Wall. 36-39.)

Jurisdiction over state judgments, in what cases —certificate of state supreme court insufficient to confer jurisdiction.

The conflict of the state law with the Constitution of the United States, and a decision by a state court in favor of its validity must appear on the face of the record before it can be re-examined in this court.

It must be that such a question was necessarily involved in the decision, and that the state court

NOTE.—*What the record must show upon writ of error to a state court*—see notes, 63 L. R. A. 329, 471.

would not have given a judgment without deciding it.

This court cannot entertain jurisdiction upon a certificate of the state supreme court alone, in the absence of any evidence of the question in the record. The office of the certificate, as it respects the Federal question, is to make more specific what is too general in the record, but it is incompetent to originate the question within the true construction of the 25th section.

[No. 164.]

Submitted Jan. 31, 1871. Decided Feb. 6, 1871.

IN ERROR to the Supreme Court of Illinois. On motion to dismiss.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **George Payson** and *Charles A. Gregory*, for defendant in error:

The plaintiffs assign, as their sole ground of error, that the supreme court of Illinois in rendering the final decree in this case, rested its decision on a certain statute of that state which, as plaintiffs allege, impaired the obligation of their contract, and is, therefore, repugnant to the Constitution of the United States.

It does not appear by the record that any such statute was brought in question in the case.

There is no mention of it in the pleadings nor in the evidence nor in the decree.

It cannot be because it is found in the opinion of the court below; for it has been several times decided that that opinion is no part of the record.

Williams v. *Norris*, 12 Wheat. 117; *R. Co.* v. *Rock*, 4 Wall. 179, 18 L. ed. 382, where the printed report of the case was offered; *Rector* v. *Ashley*, 6 Wall. 142, 18 L. ed. 733; *Gibson* v. *Chouteau*, 8 Wall. 314, 19 L. ed. 317.

Is the certificate of the presiding judge sufficient for this purpose?

If it first appear from the record itself, that such a question may have arisen, then the certificate may come in, to show that it was actually raised and decided. But unless it does so appear from the record, then, no matter what may be stated in the certificate, it is not enough. This seems clearly decided in *Armstrong* v. *Treas. etc.* 16 Pet. 285, where the court fully states the principles governing cases of this sort.

R. Co. v. *Rock*, 4 Wall. 177, 18 L. ed. 381; *Lawler* v. *Walker*, 14 How. 149.

Messrs. **C. Beckwith** and *Ayre & Kales* for plaintiff in error.

Mr. Justice **Nelson** delivered the opinion of the court:

This is a motion to dismiss the case for want of jurisdiction.

This suit was commenced by the plaintiffs in error, before the superior court in Chicago, against the defendant, to enforce the specific performance of a contract which embraced certain lots in Chicago, for the consideration of $50,000, in five equal annual instalments, with interest. The answer set up that the $50,000 was a loan of money to the plaintiffs, and that the premises in question had been conveyed by them to the defendant as a security for the loan, upon the payment of which the defendant had stipulated to reconvey, and tendered a reconveyance on the payment of the principal and interest. A cross-bill was also filed by the defendant, setting up the loan with interest at 10 per cent per annum. The answer of the defendant admitted that the transaction was a loan of money between the parties, and charged that the defendant (the plaintiff in the cross-bill), at the time of the loan, took a bond from them, conditioned to pay 2 per cent per annum in addition to the interest specified in the contract, making the interest 12 per cent per annum.

The cause was finally heard on the cross-bill, answer, replications and proofs in the case. The superior court decreed that the defendant should pay to the plaintiff the amount of the loan remaining due, with 6 per cent interest, from the date of the last payment, but he to retain the 12 per cent already paid. The defendants appealed to the supreme court, which reversed the decree, holding that the usurious interest already paid should be credited on the principal, and that interest should be allowed at the rate of 10 per cent. The cause was remanded to the superior court for a new trial, where a decree was rendered in conformity with the above opinion, and which was afterwards affirmed by the supreme court.

On looking through the record it will be seen, that the litigation resulted in a question as to the rate of interest to be allowed to Lawrence, the lender, according to the laws of Illinois, and that neither in the pleadings nor in the evidence, nor at the hearing in the superior court, was any question made as to the validity of any statute of the state on the ground of its repugnancy to the Constitution of the United States. This question was first made before the supreme court, on appeal. The certificate of the presiding judge shows that the objection was taken in the argument there and overruled, and furnishes the only evidence that any Federal question was raised in the case.

In *Lawler* v. *Walker*, 14 How. 152, it is said that the 25th section of the judiciary act required something more definite than the certificate of the supreme court to give this court jurisdiction.

The conflict of the state law with the Constitution of the United States, and a decision by a state court in favor of its validity, must appear on the face of the record before it can be re-examined in this court. It must appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the rulings of the court. It must be that such a question was necessarily involved in the decision, and that the state court would not have given a judgment without deciding it. The decision in this case was approved, and applied in *R. Co.* v. *Rock*, 4 Wall. 177, 18 L. ed. 381. The certificate was as full in that case as in the present, but it was the only evidence of the fact that a Federal question had been presented.

The judge, in delivering the opinion of the court in that case, observed that "it is probable that counsel in the argument of the case in the supreme court of Iowa, insisted these matters were involved, and that the Chief Justice felt bound to certify, when requested, that they were drawn *in question. But if the [*39 record does not show that they were necessarily drawn in question, this court cannot take ju-

risdiction to reverse the decision of the highest court of a state upon the ground that counsel brought them in question in argument. We will add, if this court should entertain jurisdiction upon a certificate alone in the absence of any evidence of the question in the record, then the supreme court of the state can give the jurisdiction in every case where the question is made by counsel in the argument. The office of the certificate, as it respects the Federal question, is to make more certain and specific what is too general and indefinite in the record, but is incompetent to originate the question within the true construction of the 25th section.

The motion to dismiss granted.

217*] *JAMES MAY, *Appt.*,

v.

MARGUERITE LeCLAIRE and George L. Davenport, Executors of Antoine LeClaire, Deceased, *et al.*

(See S. C. 11 Wall. 217-238.)

Bona fide purchaser without notice—purchaser under quitclaim deed is not—knowledge of counsel, notice to client—exceptions—suit in assumpsit for property converted—former adjudication—substituted property—residuary devisees.

One who has acquired his title by a quitclaim deed, cannot be regarded as a bona fide purchaser without notice.

Knowledge of counsel in a transaction is notice to his client.

If property be tortiously taken or converted, the tort feasor may be used in trespass or trover, or the injured party may waive the tort and sue in assumpsit.

The defendant is not permitted to set up his tort to defeat the action, and the recovery of a judgment will bar further action *ex delicto* by the plaintiff.

Where converted property has assumed altered forms by successive investments, the owner may follow it as far as he can trace it, and sue at law for the substituted property, or he may hold the wrongdoer liable for appropriate damages.

Where a trustee has abused his trust, the *cestui que trust* has the option to take the original or the substituted property, and if either has passed into the hands of a bona fide purchaser without notice, then its value in money.

Where the residuary devisees of land are not before the court, it cannot decree the conveyance of real estate, but the legal representatives being before it, the court can give a money decree against them, embracing the value of the land, which it might otherwise adjudge to be conveyed.

[Mr. Justice MILLER did not sit in this cause.]

[No. 72.]

Argued Jan. 16, 1871. Decided Feb. 13, 1871.

APPEAL from the Circuit Court of the United States for the District of Iowa.

The bill in this case was filed by the appellant, in the district court of the United States for the district of Iowa, for the cancelation of a certain trust deed, and for the conveyance of certain property, and for other relief from the alleged fraud of the respondents.

The facts of the case are fully stated in the opinion of the court.

The larger part of the arguments, being upon questions of fact, is not given.

Messrs. James M. Elwood, Jeremiah S. Black, and **J. A. Wills**, for apellant:

The question of fraud.

This a question of law, as well as of fact.

1. As a question of law. Courts of Equity will presume fraud, from the nature of the transaction and the relation of the parties.

Story, Eq. Jur. § 190; *Jackson* v. *King*, 4 Cow. 207; *Arnold* v. *Grimes*, 2 Greene (Ia.), 77.

1. What constitutes fraud in equity?

Story, Eq. Jur. § 187.

2. Meaning of the rule that fraud in equity will be presumed. How is fraud to be established? Not by open acts and declarations. Concealment and secrecy are the ingredients of the crime, not open declarations and overt acts.

It is clear, therefore, that fraud must be established by facts and circumstances.

Waterbury v. *Sturtevant*, 18 Wend. 353; 1 Story, Eq. Jur. § 190.

What effect is to be given to the denials in the answers?

See *Clark's Ex'rs* v. *Van Riemsdyk*, 9 Cranch, 153; *Wight* v. *Prescott*, 2 Barb. 196; *Waterbury* v. *Sturtevant* (*supra*).

These cases, we understand, settle the rule to be, that the positive denials of the answers may be overcome and outweighed by the circumstances showing fraud.

As against Antoine Le Claire, independent of any fraud, the complainant is entitled to a decree under the allegations in his bill.

May, being the owner of the farm and by his trust deed consenting to a sale thereof, had the right to prescribe the terms and conditions on which the same might be sold in case of his default. He did, for his own safety and security, provide that the same should be sold in tracts or parcels. The trustee had no authority to sell it in any other manner. The condition that the land should be sold in parcels must be observed by the trustee, in order to give any validity whatever to his acts in the premises. It was, so to speak, a limitation on the trust power, a prohibition to the trustee to sell in any other mode. It was a power (the power of sale) which could only be exercised in the mode, and subject to the conditions, prescribed by the instrument creating the power.

Hill, Trust. (marg.) 478; 2 Washb. Real Prop. 317; 4 Kent, Com. (marg.) 330, 334; 2 East, 204; *Harkins* v. *Butler*, 2 Pars. Cont. 421; *Greenleaf* v. *Queen*, 1 Pet. 138.

Under these authorities it is clear that the omission and failure of the trustee to sell in parcels amounted to a non-execution of the power.

Where the terms of an agreement have not been strictly complied with, or are incapable of being strictly complied with, still, if there has not been gross negligence in the party, and compensation for the injury, occasioned by a non-compliance with the strict terms can be made in all such cases, courts of equity will interfere. The doctrine of equity is not forfeiture, but compensation, and nothing but such a decree will in such cases do entire justice between the parties. Equity will decree a specific execution, not according to the letter of the contract, if that be unconscientious, but will modify it according to the change of circumstances.

Story, Eq. Jur. §§ 771, 775, 779, 796, 798, 786, 780; *Bank* v. *Lynn*, 1 Pet. 376; *Champion* v. *Brown*, 6 Johns. Ch. 398.

The agreement was simply an agreement of

NOTE.—*Effect of a quitclaim deed in an otherwise perfect record title*—see note, 29 L. R. A. 33.

settlement or compromise. It starts out with the proposition to compromise. It provides that May shall cancel what is due or claimed to be due from him to LeClaire, and that LeClaire shall cancel and release all claims he has against May, upon the basis of the proposition, stated in the agreement; and, in the conclusion of the proposition, May still expresses a preference for an arbitration. But LeClaire accepts May's proposal, and settles on the terms offered therein.

It being an agreement of settlement, it is one of those which courts of equity will support and maintain, upon the salutary principle, that parties are the best judges of their own rights, and of the terms upon which mutual claims should be settled.

1 Story, Eq. Jur. § 131, and cases cited; §§ 150, 151.

LeClaire, by his own acts and those of his agents, instead of aiding, prevented the performance of the contract by May. He (May) took all proper steps towards the performance of the agreement on his part, but was prevented from completing it at least, by the neglect (if not the misconduct) of LeClaire. And in such case, the efforts of May to perform will be considered as equivalent to performance.

1 Madd. Ch. Pr. 421, and cases cited.

LeClaire cannot take advantage of his own wrong, either active or passive.

There was part performance of the contract by the complainant. He executed his deed of Rose Bank to LeClaire. LeClaire received and took possession, has never surrendered nor offered to surrender it, but has had the use and received the profits thereof. Here was a part performance on the part of May, which entitles him to the relief asked for. It was such a performance as would have taken the case out of the statute of frauds, and entitled a party to a specific performance.

2 Story, Eq. Jur. § 761; *Lowry* v. *Tew*, 3 Barb. Ch. 407.

It would be utterly unjust and at war with every principle of equity—after LeClaire has taken possession of the farm, Rose Bank, under the agreement, had the use and received the profits of it for several years, never surrendered or offered to surrender the possession to May, nor offered to pay him the profits received therefrom, and having retained the possession until May's claim, settled by their agreement, is barred by the statute of limitations—to permit him now to say that the agreement was not a compromise, and that May must recover upon the original account settled by the agreement.

Rose Bank having been bought by LeClaire, May is now able and willing, as prayed in his bill, by deduction of the value of the Rose Bank farm, to perform substantially the contract, to convey and remove the encumbrances on Rose Bank in every respect, except as to the time. Every one of the encumbrances has been removed or can be removed, and the estate of LeClaire can hold the farm free from all encumbrances, and in the very condition that LeClaire was to receive it, under his contract with May. On the other hand, LeClaire's estate is in a situation to perform the contract on the part of LeClaire. The estate now holds the lands covered by the Davenport mortgage. The acts of LeClaire only exchanged the securities upon the land for the land itself. And where the parties are in a condition to perform the contract at the time of the filing of the bill or decree, substantially, notwithstanding the time, courts will decree a specific performance, if LeClaire or his assignee has continued in possession.

2 Story, Eq. Jur. §§ 776–780; *Miller* v. *Bear*, 3 Paige, Ch. 466; *Brashear* v. *Gratz*, 6 Wheat. 528.

Time was not of the essence of the contract, under the stipulations of the parties. The clause relating to the removal of encumbrances, was nothing more or less than a promise on the part of May to remove his liens within a year. The contract does not provide that his failure to do so shall put an end to the contract, nor change the rights of the parties.

Young v. *Daniels*, 2 Ia. 126; *Armstrong* v. *Pierson*, 5 Ia. 317; *Edgerton* v. *Peckham*, 11 Paige, Ch. 352; Newl. Cont. 238–240; *Brashear* v. *Gratz* (*supra*).

LeClaire, under the circumstances, did not and could not rescind the contract. He, in order to rescind, should have tendered to May the deed to Rose Bank, which May executed to him; also the possession of the farm, and the money received by him as rent of the premises. Without this, he could not rescind.

Griffith v. *Depew*, 3 A. K. Marsh. 177; *Brink* v. *Morton*, 2 Ia. 411; *Armstrong* v. *Pierson*, 5 Ia. 317; *Putnam* v. *Ritchie*, 6 Paige, Ch. 390.

Messrs. **Matt. H. Carpenter** and **Jno. N. Rogers**, for appellees:

If the bill had been based on this point only, *viz.:* failure to sell in parcels, it would have been clearly multifarious. LeClaire and his representatives could, by no pretext, have been properly made parties to a bill to set aside the sale on this ground; nor could any of the other defendants have been joined in a bill against LeClaire, for specific performance of his agreement with May.

It is argued that the trustee was imperatively required to sell "in parcels," but was left free to exercise his discretion as to the size of the parcels. According to this, the trustee was bound on the one hand to sub-divide the land, on selling, although it should be perfectly clear, as the fact was, that a sale of it in a body would be most advantageous for the said party of the first part; and, on the other hand, he was at liberty to exercise his discretion as to size of parcels, by selling half an acre separately, and the rest in a body.

The true meaning is that the trustee was at liberty (not bound) to sell in parcels less than the whole, provided that in his opinion, such sale would be advantageous for the grantor, in which case it would be necessarily also advantageous to the *cestui que trust*, leaving him at liberty to sell in a body, if that mode should appear most advantageous; the controlling consideration, as to the mode of sale, being the "advantage" of the parties interested therein. The language is, not "in parcels of such size," etc., but "in parcels or tracts of such size," etc. If the word "parcels" necessarily means less than the whole, "tract" does not.

Singleton v. *Scott*, 11 Ia. 589–596.

The trustee's duty (if any) as to selling in parcels, was discharged by his first offering to

sell in parcels without obtaining any bids. This has been substantially held by the supreme court of Iowa in a very late case. *Burmeister* v. *Dewey*, 27 Ia. 468.

It adds force to this decision, that the court had previously held sales of distinct parcels of land in a mass or lump by the sheriff, irregular. *Boyd* v. *Ellis*, 11 Ia. 97; *Lay* v. *Gibbons*, 14 Ia. 377.

The legal title being in the trustee, his sale and conveyance (though not in conformity to the terms of his power) passed the legal title to Dessaint, the grantee, leaving in May a mere equity to have the sale set aside on application to a court of equity. This equitable claim cannot prevail against a bona fide purchaser for value, who has obtained the legal title.

It is not very clear, from appellant's brief, on what ground the right to relieve, in the absence of any fraud on the part of LeClaire, is intended to be placed.

It not only sets up a case different from but one inconsistent with and contradictory to that set forth in the bill. The title to relief therein set up is based exclusively on the wrongfulness and invalidity of the trust deed sale, mainly on the ground of the fraudulent conspiracy; partially on account of a failure to sell in parcels.

There is not a syllable so much as hinting at an affirmance of that sale; and the purchase of the title derived under it by LeClaire's representatives is not noticed in the pleadings at all. If intended to be relied on, it should have been alleged in a supplemental bill.

But the case now set up in the argument assumes and rests upon the validity of the trust sale, and claims for appellant the benefit of the title derived under it. To sustain such an argument would be nothing short of allowing a complainant to make an entirely new bill by argument upon the hearing, and that, too, in the appellate court. This cannot be done.

Shields v. *Barrow*, 17 How. 130, 15 L. ed. 158; *Harding* v. *Handy*, 11 Wheat. 103; *Boone* v. *Chiles*, 10 Pet. 177; *Carneal* v. *Banks*, 10 Wheat. 181.

There is a defect of parties, fatal to the relief sought by appellant. The title to the land he seeks to have decreed to be conveyed to him, is vested, in undivided shares, in all the devisees of A. LeClaire, who are very numerous. Only a few of them are before the court as parties. All are necessary parties; and no decree for complainant can be made without them.

Shields v. *Barrow*, 17 How. 130, 15 L. ed. 158; *Coiron* v. *Millaudon*, 19 How. 113, 15 L. ed. 575.

Mr. Justice **Swayne** delivered the opinion of the court:

This is an appeal in equity from the decree of the circuit court of the United States for the district of Iowa. The record is in a singularly defective and confused condition. But the case has been fully argued upon the merits by the counsel upon both sides, and finding enough in the record, upon looking carefully through it, to enable us to dispose of the controversy between the parties satisfactorily to ourselves without further delay, we do not deem it necessary to reverse and remand the cause, as we might otherwise do, in order that the record may be corrected, and by a further appeal be brought up in the proper condition. *Levy* v. *Arredondo*, 12 Pet. 218; *Mandeville* v. *Burt*, 8 Pet. 256; *Harrison* v. *Nixon*, 9 Pet. 483; *Finley* v. *Lynn*, 6 Cranch, 252; *Lewis* v. *Darling*, 16 How. 1.

*The case involves no legal question [*228 of any doubt or difficulty. Its determination depends wholly upon the facts. The testimony and exhibits are very voluminous. It could serve no useful purpose elaborately to analyze them and set forth the results in this opinion. We shall content ourselves with doing little more than to announce our conclusions. We shall not deem it necessary to give in detail the evidence upon which they are founded or the processes of argument by which they are supported.

The proposition submitted by May, of the 4th of February, 1859, its acceptance on the 8th of March following by LeClaire, since deceased, and the assent of May on the same day, constituted a valid contract. There was a large difference in value between what LeClaire was to give and what he was to receive. But we have found in the record nothing which raises a doubt that the arrangement was fair and just to both parties. LeClaire was a man of property and of experience in business. The date of the proposition and of its acceptance show that he took ample time to consider the subject. The acceptance was witnessed by John P. Cook, his counsel, and one of the defendants in this case. According to the face of the proposition it involved the settlement of unadjusted demands on both sides. It was made in a spirit of peace and compromise, and was accepted in a corresponding spirit. It is the duty of a court of equity to uphold such an agreement, to protect and enforce the rights of both parties under it, and to carry it out as far as the facts, which subsequently occurred, and the settled principles of our jurisprudence, will permit.

On the 10th of March, LeClaire, in pursuance of the contract, indorsed to May the notes and mortgage of Adrian H. Davenport, and placed them, with certain collaterals which he had received from Davenport to secure the payment of the notes, in the hands of Cook & Sargent. At the same time May, also, in pursuance of the contract, executed to LeClaire a deed conveying the Rose Bank farm, and placed it in the hands of the same depositaries. Cook & Sargent were to deliver to each party what the other had deposited *for him as [*229 soon as May should have removed all encumbrances from the farm, which he was bound by the contract to do within a year from its date. When LeClaire made his deposit he took from Cook & Sargent a receipt stating its objects and terms.

The firm of Cook & Sargent consisted of John P. Cook, Ebenezer Cook, his brother, and George B. Sargent. They were bankers. On the 21st of August, 1858, they executed to LeClaire a mortgage upon a large quantity of real estate. The consideration stated is $70,000. The mortgage recites that LeClaire had "accepted various sums for the accommodation of Cook & Sargent, and proposes to indorse and accept other and further sums for them, with the view of enabling them to borrow money on

such acceptances." The condition was that they should pay these liabilities and save LeClaire harmless. Cook & Sargent subsequently failed. On the 22d of December, 1859, they sold and assigned to LeClaire the banking house of Cook, Sargent, Downey & Co., in Iowa City, and all the assets, real, personal, and mixed, of that firm. The consideration stated is that LeClaire "has made and executed certain notes, drafts, and acceptances for the accommodation of Cook & Sargent, and is now liable to pay the same." No condition or trust is expressed. On the 12th of December, 1860, Cook & Sargent assigned to the defendant, George L. Davenport, their interest in the assets of the firm of Cook, Sargent & Parker, of Florence, in the territory of Nebraska, and covenanted that the interest thus transferred was worth the sum of $15,000. On the 2d of July, 1861, by a deed, absolute on its face, LeClaire conveyed to the defendant, Louis C. Dessaint, a large number of tracts of land. On the 15th of the same month an article of agreement was entered into between them, wherein it was recited that the prior conveyance had been made in trust to enable Dessaint to sell and pay a debt of LeClaire to the Merchants' Branch of the State Bank of Iowa, and Dessaint stipulated that, after accomplishing this object and paying the expenses of the trust, he would reconvey the residue of the lands to LeClaire. These trans-[*230] actions show *the relations of the parties at the dates of their occurrence, and in that view are not without importance in this case.

The encumbrances on the Rose Bank farm consisted of a deed of trust, executed by May to Charles Powers, since deceased, to secure a note of May to W. H. & A. T. Strippel, for $6,550, payable, with interest, on the 1st of May, 1858; a mortgage to George F. Kettle to secure a note of May to him of $3,125, with interest after due, payable on the 10th of November, 1857; and the liens of several judgments not necessary to be particularly specified. At the time the contract between May and LeClaire was entered into, LeClaire was well satisfied with the arrangement. Subsequently he became dissatisfied. John P. Cook afterwards denounced it, and declared that, as the friend and attorney of LeClaire, he considered it his duty "to protect LeClaire as far as possible against so gross an imposition." The most obvious and effectual way to accomplish that object was to sell the Rose Bank farm under the deed of trust, and thus put it out of the power of May to fulfil his part of the contract, and this purpose those concerned in the scheme proceeded to carry out.

In this connection we lay out of view the important declaration of Powers, the trustee, as incompetent against the other parties.

On the 12th of April, 1859, Adrian H. Davenport, regarding May as the owner of his notes and mortgage, which LeClaire had assigned and deposited, as before stated, submitted to May a written offer for a settlement and compromise, which May declined.

On the 23th of July, 1859, John P. Cook bought from Powers the note and mortgage of May to Kettle, and gave in payment his note for $3,255.87, indorsed by LeClaire and Ebenezer Cook. Cook, the assignee, sued May on the note in the circuit court of the United States for the northern district of Illinois, and recovered a judgment.

The day after May executed his deed to LeClaire he delivered possession of the Rose Bank farm to LeClaire, and *has not since [*231] had possession or any control over the premises, or any benefit from them.

On the 20th of July, 1859, Powers, the trustee, sold this property under the deed of trust. The evidence leaves no doubt in our minds that his conduct in making the sale was grossly fraudulent. He knew that May had arranged for funds more than sufficient to discharge the debt due to his *cestuis que trust*, which were ready to be paid over as soon as May could deliver to the lender, as security, two of the notes of Davenport. We are satisfied that, with ordinary candor and fair dealing on the part of Powers and the other parties implicated, the debt secured by the deed of trust could have been speedily discharged, and all the other encumbrances removed.

But such was not the object of LeClaire and his associates, of whom Powers was clearly one. In the midst of the negotiation between May and Powers at the banking house of Powers, with funds present, and ready to be paid over by May on the condition stated, Powers, upon the receipt of a note from John P. Cook, left abruptly, under a false pretense, and made a surreptitious sale of the property to Dessaint for $5,000. A deed was ready, with a blank for the name of the purchaser, and the blank was at once filled with the name of Dessaint. The consideration mentioned in the deed is the amount of his bid. The promises of Powers to annul the sale upon the payment of the debt were obviously false, and intended only to deceive and quiet May for the time being. Measures were taken to keep away competing bidders. The amount of the debt was $7,400. Dessaint testifies that he bought under an agreement with Powers that he should pay the full amount of the debt; that Powers should procure to be assigned to him May's liability for the difference between the amount of the debt and the amount at which the property should be struck off to him; and that he paid the full amount of the debt to Powers. This feature of the transaction requires no comment. Whether Dessaint was privy to the other frauds of Powers or not, a subject upon which we can hardly entertain a doubt, * he took the [*232] title in trust for May, and subject to all May's rights, as they were before the sale and conveyance were made by Powers. Jeremy, Eq. 95.

On the 27th of July, 1859, Dessaint conveyed by a deed of quitclaim to Ebenezer Cook. The evidence satisfies us that Cook had full notice of the frauds of Powers and of the infirmities of Dessaint's title. Whether this were so or not, having acquired his title by a quitclaim deed, he cannot be regarded as a bona fide purchaser without notice. In such cases the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey. *Oliver* v. *Piatt, et al.*, 3 How. 363. Cook occupied the same relations to the property as Dessaint, his grantor.

Cook, on the 16th of December, 1860, conveyed to George L. Davenport. At the same time the judgment in favor of John P. Cook against May was assigned to the grantee. The

conveyance and assignment were one transaction. The consideration, according to the testimony of Davenport, was that he agreed to pay a bill and note of Ebenezer Cook, on which he and LeClaire were liable as accommodation parties. The bill and note were dated on the 20th of October, 1859. They matured, respectively, three and four months from date. Both were renewed by Davenport and LeClaire. Davenport admits in his testimony that LeClaire paid at that time $1,000 upon one of them.

On the 21st of November, 1860, Antoine LeClaire bound himself by a written contract to convey the property to his nephew, Joseph LeClaire. In this condition of things Antoine LeClaire died. He left no lineal heirs. By his will he gave the usufruct of his entire estate to his wife, the defendant, Marguerite LeClaire, during her life. The residue he gave, in undivided shares, to a large number of devisees. Only a few of them are parties to this litigation. Davenport testifies that Antoine LeClaire made a parol contract with him for the Rose Bank farm and, as the consideration of the purchase, agreed to pay the liabilities of Eben-
233*] ezer Cook, *which Davenport had assumed, and that his estate has since paid them.

On the 23d of January, 1862, Davenport conveyed the premises to Joseph A. LeClaire, Jr., pursuant to directions from Joseph A. LeClaire, the vendee of Antoine LeClaire. The deed contains a covenant against all persons claiming under the grantor, and none other.

John P. Cook was the counsel of LeClaire in all his transactions touching this property. He knew everything that was done, and his knowledge was notice to his client. *Le Neve* v. *Le Neve*, 2 White, Lead. Cas. in Eq. 375. But we are well satisfied, by the facts and circumstances developed in the evidence, that both he and George L. Davenport had full actual knowledge. After a careful consideration of the subject, we have found ourselves unable to come to any other conclusion. The testimony of Davenport is guarded and peculiar. Twice during his examination he declined to answer a question until time was allowed him to advise with his counsel. The proofs establish the frauds alleged in the bill. *Clark's Ex'rs* v. *Van Reimsdyk*, 9 Cranch, 153, 1 Gall. 630; *Jackson* v. *King*, 4 Cow. 220; *Butler* v. *Haskell*, 4 Desaus. 684.

If LeClaire did not actively participate in the frauds perpetrated upon May, he coolly looked on, and deliberately gathered what others had sown for him. The result was that he acquired the Rose Bank farm unencumbered, and put it out of the power of May to comply with his contract.

The year within which May was to convey the farm to LeClaire, unencumbered, expired on the 8th of March, 1860. On the next day LeClaire gave a formal written notice to May whereby he tendered performance on his part, and demanded performance by May. May was unable to fulfil and LeClaire knew it. The notice was an idle ceremony.

The liabilities of Adrian H. Davenport, which LeClaire had assigned to May and deposited with Cook & Sargent, consisted of five notes of $7,000 each, making an aggregate of $35,000, with interest. LeClaire withdrew them from the depositaries and canceled the assignment. On the 27th *of March he entered into [*234 a new contract with Davenport, whereby it was stipulated as follows: LeClaire was to resume the title and possession of the property for which the notes and the mortgage securing them were given, provided the property could be relieved from the liens upon it, of judgments against Davenport. To this end LeClaire was to foreclose the mortgage, and if at the foreclosure sale the property should sell for more than the amount of the notes and interest, Davenport was to have the overplus. If it should bring less the notes were to be released. If LeClaire should acquire the title as proposed, he agreed to confirm the sales, which Davenport represented he had made, of certain portions of the property. A map was referred to as showing the premises so sold. Davenport assigned to LeClaire, and placed in his hands notes of the vendees for part of the purchase money, amounting, with interest, to about $16,000. Davenport stipulated that there were no offsets against any of the notes, except two of trifling amount, which were mentioned, and that if it should prove there were any valid offsets, he would pay the amount to LeClaire. LeClaire agreed that, upon the payment to him of the balance of the purchase money by Davenport's vendees, he would convey to those holding title bonds from Davenport.

This agreement was carried out. A suit of foreclosure was instituted by LeClaire, and the property was sold to him for less than the amount due on the notes of Davenport. The property was thus devested of all encumbrances, and his original title was restored to him. John P. Cook, as the counsel of LeClaire, conducted the legal proceedings. May was not consulted about the agreement between LeClaire and Davenport, and was not a party to the foreclosure suit.

It has been suggested by the counsel for the appellees that if May still has the rights which he claims in respect to the Rose Bank farm, he should file a bill to redeem, and having succeeded, should tender a conveyance of the property in performance of his contract with LeClaire instead *of prosecuting this suit. [*235 That course is unnecessary. LeClaire has already had the ownership, control, and full benefit of the property, and disposed of it as he thought proper. A court of equity can do no more than he did for himself. It is not pretended that there was an encumbrance upon the property when it was conveyed by George L. Davenport to Joseph A. LeClaire, Jr.

Upon the execution of the contract between May and LeClaire, LeClaire became in equity the owner of the farm. The effect of the element of fraud in his subsequent conduct is that he must be regarded as constructively the trustee and agent of May in removing the encumbrances and acquiring the ownership and beneficial control of the property. Hence his estate is entitled to be credited with his advances and interest, instead of the aggregate of the debts extinguished, and interest on that amount. Under the circumstances, time was not of the essence of the contract on the part of May, and when this liability had been accounted for to LeClaire's estate, the contract on May's

part must be held to have been fully performed. May has had no benefit from this property since the date of his contract, and none from what he was to receive from LeClaire. . On the contrary, he has been engaged in a long and expensive conflict for the assertion of his rights, and that contest is not yet terminated. Viewing the subject in the light of these facts, we think he is entitled to be credited with annual rent and interest from the time he parted with the possession of the farm to LeClaire.

At law, in many cases, if property be tortiously taken or converted, the tort feasor may be sued in trespass or trover, or the injured party may waive the tort and sue in assumpsit. In the latter case the same results follow as if there had been an implied contract. The defendant is not permitted to set up his tort to defeat the action, and the recovery of a judgment will bar a further action *ex delicto* by the plaintiff. *Putnam* v. *Wise*, 1 Hill, 240, note; *Hill* v. *Davis*, 3 N. H. 384; *Stockett* v. *Watkins' Adm.* 2 Gill. & J. 326, 342. In the same class of cases where the converted property 236*] *has assumed altered forms by successive investments, the owner may follow it as far as he can trace it and sue at law for the substituted property, or he may hold the wrongdoer liable for appropriate damages. *Taylor* v. *Plumer*, 3 Maule & S. 562.

There are kindred principles in equity jurisprudence, whence, indeed, these rules of the common law seem to have been derived. Where a trustee has abused his trust in the same manner, the *cestui que trust* has the option to take the original or the substituted property; and if either has passed into the hands of a bona fide purchaser without notice, then its value in money. If the trust property comes back into the hands of the trustee, that fact does not affect the rights of the *cestui que trust*. The cardinal principle is that the wrong-doer shall derive no benefit from his wrong. The entire profits belong to the *cestui que trust*, and equity will so mold and apply the remedy as to give them to him.

In cases of specific performance, to which category the one before us belongs, parties are sometimes remitted to a court of law. But this is never done where the remedy is not as effectual and complete there as the chancellor can make it. Equity sometimes takes jurisdiction on account of the parties, and sometimes on account of the relief proper to be administered.

The same considerations which invoke the jurisdiction may control the remedy.

In this case more than half the residuary devisees of Antoine Le Clare are not before us. We cannot, therefore, decree the conveyance of real estate, but his legal representatives are before us, and we can give a money decree against them, embracing the value of the land, which we might otherwise adjudge to be conveyed. *Peabody* v. *Tarbell*, 2 Cush. 233; *Andrews* v. *Brown*, 3 Cush. 131; Fry on Specific Perf. 447, 457; 1 Story, Eq. §§ 788, 789. It is not necessary that the devisees should be parties to warrant such judgment. The presence of the executors is sufficient for that purpose.

Adrian H. Davenport, as well as Le Claire, had full notice *of the rights of May in [*237 respect to the securities embraced in their compromise. All those securities, including the collaterals, belonged in equity to May from the time they were deposited with Cook & Sargent. Le Claire had no right to change their form or to dispose of them, as was done in carrying out the compromise agreement. It is within the power of this court, in the exercise of its equitable jurisdiction, to annul that arrangement, and hold Davenport and Le Claire's estate liable in all respects as if the compromise had not been made. But it is also in our power to confirm the transaction, and upon the principles of constructive trusts to give May its fruits, instead of pursuing the effects themselves. This, as the case is presented in the record, we deem the proper course. Le Claire's estate must account for the proceeds of the $16,000 of notes, with interest from the time he received them. As we cannot require the land which he bought at the foreclosure sale to be conveyed, his estate must account for its present value. As he violated his agreement with May, and put it out of his power to give May in specie so large a portion of the consideration May was entitled to receive, May is not bound to take the other parcels of real estate mentioned in the contract and which Le Claire bound himself to convey, and it is within the scope of our jurisdiction to give May, in money, the present value of that property also instead of the property itself. We deem it proper, under the circumstances, to do so, and Le Claire's estate must account accordingly. The collection of the judgment against May upon his note to Kettle, recovered by Cook, must be perpetually enjoined.

An account must be taken by a master, wherein Le Claire's estate must be debited with the rent of the Rose Bank farm annually, and interest down to the time when the account is taken.

With the amount realized from the $16,000 of notes and interest to the same period.

With the value, at the same time, of the land bought in at the foreclosure sale by Le Claire, other than that previously *sold by Da- [*238 venport, the title to which Le Claire took in trust for Davenport's vendees.

With the value, at the same time, of the other parcels of land mentioned in the agreement between Cook and Le Claire and which Le Claire bound himself to convey to May.

Le Claire's estate must be credited with the amount paid on account of the bill and note of Ebenezer Cook, with interest to the same time.

The balance in favor of May, with interest from that time, Le Claire's executors must be required to pay to May.

These conclusions will do justice to May without disturbing the interests of any third person outside of the sphere of Le Claire's estate.

The decree of the court below is reversed, and the cause will be remanded, with directions to enter a decree and proceed in conformity to this opinion.

EMIL STEINBACH, *Plff. in Err.*,
v.
CHARLES V. STEWART *et al.*

(See S. C. 11 Wall. 566-581.)

Confirmation of Mexican title enures to benefit of grantee—both parties claiming under same grantor—proviso in decree—Mexican grant governed by Mexican law—construction of—possession under.

The confirmation of a Mexican title to one, enures to the benefit of his grantee.

Where both parties claim under the same grantor, a conveyance by him, to one of them, is good evidence against the other.

Where a decree of confirmation of title by the district court was made, with the proviso that the confirmation shall enure to the benefit of anyone entitled to the land under the original grantee, an affirmation by this court of such decree, in so far as it confirmed the original grant, left the proviso in the decree in full force.

The effect of an instrument as a grant of land which was made in California before it was ceded to the United States, must be determined by Mexican law.

The construction given to a contract by the parties is an aid that may always be called in when the meaning of the contract is ambiguous.

A Mexican grant of all the grantor's right in land to the grantee, "to make such use thereof as may be most convenient to him," followed by the possession of the grantee, held to be an operative grant.

A Mexican deed, indefinite in its description of the land intended to be granted, attended by proof of an actual putting of the grantee into possession under it, and a maintenance of that possession from 1846 until 1864, is competent evidence to sustain a title.

[No. 210.]

Submitted Feb. 10, 1871. Decided Feb. 20, 1871.

IN ERROR to the Circuit Court of the United States for the District of California.

The bill in this case was filed in the court below, by the plaintiff in error, for the recovery of certain real estate. Judgment having been given for the defendants, the plaintiff sued out this writ of error.

The case is stated by the court.

Mr. **John Wilson,** for plaintiff in error:

The plaintiff, to support his claim, had put in evidence the espediente of the original concession to Lazaro Peña by which it appeared that Peña presented his petition to the commandant general for a concession of this land, Oct. 14, 1839, and that the commandant general granted the land to him upon condition that he would apply to the governor for a regular title. This act of the commandant, did not, could not, pass any title; at best it only passed leave to possess for the present.

In December, 1839, while the grant was in this condition, Peña sold and conveyed all his right in the land to M. G. Vallejo.

All that Peña had then, and all that he could pass to Vallejo, was the slightest equity.

In June, 1840, Peña petitioned the governor in due form for a grant of the land.

July 13, 1840, the governor granted the land in full property to Lazaro Peña. Peña did not present any claim to the board, nor did his heirs.

M. G. Vallejo in March, 1853, presented his claim to the board of land commissioners for confirmation to him of his title to the whole of said rancho, under the said grant to Peña.

with a proviso; States Supreme in these words: original grant, b firmed." This af proviso attached court, and confirm out any limitation

By the terms o confirmed to Vallej be confirmed to a s it must be confirm jected; and this is tention of the law c ing these confirmatic cree operates as a r United States to M. title vested in the U of Guadalupe Hidalgc

Thus the plaintiff s under them, a clear cl the confirmee, and an by the defendants, anc

This confirmation v the land in Vallejo, t him passed to the plair

That it did so, see cided by the supreme which this principle has of the state:

Estrada v. *Murphy*, 1 *Clark*, 18 Cal. 533; *Clark* 220. The opinion of the was given by Ch. J. Fie

Emeric v. *Penniman*, 26 v. *Dougherty*, 32 Cal. 45

The defendants had set themselves, to those parts they occupied, and began title in themselves, by a c from Peña, the grantee of

The plaintiff objected, could only be an equity; th was set up in their answers; such a defense could not be court of the United States. sition of the plaintiff in this refer to the following decisi court:

Bennett v. *Butterworth*, 11 v. *Holme*, 21 How. 481, 16 L. v. *Young*, 3 Pet. 320; *Lessi* How. 72; *Greer* v. *Mezes*, 24 ed. 663; *Shcirburn* v. *Cordova* 16 L. ed. 741; *Hooper* v. *Sche* 235, 16 L. ed. 452; *Bagnell* v Pet. 446.

These authorities, we doubt no show both our propositions: F ing pleaded a legal title in th could not set up an equity. Se they had set up an equity, it c been sustained as a defense to ejectment, where the legal title used by plaintiff or defendants.

Second exception. To the ruling by which the defendants were perm in evidence a paper signed by Vall firmee, dated August 12, 1846.

The counsel for plaintiff objected ception of this paper as evidence

was a mere license to occupy which was terminated when Hoeppener asserted title to or attempted to convey the lands; which was overruled by the court, and excepted to by plaintiff.

This is no deed at common law, because it wants a seal and, therefore, by the law now in force in California, it would be void as a conveyance of real estate. It was, however, executed under the Mexican system. There, it is admitted, no seal was required. But there are many things lacking in this instrument that were required under that system. The parties are not mentioned, and the land intended to be affected is not described; nor is there any consideration whatever expressed; and there is nothing in it which indicates an intention to create any estate in the land. It does not declare that Vallejo intends to alienate the property or ownership of the land, nor to vest the property or dominion in Hoeppener. He does not grant it to him, his heirs, nor assigns; nor does it confer upon him any right to alienate or sell it; but simply transfers this incipient right to him for a temporary purpose, that he may use it. It is simply a permission to use the land. Under the decision of *Schott* v. *Burton*, 13 Barb. 173, it could not take effect as a feoffment, because Vallejo himself had no legal estate in the land (he having bought from Peña seven months before the grant was made) nor was there any livery of seisin. It could not stand as a bargain and sale, because it does not express any valuable consideration, and it could not operate as a covenant to stand seised to uses, because Hoeppener was a stranger and there was no consideration of blood or marriage between him and the grantor, and even if these objections could be overcome, it could not operate to convey anything more than a life estate, because there are no words of inheritance, and when we look for the habendum, which in a deed of the fee is "to hold to him and his heirs," it simply declares that the object of the instrument is that the grantee may use the land.

But when we look at it as an instrument under the Spanish system, it is still less entitled to be considered a conveyance. Anyone who has seen a conveyance under the Spanish law, will say at once that this bears no resemblance to such an instrument; nor does this instrument bear the signatures of both parties, which are absolutely required by the Spanish law to all legal and formal documents, to make a valid conveyance, the one to grant and the other to receive; and it will be noticed that while Vallejo says he has legally and formally bought, he does not say he sells it, nor are there any words used in this document to imply he has received any consideration whatever.

Messrs. **E. D. Wheeler** and **C. T. Botts**, for defendants in error:

When we come to the case of *U. S.* v. *Vallejo*, 1 Black, 283, 17 L. ed. 143, the very confirmation upon which the plaintiff relies, this court, declining to pass upon the operation or validity of the alleged mesne conveyance, simply declares, reports, or decrees, that the title to this land vested in Peña, by grant from the government of Mexico. This is the language of the court:

"It is the opinion of this court, that the original claim is a good and valid claim, and that the same should be, and is, hereby confirmed."

No reference whatever is made to the derivative claimant. It is the validity of the originat grant to Peña that is discussed; and the court concludes by declaring as above.

Surely, if confirmation has the effect to vest title at all, this confirmation vested the legal title in Peña.

The plaintiff's counsel argues with great earnestness and the citation of many authorities, that Vallejo only acquired title by virtue of the confirmation of 1861; that he had nothing to dispose of when he conveyed to Hoeppener, and that a conveyance under such circumstances, would at most only carry an equitable right to the after acquired title. Let us apply this doctrine to the conveyance from Peña to Vallejo. Peña, at the date of that conveyance, had acquired no title to the lands in controversy, and if the conveyance operated at all upon the after acquired title, it only served to vest him with an equity which Vallejo transmitted to the plaintiff, and which is not sufficient to maintain this action of ejectment.

If Vallejo did not acquire the title to these premises by virtue of the conveyance to him from Peña, he has never acquired it. If he did, Aug. 6, 1846, he conveyed it to Andres Hoeppener, the defendants' grantor.

The words *quien hara del el uso que mas le convenga*, which the plaintiff construes into a license to occupy, are, in fact, the largest words of grant that the grantor could use, and are precisely equivalent to our "to him and his heirs forever."

The supreme court of California held, in *Tohler* v. *Folsom*, 1 Cal. 207, that under the civil law, the delivery of the possession, without any written contract, would transfer the property.

Mr. Justice **Strong** delivered the opinion of the court:

The record exhibits five assignments of error, all founded upon exceptions taken in the court below to the admission *or rejection of [*573 evidence. Of these the first is, in substance, that the court permitted the defendants to give in evidence what it is contended constituted at most only an equitable right, and what was, therefore, no defense against the legal title asserted by the plaintiff. The exception cannot be understood without a brief examination of the titles under which each of the parties claimed the lands in controversy.

The title of the plaintiff had its origin in a provisional concession made by the Mexican government to Lazaro Peña on the 14th day of October, 1839. Peña was then in possession of the land, and the concession was made to him with the reservation that he should petition for the usual title from the political government. On the 13th day of October, 1840, he obtained a grant in the usual form from Don Juan B. Alvarado, then governor of the Department of California, for the land then known by the name of "Agua Caliente," embracing the land now in dispute, and on the 8th of October, 1845, the grant was approved by the departmental assembly. Before it was made, however, though after the provisional concession, Peña conveyed all his interest in the land

to Mariano G. Vallejo. In 1853 Vallejo instituted proceedings, under the act of Congress of March 3, 1851, for a confirmation of the land to him, and it was confirmed by the district court in 1859. The decree of confirmation contained the following proviso: "Provided that this confirmation of the above land to the said M. G. Vallejo shall be without prejudice to the rights of the legal representatives of Lazaro Peña, the original grantee, or whoever may be entitled to said lands under him; and said confirmation to said Vallejo shall enure to the benefit of any person, or persons, who may own or be entitled to the said land by any title, either at law or in equity, derived from the original grantee by deed, devise, descent, or otherwise." The record of the confirmation was subsequently brought into this court by appeal, and here it was adjudged that the decree of the district court, in so far as it confirmed the original grant, be affirmed. It was under this decree of confirmation that the plaintiff claimed, 574*] both through *a deed of Anna Hoeppener, sole heir of Andres Hoeppener, an alleged grantee of Vallejo, dated December 21, 1858, and secondly, by a deed dated January 17, 1863, from Vallejo himself.

The defendants asserted ownership of the parcels of the rancho "Agua Caliente," now in controversy, under an alleged grant made by Vallejo to Andres Hoeppener, dated August 12, 1846, about ten months after the grant to Peña had been approved by the departmental assembly.

It thus appears that both parties claimed under Peña and Vallejo, and a brief examination will show that the nature of their titles was the same. If that of the plaintiff was a legal estate (which it is not necessary to this case to decide), that of the defendants was equally so. That the right of Vallejo on the 12th of August, 1846, when he conveyed the property to Hoeppener, was not perfect, must be conceded. His claim had not been confirmed, and he had no patent. He had nothing but the Mexican espediente. Of course the right which he conveyed was also imperfect. But when afterwards the district court confirmed the land to him, the confirmation enured to the benefit of his prior grantee. It was not the acquisition of a new title, but the establishment of his original right. And this was expressly decreed by the proviso already quoted. By that it was adjudged that the confirmation should enure to the benefit of any person or persons who owned or were entitled to the land by any title in law or in equity, derived from the original grantee by deed, devise, descent, or otherwise. If, therefore, Hoeppener or his grantees held any such title, it was confirmed to them as truly as if he or they had been petitioners for such confirmation. Now, it is in virtue of this decree of the district court that the plaintiff claims. He has no standing without it. Asserting his rights through it, the law will not permit him to repudiate any part of its provisions.

It is argued, however, that the proviso to the decree of confirmation was annulled by the action of this court. To this we do not assent.

The judgment upon the appeal was that the original grant to Lazaro Peña was a good and 575*] valid *grant, and that the decree of the district court, in so far as it confirmed the orig-

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have been held to be conveyances of the entire estate of the grantors. *Vide, Hays* v. *Bona*, 7 Cal. 154; *Havens* v. *Dale*, 18 Cal. 362; and *Mulford* v. *Le Franc*, 26 Cal. 88. In the latter case the effect of such clauses is considerably discussed. Instead of being words of limitation or restriction, they seem rather intended to confer the largest dominion. And in our law they have been held to enlarge into a fee, a devise which, without them, would have been only a life estate.

If there were any doubts respecting the deed, whether it was intended as a grant or a license, they would be dispelled by noticing the construction manifestly given to it by the parties. This is an aid that may always be called in when the meaning of a contract is ambiguous. *French* v. *Carhart*, 1 N. Y. 102, and cases therein cited; *U. S.* v. *Appleton*, 1 Sumn. 502, 503. **577***] There was no *necessity for reducing to writing a mere license. Yet this contract was in the form of a conveyance, reduced to writing, and indorsed upon the espediente. There was no necessity of livery of seisin if the deed was a mere license, yet Hoeppener was actually put into possession of the land by the grantor, and he or his grantees retained the possession unchallenged, so far as it appears, from August 12, 1846, until this suit was brought. Vallejo never claimed any right until 1863, when he made a grant to the plaintiff, not of the land, but of "all his right, title and interest" in it. In addition to all this the plaintiff recognized a possible right in Anna Hoeppener, the heir of Andres Hoeppener, by taking a deed from her grantee, to whom she had conveyed her "right, title, and estate" in the tract of land, in the year 1858. These facts tend strongly to show that the parties understood Vallejo's deed as conveying to Hoeppener absolute ownership of the land described in it.

It is insisted, however, that even if the intent was to convey the land, instead of mere license to occupy it, the instrument was ineffectual, because informal. It is said that it did not contain all the requisites of a valid Mexican grant. It is doubtful whether this point was made in the court below. It does not distinctly appear in the bill of exceptions that it was urged as an objection to the admission of the deed. The objection appears rather to have been that Hoeppener obtained by the deed a mere license, which terminated when he asserted title to the land, or attempted to convey it. Such was the reason stated for the objection in the bill tendered by the plaintiff. But assuming that it is presented for our consideration, we are of opinion the deed contains all that was necessary to constitute an operative grant. That it was executed and delivered, and that, in pursuance of it, Hoeppener was put into possession by the grantor, are facts that are not controverted. This is all that, under the civil law, is necessary to transfer titles. Livery of seisin is the controlling fact. Admitting that, under the Mexican law, a contract in writing was necessary to a private conveyance, it is nevertheless true that the form of the instrument **578***] was not *material. Any form would answer that manifested an intent to convey. Here were words of grant (*cedo y transparo*). The word *cedo* (I grant) is the ordinary word used in Mexican conveyance to pass title to lands. *Mulford* v. *Le Franc*, 26 Cal. 108. Though the earlier cases in California asserted that the consideration or price of the grant must be mentioned in the written contract, or at least, that it must be mentioned a price was paid, the later cases have asserted a different doctrine. *Havens* v. *Dale*, 18 Cal. 366; *Merle* v. *Mathews*, 26 Cal. 455. It is quite clear that in no case could mention of a price ever have been deemed necessary when there was no price,—when the transaction was a gift. In such a case a writing without mention of any consideration, coupled with livery of seisin, or delivery of possession, would consummate the transfer. It would answer no good purpose to review the authorities upon this subject. Suffice it to say, that in view of the language of the instrument, of the facts that Vallejo put Hoeppener into possession under it, and that the grantee and his successors in the title remained in unchallenged possession for more than seventeen years before this suit was brought, we are constrained to hold that it amounted to a conveyance of all right to the lands which Vallejo had.

The third assignment of error is founded upon the third exception taken in the court below. It is, in substance, that the court received in evidence a deed from Hoeppener to Carlos Glein, dated December 1, 1847. It was offered with sundry other conveyances, by which the title conveyed to Glein became vested in Whitman, one of the defendants in error. In the deed from Hoeppener, thus received, the subject of the grant was described as follows: "All that certain tract and parcel of land, containing 300 acres, more or less, being a portion of the rancho named 'Agua Caliente,' as transferred to the said Andres Hoeppener by M. G. Vallejo, the said 300 acres being more particularly bounded and described as follows, to wit: On the west side by Sonoma Creek, on the east side by the Napa hills, on the north by *Yeltan's farm, and on the [**579** south by land of Ernest Rufus." In connection with the offer of this deed it was proved that Glein, the grantee, at the time of his purchase, took possession of the tract thus conveyed (the same now held by Whitman) and paid a valuable consideration for it; and that all the succeeding grantees, including Whitman, paid valuable considerations for their grants at the times of their several purchases, and took possession of the land, remaining in open and notorious possession while their interests continued, Whitman still retaining his. It was also proved that when Steinbach, the plaintiff, acquired his title to the Agua Caliente rancho, Whitman was in the open and notorious possession of the tract, claiming to own the same.

To the admission of this deed from Hoeppener to Glein the plaintiff objected, for two reasons assigned at the time. The first of these was that the deed did not import to convey the title to any particular tract of land; and the second was, that it created no legal estate, and that it was, therefore, incompetent evidence for any issue made in the action. Neither of these reasons is, in our opinion, well founded. The first rests upon a mistake of fact. We are unable to perceive that there was insufficient certainty in the description of the land granted. It was identified by giving natural boundaries

for both its east and west sides, and by calls for adjoining proprietors upon the north and the south. This was enough. In regard to the second reason, we remark that the entire deed is not before us. It is not found in the record, and there is nothing, therefore to show that it did not convey all the estate which Hoeppener had acquired by the deed to him from Vallejo. If it did not, it was incumbent upon the plaintiff in error to show the fact by exhibiting to us the deed itself. We infer, from the course of the argument, that the objection was intended only to reassert that Hoeppener's title was a mere equity. The worthlessness of that assertion has already been sufficiently considered.

The fourth exception is quite similar to the third. It is that the court received in evidence, against the objection of the plaintiff, a deed, dated November 14, 1846, from Andres 580*] *Hoeppener to J. Jacob Dopken, whose title subsequently passed to Martha C. Watriss, another of the defendants. The deed was for six hundred and forty acres, part of the rancho "Agua Caliente" granted to Peña, confirmed to Vallejo and conveyed by him, as above mentioned, to Hoeppener. Standing by itself, the deed is indefinite in its description of the land intended to be granted, and an insufficient designation of the subject of the grant. But it was not offered or received alone. It was made, as will be perceived, while the country was under Mexican rule, and its offer was attended by proof of what amounted to livery of seisin,—an actual putting of the grantee into possession under it, and a maintenance of that possession from 1846 until 1864, when this suit was brought. It had been admitted, when the deed was received in evidence, that Vallejo had put Hoeppener into possession of the entire rancho, and that Hoeppener continued in possession until he sold to Dopken, when he retired, and allowed his grantee to take possession of the tract sold. This was a parol identification followed by long possession unchallenged. Considering the looseness of Mexican grants at that time and the acquiescence, for so many years, of the grantor and all claiming under him, we cannot say that the deed, in connection with this other evidence, was erroneously admitted.

The only remaining assignment of error is that the court refused to allow the plaintiff to give evidence in rebuttal to prove that, even if the deed shown by the defendants from Hoeppener did make out an equity in his grantees, Hoeppener failed to perform the conditions upon which Vallejo's grant was made to him, upon which the equity rested and, therefore, that the equity expired.

A few words will dispose of this. If the assignment correctly represented what was the ruling of the court, it would be a sufficient answer to it, that the deed from Vallejo to Hoeppener was unconditional and, therefore, that his title, and that of his grantees, was not dependent upon the performance or nonperformance of conditions. But the court made no such refusal as that of which the plaintiff com- 581*] plains. *What the court did rule was that Hoeppener's statements, made after he had conveyed the land to others, could not be admitted to invalidate his deeds. Surely such a ruling requires no vindication.

Finding no error in the record is affirmed.

P. H. MORGAN *et al.*, Comm
Bank of Louisiana,
v.
JOHN THORNHILI

(See S. C. 11 Wall.

Jurisdiction over decrees in i this court has not—fi

This court has no jurisdicti of the circuit judge, rendered cial power conferred to exerci tendence and jurisdiction in a arising under the bankrupt ac section of said act, to be exer tion.

Decrees in equity, in orde examined in this court, mus dered in term time, as co mere interlocutory decrees, entered at chambers.

[No. 2

Argued Jan. 6, 1871. 1

APPEAL from the Cir ed States for the D

On motion to dismiss

The history and fact pear in the opinion c

Messrs. **C. Cushi** *Clarke,* for appellees:

The appeal in this on the following gro

1. Because the decr dered by the circuit special power confer the judge thereof, to tendence and jurisdi tions arising under by the 1st section by the said circuit in term time or va decree no appeal l

By reference to L. 518, it will be s said act, the circ general superinte cases and quest and except when made, may, upor of any party ag case in a cour duties hereby g by said court term time or

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In all other cases, where the circuit court acts in matters of bankruptcy, it is by virtue of the special, comprehensive, and almost universal power of superintendence conferred by the 2d section of the act.

By the 2d section of the act, the circuit court has a general "superintendence of all cases and questions arising under" the bankrupt act. The only exception to this general jurisdiction of superintendence, is in the case of appeals and writs of error.

The cases in which an appeal lies to the Supreme Court of the United States under the bankrupt act are necessarily limited to such final decrees made in the circuit court as have been made in cases brought there by appeal, or originating there.

The act provides:

"In cases arising under this act, no appeal or writ of error shall be allowed in any case from the circuit courts to the Supreme Court of the United States, unless the matter in dispute exceeds $2,000."

The case did not come into the circuit court by appeal from the district court, nor did it originate in the circuit court. It was the result of an application to the circuit judge, under the special powers of superintendence given him by the 2d section of the bankrupt act. The matter was brought before the circuit judge by petition, invoking the special revisory jurisdiction of the circuit judge.

It is a familiar principle of law, that the appellate jurisdiction of this court does not include a decree under a law conferring a new and special jurisdiction, in which no remedy by appeal is granted.

U. S. v. *Nourse*, 6 Pet. 470.

The decree or order appealed from in this case, was made under a law conferring a new and special jurisdiction on the circuit judge.

From the exercise of this special jurisdiction, no appeal is given.

The general superintendence granted to the circuit judge by the 2d section of the bankrupt act, is to be exercised by him in court or at chambers.

This is a controlling fact, to show that no right of appeal was intended to be given from the decisions of the circuit judge, in the exercise of this power of superintendence.

The exercise of the appellate power of this court is confined almost exclusively to the final judgments or decrees of the circuit court, rendered in term time.

The Supreme Court in the case of *U. S.* v. *Nourse*, *supra*, commenting on the fact that, in the case then before the court, the judge of the court below was authorized to act at chambers, say: "From a decision of the district judge out of court, how could the government appeal to the circuit court?"

The order or decree appealed from in this case was made by the judge out of court.

Final decrees are, according to our practice, rendered in court. The decree in this case was rendered out of court. Only interlocutory decrees are rendered out of court.

Messrs. **W. M. Evarts, P. Phillips** and *Edward Phillips & Cooley*, for appellants:

It was decided that under the bankrupt act of Aug. 19, 1841, there was no appeal to this court. But this decision rested entirely upon the construction of its various provisions, showing that its proceedings were to be conducted in a summary manner. The jurisdictional clause declared that they were to "be exercised summarily, in the nature of summary proceedings in equity."

Nelson v. *Carland*, 1 How. 265; *Ex parte Bk. of N. O.* 3 How. 317.

There are no such provisions in the present bankrupt act. On the contrary, the most ample provisions are made for appeals and writs of error from the district to the circuit courts (8th sec.), while by another section the circuit court is vested with a general superintendence and jurisdiction of all questions and cases arising under this act; and except when provision is otherwise made, may, upon bill, petition or other process of any party aggrieved, hear and determine the case in a court of equity, and these powers and duties may be exercised, either by the said court or any justice thereof, in term time or vacation. 14 Stat. at L. 518.

The revisory power of the circuit court was thus, in one form or another, extended over the whole matter confided to the jurisdiction of the district court, and if the act had been silent as to an appeal to this court from the circuit court, it would have been maintainable under the acts of 1789 and 1803. *Ex parte Zellner*, 9 Wall. 246, 19 L. ed. 666.

But the act is not silent. The 9th section declares that no appeal or writ of error shall be allowed in any case from the circuit to the Supreme Court, unless the matter in dispute shall exceed $2,000.

The 10th section authorizes this court to make rules to regulate the practice and procedure upon appeals.

It is, therefore, evident that Congress assumed that appeals would be taken from the circuit court and contented itself with alone regulating the amount which gave the jurisdiction.

If, therefore, the decree is final and the amount in controversy exceeds $2,000, the appeal is well taken.

The district court, by its judgment, had taken from the administrators appointed by the laws of the state, an estate worth many hundred thousand dollars. The administrators had a personal interest in their salaries of $3,000 per annum of which they were deprived. This judgment was affirmed by the decree of the circuit court, and the rights set up in the petition of review were denied.

A decree which changes and transfers the right of property in litigation is a final decree; for if otherwise, irreparable injury would be incurred before redress could be had.

Dean v. *Nelson*, improperly reported as *Thompson* v. *Dean*, 7 Wall. 345, 19 L. ed. 95.

It is urged by Mr. Cushing that no appeal lies in this case, because the matter was before the circuit judge by petition invoking the special revisory jurisdiction.

That is, no appeal lies, though it be admitted that the decree is final and that the amount in controversy exceeds $2,000, because the case was not carried from the district court in the form of an appeal or writ of error, under the 8th section.

But it is a mistake to suppose that the appellate power is confined to any particular

form. It is ordinarily exercised by appeal or writ of error. In many cases under statute, it is done by a certificate of division or the legislature may provide that it should be exercised by certiorari, petition for review, or by any other process deemed convenient.

It is further objected that no appeal lies when the special jurisdiction is exercised, because it is provided that the decree may be rendered by the court or by any justice thereof, in term time or vacation.

Terms of court are the arbitrary creations of statute, which may be modified or abolished by statute.

Is it any less the exercise of judicial power to decide a case in vacation? If this judicial power be exercised by a subordinate tribunal, what is there in the nature of things, which should free it from the supervision of the superior court? If there be a lack of formality in the discharge of judicial functions in vacation, it would seem to be more, not less, important that such proceeding should be reviewed by the superior court.

Much reliance is placed upon an expression wrenched from the opinion in *U. S.* v. *Nourse*, 6 Pet. 470. "From a decision of the district judge, out of court, how could the government appeal to the circuit court?"

This is said by way of illustration or argument. The court had already decided the point in issue, to wit: that, by the true construction of the act of 1820, the government was excluded from the right of appeal.

Whether the right of appeal exists in a given case, is one purely of statutory construction: and the question now before the court is whether the powers conferred by the 2d section of the bankrupt act in the circuit court, are withdrawn from the supervisory jurisdiction of this court because of the provision that "the powers and duties hereby granted may be exercised either by said court, or by any justice thereof, in term time or vacation."

Mr. Justice **Clifford** delivered the opinion of the court:

Exclusive original jurisdiction, in all matters and proceedings in bankruptcy, is conferred by the acts of Congress upon the district courts, but in case of a vacancy in the office of a district judge, or in case the district judge shall, from sickness, absence, or other disability be unable to act, the circuit judge may make all necessary rules and orders preparatory to the final hearing, and cause the same to be entered or issued, as the case may require, by the clerk of the district court. 14 Stat. at L. 517; 16 Stat. at L. 174.

Certain occurrences, during the late civil war, so crippled the resources of the Bank of Louisiana that the directors became unable to comply with the requisitions of their charter. Proceedings were accordingly instituted by the attorney general of the state, under the act "To Provide for the Liquidation of Banks," in the proper court of the state, to forfeit the charter of the bank, and on the 20th day of May, 1868, a decree was entered in the case that the charter of the bank be declared forfeited, and that its affairs be liquidated according to law.

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first heard the parties, on the 2d
0, entered a decree affirming the
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appeal to this court, which was
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petition for a review and affirming the decree adjudging the corporation a bankrupt.

Influenced by those views he made a decree that all the orders in the cause subsequent to the 21st of January, 1870, should be vacated and annulled, leaving the injunction of that date granted by the circuit judge in full force. Certain other orders, nevertheless, were subsequently made by the district judge; as, for example, he passed an order for the appointment of receivers, and another giving the appointees authority to pay rents, expenses, and charges incurred by them out of the funds of the bank. Special objection is made by the appellants to those orders as forbidden by the supersedeas, but the main purpose of the appeal when taken was to reverse the decree of the circuit court affirming the decree of the district court, and dismissing their petition praying for a reversal of that decree.

Since the appeal was entered the appellees have filed a motion to dismiss the same, upon the ground that no appeal lies to this court from a decree of the circuit court rendered in the exercise of the special jurisdiction conferred upon that court by the first clause of the 2d section of the bankrupt act. 14 Stat. at L. 518.

Circuit courts have a general superintendence and jurisdiction, by virtue of that clause, of all cases and questions arising under that act, with-
75*] in and for the districts where the *proceedings in bankruptcy are pending, and the provision is, that those courts may, upon bill, petition or other proper process, of any party aggrieved, except when special provision is otherwise made, hear and determine the case (as) in a court of equity, but the next clause of the same section provides that the powers and jurisdiction thereby granted may be exercised either by said court or by any justice thereof, in term time or vacation, and neither of the two clauses makes any provision for an appeal in any such case to this court, whether the case or question presented or involved in the bill, petition or other proper process is submitted to the court or to a justice thereof, or whether the case or question is heard or determined in vacation or in term time.

Apart from these two provisions, the third clause of the section provides that circuit courts shall also have concurrent jurisdiction with the district courts of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee touching any property or rights of property of such bankrupt transferable to or vested in such assignee.

Controversies, in order that they may be cognizable under that clause of the section, either in the circuit or district court, must have respect to some property or rights of property of the bankrupt transferable to or vested in such assignee, and the suit, whether it be a suit at law or in equity, must be in the name of one of the two parties described in that clause and against the other. All three of those conditions must concur to give the jurisdiction, but where they all concur, the party suing may, at his election, commence his suit either in the circuit or district court, and if in the latter, it is clear that the case, when it has proceeded to final judgment or decree, may be removed into

the circuit court for re-examination by
error, if it was an action at law, or b
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the judgment or decree. 14 Stat. at L

Such a suit, however, by or against
signee, or by or against any person cla
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of property, cannot be maintained in a
whatsoever unless the same shall be
within two years from the time the
action for or against such assignee
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Stat. at L. 521; 1 Stat. at L. 84.

Creditors whose claims are wholly or
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*Assignees, also, who are dissatisfi
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of the circuit court in such a case, a
press enactment is that the final jud
the court shall be conclusive, and that
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Confirmation of that view is also deri
the succeeding clause in the 24th secti
act, which provides that the prevaili
shall be entitled to costs, and that the
they are recovered against the assign
be allowed out of the estate of the
14 Stat. at L. 528.

Authority is also given to any credit
ing the discharge of a bankrupt to file

EMIL STEINBACH, *Plff. in Err.*,
v.
CHARLES V. STEWART *et al.*

(See S. C. 11 Wall. 566-581.)

Confirmation of Mexican title enures to benefit of grantee—both parties claiming under same grantor—proviso in decree—Mexican grant governed by Mexican law—construction of—possession under.

The confirmation of a Mexican title to one, enures to the benefit of his grantee.

Where both parties claim under the same grantor, a conveyance by him, to one of them, is good evidence against the other.

Where a decree of confirmation of title by the district court was made, with the proviso that the confirmation shall enure to the benefit of anyone entitled to the land under the original grantee, an affirmation by this court of such decree, in so far as it confirmed the original grant, left the proviso in the decree in full force.

The effect of an instrument as a grant of land which was made in California before it was ceded to the United States, must be determined by Mexican law.

The construction given to a contract by the parties is an aid that may always be called in when the meaning of the contract is ambiguous.

A Mexican grant of all the grantor's right in land to the grantee, "to make such use thereof as may be most convenient to him," followed by the possession of the grantee, held to be an operative grant.

A Mexican deed, indefinite in its description of the land intended to be granted, attended by proof of an actual putting of the grantee into possession under it, and a maintenance of that possession from 1846 until 1864, is competent evidence to sustain a title.

[No. 210.]

Submitted Feb. 10, 1871. Decided Feb. 20, 1871.

IN ERROR to the Circuit Court of the United States for the District of California.

The bill in this case was filed in the court below, by the plaintiff in error, for the recovery of certain real estate. Judgment having been given for the defendants, the plaintiff sued out this writ of error.

The case is stated by the court.

Mr. **John Wilson,** for plaintiff in error:

The plaintiff, to support his claim, had put in evidence the espediente of the original concession to Lazaro Peña by which it appeared that Peña presented his petition to the commandant general for a concession of this land, Oct. 14, 1839, and that the commandant general granted the land to him upon condition that he would apply to the governor for a regular title. This act of the commandant, did not, could not, pass any title; at best it only passed leave to possess for the present.

In December, 1839, while the grant was in this condition, Peña sold and conveyed all his right in the land to M. G. Vallejo.

All that Peña had then, and all that he could pass to Vallejo, was the slightest equity.

In June, 1840, Peña petitioned the governor in due form for a grant of the land.

July 13, 1840, the governor granted the land in full property to Lazaro Peña. Peña did not present any claim to the board, nor did his heirs.

M. G. Vallejo in March, 1853, presented his claim to the board of land commissioners for confirmation to him of his title to the whole of said rancho, under the said grant to Peña.

The board rejected the claim; and, on an appeal, the district court confirmed the same with a proviso; and on appeal to the United States Supreme Court, this decree was affirmed in these words: "In so far as it confirms the original grant, be, and the same is hereby affirmed." This affirmation clearly vacates the proviso attached to the decree of the district court, and confirms the land to Vallejo, without any limitation whatever.

By the terms of the decree, all the land is confirmed to Vallejo, and of course it could not be confirmed to a stranger to the proceedings; it must be confirmed to the petitioner, or rejected; and this is the clear and manifest intention of the law of March 3, 1851, authorizing these confirmations or rejections. This decree operates as a release on the part of the United States to M. G. Vallejo, of the legal title vested in the United States by the treaty of Guadalupe Hidalgo.

Thus the plaintiff showed these decrees, and, under them, a clear chain of title from Vallejo, the confirmee, and an adverse possession held by the defendants, and rested.

This confirmation vested the legal title to the land in Vallejo, the confirmee, and from him passed to the plaintiff, Steinbach.

That it did so, see the following cases decided by the supreme court of California, by which this principle has become the settled law of the state:

Estrada v. *Murphy*, 19 Cal. 248; *Leese* v. *Clark*, 18 Cal. 533; *Clark* v. *Lockwood*, 21 Cal. 220. The opinion of the court in these cases was given by Ch. J. Field.

Emeric v. *Penniman*, 26 Cal. 124; *O'Connell* v. *Dougherty*, 32 Cal. 458, with many others.

The defendants had set up title in fee in themselves, to those parts of the ranch which they occupied, and began by offering to show title in themselves, by a chain of title direct from Peña, the grantee of the ranch.

The plaintiff objected, because at best it could only be an equity; that no such defense was set up in their answers; and if it had been, such a defense could not be made in the circuit court of the United States. To sustain the position of the plaintiff in this, we beg leave to refer to the following decisions made by this court:

Bennett v. *Butterworth*, 11 How. 674; *Fenn* v. *Holme*, 21 How. 481, 16 L. ed. 198; *Stringer* v. *Young*, 3 Pet. 320; *Lessieur* v. *Price*, 12 How. 72; *Greer* v. *Mezes*, 24 How. 275, 16 L. ed. 663; *Shcirburn* v. *Cordova*, 24 How. 425, 16 L. ed. 741; *Hooper* v. *Scheirmer*, 23 How. 235, 16 L. ed. 452; *Bagnell* v. *Broderick*, 13 Pet. 446.

These authorities, we doubt not, are ample to show both our propositions: First. That having pleaded a legal title in themselves, they could not set up an equity. Second. That if they had set up an equity, it could not have been sustained as a defense to an action of ejectment, where the legal title only can be used by plaintiff or defendants.

Second exception. To the ruling of the court by which the defendants were permitted to give in evidence a paper signed by Vallejo, the confirmee, dated August 12, 1846.

The counsel for plaintiff objected to the reception of this paper as evidence, for the defense, because the same did not convey any estate from Vallejo to Hoeppener, and that it

was a mere license to occupy which was terminated when Hoeppener asserted title to or attempted to convey the lands; which was overruled by the court, and excepted to by plaintiff.

This is no deed at common law, because it wants a seal and, therefore, by the law now in force in California, it would be void as a conveyance of real estate. It was, however, executed under the Mexican system. There, it is admitted, no seal was required. But there are many things lacking in this instrument that were required under that system. The parties are not mentioned, and the land intended to be affected is not described; nor is there any consideration whatever expressed; and there is nothing in it which indicates an intention to create any estate in the land. It does not declare that Vallejo intends to alienate the property or ownership of the land, nor to vest the property or dominion in Hoeppener. He does not grant it to him, his heirs, nor assigns; nor does it confer upon him any right to alienate or sell it; but simply transfers this incipient right to him for a temporary purpose, that he may use it. It is simply a permission to use the land. Under the decision of *Schott* v. *Barton*, 13 Barb. 173, it could not take effect as a feoffment, because Vallejo himself had no legal estate in the land (he having bought from Peña seven months before the grant was made) nor was there any livery of seisin. It could not stand as a bargain and sale, because it does not express any valuable consideration, and it could not operate as a covenant to stand seised to uses, because Hoeppener was a stranger and there was no consideration of blood or marriage between him and the grantor, and even if these objections could be overcome, it could not operate to convey anything more than a life estate, because there are no words of inheritance, and when we look for the habendum, which in a deed of the fee is "to hold to him and his heirs," it simply declares that the object of the instrument is that the grantee may use the land.

But when we look at it as an instrument under the Spanish system, it is still less entitled to be considered a conveyance. Anyone who has seen a conveyance under the Spanish law, will say at once that this bears no resemblance to such an instrument; nor does this instrument bear the signatures of both parties, which are absolutely required by the Spanish law to all legal and formal documents, to make a valid conveyance, the one to grant and the other to receive; and it will be noticed that while Vallejo says he has legally and formally bought, he does not say he sells it, nor are there any words used in this document to imply he has received any consideration whatever.

Messrs. **E. D. Wheeler** and **C. T. Botts**, for defendants in error:

When we come to the case of *U. S.* v. *Vallejo*, 1 Black, 283, 17 L. ed. 143, the very confirmation upon which the plaintiff relies, this court, declining to pass upon the operation or validity of the alleged mesne conveyance, simply declares, reports, or decrees, that the title to this land vested in Peña, by grant from the government of Mexico. This is the language of the court:

"It is the opinion of this court, that the original claim is a good and valid claim, and that the same should be, and is, hereby confirmed."

No reference whatever is made to the derivative claimant. It is the validity of the original grant to Peña that is discussed; and the court concludes by declaring as above.

Surely, if confirmation has the effect to vest title at all, this confirmation vested the legal title in Peña.

The plaintiff's counsel argues with great earnestness and the citation of many authorities, that Vallejo only acquired title by virtue of the confirmation of 1861; that he had nothing to dispose of when he conveyed to Hoeppener, and that a conveyance under such circumstances, would at most only carry an equitable right to the after acquired title. Let us apply this doctrine to the conveyance from Peña to Vallejo. Peña, at the date of that conveyance, had acquired no title to the lands in controversy, and if the conveyance operated at all upon the after acquired title, it only served to vest him with an equity which Vallejo transmitted to the plaintiff, and which is not sufficient to maintain this action of ejectment.

If Vallejo did not acquire the title to these premises by virtue of the conveyance to him from Peña, he has never acquired it. If he did, Aug. 6, 1846, he conveyed it to Andres Hoeppener, the defendants' grantor.

The words *quien hara del el uso que mas le convenga*, which the plaintiff construes into a license to occupy, are, in fact, the largest words of grant that the grantor could use, and are precisely equivalent to our "to him and his heirs forever."

The supreme court of California held, in *Tohler* v. *Folsom*, 1 Cal. 207, that under the civil law, the delivery of the possession, without any written contract, would transfer the property.

Mr. Justice **Strong** delivered the opinion of the court:

The record exhibits five assignments of error, all founded upon exceptions taken in the court below to the admission *or rejection of [*573 evidence. Of these the first is, in substance, that the court permitted the defendants to give in evidence what it is contended constituted at most only an equitable right, and what was, therefore, no defense against the legal title asserted by the plaintiff. The exception cannot be understood without a brief examination of the titles under which each of the parties claimed the lands in controversy.

The title of the plaintiff had its origin in a provisional concession made by the Mexican government to Lazaro Peña on the 14th day of October, 1839. Peña was then in possession of the land, and the concession was made to him with the reservation that he should petition for the usual title from the political government. On the 13th day of October, 1840, he obtained a grant in the usual form from Don Juan B. Alvarado, then governor of the Department of California, for the land then known by the name of "Agua Caliente," embracing the land now in dispute, and on the 8th of October, 1845, the grant was approved by the departmental assembly. Before it was made, however, though after the provisional concession, Peña conveyed all his interest in the land

to Mariano G. Vallejo. In 1853 Vallejo instituted proceedings, under the act of Congress of March 3, 1851, for a confirmation of the land to him, and it was confirmed by the district court in 1859. The decree of confirmation contained the following proviso: "Provided that this confirmation of the above land to the said M. G. Vallejo shall be without prejudice to the rights of the legal representatives of Lazaro Peña, the original grantee, or whoever may be entitled to said lands under him; and said confirmation to said Vallejo shall enure to the benefit of any person, or persons, who may own or be entitled to the said land by any title, either at law or in equity, derived from the original grantee by deed, devise, descent, or otherwise." The record of the confirmation was subsequently brought into this court by appeal, and here it was adjudged that the decree of the district court, in so far as it confirmed the original grant, be affirmed. It was under this decree of confirmation that the plaintiff claimed, 574*] both through *a deed of Anna Hoeppener, sole heir of Andres Hoeppener, an alleged grantee of Vallejo, dated December 21, 1858, and secondly, by a deed dated January 17, 1863, from Vallejo himself.

The defendants asserted ownership of the parcels of the rancho "Agua Caliente," now in controversy, under an alleged grant made by Vallejo to Andres Hoeppener, dated August 12, 1846, about ten months after the grant to Peña had been approved by the departmental assembly.

It thus appears that both parties claimed under Peña and Vallejo, and a brief examination will show that the nature of their titles was the same. If that of the plaintiff was a legal estate (which it is not necessary to this case to decide), that of the defendants was equally so. That the right of Vallejo on the 12th of August, 1846, when he conveyed the property to Hoeppener, was not perfect, must be conceded. His claim had not been confirmed, and he had no patent. He had nothing but the Mexican espediente. Of course the right which he conveyed was also imperfect. But when afterwards the district court confirmed the land to him, the confirmation enured to the benefit of his prior grantee. It was not the acquisition of a new title, but the establishment of his original right. And this was expressly decreed by the proviso already quoted. By that it was adjudged that the confirmation should enure to the benefit of any person or persons who owned or were entitled to the land by any title in law or in equity, derived from the original grantee by deed, devise, descent, or otherwise. If, therefore, Hoeppener or his grantees held any such title, it was confirmed to them as truly as if he or they had been petitioners for such confirmation. Now, it is in virtue of this decree of the district court that the plaintiff claims. He has no standing without it. Asserting his rights through it, the law will not permit him to repudiate any part of its provisions.

It is argued, however, that the proviso to the decree of confirmation was annulled by the action of this court. To this we do not assent.

The judgment upon the appeal was that the original grant to Lazaro Peña was a good and 575*] valid *grant, and that the decree of the district court, in so far as it confirmed the original grant, be itself affirmed. This was no reversal of any portion of the decree of the district court. On the contrary, it left that decree in full force to all its extent. And by relation it was carried back to the inception of the title confirmed. It is a well-settled rule that where several acts concur to make a complete conveyance the original act is preferred; and all others relate to it. Vin. Abr. 290, Relation. Mr. Cruise, in his work on Real Property, Vol. 5, pp. 210, 211, says: "There is no rule better founded in law, reason, and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." The proviso was, therefore, nothing more than a declaration of what would have been the legal effect of the decree without it. If, therefore, as is insisted by the plaintiff, the confirmation vested in Vallejo the legal title it at the same time vested a legal estate in the grantees of Vallejo, or Peña, who held portions of the land under conveyances from the confirmees.

The second exception taken in the court below is, that the court received in evidence an instrument of writing, dated August 12, 1846, claimed by the defendants to be a grant of the land by Vallejo to Andres Hoeppener, and this is the basis of the second assignment of error. The bill of exceptions shows that the execution of the instrument was duly proved, that it was indorsed upon the espediente to Peña, that at the time when the deed was made Hoeppener recived full possession of the land from Vallejo, and that he continued thereafter in such possession until the land was sold by him. It is argued that the deed was only a license to occupy, and not a grant of the land, hence that it was revocable at will, conferring a mere tenancy at will, and not a legal estate. Certainly it is a very informal instrument, and were the rules of common law to be applied to it there would be difficulty in maintaining that it was a grant of the fee. *It is to be noted, [*576 however, that its character and effect are to be determined by Mexican law. It was made before California had been ceded to the United States. In inquiring what was the intention and effect of the instrument we are not, then, to be guided by the rules of the common law or by the British statute of uses. That it was more than a license to occupy is plain. Its language is, "I grant and transfer (*cedo y transparo*) all the right which I have in the land mentioned, to Don Andres Hoeppener, who shall make (or have) such use thereof as may be convenient to him." These are not words of mere license. They describe the subject of the grant, not as a possessory right, but as "all the right" of the grantor "in the land." Full effect cannot be given to all the words of the instrument unless it is held to be a conveyance of all Vallejo's title. If the intent had been to transmit less, why describe the subject as all right in the land? It is argued that the words following the operative words of transmission to Hoeppener, *viz.*, "who shall make such use thereof as may be most convenient to him," indicate that no more than a license to occupy was intended. They do not appear to us to warrant any such inference. They, or other words of like import, are common in Mexican grants which

have been held to be conveyances of the entire estate of the grantors. *Vide, Hays* v. *Bona*, 7 Cal. 154; *Havens* v. *Dale*, 18 Cal. 362; and *Mulford* v. *Le Franc*, 26 Cal. 88. In the latter case the effect of such clauses is considerably discussed. Instead of being words of limitation or restriction, they seem rather intended to confer the largest dominion. And in our law they have been held to enlarge into a fee, a devise which, without them, would have been only a life estate.

If there were any doubts respecting the deed, whether it was intended as a grant or a license, they would be dispelled by noticing the construction manifestly given to it by the parties. This is an aid that may always be called in when the meaning of a contract is ambiguous. *French* v. *Carhart*, 1 N. Y. 102, and cases therein cited: *U. S.* v. *Appleton*, 1 Sumn. 502, 503. 577*] There was no *necessity for reducing to writing a mere license. Yet this contract was in the form of a conveyance, reduced to writing, and indorsed upon the espediente. There was no necessity of livery of seisin if the deed was a mere license, yet Hoeppener was actually put into possession of the land by the grantor, and he or his grantees retained the possession unchallenged, so far as it appears, from August 12, 1846, until this suit was brought. Vallejo never claimed any right until 1863, when he made a grant to the plaintiff, not of the land, but of "all his right, title and interest" in it. In addition to all this the plaintiff recognized a possible right in Anna Hoeppener, the heir of Andres Hoeppener, by taking a deed from her grantee, to whom she had conveyed her "right, title, and estate" in the tract of land, in the year 1858. These facts tend strongly to show that the parties understood Vallejo's deed as conveying to Hoeppener absolute ownership of the land described in it.

It is insisted, however, that even if the intent was to convey the land, instead of mere license to occupy it, the instrument was ineffectual, because informal. It is said that it did not contain all the requisites of a valid Mexican grant. It is doubtful whether this point was made in the court below. It does not distinctly appear in the bill of exceptions that it was urged as an objection to the admission of the deed. The objection appears rather to have been that Hoeppener obtained by the deed a mere license, which terminated when he asserted title to the land, or attempted to convey it. Such was the reason stated for the objection in the bill tendered by the plaintiff. But assuming that it is presented for our consideration, we are of opinion the deed contains all that was necessary to constitute an operative grant. That it was executed and delivered, and that, in pursuance of it, Hoeppener was put into possession by the grantor, are facts that are not controverted. This is all that, under the civil law, is necessary to transfer titles. Livery of seisin is the controlling fact. Admitting that, under the Mexican law, a contract in writing was necessary to a private conveyance, it is nevertheless true that the form of the instrument 578*] was not *material. Any form would answer that manifested an intent to convey. Here were words of grant (*cedo y transporto*). The word *cedo* (I grant) is the ordinary word used in Mexican conveyance to pass title to lands. *Mulford* v. *Le Franc*, 26 Cal. 108. Though the earlier cases in California asserted that the consideration or price of the grant must be mentioned in the written contract, or at least, that it must be mentioned a price was paid, the later cases have asserted a different doctrine. *Havens* v. *Dale*, 18 Cal. 366; *Merle* v. *Mathews*, 26 Cal. 455. It is quite clear that in no case could mention of a price ever have been deemed necessary when there was no price,—when the transaction was a gift. In such a case a writing without mention of any consideration, coupled with livery of seisin, or delivery of possession, would consummate the transfer. It would answer no good purpose to review the authorities upon this subject. Suffice it to say, that in view of the language of the instrument, of the facts that Vallejo put Hoeppener into possession under it, and that the grantee and his successors in the title remained in unchallenged possession for more than seventeen years before this suit was brought, we are constrained to hold that it amounted to a conveyance of all right to the lands which Vallejo had.

The third assignment of error is founded upon the third exception taken in the court below. It is, in substance, that the court received in evidence a deed from Hoeppener to Carlos Glein, dated December 1, 1847. It was offered with sundry other conveyances, by which the title conveyed to Glein became vested in Whitman, one of the defendants in error. In the deed from Hoeppener, thus received, the subject of the grant was described as follows: "All that certain tract and parcel of land, containing 300 acres, more or less, being a portion of the rancho named 'Agua Caliente,' as transferred to the said Andres Hoeppener by M. G. Vallejo, the said 300 acres being more particularly bounded and described as follows, to wit: On the west side by Sonoma Creek, on the east side by the Napa hills, on the north by *Yeltan's farm, and on the [*579 south by land of Ernest Rufus." In connection with the offer of this deed it was proved that Glein, the grantee, at the time of his purchase, took possession of the tract thus conveyed (the same now held by Whitman) and paid a valuable consideration for it; and that all the succeeding grantees, including Whitman, paid valuable considerations for their grants at the times of their several purchases, and took possession of the land, remaining in open and notorious possession while their interests continued, Whitman still retaining his. It was also proved that when Steinbach, the plaintiff, acquired his title to the Agua Caliente rancho, Whitman was in the open and notorious possession of the tract, claiming to own the same.

To the admission of this deed from Hoeppener to Glein the plaintiff objected, for two reasons assigned at the time. The first of these was that the deed did not import to convey the title to any particular tract of land; and the second was, that it created no legal estate, and that it was, therefore, incompetent evidence for any issue made in the action. Neither of these reasons is, in our opinion, well founded. The first rests upon a mistake of fact. We are unable to perceive that there was insufficient certainty in the description of the land granted. It was identified by giving natural boundaries

for both its east and west sides, and by calls for adjoining proprietors upon the north and the south. This was enough. In regard to the second reason, we remark that the entire deed is not before us. It is not found in the record, and there is nothing, therefore to show that it did not convey all the estate which Hoeppener had acquired by the deed to him from Vallejo. If it did not, it was incumbent upon the plaintiff in error to show the fact by exhibiting to us the deed itself. We infer, from the course of the argument, that the objection was intended only to reassert that Hoeppener's title was a mere equity. The worthlessness of that assertion has already been sufficiently considered.

The fourth exception is quite similar to the third. It is that the court received in evidence, against the objection of the plaintiff, a deed, dated November 14, 1846, from Andres 580*] *Hoeppener to J. Jacob Dopken, whose title subsequently passed to Martha C. Watriss, another of the defendants. The deed was for six hundred and forty acres, part of the rancho "Agua Caliente" granted to Peña, confirmed to Vallejo and conveyed by him, as above mentioned, to Hoeppener. Standing by itself, the deed is indefinite in its description of the land intended to be granted, and an insufficient designation of the subject of the grant. But it was not offered or received alone. It was made, as will be perceived, while the country was under Mexican rule, and its offer was attended by proof of what amounted to livery of seisin,—an actual putting of the grantee into possession under it, and a maintenance of that possession from 1846 until 1864, when this suit was brought. It had been admitted, when the deed was received in evidence, that Vallejo had put Hoeppener into possession of the entire rancho, and that Hoeppener continued in possession until he sold to Dopken, when he retired, and allowed his grantee to take possession of the tract sold. This was a parol identification followed by long possession unchallenged. Considering the looseness of Mexican grants at that time and the acquiescence, for so many years, of the grantor and all claiming under him, we cannot say that the deed, in connection with this other evidence, was erroneously admitted.

The only remaining assignment of error is that the court refused to allow the plaintiff to give evidence in rebuttal to prove that, even if the deed shown by the defendants from Hoeppener did make out an equity in his grantees, Hoeppener failed to perform the conditions upon which Vallejo's grant was made to him, upon which the equity rested and, therefore, that the equity expired.

A few words will dispose of this. If the assignment correctly represented what was the ruling of the court, it would be a sufficient answer to it, that the deed from Vallejo to Hoeppener was unconditional and, therefore, that his title, and that of his grantees, was not dependent upon the performance or nonperformance of conditions. But the court made no such refusal as that of which the plaintiff com- 581*] plains. *What the court did rule was that Hoeppener's statements, made after he had conveyed the land to others, could not be admitted to invalidate his deeds. Surely such a ruling requires no vindication.

Finding no error in the record, the judgment is affirmed.

P. H. MORGAN *et al.*, Commissioners of the Bank of Louisiana, *Appts.*,

v.

JOHN THORNHILL *et al.*

(See S. C. 11 Wall. 65-81.)

Jurisdiction over decrees in bankruptcy—when this court has not—final decrees.

This court has no jurisdiction to revise a decree of the circuit judge, rendered by virtue of the special power conferred to exercise a general superintendence and jurisdiction in all cases and questions arising under the bankrupt act, conferred by the 2d section of said act, to be exercised in term or vacation.

Decrees in equity, in order that they may be reexamined in this court, must be final decrees rendered in term time, as contradistinguished from mere interlocutory decrees, or orders which may be entered at chambers.

[No. 218.]

Argued Jan. 6, 1871. Decided Feb. 27, 1871.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

On motion to dismiss.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **C. Cushing** and *Thomas Allen Clarke*, for appellees:

The appeal in this case should be dismissed on the following grounds:

1. Because the decree appealed from was rendered by the circuit judge, by virtue of the special power conferred on the circuit court or the judge thereof, to exercise a general superintendence and jurisdiction of all cases and questions arising under the bankrupt act, conferred by the 1st section of said act, to be exercised by the said circuit court or the judge thereof, in term time or vacation; from which class of decree no appeal lies.

By reference to the bankrupt act, 14 Stat. at L. 518, it will be seen that, by the 2d section of said act, the circuit court is invested with a general superintendence and jurisdiction of all cases and questions arising under this act; and except when special provision is otherwise made, may, upon bill, petition or other process of any party aggrieved, hear and determine the case in a court of equity. The powers and duties hereby granted may be exercised, either by said court or by any justice thereof, in term time or vacation.

By the 8th section of the bankrupt act it is further provided:

"That appeals may be taken from the district court to the circuit courts in all cases in equity, and writs of error may be allowed to said circuit courts in cases at law."

The 8th section regulating appeals, makes no change in the general law of appeals, except in reference to the amount and time within which an appeal must be taken, in which it is less favorable than the general law on regulating appeals.

An appeal, therefore, from the district court can only be taken to the circuit court, in the cases in which it can be taken ordinarily; that is, it must be taken from a final decree of the district court.

S.

Sproul v. Hemmingway, 14 Pick. 5..... 254
Staats v. Board, 10 Gratt. 400..... 768
Stacy v. Elph, 1 Myl. & K. 195..... 770
Stafford v. Union Bank of La. 16 How. 135, 17 How. 275..... 271
Stark v. Starrs, 6 Wall. 402, 419..188, 487, 537
Star of Hope, The, 9 Wall. 228, 232...283, 284
State v. Adams, 44 Mo. 570..... 555
v. Bradshaw, 10 Ired. 232..... 729
v. Branin, 3 Tab. 484..... 230
v. Charleston, 4 Rich. 286..... 375
v. Harper, 6 Ohio St. 607..... 529
v. Miller, 31 N. J. Law 521..... 555
v. Minton, 3 Tab. 529..... 230
v. North, 27 Mo. 467..... 452
Stead v. Course, 4 Cr. 403..... 704
Steamboat Co. v. Livingston, 3 Cow. 743.....374, 375
Steamboat Orleans v. Phœbus, 11 Pet. 184 627
Steamship Co. v. Joliffe, 2 Wall. 450..... 626
v. Port Wardens, 6 Wall. 34..... 375
Steinbach v. Stewart, 11 Wall. 572..... 884
Steines v. Franklin Co. 14 Wall. 15...851, 885
Stephens v. Foster, 6 Car. & P. 289..... 107
Stephenson v. Smith, 7 Mo. 610..... 537
Stevens v. Prop. of Middlesex Can. 12 Mass. 466..... 561
Stewart v. Kahn, 11 Wall. 493, 500, 502, 506.....214, 461, 687, 884
Stimpson v. Balt. & S. R. Co. 10 How. 329. 815
v. West C. R. C. Co. 4 How. 384, 404.....38, 39
Stockett v. Walkins, 2 Gill & J. 326-342.. 55
Stockton v. Bishop, 2 How. 74, 75..... 271
Stoney v. Ins. Co. 11 Paige, 635..... 110
Story, *Ex parte*, 12 Pet. 339..... 85
v. Jer. City, etc., P. R. Co. 16 N. J. Ch. 13..... 555
Stoughton v. Baker, 4 Mass. 526..... 772
Stratton v. Jarvis, 8 Pet. 4..... 250
Strawbridge v. Curtiss, 3 Cr. 267..... 180
Strother v. Lucas, 6 Pet. 763..... 418
v. Lucas, 12 Pet. 412..... 839
Sturges v. Crowninshield, 4 Wheat. 204, 205, 206.....334, 350
Sturgis v. Boyer, 24 How. 121, 122....254, 881
Sullivan v. Fulton S. Boat Co. 6 Wheat. 450..... 251
v. Phil. & R. R. Co. 30 Pa. 234..... 434
Sumner v. Hamlet, 12 Pick. 76..... 215
Supervisors v. Schenck, 5 Wall. 772, 780 784.....107, 110, 580, 813
Supervisors of Alb. v. Dorr, 25 Wend. 440, 7 Hill, 583..... 529
Surgett v. Lapice, 8 How. 48..... 430
Susquehanna Bank v. Broome Co. 25 N. Y. 312..... 67
Suydam v. Broadnax, 14 Pet. 67..... 577
v. Moore, 8 Barb. 358..... 553
v. Williamson, 20 How. 427. 432, 434, 440, 441.86, 109, 278, 396, 637 815
Swainston v. Garrick, 2 L. J. (N. S.) Exch. 255..... 783
Sweet v. Jacocks, 6 Paige, 355..... 801
Swilley v. Low, 13 La. Ann. 412..... 88

T.

Taaffe v. Downes, 3 Moo. P. C. 41 (*note*).. 649
Taggard v. Loring, 16 Mass. 336..... 220
Tancred v. Christy, 12 M. & W. 323..... 110 275, 401
Tapley v. Butterfield, 1 Met. 515..... 800
Tash v. Adams, 10 Cush. 252..... 107
Taunton Bank v. Richardson, 5 Pick. 444.. 792
Taunton Cop. Co. v. Merch. Ins. Co. 22 Pick. 108..... 784
Taylor v. Burnsides, 1 Gratt. 190..... 772
v. Carryl, 20 How. 594....671, 672, 679
v. Morton, 2 Curt. 454..... 229
v. Morton, 2 Black, 484.....86, 278
v. Plumer, 3 Maule & S. 562..... 55
v. Porter, 4 Hill, 146..... 695
Teese v. Huntingdon, 23 How. 10..... 37
Terrett v. Taylor, 9 Cr. 51..... 553
Texas v. White, 7 Wall. 700..313, 440, 457, 550
Thatcher v. Gammon, 12 Mass. 270..... 408
Theriat v. Hart, 2 Hill. 381..... 178
Thiedemann v. Goldschmidt, 1 De. Gex F. & J. 10..... 369
Thomas v. Harvie, 10 Wheat. 151..... 848
v. Ketteriche, 1 Ves. 333..... 511
v. Osborn, 19 How. 22..... 422
v. Wyatt, 25 Mo. 26..... 657
Thompson v. Dominy, 14 Mees. & W. 403.. 806
v. Carper, 1 Humph. 545..... 218
v. Phillips, Bald. 272-4..... 627
v. Railroad Co's, 6 Wall. 134..... 430
v. Riggs, 5 Wall. 678..... 336
Thomson v. Dean, 7 Wall. 342..... 271
v. Lee Co. 3 Wall. 327, 330, 331.. 105 456, 812
v. The Nanny, Bee. 217..... 880
Thorington v. Smith, 8 Wall. 1..... 759
Thornborow v. Whitaere, 2 Ld. Raym. 1164..... 439
Thorndike v. United States, 2 Mas. 18.... 331
Thrale v. Ross, 3 Bro. Ch. 56..... 503
Thredgill v. Pintard, 12 How. 24..... 563
Thwing v. Great West. Ins. Co. 103 Mass. 401..... 610
Tobey v. Chipman, 13 Allen, 124..... 791
Toomey v. L. & B. R. Co. 3 C. B. (N. S.) 150..... 672
Town v. Stetson, 5 Abb. N. S. 218..... 583
Townsend v. Greeley, 5 Wall. 336.....565, 702
Towse v. Henderson, 4 Exch. 890.....609, 610
Trebilcock v. Wilson, 12 Wall. 687....317, 809
Trenton L. & F. Ins. Co. v. Johnson, 4 Zab. 576..... 502
Trueman v. Fenton, Cowp. 548..... 682
Tucker v. Morrill, 1 Allen, 528..... 108
Turnbull v. Bowyer, 40 N. Y. 460..... 105
Twitchell v. Com. 7 Wall. 321..... 463

U.

Union Bk., Tenn. v. Jolly, 18 How. 506.... 577
Union Ins. Co. v. U. S. 6 Wall. 759..... 144
Union S. S. Co. v. N. Y. & Va. S. Co. 24 How. 313.....253, 802, 882
Union Sugar Ref. v. Matthiessen, 2 Fish. Pat. Cas. 605..... 38
Union Towboat Co. v. Bordelon, 7 La. Ann. 195..... 375
U. S. v. Adams, 6 Wall. 101, 111.....109, 635
v. Adams, 7 Wall. 463....362, 363, 756
v. Adams, 9 Wall. 554.....362, 363
v. Allen, 4 Day, 474..... 493
v. Anderson, 9 Wall. 65, 68, 70..... 89 562, 791

form. It is ordinarily exercised by appeal or writ of error. In many cases under statute, it is done by a certificate of division or the legislature may provide that it should be exercised by certiorari, petition for review, or by any other process deemed convenient.

It is further objected that no appeal lies when the special jurisdiction is exercised, because it is provided that the decree may be rendered by the court or by any justice thereof, in term time or vacation.

Terms of court are the arbitrary creations of statute, which may be modified or abolished by statute.

Is it any less the exercise of judicial power to decide a case in vacation? If this judicial power be exercised by a subordinate tribunal, what is there in the nature of things, which should free it from the supervision of the superior court? If there be a lack of formality in the discharge of judicial functions in vacation, it would seem to be more, not less, important that such proceeding should be reviewed by the superior court.

Much reliance is placed upon an expression wrenched from the opinion in *U. S.* v. *Nourse*, 6 Pet. 470. "From a decision of the district judge, out of court, how could the government appeal to the circuit court?"

This is said by way of illustration or argument. The court had already decided the point in issue, to wit: that, by the true construction of the act of 1820, the government was excluded from the right of appeal.

Whether the right of appeal exists in a given case, is one purely of statutory construction: and the question now before the court is whether the powers conferred by the 2d section of the bankrupt act in the circuit court, are withdrawn from the supervisory jurisdiction of this court because of the provision that "the powers and duties hereby granted may be exercised either by said court, or by any justice thereof, in term time or vacation."

Mr. Justice **Clifford** delivered the opinion of the court:

Exclusive original jurisdiction, in all matters and proceedings in bankruptcy, is conferred by the acts of Congress upon the district courts, but in case of a vacancy in the office of a district judge, or in case the district judge shall, from sickness, absence, or other disability be unable to act, the circuit judge may make all necessary rules and orders preparatory to the final hearing, and cause the same to be entered or issued, as the case may require, by the clerk of the district court. 14 Stat. at L. 517; 16 Stat. at L. 174.

Certain occurrences, during the late civil war, so crippled the resources of the Bank of Louisiana that the directors became unable to comply with the requisitions of their charter. Proceedings were accordingly instituted by the attorney general of the state, under the act "To Provide for the Liquidation of Banks," in the proper court of the state, to forfeit the charter of the bank, and on the 20th day of May, 1868, a decree was entered in the case that the charter of the bank be declared forfeited, and that its affairs be liquidated according to law.

Pursuant to that decree the appellants were appointed commissioners for that purpose, and the record shows that they accepted the trust, that they took the required oaths, that they gave the necessary bonds, that they entered upon the discharge of their duties, and that they continued to administer the affairs of the bank until the 20th of May of the following year, when the appellees, or the first three named, filed a petition in the district court for that district, *praying that the bank and the [*73 said commissioners, in their character as such, might be declared a bankrupt, and that a warrant might issue to take possession of the estate of the bank in the hands of the commissioners.

They represented in their petition that the bank and the commissioners had each, within six months preceding the date of the petition, committed an act of bankruptcy, that the corporation had for a long time suspended payment of its commercial paper, and that the commissioners had, within the same period, made certain payments, and transferred certain assets of the bank in payment of its debts, with intent to give a preference to certain creditors of the bank. Special reference to the supplemental petition is unnecessary, as the representations of the petition are substantially the same, and the two were heard together in the court below.

Three several injunctions were granted in the case by the district judge sitting in bankruptcy, and on the 11th of January, 1870, the district court entered a decree that the bank was a bankrupt. Within ten days from the date of the decree, a petition for a review of those orders and decrees was filed by the commissioners in the circuit court, under the 2d section of the bankrupt act, and the circuit court having first heard the parties, on the 2d of March, 1870, entered a decree affirming the orders and decrees of the district court. Application was immediately made by the commissioners for an appeal to this court, which was refused by the circuit judge, but it was ultimately granted by one of the associate justices of this court, more than ten days, however, subsequent to the date of the decree of the circuit court.

Seasonable application for the appeal having been made and a sufficient bond tendered, the appellants contended, and still contend, that the appeal as subsequently allowed operated as a supersedeas from the date of the first application. Different views, however, were entertained by the district judge, and on the 29th of March, 1870, he passed an order directing the marshal to resume possession *of all such [*74 portion of the assets of the bank as he had surrendered to the commissioners.

Dissatisfied with that order the commissioners applied to the associate justice of this court assigned to that circuit to vacate that order and to enforce the supersedeas supposed to have been created by the appeal as allowed in pursuance of the last application. His opinion was that the appeal, as allowed, related back to the date of the original application for the same to the circuit judge, and that it operated as a supersedeas, the same as it would have done if it had been granted within ten days from the date of the decree dismissing the

W.

White v. Fox, 22 Me. 341.....728, 729
v. Hart, 13 Wall. 646..... 693
v. R. R. Co. 21 How. 575.....105, 812
v. Syr. & U. R. R. Co. 14 Barb. 559. 555
v. Whitman, 1 Curt. 494..... 30
Whitfield v. Le Despencer, Cowp. 754.... 529
Whiting v. Bank of U. S. 13 Pet. 15..... 271
Whitridge v. Dill, 23 How. 453..... 829
Wilcox v. Jackson, 13 Pet. 516..... 537
Wilde v. Serpell, 10 Gratt. 405..... 768
Wilkins v. Despard, 5 T. R. 112..... 817
Wilkinson v. Conn. Mut. Ins. Co. 30 Ia. 119..... 621
v. Leland, 2 Pet. 657, 658.....351, 696
Willard v. Tayloe, 8 Wall. 568..... 336
Wm. Bagaley, The, 5 Wall. 405, 412..88, 250, 253, 474, 874
Williams v. Bank of U. S. 11 Wheat. 414. 48, 794
v. Benedict, 8 How. 111..... 265
v. Byrne, Hemp. 473..... 763
v. Gun, Fortesc. 177..... 682
v. Oliver, 12 How. 123..... 637
v. School Dis. 21 Pick. 82..... 448
v. Suffolk Ins. Co. 13 Pet. 420.... 687
Willink v. Morris Can. Co. 3 Green's Ch. 402..... 206
Wilmington R. R. v. Reid, 13 Wall. 264....613
Wilson v. Castro, 31 Cal. 420..... 701
v. Dickson, 2 B. & Ald. 2..... 590
v. Ins. Co. of N. Y. 12 Pet. 140.... 48
v. Leslie, 20 Ohio, 161..... 800

W.

Wilson v. Mayor of N. Y. 4 E. D. Smith, 678. 194
v. Stoner, 9 S. & R. 39..... 873
Wolfe v. Goulard, 18 How. Pr. 64..... 583
Wolff v. Koppel, 2 Den. 272..... 229
Wood v. Ins. Co. 32 N. Y. 619..... 402
v. Lowry, 17 Wend. 492..... 191
v. U. S. 16 Pet. 342..... 817
Woodbury Sav. Bk. v. Char. Oak Ins. Co. 31 Ct. 517..... 526
Woodman v. Thurston, 8 Cush. 157..... 792
Woodruff v. Parham, 8 Wall. 123, 139.. 452, 519
Woodworth v. Stone, 3 Story, 753..... 39
Workman v. Mifflin, 30 Pa. 362..... 311
Worth v. Marston, 14 Wall. 10..... 759
Wright v. Campbell, 4 Burr. 2051..... 806
v. Fawcett, 4 Burr. 2041..... 880
v. Reed, 3 Term. 554..... 336
Wyman v. Fiske, 3 Allen, 238..... 107
Wynehamer v. People, 33 N. Y. 394..... 695

Y.

Yates v. Lansing, 5 Johns. 291..... 649
Yates v. Whyte, 4 Bing. N. Cas. 272..... 596
Yea v. Fouraker, 2 Burr. 1099..... 682
Yeates v. Groves, 1 Ves. Jr. 280..... 764
Young v. Martin, 8 Wall. 354..... 359

Z.

Zellner, *Ex parte*, 9 Wall. 244..... 96
Zipsy v. Hill, 1 Fost. & Fin. 573..... 783
Zolleverein, The, 1 Swab. 96..... 825

ACTS OF CONGRESS CITED.

Act of July 4, 1879, ch. 2 (1 Stat. 24) 325
Treaty Sep. 3, 1783 (8 Stat. 80)..... 326
Act of July 31, 1789, ch. 5 (1 Stat. 29) 325
Act of Aug. 7, 1789, ch. 9 (1 Stat. 54) 626
Act of Sep. 1, 1789, ch. 11 (1 Stat. 55) 194
Act of Sep. 2, 1789, ch. 12 (1 Stat. 65) 325
Judiciary Act Sep. 24, 1789, ch. 20 (1 Stat. 73–85)..48, 63, 64, 75, 97, 109, 113, 175, 178, 180, 253, 261, 263, 271, 278, 358, 359, 372, 377, 396, 407, 450, 461, 486, 502, 527, 539, 540, 577, 636, 662, 763, 787, 812, 846, 879, 883, 886.
Act of Sep. 29, 1789, ch. 21 (1 Stat. 93) 539
Act of April 30, 1790, ch. 9 (1 Stat. 112) 307, 497
Act of May 26, 1790, ch. 11 (1 Stat. 122) 886
Act of May 26, 1790, ch. 14 (1 Stat. 123) 661
Act of May 31, 1790, ch. 15 (1 Stat. 124) 711
Act of Aug. 4, 1790, ch. 34 (1 Stat. 138, 142)..... 337
Act of Aug. 12, 1790, ch. 47 (1 Stat. 187) 337
Act of Feb. 4, 1791, ch. 4 (1 Stat. 189) 118
Resolution of Congress of March 3, 1791 (1 Stat. 225)..... 323
Act of April 2, 1792, ch. 16 (1 Stat. 246, 250).....323, 326, 463
Act of Dec. 31, 1792, ch. 1 (1 Stat. 287) 194, 374, 377
Act of Feb. 12, 1793, ch. 7 (1 Stat. 302, 303).....155, 497
Act of Feb. 18, 1793, ch. 8 (1 Stat. 305) 372, 374, 377
Act of Mar. 2, 1793, ch. 22 (1 Stat. 334) 672
Act of Mar. 20, 1794, ch. 8 (1 Stat. 345) 337
Act of Dec. 12, 1794, ch. 3 (1 Stat. 404) 262, 271
Act of Mar. 3, 1795, ch. 45 (1 Stat. 433) 337
Act of Mar. 3, 1797, ch. 20 (1 Stat. 512) 534
Act of April 7, 1798, ch. 28 (1 Stat. 549) 661
Act of July 16, 1798, ch. 79 (1 Stat. 607) 337
Act of Mar. 2, 1799, ch. 22 (1 Stat. 627, 695).....151, 166, 493
Act of Mar. 2, 1799, ch. 24 (1 Stat. 709) 507
Act of April 23, 1800, ch. 33 (2 Stat. 45) 507
Act of May 7, 1800, ch. 41 (2 Stat. 58) 661
Act of May 7, 1800, ch. 42 (2 Stat. 60) 337
Act of May 10, 1800, ch. 55 (2 Stat. 73) 532
Act of Feb. 27, 1801, ch. 15 (2 Stat. 106) 706
Act of April 29, 1802, ch. 31 (2 Stat. 156) 96
Act of Mar. 3, 1803, ch. 40 (2 Stat. 244) 48, 178, 252, 253, 261, 278
Act of Nov. 10, 1803, ch. 2 (2 Stat. 245) 337

cation in writing of the grounds of his opposition, and the court in such a case may, in its discretion, order any question of fact so presented to be tried at a stated session of the district court; and the better opinion, perhaps, is that the trial contemplated by the section, if ordered, is a trial by jury. 14 Stat. at L. 532; *Gordon* v. *Scott*, 2 Bank. Reg. 28; *In re Eidom*, 3 Bank. Reg. 39; *In re Lawson*, 2 Bank. Reg. 125.

Debts contracted by a debtor and provable under the bankrupt act, if the same amount to $250, authorize the creditor or creditors to file a petition praying that the debtor may be adjudged a bankrupt, and the 40th section of the same act provides that, upon the filing of the petition, if it appears that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time specified in the order, why the prayer of the petition should not be granted. Prior to the return day of the order, it is required that notice shall be given to the debtor, and the provision is that the court shall, if the debtor so demand on the same day, order a trial 78*] *by jury, at the first term of the court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy. 14 Stat. at L. 537.

Appellate jurisdiction, in its strictest sense, as exercised under the judiciary act, is certainly conferred upon the circuit courts in four classes of cases by the express words of the bankrupt act, without any resort to construction: (1) By appeal from the final decree of the district courts in suits in equity commenced and prosecuted in the district courts by virtue of the jurisdiction created by the third clause of the 2d section of the act. (2) By writs of error sued out to the district court in civil actions finally decided by the district courts, in the exercise of jurisdiction created by the same clause of that section. (3) By appeal from the decisions of the district courts rejecting wholly or in part the claim of a creditor, as provided in the 8th section of the act. (4) By appeal from the decisions of the district courts allowing such a claim when the same is opposed by the assignee.

Appeals from the district courts to the circuit courts are not allowed in any case unless the appeal is claimed and notice given thereof to the clerk of the district court, to be entered in the record of the proceedings, and also to the assignee, creditor, or the proper party in equity, within ten days from the date of the decision or decree, nor unless the appellant, at the time of claiming the same, also gives bond in the manner required by law in case of such an appeal from a subordinate to an appellate tribunal.

Whether a writ of error will lie from the circuit court to the court where the debtor opposes the petition that he may be adjudged a bankrupt, and the question whether he has committed an act of bankruptcy is tried by a jury, as provided in the 41st section of the act, is not a question involved in the case before the court. Nor is the question presented in the case whether a writ of error will lie from the circuit court to the district court where an issue 79*] *of fact is framed, as provided in the 31st section of the act, and the same is tried by a jury at a stated session of the district court.

Suffice it to say at this time that such case when tried by a jury, if the circuit court ha any jurisdiction upon the subject, must be r moved into the circuit court by a writ of erro as they, when tried by a jury, are excluded fro the special jurisdiction conferred in the fir clause of the section, by the very words of th clause. Where "special provision is otherwis made" the case is excluded from the gener superintendence and jurisdiction of the circui court by the exception introduced, as a pa renthesis, into the body of that part of the sec tion.

Special provision is made in such cases, with in the meaning of that exception, when the cas is tried by a jury, and there is not a word in th act having the slightest tendency to show tha Congress intended that a fact found by a jur in a district court should be re-examined in a summary way by the circuit court, and it is no pretended that a party may appeal and be en titled to a second trial by jury, unless the firs verdict is set aside for error of law. Suc cases may be tried by the district court withou a jury, and in that event no doubt is enter tained that the case is within the supervisor jurisdiction of the circuit court.

Due notice was given to the bank of the peti tion filed in the circuit court that the corporation should be adjudged a bankrupt, and the commissioners, as the legal representatives of the bank, appeared and made defense, but they did not demand in writing, or otherwise, a trial by jury, and the case was heard and determined by the court. Subsequent to the decree adjudging the bank a bankrupt, the commissioners presented a petition to the circuit judge, praying for a reversal of that decree, by virtue of the special jurisdiction conferred upon the circuit court in the first clause of the 2d section of the bankrupt act, and the petition was heard at chambers, and a decree was entered dismissing the petition, and affirming the decree of the district court.

*Independent of the bankrupt act the [*80 district courts possess no equity jurisdiction whatever, as the previous legislation of Congress conferred no such authority upon those courts since the prior bankrupt act was repealed. *Ex parte Christy*, 3 How. p. 311. Whatever jurisdiction, therefore, they possess in that behalf is wholly derived from the bankrupt act now in force.

Undoubtedly, the jurisdiction conferred by the third clause of the 2d section is of the same character as that conferred upon the circuit courts by the 11th section of the judiciary act (1 Stat. at L. 73), and it follows that final judgments in civil actions and final decrees in suits in equity rendered in such cases, where the sum or value exceeds $2,000, exclusive of costs, may be re-examined in this court when properly removed here by writ of error or appeal, as required by existing laws.

Concurrent jurisdiction with the district courts of all suits at law or in equity are the words of that clause, showing conclusively that the jurisdiction intended to be conferred is the regular jurisdiction between party and party, as described in the judiciary act and the 3d article of the Constitution.

Cases arising under that clause, where the amount is sufficient, are plainly within the 9th

section of the bankrupt act, and as such may be removed here for re-examination, but the revision contemplated by the first clause is evidently of a special and summary character, substantially the same as that given in the prior bankrupt act, as sufficiently appears from the words "general superintendence," preceding and qualifying the word "jurisdiction," and more clearly from the fact that the jurisdiction extends to mere questions as contradistinguished from judgments or decrees as well as to cases, showing that it includes the latter as well as the former, and that the jurisdiction may be exercised in chambers as well as in court, and in vacation as well as in term time.

Much stress was laid, in argument in support of the theory that an appeal will lie to this court from a decision of the circuit court rendered under the first clause of the 2d 81*] *section, upon the fact that the case or question, as therein provided, may be heard and determined in a court of equity, as the phrase reads in the printed volume of the Statutes at Large; but that phrase, even if correctly printed, must be read and considered in connection with the succeeding clause, and when so read and considered it is plain that the meaning is the same as it would be if it read "as a court of equity," or "as in a court of equity;" that it merely prescribes the rule of decision by which the court is to be governed, and that it is entirely consistent with the subsequent clause before referred to, which provides that the case or question may be heard and determined by a justice of the court as well as by the court, and in vacation as well as in term time, which is palpably inconsistent with the theory that Congress intended that an appeal from the decision of any case or question under the first clause should be allowed to this court.

But the phrase "hear and determine the case in a court of equity," as printed in the fourteenth volume of the Statutes at Large, is erroneously transcribed from the act of Congress as it passed the two Houses and was approved by the President. Correctly transcribed it reads "hear and determine the case as in a court of equity," which shows without any resort to construction that all Congress intended by the phrase was, to prescribe the rule of decision, whether it was made in court or at chambers or in term time or vacation.

Decrees in equity, in order that they may be re-examined in this court, must be final decrees rendered in term time, as contradistinguished from mere interlocutory decrees or orders which may be entered at chambers, or, if entered in court, are still subject to revision at the final hearing.

Adopt the theory of the appellees and the proceedings in bankruptcy might be protracted indefinitely, as every question arising in the courts may be transferred first to the circuit court and then to this court, which would tend very largely to defeat all the beneficent purposes of the bankrupt act.

For these reasons the appeal is dismissed for the want of jurisdiction.

DAVID DOWS, *Appt.*,
v.
THE CITY OF CHICAGO, A. H. Heald, Collector, etc., The Union National Bank of Chicago;
and
THE UNION NATIONAL BANK OF CHICAGO, *Appt.*,
v.
DAVID DOWS, The City of Chicago and A. H. Heald, Collector, etc.

(See S. C. 11 Wall. 108-112.)

Bill to restrain collection of tax, not maintainable—unless it also presents some ground of equitable jurisdiction—cross-bill, when dismissed.

A bill in equity, to restrain the collection of a tax, will not be sustained, on the ground alone that the tax was illegal.

It must appear, in addition, that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or throw a cloud upon title.

A cross-bill, although sustainable, if it were an original bill, must be dismissed if the original bill is.

[Nos. 409, 410.]

Submitted Feb. 6, 1871. Decided Feb. 27, 1871.

APPEALS from the Circuit Court of the United States for the Northern District of Illinois.

The bill in this case was filed in the court below, by the appellant, Dows, to restrain the collection of a certain tax. A cross-bill was filed by the Union National Bank, one of the respondents. That court having entered a decree dismissing both the original bill and the cross-bill, the complainants in each of said bills took their appeals to this court.

The case is sufficiently stated in the opinion of the court.

Messrs. Melville W. Fuller, Mattocks & Mason and **James H. Roberts** for appellants.

Mr. **M. F. Tuley** for appellees.

Mr. Justice **Field** delivered the opinion of the court:

This is a suit in equity, to restrain the collection of a tax levied by the city of Chicago upon shares of the capital stock of the Union National Bank of Chicago, owned by the complainant. The bank was organized and is doing business in the city of Chicago, under the general bank-

NOTE.—*When an injunction to restrain the collection of a tax will be granted.*

Equity has no jurisdiction to restrain the collection of a personal tax, even conceding it to be illegal; the ordinary legal remedies being ample for the party's protection. Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654; Williams v. Detroit, 2 Mich. 560; Henry v. Gregory, 29 Mich. 68; Brewer v. Springfield, 97 Mass. 152; Durant v. Eaton, 98 Mass. 469; Loud v. Charlestown, 99 Mass. 208; Whiting v. Boston, 106 Mass. 89; Hunnewell v. Charlestown, 106 Mass. 350; Rockingham Savings B'k v. Portsmouth, 52 N. H. 17; Dodd v. Hartford, 25 Conn. 332; Ritter v. Patch, 12 Cal. 298; Berri v. Patch, 12 Cal. 299; Worth v. Fayettsville, Winst. Eq. (N. C.). 70; Van Cott v. Supervisors, 18 Wis. 247; Green v. Mumford, 5 R. I. 472; McCoy v. Chillcothe, 3 Ohio, 370; S. C. 17 Am. Dec. 607; Conley v. Chedic, 6 Nev. 322; Deane v. Todd, 22 Mo. 90; Sayre v. Tompkins, 23 Mo. 443; Barrow v. Davis, 46 Mo. 394; McPike v. Pew, 48 Mo. 525; Brooklyn v. Meserole, 26 Wend. 132; Intendant v. Pippin, 31

ing act of Congress, and the complainant is a citizen and resident of the state of New York.

The principal grounds alleged for the relief prayed are, that there was in the tax of the shares of the bank a want of uniformity and equality with the tax of other personal property in Illinois, as required by the Constitution of that state; and that the shares of the bank followed the person of the owner, and were incapable of having any other situs than that of his domicil, and were not, therefore, property within the jurisdiction of the state.

Other objections, relating principally to the manner in which the tax lists were prepared, the want of notice of the assessment to the complainant, and the absence of any deductions for debts, are also urged, tending more to show 109*] *irregularities in the proceedings than invalidity in the tax.

But according to the view we take of this case, it is unnecessary to consider the force of any of the objections urged by the appellants to the decrees rendered. Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of *equity jurisdiction before the pre- [*110 ventive remedy of injunction can be invoked. It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.

No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked. In the cases where equity has interfered, in the absence of these circumstances, it will be found, upon examination, that the question of jurisdiction was not raised, or was waived. Such was the case of *Bk. of Utica* v. *Utica*, 4 Paige, 399, where the tax was illegal, and the Chancellor stated that the complainant had a complete remedy at law, but as the parties submitted

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Ala. 542; Baltimore v. Balt. & Ohio R. Co. 21 Md. 50; Moors v. Smedley, 6 Johns. Ch. 28; Susquehanna Bank v. Supervisors, 25 N. Y. 312; Hannewinkle v. Georgetown, 15 Wall. 547, 21 L. ed. 231; Dows v. Chicago, *supra*. *Contra:* that equity will restrain collection of an illegal tax. Jeffersonville v. Patterson, 32 Ind. 140; Wood v. Draper, 24 Barb. 187; Williams v. Peinny, 25 Iowa, 436.

One municipality cannot maintain a suit to restrain the collection of a tax levied by another. Nunda v. Chrystal Lake, 75 Ill. 311.

An injunction against collecting a tax assessed in the ordinary way, and unaccompanied by any circumstances of peculiar injury, will not lie, although the act authorizing the tax be unconstitutional. McCoy v. Chillicothe, 3 Ohio, 370, 17 Am. Dec. 607; Mech's, etc. v. Debolt, 1 Ohio St. 591; Exch. etc. v. Hines, 3 Ohio St. 1. *Contra,* Knowlton v. Supervisors, etc. 9 Wis. 410.

Injunction to stay tax sale of city lots assessed by the city council of Cincinnati will lie where the proceedings, though illegal and void, were under legal color and apparently authorized by law. Burnett v. Cincinnati, 3 Ohio, 73; S. C. 17 Am. Dec. 582; Culbertson v. Cincinnati, 16 Ohio, 574; Jonas v. Cincinnati, 18 Ohio, 318.

A taxpayer, as such, cannot maintain a suit to restrain the collection of a tax or the application of the proceeds to the purposes for which it was raised. Kilbourne v. St. John, 59 N. Y. 21, 17 Am. Rep. 291.

A person lawfully taxed by a municipal corporation cannot set off a debt due him from the corporation against the tax; nor will equity enjoin the collection of the tax till the debt is paid; nor because of a failure to recover the debt through the ordinary legal remedies; nor because of irregularities in the notice of time and place of sale. Finnegan v. City of Fernandina, 15 Fla. 379, 21 Am. Rep. 292; 2 Dutch. 399; 3 Met. 526; 26 Vt. 486.

An action does not lie in the name of the state at the relation of the attorney general for an injunction to restrain the collection of a tax levied to pay void bonds issued by a public (school district) corporation. State v. McLaughlin, 15 Kans. 228; 22 Am. Rep. 264.

Injunction will lie to restrain the collection of a tax on personal property, where the enforcement of the tax would lead to a multiplicity of suits, or where the law authorizing the tax is illegal, or where there is no means of recovering back from the State taxes illegally assessed. City Nat'l B'k v. Paducah, Thomp. Nat'l B'k Ca. 300; First Nat'l B'k v. County of Douglas, 3 Dill. 298; Thomp. Nat'l B'k Ca. 267.

Equity will not enjoin the collection of taxes for mere legal irregularities or errors in the assessment of the tax, or in the execution of the power conferred upon taxing officers. To authorize such interference the property must have been exempt; or the levy without legal power; or the persons imposing it unauthorized; or they must have proceeded fraudulently. State R. Taxes, 92 U. S. 575; Moors v. Smedley, 6 Johns. Ch. 28; Green v. Mumford, 5 R. I. 478; Harrison v. Vines, 46 Tex. 15; Chicago, etc. v. Frary, 22 Ill. 34; Du Pages v. Jenks, 65 Ill. 275; Munson v. Miller, 66 Ill. 380; Chicago, etc. R. Co. v. Cole, 75 Ill. 591; Messeck v. Supervisors, 50 Barb. 190; Dodd v. Hartford, 26 Conn. 239; Cedar Rapids R. Co. v. Carroll Co. 41 Iowa, 153; Albany, etc. Co. v. Auditor Gen. 16 Alb. L. J. 451; Hannewinkle v. Georgetown, 82 U. S. (15 Wall.) 548; Clintons' etc. Appeal, 56 Pa. St. 315; O'Neal v. Virginia, 18 Md. 1; Warden v. Supervisors, etc. 14 Wis. 618; Kellogg v. Oshkosh, 14 Wis. 623; Macklot v. Davenport, 17 Iowa, 379.

In the State Railroad Tax Cases the Supreme Court says: "We do not propose in these cases to lay down any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say that in addition to illegality, hardship or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere error, excess in valuation, or hardship, or injustice of the law, or any grievance which can be remedied by a suit at law either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax." State Railroad Tax Cases, 92 U. S. 575. They also lay down, with unanimity as a rule to govern the courts of the United States that no injunction, preliminary or final, can be granted to stay the collection of taxes until it is shown that all the taxes conceded to be due, or that the court can see ought to be paid, or which can be shown to be due by affidavits, have been paid, or tendered, without demanding a receipt in full. State Railroad Tax Cases, 92 U. S. 575, citing Cooley on Tax, 537; Palmer v. Napoleon, 16 Mich. 176; Hersey v. Supervisors, 16 Wis. 185; Roseberry v. Huff, 27 Ind. 12; Frazer v. Liebon, 16 Ohio St. 614; Parmely v. R. Co. 3 Dill. 19; see, also, Taylor v. Thompson, 42 Ill. 10; Briscoe v. Allison, 43 Ill. 291; Mills v. Johnson, 17 Wis. 598.

See also note to 42 L. ed. U. S. 445, and note to 54 C. C. A. 550.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

DECEMBER TERM, 1870.

Vol. 78.

Argued Feb. 13–16, 1871. Decided Mar. 6, 1871.

BILL in chancery.

The bill in this case was filed in this court by the complainant, to establish jurisdiction over certain counties claimed as a part of West Virginia. The act hereafter referred to as Exhibit I., passed May 13, 1862, contained these sections:

"2. Be it further enacted, That the consent of the legislature of Virginia be, and the same is hereby given, that the counties of Berkeley, Jefferson, and Frederick, shall be included in and form part of the state of West Virginia, whenever the voters of said counties shall ratify and assent to the said Constitution, at an election held for the purpose, at such time and under such regulations as the commissioners named in the said schedule may prescribe.

"3. And be it further enacted, That this act shall be transmitted by the executive to the senators and representatives of this commonwealth in Congress, together with a certified original of the said Constitution and schedule, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of Congress to the admission of the state of West Virginia into the Union."

The act, called Exhibit II., passed Jan. 31, 1862, after providing for an election in Berkeley county and minutely providing for its regulation and returns continues:

"Which returns, written in words, not in figures, shall be signed by the commissioners. One of the said returns shall be filed in the clerk's office of the said county, and the other shall be sent under the seal of the secretary of this commonwealth, within ten days from the commencement of the said vote, and the governor of this state, if of opinion that the said vote has been opened and held, and the result ascertained and certified pursuant to law, shall certify the result of the same under the seal of this state, to the governor of the said state of West Virginia."

"If the governor of this state shall be of opinion that the said polls cannot be safely and properly opened and held in the said county of Berkeley on the fourth Thursday of May next, he may, by proclamation, postpone the same and appoint in the same proclamation, or by one to be hereafter issued, another day for opening and holding the same."

"If a majority of the votes given at the polls opened and held pursuant to this act, be in favor of the said county of Berkeley becoming part of the state of West Virginia, then shall the said county become part of the state of West Virginia, when admitted into the same with the consent of the legislature thereof."

"This act shall be in force from its passage."

The act called Exhibit III., passed Feb. 4, 1863, after providing for an election in certain other counties, including Jefferson and Frederick, reads:

"It shall be the duty of the governor of the commonwealth to ascertain and certify the result as other elections are certified."

"In the event the state of the country will not permit, or from any cause said election or annexation cannot be fairly held on the day aforesaid, it shall be the duty of the governor of this commonwealth, as soon as such electio can be safely and fairly held, and a full an free expression of the opinion of the people ha thereon, to issue his proclamation ordering suc election for the purpose aforesaid, and certif the result as aforesaid."

"This act shall be in force from its passage.

The act called Exhibit IV., passed Dec. 5 1865, reciting that the conditions prescribed i the above acts had not been complied with that the consent of Congress had not been ob tained. "So that the proceedings heretofor had on this subject are simply inchoate," re pealed all the said statutes above named, an withdrew all consent to the transfer of any o said counties.

Mar. 10, 1866, Congress passed a resolutio assenting to the transfer of the said counties t West Virginia. Virginia at that time had n representation in Congress.

The case is further stated in the opinion o the court.

Messrs. **B. R. Curtis,** *T. R. Bowden,* **Taylor,** *Atty. Gen.* of Virginia, and **Andrew Hunter,** for complainant:

I. The proposed transfer from the common wealth of Virginia, of that part of its territory and jurisdiction now in question, to the stat of West Virginia, could be effectually mad only by a compact or agreement, within th meaning of those words in the Constitution.

Const. art. 1, § 10.

It is self-evident that one state cannot grant and another accept a cession of territory and jurisdiction, without a compact or agreement; and all such compacts and agreements have been uniformly received and treated by the judiciary and by Congress, as within this provision of the Constitution, and as requiring the assent of Congress.

Rhode Island v. *Mass.* 12 Pet. 724; *Poole* v. *Fleeger,* 11 Pet. 207; *Florida* v. *Ga.* 17 How. 478, 15 L. ed. 181; *Mass.* v. *Rhode Island,* not reported; act, Feb. 9, 1859, 11 Stat. at L. 382.

The acts of states in reference to their territory are not to be interpreted by technical rules, nor evidenced only by technical words. The substance of the transaction and the real intent of the act are alone to be considered. And if the thing proposed could take effect only by force of a compact or agreement between two states, that thing is prohibited from taking effect until the assent of Congress is obtained.

II. The legislation of Virginia, as to the cession of the counties of Jefferson and Berkeley to the state of West Virginia, was only a proposal, to become operative as a transfer of territory upon certain conditions. So far as it depended upon the commonwealth of Virginia to prescribe those conditions, they are contained in its acts of legislation.

But no proposal by one state to another state can amount to a concluded compact or agreement, until the assent of Congress is given to it. Prior to that assent, any action of the state must be deemed a proposal only, which it may withdraw or continue, according to its own sense of right.

III. The bill shows that the commonwealth of Virginia had amply sufficient grounds and reasons for withdrawing its proposed agreement to a cession of part of its territory, and did withdraw it before its proposal had become

operative as a concluded compact or agreement.

(1) The general duty of a state to preserve itself in all its parts, and not to cut off by cession of territory and jurisdiction any of its people and their property, is clear and acknowledged. This duty yields only to some necessity incumbent on the state, or to considerations arising from the wishes of that part of its people whose cession is in question.

Vatt. Law Nat. 4, 5; Lawr. Wheat. 874-876.

(2) This duty is clearly recognized by the legislation of Virginia respecting these cessions.

(3) The requirement of the consent of a majority of the legal voters in each of the counties, after a fair opportunity to express their wishes according to the established and legal course, was a fundamental condition of the proposal of cession; and if a cession had been made without such consent, it has been made without the consent of Virginia, and contrary to its expressed will.

IV. The means prescribed for the ascertainment of that consent were deemed to be sufficient. But if, through fraud and falsehood, they proved to be wholly insufficient, the commonwealth of Virginia was not precluded and stopped from knowing the truth and acting upon it.

V. If this were a question between two private persons respecting a grant of land, and it were to appear that the conveyance, though fully executed, was made under a mistake of the magnitude and produced by the means shown in this, bill, a court of equity would annul the grant.

VI. A compact between two states, though fully concluded, may, according to principles of public law, be annulled by one of them upon discovery of a mistake concerning facts, which the compact itself shows were fundamental.

Lawr. Wheat. 453.

A fortiori may one of the parties withdraw its assent before the compact has been fully concluded, and whatever has been done has been only *sub spe rati*, and upon discovery that a condition, shown upon the face of the proceedings to be fundamental, has not been complied with.

Messrs. **Reverdy Johnson, B. Stanton, and Chas. J. Faulkner,** for respondent:

The complainant, at the filing of the bill, was not a state of the Union, within the meaning of the judicial clause in the 3d article of the Constitution of the United States, which gives to a state the right to invoke the original jurisdiction of this court. She was then denied representation in Congress by the legislative department of the government, and has only been recently admitted to such representation, and that department claims to have the sole right to decide that question. If that proposition is true, Virginia was not a state entitled to file this bill.

Whether a state, in the sense of the Constitution, is a state of the United States, is a political inquiry, to be decided by the political department of the government. If so, Virginia was not such a state when this bill was filed. That that department held that she was not such a state, is clear from the various laws which were passed, upon the recommendation of a majority of the joint committee of both Houses, appointed under the concurrent resolutions of December 13, 1865, and from the reasons contained in such report in support of such laws.

Second. But, supposing this objection to be unsound, the second question is whether the case, as made by the bill, gives the complainant a right to the relief prayed. Under this head, it will be contended that, by the acts of Virginia before referred to, of January and February, 1863, the governor of the state was made the exclusive judge to decide whether the elections directed by those laws to be held in the counties in controversy, Jefferson and Berkeley, were duly held and conducted, and whether a majority of the people at such elections voted in favor of annexation to West Virginia; that this court, consequently, cannot go behind the governor's decision. That the governor did decide these questions is not denied. His certificate to the governor of West Virginia, the authenticity of which is not controverted, is also conceded, and that the governor of the latter state, acting upon that certificate, proclaimed the counties to be a part of West Virginia.

The principle upon which it is maintained, that the certificate of the governor of Virginia is conclusive, it is submitted, is settled by the cases of *Knox Co.* v. *Aspinwall*, 21 How. 539, 16 L. ed. 208; *Bissell* v. *Jeffersonville*, 24 How. 287, 16 L. ed. 664; *Moran* v. *Miami Co.* 2 Black, 722, 17 L. ed. 342.

The bill does not aver that the authorities of West Virginia were parties or privies to any fraud alleged to have been perpetrated, or to any substantial defect in the elections had under the acts of Virginia of January and February. West Virginia, therefore, is to be considered as having acted in good faith in assuming possession and jurisdiction over the counties in question and their people, and that, upon the facts before her, she had a right to do so.

Third. But it is said that before Congress gave any assent to the transfer of the counties from Virginia to West Virginia, the former state, by the act of December 5, 1865, withdrew her assent by repealing the said acts of January and February; and that, until such congressional assent was given, Virginia had a right to pass such repealing act. This proposition is denied. The provision in the Constitution upon the subject is, that "no state shall, without the consent of Congress, enter into any agreement or compact with another state," etc. Art. 1, § 10.

The time when this consent is to be given, whether before or after or simultaneous with such agreement or compact, or the form in which it is to be given, the Constitution does not provide. The clause clearly assumes the authority of a state to enter into such compacts, and its object is merely to prevent their becoming binding upon the other states, without the sanction of Congress.

Green v. *Biddle*, 8 Wheat. 1.

That the states are authorized to enter into compact with each other, subject to the qualification of Congressional sanction for their absolute validity, has been adjudged.

Poole v. *Fleeger*, 11 Pet. 209, and *Rhode Island* v. *Mass.* 12 Pet. 725.

This sanction may be implied from the action of the government.

Any conduct upon its part, from which that implication can be drawn, is sufficient. And it will be contended that the facts which the court is bound to notice are conclusive to show that Congress not only did not refuse, but gave its consent to the compact in question.

The authorities relied upon by the complainants' counsel at the former argument, of *Florida* v. *Georgia*, 17 How. 494, 15 L. ed. 190; Lawr. Wheat. 453, and Vatt. Law Nat. ch. 2, pp. 4, 5, are not in any way inconsistent with this view.

Mr. Justice **Miller** delivered the opinion of the court:

The commonwealth of Virginia brings her bill in equity against the state of West Virginia, in this court, on the ground of its original jurisdiction of controversies between states under the Constitution, in which it is alleged that such a controversy has arisen between those states in regard to their boundary, and especially as to the question whether the counties of Berkeley and Jefferson have become part of the state of West Virginia, or are part of, and within the jurisdiction of, the commonwealth of Virginia; and the prayer of the bill is, that it may be established by the decree of this court, that those counties are part of the commonwealth of Virginia and that the boundary line between the two states shall be ascertained, established, and made certain, so as to include the counties mentioned as part of the territory and within the jurisdiction of the state of Virginia.

The stating part of this bill is largely composed of the substance of four acts of the general assembly of the commonwealth, copies of which are made exhibits and filed with the bill. The first of these statutes, after giving the consent of Virginia to the formation of the new state of West Virginia out of certain enumerated counties, previously part of the commonwealth, enacts in its 2d section, that consent is also given that the counties of Berkeley, Jefferson, and Frederick shall be included within the new state, whenever those counties shall ratify and assent to the Constitution of that state, at an election to be held for that purpose, at such time and under such regulations as the commissioners named in the schedule of the new Constitution shall prescribe. This act was passed May 13, 1862. On the 31st January, 1863, the same state passed another act, by which a vote was to be taken in the county of Berkeley, on the question whether that county should become part of the state of West Virginia, and four days later a similar act was passed to allow certain other counties on the same day mentioned in the act of January 31, to take a similar vote, and among the counties included in this last act was the county of Jefferson. Both these acts provided for the mode of ascertaining the result and communicating it to the state of West Virginia, and declared that if the vote was ascertained to be favorable to the proposition, the counties should become part of the new state. The fourth act of the Virginia legislature made an exhibit by the bill, was passed December 5, 1865, nearly three years after the two just mentioned, and repeals the 2d section of the act of 1862, and all of the two other acts, and withdraws all the consent given by those acts for the transfer of counties to the state of West Virginia. These statutes will be examined hereafter with more minuteness, as the questions which arise out of them come to be considered.

The bill, in addition to the substance of these statutes, alleges that no action whatever was had or taken under the 2d section of the act of 1862, but that afterwards the state of West Virginia was admitted into the Union under an act of Congress and proclamation of the President, without including either the counties of Berkeley, Jefferson, or Frederick.

It further alleges that an attempt was made to take the vote in the counties of Jefferson and Berkeley, at the time mentioned in the act of January 31, and February 4, 1863, but that owing to the state of the country at that time no fair vote could be taken; that no polls were open at any considerable number of the voting places; that the vote taken was not a fair and full expression; all of which was well known to the person who procured the certificates of election. It also alleges that it having been falsely and fraudulently suggested and falsely and untruly made to appear to the governor of the commonwealth, that a large majority of the votes was given in favor of annexation, he certified the same to the state of West Virginia, and that, thereupon, without the consent of Congress, that state extended her jurisdiction over the said counties of Berkeley and Jefferson, and over the inhabitants of the same, and still maintains the same.

To this bill the state of West Virginia appeared and filed a general demurrer, which, after having been twice argued at an interval of over three years, is now to be disposed of by the court.

The first proposition on which counsel insist in support of the demurrer is that this court has no jurisdiction of the case, because it involves the consideration of questions purely political; that is to say, that the main question to be decided is the conflicting claims of the two states to the exercise of political jurisdiction and sovereignty over the territory and inhabitants of the two counties which are the subject of dispute.

This proposition cannot be sustained without reversing the settled course of decision in this court and overturning the principles on which several well considered cases have been decided. Without entering into the argument by which those decisions are supported, we shall content ourselves with showing what is the established doctrine of the court.

In the case of *Rhode Island* v. *Mass.* 12 Pet. 724, this question was raised, and Chief Justice Taney dissented from the judgment of the court by which the jurisdiction was affirmed, on the precise ground taken here. The subject is elaborately discussed in the opinion of the court, delivered *by Mr. Justice Baldwin, [*54 and the jurisdiction, we think, satisfactorily sustained. That case, in all important features, was like this. It involved a question of boundary and of the jurisdiction of the states over the territory and people of the disputed region. The bill of Rhode Island denied that she had ever consented to a line run by certain commis-

THE DECISIONS

OF THE

Supreme Court of the United States

AT

DECEMBER TERM, 1870.

[Names of Counsel who actually appeared and argued the case, as shown by the Minute Book, are given in heavy faced type.]

WILLIAM COOK *et al., Plff. in Err.*,
v.
ALBERT T. BURNLEY and Royal A. Porter.

(See S. C. 11 Wall. 659-672.)

Mexican title of Juan Cano, valid—insufficient adverse possession—plea in abatement, when too late—former suit—objection to deposition—continuous possession—Texas decisions as to innocent purchaser—decision on discretionary questions, not available as error.

Title of Juan Cano, a colonist, in the *empressario* grant of Martin De Leon, and to whom the commissioner of that colony conveyed the league of land Apr. 11, 1835, as decided in White *et al.* v. Burnley, 20 How. 235, is valid.

Where a defendant sets up title under a land-warrant, which he had located within the boundaries of the grant to plaintiff's grantor, and relied on adverse possession of three years under the junior title, such defense is insufficient.

A plea in abatement of a suit put in after the defendants had pleaded to the merits is too late.

Where the parties to a suit in a state court were not the same as in the present case, the suit in the state court cannot be pleaded in abatement.

Where, in a deposition taken under the 30th section of the judiciary act, there is no certificate by the magistrate that he reduced the testimony to writing himself, or that it was done by the witness in his presence, such omission is fatal to the deposition.

What is a continuous possession is a mixed question of law and fact.

Where a survey of a plat granted by the commissioner was laid down on the public map of the district, which was deposited in the general land office as a matter of record, this, according to the decisions in the courts of Texas, deprives the junior locator of the character of an innocent purchaser; so does actual notice of the prior grant.

Exceptions to the rulings of the court on motions to postpone the trial and to change the venue are not available on writ of error.

[No. 13. Dec. Term, 1867].

Submitted Dec. 6, 1867. Decided Dec. 23, 1867.

IN ERROR to the District Court of the United States for the Eastern District of Texas.

The case is further stated by the court.

The suit was brought by Burnley and Porter, to recover a league of land situate on the western shore of Matagorda Bay, near the mouth of the River Levaca, in Calhoun County, Texas.

Messrs. **W. & A. L. Merriman,** *George W. Paschal,* and *A. H. Evans* for plaintiffs in error.

Messrs. **Greene Adams** and **W. P. Ballinger,** for defendants in error:

The parcel in immediate controversy lies

NOTE.—*Plea in abatement of another suit pending, when good.*

The law abhors multiplicity of actions and, therefore, whenever it appears on record, that the plaintiff has sued out two writs against the same defendant for the same thing, the second writ shall abate. 9 H. 6; Mo. 418, 539; 5 Co. 61; Doctr. Pl. 10, 67; Renner v. Marshall, 14 U. S. (1 Wheat.), 215; Johnston v. Bower, 4 H. & M. 487.

Plea of a prior action pending for the same cause between the same parties is a good plea in abatement, and, if true when filed, cannot be defeated by a subsequent discontinuance of the prior action. Frogg v. Long, 3 Dana, 157; S. C. 28 Am. Dec. 69; 1 Chit. 443; 1 Salk. 329; 2 Raym. 1014.

Pendency of a suit in a foreign court or in a court of the United States is not pleadable in abatement or in bar of a proceeding in a state court. Mitchell v. Bunch, 2 Paige, 606; S. C. 22 Am. Dec. 669; Maule v. Murray, 7 Term, 470; Imlay v. Ellefsen, 2 East, 453; Trubee v. Alden, 6 Hun, 78; B'k of Australia v. Nias, 16 Q. B. 717; Ld. Dillon v. Alvares, 4 Ves. 357; Foster v. Vassall, 3 Atk. 587; Cox v. Mitchell, 7 C. B. N. S. 55; Eaton, &c. R. Co. v. Hunt, 20 Ind. 457; Lyman v. Brown, 2 Curt. 559.

Pendency of an action for same cause in U. S. circuit court, having jurisdiction, is a good plea in abatement in the state courts for the same district. Smith v. Atl. Mut. F. Ins. Co. 22 N. H. 21; otherwise if it be for a district in another state. Sloan v. McDowell, 75 N. C. 29; Loyd v. Reynolds, 29 Ind. 299.

The pendency of an action in a state court is not a bar to a suit in U. S. circuit court or in supreme court of District of Columbia for same cause of action between same parties. Stanton v. Embry, 93 U. S. 548; White v. Whitman, 1 Curt. 494; Parsons v. Greenville, etc. R. Co. 1 Hugh. 279; Loring v. Marsh, 2 Cliff. 311.

The pendency of a suit in another state is not matter of abatement to a suit upon the same cause of action. West v. McConnell, 5 La. 424, 25 Am. Dec. 191; Chatzel v. Bolton, 3 McCord, 33; Salmon v. Wooton, 9 Dana, 422; Davis v. Morton, 4 Bush, 442; Bowne v. Joy, 9 Johns. 221; Walsh v. Durkin, 12 Johns. 199; Newell v. Newton, 10 Pick. 470; Telverton v. Conant, 18 N. H. 123; De Armond v. Bonn, 12 Ind. 607; Drake v. Brandner, 8 Tex. 351; Smith v. Lathrop, 44 Pa. St. 326; Humphries v. Davis, 38 Ala. 199; McJilton v. Love, 13 Ill. 486; Allen v. Watt, 69 Ill. 655; Trabee v. Short, 5 Cold. 293.

Pendency of a proceeding *in rem* in a foreign jurisdiction may be pleaded in abatement of the same cause of action, so also may a proceeding in a mixed action in which a specific thing as well as the performance of a personal obligation is de-

vided for representation of these counties in the Senate and House of Delegates if they elected to become a part of the new state, and that they should in that event constitute the eleventh judicial district. A distinct section also declares, in general terms, that additional territory may be admitted into and become part of the state with the consent of the legislature.

The schedule of this Constitution arranged for its submission to a vote of the people on the first Thursday in April, 1862.

This vote was taken and the Constitution ratified by the people; but it does not appear that either of the three counties of Jefferson, Berkeley, and Frederick took any vote at that time.

Next in order of this legislative history is the act of the Virginia legislature of May 13, 1862, passed shortly after the vote above mentioned had been taken, and which is Exhibit No. 1, in complainant's bill. This act gives the consent of the state of Virginia to the formation of the state of West Virginia out of certain counties named under the provisions set forth in its Constitution, and by its 2d section it is declared that the consent of the legislature of Virginia is also given that the counties of Berkeley, Jefferson, and Frederick, shall be included in said state "whenever the voters of said counties shall ratify and assent to said 58*] Constitution, *at an election held for that purpose, at such time and under such regulations as the commissioners named in the said schedule may prescribe."

This act was directed to be sent to the Senators and Representatives of Virginia in Congress, with instructions to obtain the consent of Congress to the admission of the state of West Virginia into the Union.

Accordingly on the 31st of December, 1862, Congress acted on these matters, and reciting the proceedings of the convention of West Virginia, and that both that convention and the legislature of the state of Virginia had requested that the new state should be admitted into the Union, it passed an act for the admission of said state, with certain provisions not material to our purpose.

Let us pause a moment and consider what is the fair and reasonable inference to be drawn from the actions of the state of Virginia, the convention of West Virginia, and the Congress of the United States in regard to these counties.

The state of Virginia, in the ordinance which originated the formation of the new state, recognized something peculiar in the condition of these two counties, and some others. It gave them the option of sending delegates to the constitutional convention, and gave that convention the option to receive them. For some reason not developed in the legislative history of the matter these counties took no action on the subject. The convention, willing to accept them, and hoping they might still express their wish to come in, made provision in the new Constitution that they might do so, and for their place in the legislative bodies, and in the judicial system, and inserted a general proposition for accession of territory to the new state. The state of Virginia, in expressing her satisfaction with the new state and its Constitution, and her consent to its formation, by a special section, refers again to the counties of Berkeley, Jefferson, and Frederick, and enacts that whenever they shall, by a majority vote assent to the Constitution of the new state they may become part thereof; and the legislature sends this statute to Congress with a request that it will admit the new *state [*59 into the Union. Now, we have here, on two different occasions, the emphatic legislative proposition of Virginia that these counties might become part of West Virginia; and we have the Constitution of West Virginia agreeing to accept them and providing for their place in the new born state. There was one condition, however, imposed by Virginia to her parting with them, and one condition made by West Virginia to her receiving them, and that was the same, namely: the assent of the majority of the votes of the counties to the transfer.

It seems to us that here was an agreement between the old state and the new that these counties should become part of the latter, subject to that condition alone. Up to this time no vote had been taken in these counties; probably none could be taken under any but a hostile government. At all events, the bill alleges that none was taken on the proposition of May, 1862, of the Virginia legislature. If an agreement means the mutual consent of the parties to a given proposition, this was an agreement between these states for the transfer of these counties on the condition named. The condition was one which could be ascertained or carried out at any time; and this was clearly the idea of Virginia when she declared that whenever the voters of said counties should ratify and consent to the Constitution they should become part of the state, and her subsequent legislation making special provision for taking the vote on this subject, as shown by the acts of January 31st and February 4th, 1863, is in perfect accord with this idea, and shows her good faith in carrying into effect the agreement.

2. But did Congress consent to this agreement?

Unless it can be shown that the consent of Congress, under that clause of the Constitution which forbids agreements between states without it, can only be given in the form of an express and formal statement of every proposition of the agreement, and of its consent thereto, we must hold that the consent of that body was given to this agreement.

*The attention of Congress was called [*60 to the subject by the very short statute of the state of Virginia requesting the admission of the new state into the Union, consisting of but three sections, one of which was entirely devoted to giving consent that these two counties and the county of Frederick might accompany the others, if they desired to do so. The Constitution of the new state was literally cumbered with the various provisions for receiving these counties if they chose to come, and in two or three forms express consent is there given to this addition to the state. The subject of the relation of these counties to the others, as set forth in the ordinance for calling the convention, in the Constitution framed by that convention, and in the act of the Virginia legislature, must have received the attentive consideration of Congress. To hold otherwise is to suppose that the act for the admission of the new state

passed without any due or serious consideration. But the substance of this act clearly repels any such inference; for it is seen that the Constitution of the new state was, in one particular at least, unacceptable to Congress, and the act only admits the state into the Union when that feature shall be changed by the popular vote. If any other part of the Constitution had failed to meet the approbation of Congress, especially so important a part as the proposition for a future change of boundary between the new and the old state, it is reasonable to suppose that its dissent would have been expressed in some shape, especially as the refusal to permit those counties to attach themselves to the new state would not have endangered its formation and admission without them.

It is, therefore, an inference clear and satisfactory that Congress, by that statute, intended to consent to the admission of the state with the contingent boundaries provided for in its Constitution and in the statute of Virginia, which prayed for its admission on those terms, and that in so doing it necessarily consented to the agreement of those states on that subject. 61*] *There was then a valid agreement between the two states consented to by Congress, which agreement made the accession of these counties dependent on the result of a popular vote in favor of that proposition.

3. But the commonwealth of Virginia insists that no such vote was ever given; and we must inquire whether the facts alleged in the bill are such as to require an issue to be made on that question by the answer of the defendant.

The bill alleges the failure of the counties to take any action under the act of May, 1862, and that on the 31st of January and the 4th of February, thereafter, the two other acts we have mentioned were passed to enable such vote to be taken. These statutes provide very minutely for the taking of this vote under the authority of the state of Virginia; and among other things, it is enacted that the governor shall ascertain the result, and, if he shall be of opinion that said vote has been opened and held and the result ascertained and certified pursuant to law, he shall certify that result under the seal of the state to the governor of West Virginia; and if the majority of the votes given at the polls were in favor of the proposition, then the counties became part of said state. He was also authorized to postpone the time of voting if he should be of opinion that a fair vote could not be taken on the day mentioned in these acts.

Though this language is taken mainly from the statute which refers to Berkeley county, we consider the legal effect of the other statute to be the same.

These statutes were in no way essential to evidence the consent of Virginia to the original agreement, but were intended by her legislature to provide the means of ascertaining the wishes of the voters of these counties, that being the condition of the agreement on which the transfer of the counties depended.

The state thus showed her good faith to that agreement, and undertook in her own way and by her own officers to ascertain the fact in question.

62*] *The legislature might have required the vote to have been reported to it, and assumed the duty of ascertaining and making known the result to West Virginia; but it delegated that power to the governor. It invested him with full discretion as to the time when the vote should be taken, and made his opinion and his decision conclusive as to the result. The vote was taken under these statutes, and certified to the governor. He was of opinion that the result was in favor of the transfer. He certified this fact under the seal of the state to the state of West Virginia, and the legislature of that state immediately assumed jurisdiction over the two counties, provided for their admission, and they have been a part of that state ever since.

Do the allegations of the bill authorize us to go behind all this and inquire as to what took place at this voting? To inquire how many votes were actually cast? How many of the men who had once been voters in these counties were then in the rebel army? Or had been there and were thus disfranchised? For all these and many more embarrassing questions must arise if the defendant is required to take issue on the allegations of the bill on this subject.

These allegations are indefinite and vague in this regard. It is charged that no fair vote was taken; but no act of unfairness is alleged. That no opportunity was afforded for a fair vote. That the governor was mislead and deceived by the fraud of those who made him believe so. This is the substance of what is alleged. No one is charged specifically with the fraud. No particular act of fraud is stated. The governor is impliedly said to have acted in good faith. No charge of any kind of moral or legal wrong is made against the defendant, the state of West Virginia.

But, waiving these defects in the bill, we are of the opinion that the action of the governor is conclusive of the vote as between the states of Virginia and West Virginia. He was, in legal effect, the state of Virginia in this matter. In addition to his position as executive head of the state, the legislature delegated to him all its own power in the premises. It vested him with large control as to the time of taking the *vote, and it made his opinion of the [*63 result the condition of final action. It rested, of its own accord, the whole question on his judgment and in his hands. In a matter where that action was to be the foundation on which another sovereign state was to act,—a matter which involved the delicate question of permanent boundary between the states and jurisdiction over a large population,—a matter in which she took into her own hands the ascertainment of the fact on which these important propositions were by contract made to depend, she must be bound by what she has done. She can have no right, years after all this has been settled, to come into a court of chancery to charge that her own conduct has been a wrong and a fraud, that her own subordinate agents have misled her governor, and that her solemn act transferring these counties shall be set aside, against the will of the state of West Virginia, and without consulting the wishes of the people of those counties.

This view of the subject renders it unnecessary to inquire into the effect of the act of

1865 withdrawing the consent of the state of Virginia, or the act of Congress of 1866, giving consent, after the attempt of the state to withdraw hers.

The demurrer to the bill is, therefore, sustained, and the bill must be dismissed.

Mr. Justice **Davis**, dissenting:

Being unable to agree with the majority of the court in its judgment in this case, I will briefly state the grounds of my dissent.

There is no difference of opinion between us in relation to the construction of the provision of the Constitution which affects the question at issue. We all agree that, until the consent of Congress is given, there can be no valid compact or agreement between states. And that, although the point of time when Congress may give its consent is not material, yet, when it is given, there must be a reciprocal and concurrent consent of the three parties to the contract. **64***] Without *this, it is not a completed compact. If, therefore, Virginia withdrew its assent before the consent of Congress was given, there was no compact within the meaning of the Constitution.

To my mind nothing is clearer, than that Congress never did undertake to give its consent to the transfer of Berkeley and Jefferson counties to the state of West Virginia until March 2, 1866. If so, the consent came too late, because the legislature of Virginia had, on the 5th day of December, 1865, withdrawn its assent to the proposed cession of these two counties. This withdrawal was in ample time, as it was before the proposal of the state had become operative as a concluded compact, and the bill (in my judgment) shows that Virginia had sufficient reasons for recalling its proposition to part with the territory embraced within these counties.

But, it is maintained in the opinion of the court that Congress did give its consent to the transfer of these counties by Virginia to West Virginia, when it admitted West Virginia into the Union. The argument of the opinion is, that Congress, by admitting the new state, gave its assent to that provision of the new Constitution which looked to the acquisition of these counties, and that if the people of these counties have since voted to become part of the state of West Virginia, this action is within the consent of Congress. I most respectfully submit that the facts of the case (about which there is no dispute), do not justify the argument which is attempted to be drawn from them.

The 2d section of the 1st article of the Constitution of West Virginia was merely a proposal addressed to the people of two distinct districts, on which they were invited to act. The people of one district (Pendleton, Hardy, Hampshire, and Morgan) accepted the proposal. The people of the other district (Jefferson, Berkeley, and Frederick) rejected it.

In this state of things, the first district became a part of the new state, so far as its Constitution could make it so, and the legislature of Virginia included it in its assent, and **65***] *Congress included it in its admission to the Union. But neither the Constitution of West Virginia, nor the assent of the legislature of Virginia, nor the consent of Congress, had any application whatever to the second district. For though the 2d section of the first article of the new Constitution had proposed to include it, the proposal was accompanied with conditions which were not complied with; and when that Constitution was presented to Congress for approval, the proposal had already been rejected, and had no significance or effect whatever.

I am authorized to say that Mr. Justice **Clifford** and Mr. Justice **Field** concur in this dissent.

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*JUSTO GARCIA Y LEON, *Plff. in Err.*, [*185

v.

MARIANO GALCERAN.

JUSTO GARCIA Y LEON, *Plff. in Err.*,

v.

MANUAL PIJUAN.

JUSTO GARCIA Y LEON, *Plff. in Err.*,

v.

JUAN OLIVER.

(See S. C. 11 Wall. 185-192.)

Suits by mariners to recover wages—where brought—mariners may waive lien and sue in state court—suits against sureties.

Mariners, in suits to recover their wages, may proceed against the owner or master of the ship *in personam*, or they may proceed *in rem* against the ship, or ship and freight, at their election.

The mariner may proceed by libel in the district court, or by an action at law, either in the circuit court, or in a state court, as in other causes of action cognizable in the state and Federal courts, exercising jurisdiction in common-law cases.

Claims of the kind create a lien upon the vessel under the laws of Louisiana, similar to the lien which arises in such cases under the maritime law.

Common-law remedies are not competent to enforce a maritime lien by a proceeding *in rem* and, consequently, the jurisdiction in such cases is exclusively in the district courts.

Even where a maritime lien arises, the injured party may waive his lien, and may resort to his common law remedy in the state court, against the owner of the vessel.

Suit may be brought in the state court against sureties in a bond given to release property from a writ of sequestration.

[Nos. 85, 86, 92.]

Submitted Feb. 6, 1871. Decided Mar. 6, 1871.

IN ERROR to the Seventh Judicial District Court of the State of Louisiana.

Petitions in these cases were filed in the district court in and for the parish of Orleans in the state of Louisiana, by the defendants in error, for moneys alleged to be due them upon certain bonds given as security in the course of legal proceedings therefor, had for the collection of sailors' wages. Judgments having been given for the plaintiffs, the defendant sued out these writs of error.

The case is fully stated by the court.

Messrs. **Caleb Cushing** and *John T. Drew*, for plaintiff in error:

Even if the state court could entertain a personal action against the owner, it had no jurisdiction over the vessel by conservatory writ and proceeding *in rem*, to enforce a maritime lien by seizure before judgment.

This question seems to be settled in a late case of *The Belfast* v. *Boon*, 7 Wall. 624, 19 L. ed. 266; and in the case of *The Moses Taylor*, 4 Wall. 411, 18 L. ed. 397.

Having no jurisdiction, therefore, over the vessel in a proceeding *in rem*, a judicial bond, given in that court for its delivery, is null and void; and the court having no authority of law, or jurisdiction of the subject-matter, the order of the court to bond is also an absolute nullity.

"The rule that as one binds himself he must remain bound, may be true in mere conventional obligations; but the effect of judicial bonds must be tested by the law directing them to be taken. That which is superadded must be rejected, and that which is omitted supplied. So, if there be no law authorizing such a bond to be taken, or if the prerequisites required for the taking thereof be not fulfilled, the bond will not bind; there is error, and the consideration fails." 2 Hennen, La. Dig. new ed. p. 1023, *verbo* 6.

(No counsel appeared in this court for the defendants in error, but an argument was filed by them, of which the following is an abstract:)

The owner of the vessel sequestered was personally sued and cited, and in due course of law, judgments were rendered by default against him *in personam*, for the amounts claimed, with the mariner's lien and privilege upon the property sequestered.

On the return of the sheriff, that the property bonded could not be found, suits were then brought in the same court by the defendants in error, to enforce *in personam* the obligation of said forthcoming bonds against the surety thereon, and after the question of jurisdiction was urged and overruled, judgments were rendered in *personam*, in favor of the defendants in error, against said surety, for the amounts fixed by the original judgments.

The right of mariners to bring suits *in personam* against the owners of the vessel on which they have earned their wages, in the state courts, is expressly reserved to them by the judiciary act of 1789, under the proviso, "saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it."

The writ of sequestration was issued as a mesne or conservatory process, to preserve intact, *pendente lite*, a lien and privilege granted by law; and to secure the presence of the vessel within the territorial jurisdiction of the state court, until after the final judgments, to be then subjected to execution and sale. Said writ was as lawful as the suit itself, to which it was a mere appendage or incident, and as the writ of fieri facias issued on said personal judgments, and of which said writ of sequestration was the mere precursor.

The only thing which the Federal Constitution and the judiciary act of 1789 seem to have taken away from the state courts is the cognizance of civil causes of admiralty and maritime jurisdiction, when the same are sought to be brought solely *in rem*, against the offending vessel itself as a party defendant to the suit.

The writ of sequestration has no analogy whatever with the admiralty process, as understood and defined by writers on admiralty law.

See art. 269 *et seq.* of the Louisiana Code of Practice.

"When properly brought, the suit is against the owners of the vessel; and in states where there are attachment laws, the plaintiff may attach any property not exempted from execution belonging to the defendant. The vessel is held under the attachment as the property of the defendant, and not as the offending thing, as in the case of a proceeding *in rem*." *The Belfast* v. *Boon*, 7 Wall. 645, 19 L. ed. 272.

"The distinguishing and characteristic feature of such a suit (one *in rem*) is, that the vessel or thing proceeded against is itself seized and impleaded as the defendant. It is this dominion of the suit in admiralty over the vessel or thing itself, which gives to tne title made under its decrees, validity against the whole world. By the common-law process, whether of mesne attachment or execution, property is reached only through a personal defendant, and then only to the extent of his title." *The Moses Taylor*, 4 Wall. 427, 18 L. ed. 400.

Mr. Justice **Clifford** delivered the opinion of the court:

Mariners in suits to recover their wages, may proceed against the owner or master of the ship *in personam*, or they *may proceed *in* [*188 *rem* against the ship, or ship and freight, at their election.

Where the suit is *in rem* against the ship, or ship and freight, the original jurisdiction of the controversy is exclusive in the district courts, as provided by the 9th section of the judiciary act; but when the suit is *in personam* against the owner or master of the vessel, the mariner may proceed by libel in the district court, or he may, at his election, proceed in an action of law either in the circuit court, if he and his debtor are citizens of different states, or in a state court as in other causes of action cognizable in the state and Federal courts exercising jurisdiction in common-law cases, as provided in the 11th section of the judiciary act. 1 Stat. at L. 78; *The Belfast*, 7 Wall. 642, 644, 19 L. ed. 271.

He may have an action at law in the case supposed either in the circuit court or in a state court, because the common law, in such a case, is competent to give him a remedy, and wherever the common law is competent to give a party a remedy in such a case, the right to such a remedy is reserved and secured to suitors by the saving clause contained in the 9th section of the judiciary act.

Services, as mariners on board the schooner Gallego, were rendered by each of the appellees in these cases, and their claims for wages remaining unpaid, on the 8th of August, 1868, they severally brought suit *in personam* against Joseph Maristany, the sole owner of the schooner, to recover the respective amounts due to them, as wages for their services as such mariners.

Claims of the kind create a lien upon the vessel under the laws of that state quite similar to the lien which arises in such cases under the maritime law. They accordingly applied to the court where the suits were returnable for writs of sequestration, and the same having been granted and placed in the hands of the sheriff for service, were levied upon the schooner as a security to respond to the judgments which the plaintiffs in the respective suits might recover *against the owner [*189 of the vessel, as the defendant in the several suits.

Such a writ when duly issued and served in

such a case has substantially the same effect in the practice of the courts of that state as an attachment on mesne process in jurisdictions where a creditor is authorized to employ such a process to create a lien upon the property of his debtor as a security to respond to his judgment. Neither the writ of sequestration nor the process of attachment is a proceeding *in rem*, as known and practised in the admiralty; nor do they bear any analogy whatever to such a proceeding, as the suit in all such cases is a suit against the owner of the property and not against the property as an offending thing, as in case where the libel is *in rem* in the admiralty court to enforce a maritime lien in the property.

Due notice of the suit was given to the defendant in each case, and he appeared and made defense. Pending the suits the schooner, which had previously been seized by the sheriff under the writ or writs of sequestration, was released on motion of the defendant in those suits and was delivered into his possession, he, the defendant, giving a bond to the sheriff, with surety, conditioned to the effect that he would not send the property out of the jurisdiction of the court nor make any improper use of it, and that he would faithfully present the same in case such should be the decree of the court, or that he would satisfy such judgment as should be recovered in the suit.

Judgment was recovered by the plaintiff in each case against the owner of the schooner, and executions were issued on the respective judgments, and the same were placed in the hands of the sheriff. Unable to find any property of the debtor or to make the money, the sheriff returned the execution unsatisfied, and the property bonded was duly demanded both of the principal obligor and of the present plaintiff in error, who was the surety in each of the forthcoming bonds.

Given, as the bonds were, on the release of the schooner, they became the substitute for 190*] the property, and the obligors *refusing to return the same or to satisfy the judgments, the respective judgment creditors instituted suits against the surety in those bonds. Service having been duly made, the defendant appeared and filed an exception to the jurisdiction of the court in each case, upon the ground that the cause of action was a matter exclusively cognizable in the district courts of the United States, but the court overruled the exception and gave judgment for the plaintiff; whereupon the defendant sued out a writ of error in each case and removed the same into this court.

Briefly stated, the defense in the court below was, that the action was founded on a bond given for the sale of the schooner seized under admiralty process in a proceeding *in rem*, over which the state court had no jurisdiction *ratione materiæ*, "and that the bond was taken *coram non judice* and is void." Enough has already been remarked to show that the theory of fact assumed in the exception is not correct, as the respective suits instituted by the mariners were suits *in personam* against the owner of the schooner, and not suits *in rem* against the vessel, as assumed in the exception. Were the fact as supposed, the conclusion assumed would follow, as it is well-settled law that common-law remedies are not appropriate nor competent to enforce a maritime lien by a proceeding *in rem* and, consequently, that the jurisdiction conferred upon the district courts, so far as respects that mode of proceeding, is exclusive.

State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a state court to enforce such a lien by a suit or proceedings *in rem*, as practised in the admiralty courts; but whenever a maritime lien arises the injured party may pursue his remedy by a suit *in personam* or by a proceeding *in rem* at his election. Such a party may proceed *in rem* in the admiralty, and if he elects to pursue his remedy in that mode, he cannot proceed in any other form, as the jurisdiction of the admiralty courts is exclusive in respect to that mode of proceeding, but such a party is not restricted to that mode of proceeding even in the admiralty court, as he may waive his lien and proceed *in [*191 *personam* against the owner or master of the vessel in the same jurisdiction, nor is he compelled to proceed in the admiralty at all, as he may resort to his common-law remedy in the state courts, or in the circuit court, if he and his debtor are citizens of different states.

Suitors, by virtue of the saving clause in the 9th section of the judiciary act conferring jurisdiction in admiralty upon the district courts, have the right of a common-law remedy in all cases "where the common law is competent to give it." and the common law is as competent as the admiralty to give a remedy in all cases where the suit is *in personam* against the owner of the property.

Attempts have been made to show that the opinion of the court in the case of *The Moses Taylor*, 4 Wall. 411, 18 L. ed. 397, and the opinion of the court in the case of *The Hine* v. *Trevor*, 4 Wall. 555, 18 L. ed. 451, are inconsistent with the views here expressed; that the court in those cases do not admit that a party in such a case can ever have a remedy in a state court; but it is clear that every such suggestion is without foundation, as plainly appears from the brief explanations given in each case by the justice who delivered the opinion of the court. Express reference is made in each of those cases to the clause in the 9th section of the judiciary act, which gives to suitors the right of a common-law remedy where the common law is competent to give it, and there is nothing in either opinion, when the language employed is properly applied to the subject-matter then under consideration, in the slightest degree inconsistent with the more elaborate exposition of the clause subsequently given in the opinion of the court in the case of *The Belfast*, 7 Wall. 642, 19 L. ed. 271, in which all the members of the court as then constituted concurred. Those explanations are a part of the respective opinions, and they expressly recognize the right of the suitor to his common-law action and remedy by attachment, as provided in the saving clause of the 9th section of the judiciary act.

Common-law remedies are not competent to enforce a maritime lien by a proceeding *in rem* and, consequently, the *original juris- [*192 diction to enforce such a lien by that mode of proceeding is exclusive in the district courts, which is precisely what was decided in each of

the three cases to which reference is made. Authority, therefore, does not exist in a state court to hear and determine a suit *in rem*, founded upon a maritime contract in which a maritime lien arises, for the purpose of enforcing such a lien. Jurisdiction in such cases is exclusively in the district courts, subject to appeal as provided in the acts of Congress, but such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port, and in respect to such contracts it is competent for the states to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement. *The Belfast*, 7 Wall. 643, 19 L. ed. 271. *The St. Lawrence*, 1 Black, 529, 17 L. ed. 184.

Even where a maritime lien arises, the injured party, if he sees fit, may waive his lien and proceed by a libel *in personam* in the admiralty, or he may elect not to go into admiralty at all, and may resort to his common-law remedy, as the plaintiffs in these cases did, in the subordinate court. They brought their suits in the state court against the owner of the schooner, as they had a right to do, and having obtained judgments against the defendant, they might levy their executions upon any property belonging to him, not exempted from attachment and execution, which was situated in that jurisdiction.

Undoubtedly they might also resort to the bond given when the schooner was released, but they were not compelled to do so if the sheriff could find other property belonging to the debtor. By the return of the sheriff it appears that other property to satisfy the executions could not be found, and under those circumstances they brought these suits against the surety in those bonds, as they clearly had a right to do, whether the question is tested by the laws of Congress or the decisions of this court.

Judgment affirmed.

THE GERMANIA FIRE INSURANCE COMPANY, *Plff. in Err.*, *v.* JOHN R. FRANCIS.

(See S. C. 11 Wall. 210-216.)

Averment of citizenship of corporation—is citizen only of state creating it—effect of want of jurisdiction of court below.

Where the declaration avers that the defendant is a corporation created by an act of the legislature of the state of New York, located in Mississippi, and doing business there under the laws of the state, this, in legal effect, is an averment that the defendant was a citizen of New York.

A corporation, although it may be permitted to transact business where its charter does not operate, cannot on that account acquire a residence there.

Where the declaration is, on its face, bad in not showing that one of the parties to the suit was a citizen of Mississippi, the district court had no jurisdiction to try it.

Where the court below has no jurisdiction to try the case, its judgment will be reversed.

[No. 82.]

Argued Feb. 24, 1871. Decided Mar. 6, 1871.

IN ERROR to the District Court of the United States for the District of Mississippi.

Suit was brought in the circuit court of Monroe county, state of Mississippi, by the defendant in error, to recover insurance upon a certain stock of merchandise. Upon the petition of the plaintiff, the case was removed to the district court of the United States for the northern district of Mississippi.

Judgment having been given for the plaintiff, the defendant sued out this writ of error.

The case is sufficiently stated by the court.

Messrs. **J. M. Carlisle** and **J. D. McPherson**, for plaintiff in error:

The question is here distinctly raised, whether the Federal court acquired jurisdiction by the transfer ordered and made, as hereinbefore stated.

There is but one act of Congress authorizing the plaintiff to remove his cause from the state to the Federal court; that is the act of Mar. 2, 1867. 14 Stat. at L. 558. And this act in express terms, authorizes the transfer only when one party is a citizen of the state in which the suit is brought, and the other party is a citizen of a different state.

In the case at bar, neither in the declaration nor elsewhere was it made to appear that either party was a citizen of Mississippi. On the contrary, the declaration filed in the district court, averred in express terms, that the plaintiff was a citizen of Illinois; and also averred, in legal effect, that the defendant was a citizen of New York by averring that it was a corporation created by an act of the legislature of New York.

R. Co. v. *Wheeler*, 1 Black, 286, 17 L. ed. 130; *R. Co.* v. *Letson*, 2 How. 497.

The averment that the defendant was doing business in Mississippi, under the laws of that state, can have no effect upon the jurisdiction of the Federal courts, which, under the Constitution and statutes of the United States, depends solely on citizenship.

Messrs. **T. A. Hendricks**, *D. W. Voorhees*, and *R. N. Bishop*, for defendant in error:

The jurisdictional facts in this case are contained in the averments in the petition: "That said defendant is a corporation, with agents and officers in said state of Mississippi, here residing and transacting the business of insurance, for which said company was incorporated," and in the declaration as "a corporation created by an act of the legislature of the state of New York, located in the city of Aberdeen and state of Mississippi, in the district aforesaid, under and by virtue of the laws of Mississippi."

These averments are substantially the same, and present the question: Is a corporation with agents and officers residing, located, and doing business in a state, under and by virtue of its laws and suable there, a citizen of that state under the act of Mar. 2, 1867?

It is believed that the exact point raised here has never been decided by this court. The two

NOTE.—*Citizenship of corporations with reference to jurisdiction of courts over them*—see notes, 3 L. ed. U. S. 36; 27 L. ed. U. S. 87; 6 C. C. A. 174.

cases cited by plaintiff in error do not decide it, though they throw considerable light on it. But in neither of these cases do they establish a test or criterion for the locality of a citizenship of a corporation, nor do they describe a similar state of facts to those exisiting in this case.

In this case the plaintiff in error was created by the state of New York, and has its principal place of business there. But it was so created, not to exist in New York alone, not, in the words used in *Letson's Case* "to perform its functions" "under the authority of that state," but expressly "to perform its functions" in other states and under their authority, wherever it could get permission.

This court, in *Letson's Case*, 2 How. 497, 558, says:

"Lord Coke says: Every corporation and body politic residing in any county, riding, city or town corporate, or having lands or tenements in any shire, *qua propriis manibus et sumptibus possident et habent*, are said to be inhabitants within the purview of the statute."

In the case of *King* v. *Gardner*, in Cowp. 79, a corporation was decided by the court of K. B. to come within the description of occupiers or inhabitants.

In *The Bank* v. *Deveaux*, the case most relied upon for the doctrines contended for by the plaintiff in error, it is said of a corporation: "This ideal existence is considered as an inhabitant, when the general spirit and purpose of the law require it." If it be so for the purposes of taxation, why is it not so for the purposes of a suit in the circuit court of the United States, when the plaintiff has the proper residence? Certainly, the spirit and purpose of the law require it.

It had, therefore, the quality of residence in Mississippi.

It had removed and assumed an existence there "under and by virtue of the laws of Mississippi." See R. S. of Miss. ch. Insurance:

That a corporation can have no legal existence beyond the limits of the state incorporating it has been repeatedly decided and is true, if there is no further action on the part of other states.

But when a corporation created by one state for the express purpose of transacting its business in such other states as will admit it, by the express statutory permission and authority of another state, sends its officers and agents into such state, or appoints citizens and residents of that state its officers and agents, accepts the laws and conditions annexed by that state to its admission—one of which is that it shall be suable there, and to which it in writing expressly consents—then it would seem, both in fact and in law, to exist in that state, and to be a citizen there for the purpose of suing and being sued, which is the only quality and attribute of citizenship a corporation has ever been held to possess. It has, therefore, the quality of suability in that state.

It had assented to the conditions in the statutes of Mississippi and in return, therefore, it was authorized and empowered by Mississippi to do business here. Its power to perform its functions in the state of Mississippi, and to exist there, are, therefore, derived from that state, and it has to that extent at least its incorporation (by which is meant its grant of power) from the state of Mississippi, and ha that quality of citizenship there.

The cases cited by plaintiff in error *Letson' Case*, *supra*, and *R. Co.* v. *Wheeler*, 1 Black 286, 17 L. ed. 130, do not conflict with thi view.

In *Letson's Case*, 2 How. 497, the court de cides: "A corporation created by a state t perform its functions under the authority o that state, and only suable there, though it may have members out of the state, seems to us to be a person, though an artificial one, inhabiting and belonging to that state and, therefore, entitled for the purpose of suing and being sued to be deemed a citizen of that state."

This is the definition of a corporation which is a citizen of a particular state for a particular purpose. The plaintiff in error was not created to perform its functions under the authority of New York alone, but in any other state under its authority. Neither is it only suable there—in New York. But by the law of Mississippi (statutes on insurance above cited) it is made suable in that state,—required to give its written consent thereto, which this court will conclusively presume it has done. It does not, therefore, under this decision, become exclusively a citizen of New York.

In the second case cited, *R. Co.* v. *Wheeler*, *supra*, the corporation, plaintiff in error, attempted to fix a criterion by which the citizenship of a corporation could be located, and fixed upon the locality of its principal place of business, as the test. The court decided that that was not an exclusive test of quality, and the fact that its principal place of business was in Ohio, did not make it a citizen of Ohio.

Courts have nowhere decided that the mere fact of incorporation in a particular state alone, made it a citizen of that state.

Mr. Justice **Davis** delivered the opinion of the court:

The only point in this case, which we are required to notice, relates to the jurisdiction of the district court to hear and determine it.

The act of Congress of March 2, 1867 (14 Stat. at L. 558), which allows a plaintiff, under certain circumstances, to remove his cause from the state to the Federal court, authorizes the transfer only when one party is a citizen of the state in which the suit is brought and the other party is a citizen of a different state. In this case, while it appears on the face of the declaration that the plaintiff is a citizen of Illinois, it does not appear that the defendant is a citizen of Mississippi. This being so, it is not necessary to notice the subsequent pleadings, because if the court can see, on the case made by the plaintiff in his declaration, that the district court acquired no jurisdiction over it, it is bound to reverse the judgment and direct the district court to remand the cause to the state court in which it was instituted. *Pollard* v. *Dwight*, 4 Cranch, 429.

*If the declaration had averred the [*216 citizenship of the parties to be as the law requires it, the jurisdiction of the district court would have attached, and we would be required to look further into the record in order to ascertain whether the defendant had raised the question of jurisdiction in season to avail it-

wif of the objection in this court. *De Sobry* v. *Nicholson*, 3 Wall. 423, 18 L. ed. 264.

The declaration avers that the plaintiff in error (the defendant in the court below) is a corporation created by an act of the legislature of the state of New York, located in Aberdeen, Mississippi, and doing business there under the laws of the state. This, in legal effect, is an averment that the defendant was a citizen of New York, because a corporation can have no legal existence outside of the sovereignty by which it was created. *Ohio & Miss. R. Co.* v. *Wheeler*, 1 Black, 286, 17 L. ed. 130; *Louisville R. Co.* v. *Letson*, 2 How. 497. Its place of residence is there, and can be nowhere else. Unlike a natural person, it cannot change its domicil at will and, although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there.

As, therefore, the declaration is, on its face, bad in not showing that one of the parties to the suit was a citizen of Mississippi, it follows that the transfer of the cause was not authorized by law and that the district court had no jurisdiction to try it.

The judgment of the District Court is reversed and the cause is remanded to that court, with instructions to transmit it to the Circuit Court of Monroe County, for further proceedings in conformity to law and justice.

ALEXANDER Y. P. GARNETT, Claimant of Certain Real Estate, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C. 11 Wall. 256–259.)

Writ of error in District of Columbia—appellate jurisdiction of this court.

A writ of error lies from the supreme court of the District of Columbia to the district court of that District.

This court can revise judgments of such district court, only after they have been the subject of review by such supreme court, and then only in connection with the action of that court in affirming or reversing them.

[Nos. 14, 15.]

Argued Jan. 31, Feb. 1, 1869. Re-argued Feb. 8, 9, 1871. Decided Mar. 6, 1871.

IN ERROR to the Supreme Court of the District of Columbia.

This case arose upon a libel on information filed in the supreme court of the District of Columbia, sitting as a district court of the United States in and for said District of Columbia, for the confiscation of certain real estate of the plaintiff in error. A decree of condemnation of all the estate of the defendant the plaintiff in error here, having been entered in that court, the said defendant sued out a writ of error to the supreme court of said District of Columbia, sitting as a circuit court of the United States, by which court the said writ of error was dismissed. Thereupon, the said defendant sued out this writ of error.

The case is sufficiently stated by the court.

The argument of the case upon the merits was substantially the same as in the case of McVeigh v. *United States, post*, 80.

Messrs. **C. Cushing**, *W. W. Boyce*, and **B. R. Curtis**, for plaintiff in error.

Messrs. Hoar, Atty.-Gen., Field, Asst. Atty.-Gen., first argued the case, afterwards *Akerman, Atty.-Gen.*, and *Bristow, Solicitor Gen.*, reargued for defendants in error at above dates.

Mr. Justice **Swayne** delivered the opinion of the court:

This is a writ of error to the supreme court of the District of Columbia.

*The original proceeding was instituted in the district court of the United States for same territory. Its object was to procure the condemnation and sale of the property of the plaintiff in error, described in the libel of the United States, pursuant to the provisions of the act of Congress of July 17th, 1862, entitled "An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes." The libel alleged that the property belonged to Garnett, and that he was within three of the categories defined in the 5th section, which rendered it liable to be proceeded against in the manner prescribed. His offenses were specifically set forth. The property was condemned and sold. Garnett sued out a writ of error from the supreme court of the District of Columbia. The attorney of the United States filed a motion to dismiss the writ. The court dismissed it upon the ground that a writ of error would not lie from that court to the district court. Garnett excepted. His bill of exceptions is found in the record. [*258

This is the only point in the case which we have found it necessary to consider. In coming to this conclusion the learned court fell into an error.

The case was decided prior to the decision of this court in *Ex parte Bradley*, 7 Wall. 364, 19 L. ed. 214. It was not seriously controverted by the counsel for the defendants in error, in the argument at the bar, that this authority is conclusive upon the subject. The proposition is too clear to require discussion. Error, and not appeal was the proper revisory remedy. *Armstrong's Foundry*, 6 Wall. 766, 18 L. ed. 882. The other objections taken to the writ are also without validity. The order dismissing it must, therefore, be reversed. This will restore the case to the place it occupied before the supreme court of the District of Columbia, when the order dismissing it was made. As that court did not pass upon the alleged errors of the district court, we cannot consider them. Our province is to exercise appellate jurisdiction touching the proceedings of the supreme court of the district. We can examine those of the district court only after they have been the subject of review by the supreme court, and then only in connection with the action of that court in affirming or reversing them. We cannot regard them until they have received the impress of the judgment of the higher local court. [*259

The order dismissing the writ of error is reversed, and the cause will be remanded to the Supreme Court of the District of Columbia, with directions to proceed in the cause in conformity to law.

cases cited by plaintiff in error do not decide it, though they throw considerable light on it. But in neither of these cases do they establish a test or criterion for the locality of a citizenship of a corporation, nor do they describe a similar state of facts to those exisiting in this case.

In this case the plaintiff in error was created by the state of New York, and has its principal place of business there. But it was so created, not to exist in New York alone, not, in the words used in *Letson's Case* "to perform its functions" "under the authority of that state," but expressly "to perform its functions" in other states and under their authority, wherever it could get permission.

This court, in *Letson's Case*, 2 How. 497, 558, says:

"Lord Coke says: Every corporation and body politic residing in any county, riding, city or town corporate, or having lands or tenements in any shire, *qua propriis manibus et sumptibus possident et habent*, are said to be inhabitants within the purview of the statute."

In the case of *King* v. *Gardner*, in Cowp. 79, a corporation was decided by the court of K. B. to come within the description of occupiers or inhabitants.

In *The Bank* v. *Deveaux*, the case most relied upon for the doctrines contended for by the plaintiff in error, it is said of a corporation: "This ideal existence is considered as an inhabitant, when the general spirit and purpose of the law require it." If it be so for the purposes of taxation, why is it not so for the purposes of a suit in the circuit court of the United States, when the plaintiff has the proper residence? Certainly, the spirit and purpose of the law require it.

It had, therefore, the quality of residence in Mississippi.

It had removed and assumed an existence there "under and by virtue of the laws of Mississippi." See R. S. of Miss. ch. Insurance:

That a corporation can have no legal existence beyond the limits of the state incorporating it has been repeatedly decided and is true, if there is no further action on the part of other states.

But when a corporation created by one state for the express purpose of transacting its business in such other states as will admit it, by the express statutory permission and authority of another state, sends its officers and agents into such state, or appoints citizens and residents of that state its officers and agents, accepts the laws and conditions annexed by that state to its admission—one of which is that it shall be suable there, and to which it in writing expressly consents—then it would seem, both in fact and in law, to exist in that state, and to be a citizen there for the purpose of suing and being sued, which is the only quality and attribute of citizenship a corporation has ever been held to possess. It has, therefore, the quality of suability in that state.

It had assented to the conditions in the statutes of Mississippi and in return, therefore, it was authorized and empowered by Mississippi to do business here. Its power to perform its functions in the state of Mississippi, and to exist there, are, therefore, derived from that state, and it has to that extent at least its incorporation (by which is [illegible]

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Mr. Justice **Davis** delive
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Cranch, 429.

*If the declaration had averre
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sider, upon any principle that I am aware of. Now, was it not proper that this court of the United States should consider the question whether McVeigh had committed the offenses alleged in the libel, to cause the forfeiture of this property? Did not Congress intend, when it enacted this law, that that should be considered, and considered in every case?

In the case of *Hardiman* v. *Harris*, reported in 14 How. 334, Mr. Justice Daniel, who gave the opinion of the court, shows that it is a principle of universal jurisprudence which cannot be disregarded, that every party who is proceeded against in a court of justice, civilly or criminally, must have notice. Why? That he may appear and be heard. From the days of Magna Charta, as Lord Coke tells us, down to the present time, due process of law includes *actor, reus judex;* and how is anybody to be *judex* unless he hears?

This court has decided that the question whether a person was guilty, in point of fact, of these offenses leading to confiscation, must be tried by a jury, and under that decision, I suppose, beyond all doubt, all these cases must go back; but it is extremely important, I must say, considering the number of persons and the amounts of property involved, it is of public importance that the court should not merely formally send back these cases, but should send them back with decisions of points one way or the other, which are controlling.

In the case of *Armstrong's Foundry*, 6 Wall. 766, 18 L. ed. 882, and the other cases in 6 Wall. are referred to in the brief, the court has held that similar proceedings are on the common-law side of the court, and there must be trial by jury. Well, McVeigh filed his answer. The judge says: "You are a resident within the enemy's lines, and you are a rebel; you cannot be heard." How is he going to get to the jury? I respectfully submit that McVeigh was deprived of a legal right to be heard, to try his case, and deprived of it contrary to law.

Messrs. **Hoar,** *Atty.-Gen.*, and **Field,** *Asst. Atty.-Gen.*, made first argument for defendants in error, and *Messrs.* **Amos T. Akerman,** *Atty.-Gen.*, and **B. H. Bristow,** *Solicitor Gen.*, made the re-argument:

An enemy has no standing in a court, and cannot be admitted as a claimant, even in prize. Whether he be an enemy or not, if contested, must be determined by the court; but it is a different issue from the issue on the merits, and is to be determined in the first instance by the court. In proceedings *in rem*, if it is admitted by the claimant that he is an enemy, his claim must be stricken out.

Mumford v. *Mumford*, 1 Gall. 366; *The Emulous*, 1 Gall. 563; *The Peterhoff*, Blatchf. Pr. Cas. 463; Halleck, Int. L. 772, § 23, and the authorities there cited; *Hanger* v. *Abbott*, 6 Wall. 532, 18 L. ed. 939.

In the *McVeigh Case*, the claim and answer are not set out in the record; but the order striking them from the files recites that "it appearing from the answer that has been filed in this cause that the said respondent, William N. McVeigh, is, and at the time of the filing was, a resident of the city of Richmond, within the Confederate lines, and a rebel."

*Mr. Justice **Swayne** delivered the [*266 opinion of the court:

This is a writ of error to the Circuit Court of the United States for the district of Virginia.

The defendants in error filed in the district court of the United States for that district a libel of information, under the act of July 17, 1862, to reach, for the purposes of forfeiture and sale, certain real and personal property of McVeigh, a description of which is fully set forth. The original libel was the same, *mutatis mutandis*, as that in the case of *Garnett, claimant of certain real estate*, v. *The United States* [*ante*, 79.] An amendment was subsequently made, whereby a further charge was alleged of the offense defined in the 6th section of the act. The plaintiff in error appeared by counsel, interposed a claim to the property, and filed an answer. The attorney of the United States submitted a motion that the appearance, answer and claim should be stricken from the files, for the reasons that the respondent was "a resident of the city of Richmond, within the Confederate lines, and a rebel." An order was made according to the motion. Subsequently a decree *pro confesso* was taken. The property was condemned as forfeited, and ordered to be sold. The circuit court, upon error, affirmed the decree, and the case is now before us for review.

It is objected that McVeigh was incompetent to sue out this writ of error. His alleged criminality lies at the foundation of the proceeding. It was averred in the libel that he was the owner of the property described, and that he was guilty of the offenses charged, which rendered it liable to forfeiture. The questions of his guilt and ownership were, therefore, fundamental in the case. The notice of publication was given to bring him constructively before the court. It was in the nature of the substituted service of process. If he failed to appear, his absence and silence could not affect the validity of the proceedings. After the decree, *pro confesso*, he occupied the same relation to the record as a *defendant against whom a [*267 judgment by default has been taken. The case is wholly unlike a proceeding purely *in rem*, where no claimant is named, and none appears until after the final decree or judgment is entered, and the case has terminated. We entertain no doubt that the plaintiff in error had the right to sue out the writ, and that the record is properly before us for examination.

In our judgment the district court committed a serious error is ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order, in effect, denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact, and of the right administration of justice. *Calder* v.

WILLIAM N. McVEIGH, *Plff. in Err.*, *v.* UNITED STATES.

(See S. C. 11 Wall. 259–268.)

Confederate citizen may defend an action, and bring writ of error.

In a libel of information, under the act of July 17, 1862, to reach, for the purposes of forfeiture and sale, real and personal property, the owner of the property, although a resident of the city of Richmond, within the Confederate lines, and a Confederate, may file an answer and defend.

He also has the right to sue out a writ of error to this court.

[No. 28.]

Argued Jan. 31, Feb. 1, 1870. Re-argued Feb. 8, 9, 1871. Decided Mar. 6, 1871.

IN ERROR to the Circuit Court of the United States for the District of Virginia.

In this case a libel of information was filed in the district court of the United States for the eastern district of Virginia, to confiscate certain real estate of the plaintiff in error. A decree of confiscation having been entered in that court, the defendant sued out a writ of error to the circuit court, where the said decree was affirmed; whereupon the said defendant sued out this writ of error:

The case is further stated by the court.

Messrs. B. R. Curtis, **C. Cushing,** *George William Brent, C. W. Wattles, I. W. Moore,* and **Hughes,** *Denver & Peck,* for plaintiff in error:

Of course nothing remained for McVeigh but to be defaulted, because he was not allowed to appear; and the question is whether that was erroneous or not. The grounds assigned in the order are, that it appeared from the answer that McVeigh was a resident of the city of Richmond, within the Confederate lines, and a rebel. On looking into this act of Congress, it is found not to have been the intention of Congress to inflict this forfeiture upon persons because they were residents within the enemy's lines. That is quite clear; and it is also quite clear that there is nothing in this act of Congress to inflict a forfeiture upon a person because he was a rebel at the time when this answer was filed, even if it be assumed that the judge interpreted "rebel" to mean a person giving aid and comfort to the Rebellion, of which interpretation this court has no evidence whatever. I agree that the provision of the 5th section, which relates to persons owning property in any loyal state or territory of the United States, or in the District of Columbia, applies to those who, at any time after the passage of this act, should give aid and comfort to the enemy; but it does not apply to those who owned property within the state of Virginia, which was not one of the loyal states, and was one of the Confederate States. The 7th section of this law, which provides for persons who own property and commit the described offenses within the Confederate States, is limited, and limited in this way: "That if any person within any state or territory of the United States, other than those named as aforesaid (that is, other than the loyal states), after the passage of this act, being engaged in armed rebellion against the government of the United States, or aiding or abetting such re-

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Mr. Justice **Strong** delivered the opinion of the court:

The effect of Graham's assignment to the complainant was, undoubtedly, to dissolve the partnership which had existed between Beauregard, May and himself, but it did not make his assignee a tenant in common with the other two partners in the property of the firm. It seems to be assumed on behalf of the complainant, that in succeeding to Graham's rights, the Bank acquired an ownership of the effects of the firm jointly with Beauregard and May, and that, as Graham had been an equal partner with them, his assignee of course became the owner of one undivided third of the railroad lease and other property of the firm. But this assumption is based upon a misapprehension of the effect of the assignment. It has repeatedly been determined, both in the British and American courts, that the property or effects of a partnership belong to the firm and not to the partners, each of whom is entitled only to a share of what may remain after payment of the partnership debts and after a settlement of the accounts between the partners; consequently that no greater interest can be derived from a voluntary sale of his interest by one partner or by sale of it under execution. *West* v. *Skip*, 1 Ves. 239; *Nicoll* v. *Mumford*, 4 Johns. Ch. 522; *Doner* v. *Stauffer*, 1 Pa. 198. In *Field* v. *Taylor*, 4 Ves. Jr. 396, it was said that "a party coming into the right of partner" in any mode, either by purchase from such partner, or as a personal representative 629*] *or under an execution or commission of bankruptcy) "comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be made available, or be delivered but under an account between the partnership and the partner, and it is an item in the account that enough must be left for the partnership debts."

When, therefore, the bank obtained from Graham the assignment, which is the foundation of its claim in this suit, it obtained thereby no ownership of the lease made by the railroad company to Beauregard, and which he agreed to hold for the benefit of the firm, nor did it obtain any aliquot part of it, or of any of the effects of the firm. The utmost extent of its acquisition was an interest in the surplus, if any, which might remain after all debts of the firm should be paid, and after the liabilities of Graham to his copartners, as such, should be discharged. It was not in the power of Graham, by retiring from the firm in violation of the articles of copartnership, either to introduce another partner or to deprive the partners who remained of their right to have all the partnership property held for partnership purposes. Incident to the right of the bank to share in the surplus was a right to enforce a settlement of the partnership accounts in order to ascertain if there was any surplus. It is true the words of the assignment were very broad. It purported to transfer all the estate, right, title, and interest in the lease made by the New Orleans & Carrollton Railroad Company to Beauregard, to which the assignor might be entitled by virtue of the articles of copartnership, and also all his right and interest in any property and effects of the partnership, and all debts to him from the partnership or any member thereof. But no matter what its language, it is clear no more could pass under it than the right of the assignor; and if, as we have said, that was not a right to the specific articles of property belonging to the firm, the bank obtained no such right. We are not now speaking of the fact that, under his contract with the railroad company, Beauregard had no right to transfer the lease either to the partnership or its members. This case does not require us *to [*630 consider that inability. It is sufficient that the complainant's right was only an equity to share in the surplus, if any, of the firm property after settlement of the partnership accounts, and that this is a bill for such a settlement. Manifestly, then, it is incurably defective, because neither Graham nor May are made parties defendant. It is too plain for discussion that to such a bill all the members of the firm are indispensable parties, for they are all directly affected by any decree that can be made. How utterly impossible it is to ascertain what the equity of the complainant is, with the present state of the record, will appear more distinctly, if the provisions of the articles of copartnership be considered. When it was formed, Beauregard had obtained from the New Orleans & Carrollton Railroad Company a lease of its railroad, with all its rolling stock and with its corporate privileges, for the term of twenty-five years. Though the sole lessee, and prohibited by his contract from assigning or underletting, it was, nevertheless, agreed between him and his copartners that the lease should be for their common benefit; that May and Graham should each advance $150,000 to carry on the enterprise of running the road, and that Beauregard should take charge of, manage, and direct the undertaking for the mutual advantage of the parties, at a fixed annual salary, selecting and appointing his own assistants. It was agreed that the money advanced, with eight per cent interest, should be repaid from the annual profits of the enterprise, and that the remainder of the net profits should be equally divided between the partners, and that all losses should be equally borne by them. The contract evidently contemplated that the property of the firm and the management of its affairs should be in the hands of Beauregard. Books were to be kept, showing not only all money received and expended but also all purchases made on account of the copartnership; and monthly statement of amounts received and expended were required to be furnished by Beauregard to May and Graham. It was also agreed that the partnership should continue twenty-five years from the date *of the [*631 lease which was April 12, 1866. Now, it is quite possible that on settlement of the accounts, Graham may be found indebted to the firm, or to his copartners, and that the court would be required thus to decree. How can such a decree be made when he is no party to the record? Or it might appear that May is a large debtor to the firm. How can any decree be made against him? How can any decree be made that will not prejudice one or the other of these partners? And yet, whether the bank complainant has any interest or not—whether it acquired anything under Graham's assignment

—can be determined only by a final and conclusive settlement of the partnership accounts between all the partners, two of whom are not parties to this suit.

It is argued, however, on behalf of the appellant, that even if May and Graham were necessary parties, the bill should not have been dismissed, but that the complainant should have been allowed to bring in new parties by a supplemental bill. It is, doubtless, the general rule that a bill in chancery will not be dismissed for want of proper parties; but the rule is not universally true. It rests upon the supposition that the fault may be remedied, and the necessary parties supplied. When this is impossible, and whenever a decree cannot be made without prejudice to one not a party, the bill must be dismissed. Nothing is to be gained by retaining it, when it is certain that the complainant can never be entitled to a decree in his favor. Note 5, § 541, Story, Eq. Pl.; *Shields* v. *Barrow*, 17 How. 130, 15 L. ed. 158. In the present case, we have seen that no decree for an account can be made, until all the partners are made parties. But if both May and Graham had been made parties defendant, the circuit court would have had no jurisdiction of the case. It is said Graham might have been made a co-plaintiff. Perhaps he might, and had application been made in due season for such an amendment of the bill, it might have been the duty of the circuit court to grant it. But no such application was made. The complainants chose to stand upon their case as they presented it. Possibly they never would have sought 632*] *to bring in the necessary parties. The defendants could not bring them in. New parties cannot be brought into a cause by a cross-bill (*Shields* v. *Barrow*, *supra*), and had the bill not been dismissed, it must have been left at the option of the complainants whether the case should ever be brought to a final decree. Under these circumstances, there was no reason for retaining the bill.

It is insisted, however, that the court erred in dismissing the bill, reserving only a right to sue Beauregard, May and Graham, for a settlement of the partnership between them prior to the 14th and 16th of May, 1867. Yet if the right acquired by Graham's assignment was, as the authorities show, not an ownership of the specific effects of the partnership, but only a right to share in the surplus remaining after the settlement of the partnership accounts and the payment of all its debts, as well as the just claims of the several partners, it is clear there can be in the complainant no equity against the railroad company, or against Hernandez, Binder, or Bonneval, who have succeeded to May's rights (not his obligations), if they have not to Graham's. No fraudulent confederacy is charged in the bill. At most, according to the complainant's own showing, they are purchasers of property that belonged to the firm. There was, therefore, not only a want of indispensable parties, a want which cannot be supplied without ousting the jurisdiction of the court, but a misjoinder of the defendants, a misjoinder apparent upon the face of the bill. Hence the decree of the circuit court was correct.

The decree of the Circuit Court is affirmed.

WILLIAM M. COOK, *Plff. in Err.*,
v.
ROYAL H. PORTER *et al.*, Executors
Albert T. Burnley, Deceased.

(See S. C. "*Cook* v. *Burnley*," 11 Wall. 671-67

Error in executing mandate of this court-second writ of error—discretionary decisio not ground of error—what second writ error brings up.

Where the court below commits any substanti error in executing the mandate of this court, a se ond writ of error or appeal, as the case may b will lie to correct the error, and to cause the ma date to be executed according to its tenor and effec

An application to supply a lost writ, declaratio or other pleading, if accompanied by proof of los is addressed to the discretion of the court, and d cisions which rest in the discretion of a court c original jurisdiction, cannot be re-examined in a appellate court upon a writ of error.

A second writ of error brings up nothing for re vision, except the proceedings subsequent to th mandate, and if those proceedings are merely suc as the mandate commanded, the writ of error wil be dismissed.

[No. 474.]

Argued Mar. 3, 1871. Decided Mar. 6, 1871

IN ERROR to the Circuit Court of the United States for the Eastern District of Texas.

On motion to dismiss.

This case was before this court on a writ of error, in the December term, 1867, and a mandate therefrom transmitted to the court below. *Ante*, 29.

The original petition having been lost, the court below entered a decree that a copy filed by the plaintiffs be adjudged to be the original; whereupon the defendant sued out this writ of error.

The case is further stated by the court.

Messrs. **W. G. Hale** and *W. P. Ballinger*, for defendants in error:

1. There was no final judgment and, in fact, no judgment whatever, to which a writ of error would lie. There was only an order to supply a lost record, and to issue executory process.

As to the first, it was clearly within the discretion of the circuit court, as a part of its practice, to determine how a missing record should be replaced. The course pursued was, in fact, that suggested by the Texas rule (Paschal, Dig. art. 4969; *Mays* v. *Moore*, 13 Tex. 88), but it was not in itself proper and usual. No exception was noted or taken, except by the protest filed by Cook, which was based upon frivolous objections, and was not sustained by any counterproof.

As to the second, the issuance of process, the circuit court was not determining or declaring anything as to the right of the parties, or adjudging any controversy. There was no controversy, and could be none, as to granting a writ of possession on an existing judgment.

McCargo v. *Chapman*, 20 How. 555, 15 L. ed. 1021; *Corning* v. *Iron & Nail Co.* 15 How. 466.

The court below could not entertain any opposition to the execution of the mandate of this court; and, therefore, could not render any judgment thereon.

Same cases; *Sibbald* v. *U. S.* 12 Pet. 492; *Sizer* v. *Many*, 16 How. 98; *Roberts* v. *Cooper*, 20 How. 467, 481, 15 L. ed. 969, 973.

On both these grounds the order from which the writ of error was taken was not a judgment, but only the necessary consequence of the previous judgment already affirmed.

Messrs. **Thos. Wilson** and *Geo. W. Paschal*, for plaintiff in error:

1. A second writ of error is allowable and lawful in many cases. "It must be founded on a procedure subsequent to the original decree, and in a matter not concluded by it.

McMicken v. *Perin*, 20 How. 135, 15 L. ed. 858.

If a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate.

Roberts v. *Cooper*, 20 How. 481, 15 L. ed. 973, and cases cited.

If this was a final judgment of the circuit court, and founded upon a procedure subsequent to the original judgment of this court and not concluded by it, then this writ must not be dismissed. No questions as to the correctness of the rulings in the court below are to be considered now.

In the case of *Perkins* v. *Fourniquet*, 14 How. 328, after an appeal to this court in which the decree of the court below was affirmed and mandate sent down, the court below referred the claims of the respective parties to a commissioner to examine and report; it was only a question of calculation of interest. He made his report, and the court considered it.

This court says: "This decision, although briefly stated, was in substance a final decree upon the matters in controversy." P. 330.

In *R. Co.* v. *Soutter*, 2 Wall. 521, 17 L. ed. 904, this court, Miller, J., says: "There is no question but that many orders and decrees, affecting materially the rights of parties, are made in the progress of a chancery suit, which are not final in the sense of that word in its relation to appeals."

The adjudications which the court makes, on exception to the reports of masters involving the whole matter of litigation, are not final decrees: and in these and numerous other cases if the court can only on appeal examine the final or last order which gives the right of appeal, it is obvious that the entire benefit of an appeal must, in many cases, be lost.

The order in the case was final and complete. The order prepared the case for execution. The next step was to issue the execution. When this was done, the court had expended its power. But in the making of this order, the court below in no way trenched upon the ground passed over by this court in its former decision. This court made no decision as to lost records or substitution of certified copies. These are the questions presented for adjudication on the final hearing of this cause. They are undetermined as yet by this court. It is to determine these questions that this writ of error is prosecuted. When this case will have been heard, these questions may be determined.

Mr. Justice **Clifford** delivered the opinion of the court:

Final process is never issued by this court in the exercise of its appellate jurisdiction, except in cases where a state has once refused to execute the mandate of the court. Instead of that the mandate is transmitted to the subordinate court, and where the directions contained in the mandate are precise and unambiguous, it is the duty of the subordinate court to carry it into execution, and not to look elsewhere to change its meaning. *Skillern* v. *May*, 6 Cranch, 267; *Ex parte Story*, 12 Pet. 339; *West* v. *Brashear*, 14 Pet. 51; Curt. Com. § 405.

Two causes are assigned for the motion to dismiss the present writ which is a second writ of error in the case sued out by the same party: (1) Because the writ of error is not prosecuted from any final judgment in the cause; (2) because the writ is sued out to reverse an order of the circuit court carrying into effect the mandate of this court.

Where the subordinate court commits any substantial error in executing the mandate of the supreme court, it is well-settled law that a second writ of error or appeal, as the case may be, will lie to correct the error, and to cause the mandate to be executed according to its tenor and effect. *McMicken* v. *Perin*, 20 How. 135, 15 L. ed. 858; *Roberts* v. *Cooper*, 20 How. 481, 15 L. ed. 973.

Ejectment was brought on the 13th of June, 1859, by the present defendants, or one of them and the testator of the *other two, in [*675 the district court of the United States for that district, to recover the possession of certain lands described in the petition filed in that court on that day. Process was issued, and the same having been served, the defendants appeared and made defense, and the parties went to trial. Under the rulings of the court the verdict and judgment were for the plaintiffs, and the defendants sued out a writ of error and removed the cause into this court.

Prior to the institution of that suit Texas was divided into two judicial districts, called the eastern and western, and the acts of Congress creating those districts provided to the effect that the district judge, whether sitting in the one or the other, might exercise circuit court powers. 9 Stat. at L. 1; 11 Stat. at L. 164.

Subsequent to the removal of the cause into this court. Texas was included in the sixth circuit, and all acts which vested in the district court of the United States for the district of Texas the power and jurisdiction of circuit courts was repealed, and the 3d section of the act provided that all actions, suits, prosecutions, causes, pleas, process, and other proceedings relative to any cause, civil or criminal, . . . shall be and are declared to be respectively transferred, returnable, and continued to the several circuit courts constituted by that act, 12 Stat. at L. 576.

When reached in order, the cause as removed here by the first writ of error was heard, and this court affirmed the judgment rendered by the distict court before the acts of Congress giving that court circuit court powers were repealed. Judgment was entered in that court on the 30th of June, 1859, before the state was included in the sixth circuit, but the act including the state in the sixth circuit passed before the judgment was affirmed in this court. Consequently the mandate of this court was transmitted to the circuit court of that district, as required by the 3d section of the act.

Reference to the present record will show

that the mandate, as transmitted, was duly re-
676*] ceived and recorded and, of *course, the judgment was duly affirmed; but objection is taken by the defendants in the judgment to the subsequent action of the court.

Suggestion was made by the plaintiffs in the suit that the original petition was lost, and they moved for leave to file a copy of the same, and for a writ of possession to carry the judgment, as affirmed, into execution.

Objection was made by the defendants to the motion, and the parties having been heard, the court took the matter under advisement, but finally passed an order that the copy of the original petition filed by the plaintiffs be adjudged to be the petition therein, and that the writ of possession as prayed for, do issue. Such was the decision of the court, and the same was subsequently entered as a decree, and the defendants sued out a writ of error, and removed the cause into this court to reverse that decree. Sued out, as the writ of error was, to reverse that decree, the present defendants have filed a motion to dismiss it for the reasons assigned, and the court is of the opinion that the motion must be granted.

Nothing can be more certain, in legal decision, than the proposition tnat an application to supply a lost writ, declaration, or other pleading, if accompanied by proof of loss, is, in general, addressed to the discretion of the court, and it is well-settled law, that decisions which rest in the discretion of a court of original jurisdiction, cannot be re-examined in an appellate court upon a writ of error. *Liter* v. *Green*, 2 Wheat. 306; *Silsby* v. *Foote*, 14 How. 218; *Morsell* v. *Hall*, 13 How. 212; *United States* v. *Buford*, 3 Pet. 12; *Jenkins* v. *Banning*, 23 How. 455, 16 L. ed. 580; *Mandeville* v. *Wilson*, 5 Cranch. 15; *Spencer* v. *Lapsley*, 20 How. 264, 15 L. ed. 902.

Secondary evidence of a lost record, as well as of any other instrument, is admissible after proof of the loss; but in this case the plaintiffs filed a copy from the record of the case transmitted to this court, and the circuit court was quite right in allowing the loss of the petition to be supplied. 1 Greenl. Ev. 12th ed. § 509.

Certainly it was not error to grant a writ of
677*] possession. *as that was but executing the express directions of the mandate, and surely it will not be argued that it was error to order to be done what this court had commanded should be done by its mandate.

Suppose all the foregoing conclusions are correct, still it is contended that the writ of error cannot be dismissed because it is a writ of error sued out under the 22d section of the judiciary act, which, it is said, brings up the whole record.

Undoubtedly, it is true that the first writ of error was sued out under that section, and that such a writ does bring up the whole record, and it is well settled that it is no ground to dismiss the writ of error because there is no bill of exceptions, agreed statement of facts, or material demurrer in the record presenting any question of law for the decision of the appellate court, as the absence of every such question is good cause for affirming the judgment, but it is not a good ground for dismissing the writ of error. *Taylor* v. *Morton*, 2 Black, 484, 17 L. ed. 278; *Minor* v. *Tillotson*, 1 How. 287; *Suydam* v. *Williamson*, 20 How. 441, L. ed. 984.

Grant that; still the second writ of error though issued under the 22d section of the judiciary act, does not bring up the whole record for re-examination. On the contrary, it equally well settled that the second writ error brings up nothing for revision except the proceedings subsequent to the mandate; and follows that if those proceedings are mere such as the mandate commanded, and were necessary to the execution of the mandate, the writ of error will be dismissed, as any other rule would enable the losing party to delay the execution of the mandate indefinitely, which cannot be admitted.

Motion to dismiss granted.

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*A. LEVY, *Plff. in Err.*, [*244
v.
A. T. STEWART *et al.*

(See S. C. 11 Wall. 244-256.)

Enemy creditors cannot sue—statute of limitations suspended during war.

Enemy creditors cannot prosecute their claims subsequent to the commencement of hostilities, but the restoration of peace removes the disability and opens the doors of the courts.

The operation of the statute of limitations is suspended during the period the creditor is prohibited by the existence of the war and the law of nations from enforcing his claim.

[No. 90.]

Argued Feb. 27, 1871. Decided Mar. 20, 1871.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The defendants in error brought suit in the court below, upon certain promissory notes. Judgment having been given in their favor, the defendant thereupon sued out this writ of error.

The case is fully stated by the court.

Messrs. **P. Phillips**, *L. Janin*, and *E. T. Merrick*, for plaintiff in error:

In May, 1868, more than seven years had elapsed from the maturity of the notes. If the prescription was complete, then, in order to renew the obligation, the acknowledgment must be of a particular specific debt, and be specifically proven.

Courtebray v. *Rils*, 9 Rob. 513; *Buard* v. *Lemee*, 12 Rob. 251.

The agreement to compromise is not such an acknowledgment as to amount to a new promise to pay the specific debt.

Tyson v. *McGill*, 15 La. 145; *Succession of Jewell*, 11 La. Ann. 83.

Independent of this, the statute of the state requires that, to be binding, the promise must be in writing when the prescription has already run. See act of 1858, p. 148.

Prescription is governed by the law of the forum,—in other words, the law of the state in which the suit is brought.

The 34th section of the judiciary act enforces this principle, by declaring that the laws of the several states shall be regarded as rules

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NOTE.—*Suspension of statute of limitations during war*—see note to Hanger v. Abbott, 18 L. ed. U. S. 939.

of decisions in trials at common law in the courts in the United States.

By the Code of Louisiana, bills and notes are prescribed by five years reckoning from their maturity.

This prescription is peculiar, for it runs against minors and interdicted persons, and also against persons residing out of the state.

Arts. 3505, 3506.

There is a marked distinction between this and the stat. of 21 Jac. 1, which specially saves the rights of such persons.

A fixed and received construction by a state in its own courts makes a part of the statute law, and must be considered as final by the Supreme Court.

Shelby v. *Guy*, 11 Wheat. 361; *Greene* v. *Neal*, 6 Pet. 298.

Counting five years from the maturity of the notes, brings us to February, 1866. From the close of the war to this latter period, there was still nine months in which the parties could have brought their suit. This they did not avail themselves of, but took their first action three years after the termination of the war.

In *Rabel* v. *Pourciau*, 20 La. Ann. 131, February term, 1868, the supreme court of Louisiana says: "On 30th January, 1866, the prescription on the note would have expired; but of this time there were two years, during which judicial action was suspended in the parish where defendant resided, and we are now to determine whether the plaintiff, having failed to sue within five years, although there was no impediment during the last six months of the legal delay, his action subsequently instituted is not prescribed."

After a full discussion and a learned argument by a former chief justice, on a motion for rehearing, the court decided that the maxim, *contra non valentem agere nulla currit præscriptio*, could not be invoked to relieve the note from the effect of prescription; that the maxim has no application to the prescription of bills and notes, when suit might have been brought before prescription obtained.

This decision was reaffirmed in *Durben* v. *Spiller*, 20 La. Ann. 219; *Payne* v. *Douglass*, 20 La. Ann. 280; *Durand* v. *Hienn*, 20 La. Ann. 345; *Marcy* v. *Steele*, 20 La. Ann. 413; *Norwood* v. *Mills*, 20 La. Ann. 422; *Lemon* v. *West*, 20 La. Ann. 427; *Watts* v. *Bradley*, 20 La. Ann. 523; *Schlenker* v. *Taliferro*, 20 La. Ann. 565.

These decisions are founded on the authority of eminent civilians, who have commented on the Code Napoleon, from which the Louisiana Code is derived.

Messrs. **S. M. Johnson** and **C. F. Peck**, for defendants in error:

The plaintiffs in the court below did institute suit, by the defendant's own admission May 4, 1868, on the same cause of action; nor does it appear by any act of theirs that that suit was discontinued.

It is proper to observe that Louisiana was long under the dominion of Spain, and in its Civil Code has adopted the Roman law. Properly speaking, it has no statute of limitation, but has adopted in its stead the law of prescription, which differs from the American and English laws in this: that while those statutes only bar the remedy, without extinguishing the right, the law of prescription of Louisiana, as of Spain, bars both remedy and right.

Prescription is a manner of acquiring property or of discharging debts by the effect of time. Civil Code, art. 3420.

Whether the circuit court of the United States was bound to follow the supreme court of Louisiana upon the law of prescription of the state of Louisiana, is certainly a grave question, under the peculiar circumstances of this case.

By the act of Feb. 5, 1867, 14 Stat. at L. 385, power is given to this court in certain cases to re-examine, reverse or affirm the final judgments of the highest courts of any state; and it is expressly provided that whenever the highest court of any state shall affirm the validity of a statute of, or an authority exercised under, any state, which "are repugnant to the Constitution, treaties, or laws of the United States," this court may re-examine, reverse, or reaffirm such judgment.

The 34th section of the judiciary act of 1789, 1 Stat. at L. 85, is referred to, and it is claimed that the Supreme Court of the United States is bound to follow the rules of construction of the state courts, upon questions arising under state laws.

The question presented here, in no practical sense, involves the construction of the law of prescription; but it is whether that law was a valid law during the war; whether the acts of the state and the United States did not operate *ipso facto*, to suspend the law during the war. The defendants in error here insist that by virtue of the decision of this court in the case of *Hanger* v. *Abbott*, reported in 6 Wall. 532, 18 L. ed. 939, they have a right to claim that prescription was so suspended.

Inter arma silent leges is the rule which applied to the state from 1861 to 1865. The statute of prescription pleaded by the defendant in the court below, was inoperative as against the plaintiffs, who resided in New York when the notes matured, and during the whole period of the war.

Bailey v. *Jackson*, 16 Johns. 214; Wheat. 541, 546; 1 Kent, 67, 68; *Hanger* v. *Abbott*, *supra*.

Mr. Justice Swayne, speaking of adverse decisions of the state courts, and the power and duties of this court, in respect to cases arising under the 25th section of the judiciary act of 1789, says:

"This duty carries with it investigation, reflection and the exercise of judgment. It cannot be performed on our part by blindly following in the footsteps of others, and substituting their judgment for our own.

"In all the cases brought here under the 25th section of the judiciary act, this court has never hesitated to determine for itself the construction and effect of any statute of a state brought here under review, without reference to previous adjudications of the highest court of the state upon this subject."

Butz v. *Muscatine*, 8 Wall. 575, 19 L. ed. 490.

Mr. Justice **Clifford** delivered the opinion of the court:

Statutes of limitations exist in all the states, and with few exceptions they have been copied from the one brought here by our ancestors in

colonial times. Story, Confl. L. § 576. They are regarded as statutes of repose arising from the lapse of time and the antiquity of transactions, and they also proceed upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period.

250*] *Exceptions are to be found in all such statutes; but cases where the courts of justice were closed in consequence of insurrection or rebellion are not within the express terms of any such exception, contained either in the original act or any other of later date.

Express exceptions of the kind, it is conceded, do not exist, and if none can be implied then all debts due from one belligerent to an other, as well as executory contracts involving commercial intercourse with the enemy, are practically discharged, as, if the war is of much duration, prior claims will be barred by the local statute of limitations.

Enemy creditors cannot prosecute their claims subsequent to the commencement of hostilities, as the rule is universal and peremptory that they are totally incapable of sustaining any contract in the tribunals of the other belligerent.

Absolute suspension of the right to sue and prohibition to exercise it exist during the war by the law of nations, but the restoration of peace removes the disability and opens the doors of the courts.

The William Bagaley, 5 Wall. 405, 18 L. ed. 589; *Jecker* v. *Montgomery*, 18 How. 111, 15 L. ed. 312; *The Hoop*, 1 C. Rob. 200.

Peace, it is said, restores the right and the remedy, but it cannot restore the remedy if the war is of much duration, unless it be held that the operation of the statute of limitations is also suspended during the period the creditor is prohibited by the existence of the war and the law of nations from enforcing his claim.

On the 27th of July, 1868, the plaintiffs in the court below commenced an action of assumpsit against the present plaintiff on three promissory notes, signed at New York and made payable at New Orleans. One, dated August 6, 1860, due six months after date, for $1,618.55; another, dated August 20, 1860, due six months after date, for $1,415.59; and the other, dated August 20, 1860, due six months after date, for $442.17, all of which notes, at matu-

251*] rity, were duly presented for *payment, which being refused, they were duly protested for non-payment. Process was duly issued and, being served, the defendant appeared and pleaded as a defense the prescription of five years as established by the Civil Code of the state.

New facts alleged by the defendant in his answer are considered as denied by the plaintiff in the state courts without any replication, and the same rules of practice have been adopted in the circuit courts. Matters in avoidance, therefore, alleged in the answer, are open to every objection of law and fact the same as if specially pleaded. *Daquin* v. *Coiron*, 3 La. 392; *Muse* v. *Yarborough*, 11 La. 533; *Swilley* v. *Low*, 13 La. Ann. 412; *Bank* v. *Allard*, 8 Mart. N. S. 141.

Viewed in that light, as the pleadings must be, the issue between the parties was the same as it would be in jurisdictions governed by the common law, where the plaintiff replied denying the allegations of the answer, or pleaded specially that the operation of the prescription was suspended during the late Civil War, and that the plaintiff did commence his suit within five years next after the cause of action accrued. *Riley* v. *Wilcox*, 12 Rob. La. 648; Code, art. 329.

Testimony was taken and the parties were heard, but the court, neither party requesting a jury, overruled the plea of prescription, and entered judgment for the plaintiffs. Subsequent to the judgment a statement of facts was filed, signed by the judge and the parties, which consists of the pleadings, the notes and documents offered in evidence, the entries in the minutes of the proceedings, the judgment of the court, together with a statement of the evidence introduced. By the statement it appears that the defendant, at the dates at which the notes were given, and when they matured, resided at Bayou Sara, and that he continued to reside there during the war of the Rebellion; that he had an agent in New Orleans during that period, and that he made one or two visits there towards the close of the war; that the plaintiffs resided throughout that period in the city *of New York; that on the 4th of [*252 March, 1868, they brought a suit for the same cause of action; that the defendant made a compromise and settlement of the same with the attorney who instituted the suit, whereby the suit, on the 8th of May following, was discontinued; that the attorney, in making the settlement and in discontinuing the suit, acted without authority, and that the plaintiffs repudiated his acts in the case as soon as they were informed of the same, and afterwards brought the present suit.

Exceptions were taken by the defendant to the rulings and decisions of the court upon three grounds, as follows: (1) Because the bringing of the first suit did not interrupt the prescription established by the laws of the state; (2) because the Civil War did not interrupt the prescription under the rule established by the decisions of the supreme court of the state; (3) because the courts of the United States are bound to follow the decisions of the supreme court of the state in respect to the law of prescription, as applied to such causes of action.

Different views, however, were entertained by the circuit court, and judgment was rendered for the plaintiffs. Whereupon the defendant sued out a writ of error and removed the cause into this court.

Much discussion of the first response made by the plaintiffs to the defense of prescription, as set up by the defendant in his answer, is unnecessary, as the court is of opinion that the decision of the case must turn upon the second response of the plaintiffs to that defense, which is, that in computing the five years since the cause of action accrued, the period during which the courts of the state where the defendant resided were closed in consequence of the late Civil War, must be deducted.

Regulations exist in some of the states that where a first suit is abated and a second suit is brought within a prescribed time, the statute of

limitation shall cease to run from the date of the first suit, but the court is not referred to any such enactment as applicable in this case, and it is believed that none such exists, as the 253*] Code of the state provides that *if the plaintiff, after having made his demand, abandons or discontinues it, the interruption shall be considered as having never happened. Code, art. 3485.

Grant all that, still the question remains to be considered whether the alleged prescription was not interrupted by the fact that the courts of the state where the defendant resided were closed by the late Civil War for such a period of time that the bar was not complete when the present suit was commenced.

Proclamation of blockade was made by the President on the 19th of April, 1861, and on the 13th of July in the same year Congress passed a law authorizing the President to interdict all trade and intercourse between the inhabitants of the states in insurrection and the rest of the United States. 12 Stat. at L. 257, 258.

On the 20th of August, 1866, the President, by his proclamation of that date, proclaimed that the insurrection was at an end and that peace, order, and tranquility were fully restored in all the states. *U. S.* v. *Anderson*, 9 Wall. 70, 19 L. ed. 619; 14 Stat. at L. App. 7.

Permanent military possession of New Orleans, it is conceded, was taken by our forces at a much earlier period, and it is also true that the circuit court was organized there at the date specified in the statement of facts, but that portion of the state where the defendant resided still remained within the lines of the insurrectionists, and of course the courts of the state were closed so far as respects the rights of the plaintiffs in this case. *The Venice*, 2 Wall. 258, 17 L. ed. 866.

Throughout the entire period between the dates of those proclamations the courts of the state were closed to the plaintiffs and they were totally incapable of instituting any suit for the enforcement of their claim. *The Hoop*, 1 C. Rob. Adm. 200; Wheat. Law of Nations, by L. 544, 877; *Esposito* v. *Bowden*, 4 Ell. & B. 963; *Griswold* v. *Waddington*, 16 Johns. 438.

Exceptions, not mentioned in the statute of 254*] limitations, *have sometimes been admitted, and this court decided in the case of *Hanger* v. *Abbott*, 6 Wall. 532, 18 L. ed. 939, that the time during which the courts of the states in rebellion were closed to the citizens of the rest of the Union is to be excluded in suits, since brought, from the computation of the time fixed by the statutes of limitation within which suits may be brought, though no such exception is expressly admitted in the limitation act. Neither laches nor fraud can be imputed to the creditor in such a case, as the inability to sue becomes absolute by the declaration of war wholly irrespective of his consent or opposition. When the contract was made he was competent to sue, but the effect of war is to suspend his right during its continuance, not only without any fault on the part of the creditor, but under circumstances which make it his duty to abstain from any such attempt. His remedy, as was said in that case, is suspended by the two governments and by the law of nations not applicable at the date of the contract, and which comes into operation in consequence of an event over which he has no control. *The Protector*, 9 Wall. 689, 19 L. ed. 812.

Recent decisions of the supreme court of the state are referred to by the defendant in which it is denied that any exception whatever is allowed in any case, in the law of prescription, as to bills and notes. *Rabel* v. *Pourciau*, 20 La. Ann. 131; *Lemon* v. *West*, 20 La. Ann. 427; *Smith* v. *Stewart*, 21 La. Ann. 75.

None of those decisions are founded upon any express enactment, and the reasons assigned for the conclusion are not satisfactory. They admit that the maxim, *contra non valentem agere non currit præscriptio*, is a maxim of universal justice, but deny that it applies to causes of action founded upon bills and notes, chiefly because "they are prescriptible against minors and interdicted persons as well as others," which the chief justice of that court, in the case first cited, held to be an unsatisfactory reason for the conclusion, and in that view the court here entirely concurs.

Suppose that the rule of that court cannot be adopted, *still it is insisted by the [*255 defendant that the suspension of the prescription ceased when the Rebellion came to an end; that the suit was instituted too late, as it might have been commenced within five years next after the cause of action accrued, and certain continental authorities are referred to where that rule is apparently maintained. 2 Troplong, De la Prescription, 258, etc.

Authorities of the kind, though entitled to great respect, are not obligatory, and the court is of the opinion that the rule adopted in the case of *Hanger* v. *Abbott*, *supra*, is more consonant with justice and more in accordance with the analogies of our law than the one suggested by those commentators.

Even the supreme court of the state which refused to adopt that rule admits that the law ought to be so; but proceeds to show from certain prior decisions of this court that it is not so, not one of which is an authority to support the proposition for which they were invoked.

Evidently the case before the court is controlled by the decision in the case of *Hanger* v. *Abbott* and *The Protector*, *supra*, and the court as now constituted adheres to those decisions.

Creditors' debts due from belligerents are suspended during war, but the debts are not annulled. They are precluded during war from suing to recover their dues, but with the return of peace we return the right and the remedy. Chit. on C. and M. 423; Wheat. Law of Nations, by L. 541; Vattel, b. iii. c. 6, sec. 77.

Where a debt has not been confiscated during war, the rule is now universally acknowledged that the right to sue revives when peace is restored, and the rule is that the restoration of peace returns to the creditor both the remedy and the right, which necessarily implies that the law of limitation was suspended during the same period.

Judgment affirmed.

1*]*THE NEW ENGLAND MARINE INSURANCE COMPANY, *Appts.*

v.

THOMAS DUNHAM.

(See S. C. 11 Wall. 1-36.)

Jurisdiction on division of opinion—admiralty has jurisdiction of libel in personam on policy of marine insurance—maritime contract—marine insurance.

*The admiralty and maritime jurisdiction of the United States is not limited by the statutes or judicial prohibitions of England.

First. The locus, or territory of maritime jurisdiction, where torts must be committed and where business must be transacted in order to be maritime in their character, extends not only to the main sea, but to all the navigable waters of the United States, or bordering upon the same, whether landlocked or open, salt or fresh, tide or no tide.

Second. As to contracts, the true criterion of whether they are within the admiralty and maritime jurisdiction, is their nature and subject-matter, as whether they are maritime contracts, having reference to maritime service, maritime transactions, or maritime casualties, without regard to the place where they were made.

In view of these principles it was held, that the contract of marine insurance is a maritime contract within the admiralty and maritime jurisdiction, though within the exclusive jurisdiction of the United States courts.

The case of De Lovio v. Boit, 2 Gall. 398, affirmed.

This court has jurisdiction under the act of 1802, of a certificate of division in opinion between the associate judges of the Supreme Court and the circuit judge, together holding the circuit court, as well as between either of said judges and the district judge.

[No. 354.]

Submitted Dec. 20, 1870. Decided March 27, 1871.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of Massachusetts.

The libel in this case, on a policy of marine insurance, was filed in the court below. The judges being equally divided in opinion, certified the case to this court.

The case is stated in the opinion of the court.

Mr. **F. C. Loring**, for libellants:

The contract of marine insurance concerns vessels, their ownership and navigation; cargoes, charter-parties; contracts of affreightment; profits and commissions on goods transported by water; carriage of passengers; damage by the perils of the sea, fire and collision; hypothecations, salvage, wages and provisions; averages, contributions and jettisons; questions of prize, and all other maritime matters, and exclusively so, unless in some exceptional case, as the protection of a cargo landed at a port of necessity, when the policy covers it though on land.

All these are maritime matters, and it would seem to be a corollary, that a contract, relating to them exclusively, must be maritime, and be governed by the same laws, and be subject to the same jurisdiction.

*Headnotes by Mr. Justice BRADLEY.

NOTE.—*To what places the jurisdiction of admiralty is confined*—see note to Allen v. Newberry, 16 L. ed. 110.

Cases certified on division of circuit court; jurisdiction of U. S. Supreme Court in; on what division should be—see note to Webster v. Cooper, 13 L. ed. U. S. 325.

Jurisdiction in admiralty as to matters of contract—see notes 18 C. C. A. 347; 27 C. C. A. 530.

On the continent of Europe, the jurisdicti of maritime courts over contracts of marine surance, has never been questioned and is c stantly exercised. In Scotland, suits on pc cies are frequently, if not usually, brought fore the court of admiralty; and in the appe to the House of Lords, taken in many cases, question has been raised as to the jurisdictic In England, the cognizance of policies of surance was formerly claimed by the court admiralty, and it may be considered as an op question, so far as the written law show whether that court would not now entertain suit on a policy. There is no case reported which the question has been decided or di cussed; though it has been taken for grant that the English admiralty would not ente tain the jurisdiction.

By the universal and unanimous foreig practice and authorities, with one exceptic only, the contract of marine insurance is co sidered to be maritime, and a proper subje for the cognizance of a court vested with juri diction over maritime cases.

No case is found, in the reports of any court of the United States, of an action in the ad miralty on a policy of insurance, until the yea 1815; nor on a charter-party, nor for freight until 1829.

At the October term of the circuit court fo the district of Massachusetts, in the year 1815 the question was first presented by a libel on policy of insurance. A plea to the jurisdictio was interposed, and the result was the opinio of Judge Story, in the case of *De Lovio* v. *Boit* 2 Gall. 398.

This celebrated opinion amounts as nearly to a demonstration of the positions sought to be maintained, as the nature of the case would permit. It never has been answered, or attempted to be; though, occasionally, doubts have been expressed and intimations made, that it might not be followed to its full extent.

It rests on a few simple propositions:

First. That the English court of admiralty, as well as all other maritime courts, has exercised jurisdiction over maritime contracts.

Second. That marine insurance is and has always been held to be a maritime contract.

Third. That the Constitution of the United States authorizes the establishment of courts to exercise jurisdiction over all admiralty and maritime cases.

Fourth. That Congress has established courts to exercise such jurisdiction, concurrently with courts of common law, and that, consequently, these courts have jurisdiction over contracts of marine insurance.

The argument drawn from the practical jurisdiction of the English admiralty at the time of the revolution, was fully considered and answered, and the conclusion arrived at, which has been so many times subsequently affirmed by this court, that it must be considered an axiom, that the jurisdiction exercised by the English court at that time, affords no rule or precedent for the exercise of the admiralty jurisdiction vested in the courts of the United States.

Cunningham v. *Hall*, 1 Cliff. 43; *Waring* v. *Clarke*, 5 How. 441.

Mr. Chief Justice Marshall affirmed, in the case of *The Little Charles*, 3 Brock. 380, in

1819, that "the courts of the United States have never doubted their right to proceed under their general powers as courts of admiralty, where they are not restrained from the use of these powers by statutes," and such appears to have been the opinion of the court at the time, according to Judge Story.

That Mr. Justice Washington would have sustained the jurisdiction, cannot be doubted. In his opinion, in the case of *The Seneca*, 3 Wall. Jr. 399, & 18 Am. Jur. 486, he says: "I not only admit, but insist:

First. That the judicial power of the United States under the Constitution, and the jurisdiction of the district courts under the 9th section of the judiciary act of 1789, embrace all cases of maritime nature, whether they be particularly of admiralty cognizance or not.

Second. That this jurisdiction, and the law regulating its exercises, are to be sought for in the general maritime law of nations, and are not confined to that of England, or of any other particular maritime nation."

He afterwards speaks of the ordinances of Louis XIV., as generally adopted, as evidence of the maritime law of nations.

The occurrence of differences of opinion as to the extent of the admiralty jurisdiction, is of late date. It first appears eminently in *Ramsay* v. *Allegre*, 12 Wheat. 611, in 1827, in the dissenting opinion of Mr. Justice Johnson, with whom have concurred, at different times, Mr. Justice Baldwin, Mr. Justice Daniel, and Mr. Justice Campbell, and others to a less extent; but the majority of the court have uniformly held, that the practical jurisdiction of the English admiralty affords no rule for the jurisdiction vested in the courts of the United States by the Constitution and by Congress, and that that embraces all maritime contracts.

In 1822, another libel on a policy of insurance came before the circuit court for the first circuit, *Peele* v. *Ins. Co.* 3 Mas. 27.

The respondents appeared under protest to the jurisdiction, but did not argue the question, intending to do so on appeal.

A decision on the merits was in favor of the libellants, and the respondents claimed an appeal to this court. The usual bond was given for prosecuting the appeal, and it was entered but afterwards disappeared from the docket.

In 1842, a libel on a policy of insurance was brought in the same district. *Hale* v. *Ins. Co.* 2 Story, 176.

Mr. B. R. Curtis, subsequently a justice of this court, appeared for the respondents. No exception was taken to the jurisdiction, and the cause was argued and decided on the merits. Mr. Justice Story repeated his deliberate adherence to the doctrine of *DeLovio* v. *Boit*, 2 Gall. 398. He also stated that *Peele* v. *Ins. Co.* 3 Mas. 27, went off without any decision in this court; his belief that Mr. Chief Justice Marshall and Mr. Justice Washington would have sustained the jurisdiction, and that he had no reason to believe that a majority of the court were opposed to it.

No libel on a policy of insurance came before the court while Mr. Justice Woodbury, the immediate successor of Mr. Justice Story, was on the Bench; but it is evident that he was prepared to sustain the jurisdiction. In *Dean* v. *Bates*, 2 Wood. & M. 88, speaking of the admiralty jurisdiction, he said: "If that matter had been . . . for the recovery on some contract of admitted admiralty jurisdiction, such as to pay a ranson or an insurance, the district court, by having a jurisdiction in all civil cases of an admiralty character, under the act of 1789, could clearly sustain this libel."

In the case of *Younger* v. *Ins. Co.* 1 Sprague, 243, Judge Sprague held "the jurisdiction of the admiralty over policies of insurance to be the settled law and practice of this court."

In the same case on appeal (2 Curtis, 322), Mr. Justice Curtis declined to consider the question as open in the first circuit. He was of counsel for the insurers in *Hale* v. *Ins. Co.* 2 Story, 176, and made no objection to the jurisdiction, and he also declined to argue against the jurisdiction in *Rae* v. *Cutler*, 1 Sprague, 135.

In the case of *Drinkwater* v. *The Spartan*, 1 Ware, 152; Judge Ware, speaking of the decision in *De Lovio* v. *Boit*, *supra*, says: "I concur most fully in the doctrine maintained in that very learned and masterly opinion."

In the text books on admiralty practice and jurisdiction, the jurisdiction of the court over contracts of insurance is generally asserted. See Dunl. Adm. Pr. 43; Ben. Adm. 8, 50, 147.

On page 166, the latter says: "The contract of insurance against the perils of the seas is one that was suggested by and sprang from the hazards peculiar to ships and vessels in the pursuit of maritime commerce. In like manner, the rights, duties and liabilities, which are its characteristics, have always been regulated by the maritime law. It has always and everywhere been considered a maritime contract, and nowhere out of England has it ever been excluded from the admiralty jurisdiction. And in all the grants of jurisdiction even in England, it is especially mentioned as a matter of admiralty jurisdiction."

Judge Conkling remarks (vol. 1, p. 13): "The precise question, whether it (the jurisdiction) extends to contracts of marine insurance, remains yet to be definitely settled by the Supreme Court. But these contracts, relating as they do purely to maritime pursuits, and being eminently conducive, if indeed they are not to be regarded as indispensable, to the successful prosecution of navigation and commerce, it is not easy to perceive upon what ground they can consistently be excepted from the principles already established by that court."

See, also, note, 1 Kent, Com. 370, in which "insurance" is mentioned as a matter of settled admiralty jurisdiction.

In the reports of this court, and of other courts of the United States, no other reference has been found to the contract of insurance as a matter of admiralty jurisdiction, except in *Taylor* v. *Carryl*, 20 How. 583, 15 L. ed. 1028, where Mr. Chief Justice Taney expressed a doubt upon the subject, which had not been presented or referred to in the argument, and which evidently he had not examined. There is a reference to policies in Bee's Adm. 200, where they, with bills of lading and bottomry bonds, are declared to be suable at common law only.

Considering the authorities apart from the repeated declarations of this court, that the admiralty jurisdiction of the district court extends generally over maritime contracts, and

the universal admission that marine insurance is a maritime contract, we have this express authority in favor of the jurisdiction:

Three deliberate decisions of Mr. Justice Story, in point. The opinion of Mr. Justice Woodbury, that insurance is clearly a contract within the admiralty jurisdiction. The fact that Mr. Justice Curtis sustained the jurisdiction as a settled practice in the first circuit and, as counsel, took no exception to it. The statement by Mr. Justice Story, of his belief that if the appeal above mentioned had been prosecuted, the jurisdiction would have been maintained by this court. The decisions by Judge Sprague, Judge Ware, and Judge Lowell, of the district court, and the opinions of Mr. Dunlap, Mr. Benedict, and Judge Conkling.

Against these, is only the doubt of Mr. Chief Justice Taney, above referred to, which does not amount even to a *dictum*.

The weight of authority is decidedly in favor of the jurisdiction. Indeed, there is an utter absence of authority against it, even in England. There is no case on record known, in which the court of admiralty has refused to entertain jurisdiction over the subject, or in which the courts of common law have prohibited it. In admiralty commissions, insurance is usually mentioned as a matter over which jurisdiction is to be exercised; and in Scotland, the court of admiralty, under similar commissions, constantly entertains such jurisdiction.

All that can be said about the exercise of the jurisdiction by the English court is that practically, it has not been resorted to.

This court has definitely established the rule, that the admiralty jurisdiction was not limited to those cases over which the English court of admiralty practically exercised jurisdiction at the time of the revolution, and has declared by its Chief Justice that it extends to all maritime cases, when not restrained by statute. The only question then is, whether or not marine insurance is a contract concerning matters of navigation, trade, commerce, etc.; or in other words, a maritime contract.

There can be only one answer and the jurisdiction follows, of course.

It is a matter of history, that the commissions issued by the Crown to the judges of the colonial courts of admiralty, conferred, in terms, unlimited jurisdiction over all maritime cases, and usually specified "policies of assurance."

See commissions quoted in *De Lovio* v. *Boit*, 2 Gall. 398, and in Ben. Adm. Pr. 82, 90. He states that he has seen nine commissions.

That the framers of the Constitution, and the lawyers of that day, were familiar with a different and more extensive jurisdiction in the colonies than was practised in the English court of admiralty, is asserted by Judge Wayne in his opinion of *Waring* v. *Clarke*, 5 How. 454, and the authorities cited by him fully maintain the assertion.

It will be found, on examining the records referred to, that no objection was made to the extensive jurisdiction exercised. It seems to have been considered a matter about which there could be no doubt. In one case only was there a plea to the jurisdiction. A master sued *in rem*, in a home port, for wages and disbursements. Such a plea was interposed and overruled.

The jurisdiction claimed by Judge Sto Judge Ware, and others, for the admiral courts of the United States, is not somethi new and before unknown; but is not so e tensive as was actually exercised by the c lonial courts.

If the jurisdiction, known to have been e ercised by the admiralty courts before the rev lution, is to be taken as the rule, it must b admitted that every case which can properly b defined as maritime, is a proper subject for th jurisdiction of the United States district court and, of course, marine insurance.

The same conclusion must be drawn from th fact that admiralty jurisdiction was exercise by the vice-admiralty court of Massachusett over all maritime contracts and cases. Th judge who presided in that court was at th same time the judge of the vice admiralt courts of New York, Pennsylvania, the Jersey New Hampshire, Connecticut, Maine, and Nov Scotia, and it must have been that he held an exercised the same jurisdiction, when holdin court in the other colonies or provinces in cluded in his commission, that he did when sit ting in Massachusetts.

The argument to be derived from history i conclusive in favor of a literal construction o the words of the Constitution and statutes, giving the courts of the United States jurisdiction over all admiralty and maritime cases.

The records of the circuit court show four express decisions on policies of insurance. To which may be added, *Dean* v. *Bates*, 2 Wood & M. 88, in which Mr. Justice Woodbury expressed the decided opinion above referred to, making in all five decisions, in which the jurisdiction of the United States district court over policies of insurance has been affirmed or exercised by justices of this court.

The binding force of precedents is universally recognized in courts of law, and a stronger case in this respect can hardly be imagined than this, where the course of decision is uniform from 1815, when the question was first presented, down to 1867. *Stare decisis* is a well-established rule, founded on principles of reason and justice, as well as of expediency.

The libellants do, therefore, submit, with the greatest deference and respect, that to exercise jurisdiction over policies of marine insurance is the established law and practice of the circuit court for the first circuit held by justices of this court; that such practice is in conformity with the universal maritime law and usage; with the decisions of this court affirming jurisdiction over charter-parties, and maritime contracts generally; with the jurisdiction exercised by the vice admiralty courts before the revolution, which must have been known to the makers of the Constitution; and is imperatively required to carry into effect the provisions of the Constitution touching the jurisdiction of its courts and the regulation of commerce, and to establish uniformity of principle and practice throughout the Union in one of the most important branches of commercial law.

It cannot now be questioned, that the framers of the Constitution intended to vest in Congress the power to establish courts to exercise admiralty jurisdiction over all admiralty and maritime cases.

Congress, in the exercise of its discretion,

might have conferred upon the courts it was to create, such jurisdiction as it should see fit, and limit it to certain cases; but nothing of the kind was done. The judiciary act confers on the district courts unqualified jurisdiction over all civil, admiralty and maritime cases.

It is no objection to the exercise of the jurisdiction over a contract of insurance, that it is made on land, and in case of loss is payable on land. The same objection exists against all other maritime contracts. In fact, contracts are seldom made on the seas, or are wholly performed there.

The question is not where was the contract made, but: what does it concern? Marine insurance concerns only what happens on the seas to ships, cargoes and freights, collisions, averages, hypothecations, wages and provisions, contributions, jettisons, and matters of prize and other maritime matters, and is, therefore, strictly a maritime contract.

It is said that the admiralty cannot exercise jurisdiction over contracts of insurance, because there is no lien. But it is well settled here and in England, that the admiralty courts originally acted principally *in personam*, without regard to there being a remedy *in rem;* and where that existed it was subordinate and auxiliary to its action *in personam*.

It is insisted that *De Lovio* v. *Boit*, 2 Gall. 398, is virtually overruled by the decision in *Cutler* v. *Rae*, 7 How. 729. It might seem to follow, that if the district court had no jurisdiction to enforce a general average contribution, *in personam*, it could not take cognizance of a policy of insurance.

But if the contract, or quasi contract, of general average cannot be enforced *in personam*, it does not necessarily follow that an express contract of insurance cannot. But if it should be so held, then the question arises as to what the court decided in *Cutler* v. *Rae*, and whether that decision is now of authority.

On examining the opinion, it is plain that the general jurisdiction over averages was not even considered.

The only point decided is that the maritime law does not imply a promise from the owner of goods liable to a contribution, to pay his proportion; a necessary inference being, that if the owner had expressly promised to pay, an action would be sustained, as it was not denied that a suit *in rem* would be within the jurisdiction.

From the dissenting opinion of Mr. Justice Wayne, and his statement in the appendix to 8 Howard, it appears that the case was not thoroughly considered; that the printed argument in favor of the jurisdiction was not before all of the court, and was not alluded to in conference; that the decision was made by a divided court, Mr. Justice Catron not giving an opinion because he was not satisfied either way; that the remaining eight judges were at first equally divided, and that it was finally disposed of rather from acquiescence in what was thought to be English authority against the jurisdiction, than from a close and searching scrutiny into the practice and jurisdiction of courts of admiralty.

As might be expected, this decision has not been very respectfully considered by the profession. Mr. Justice Wayne said, if the case were presented in his circuit, he should consider the question open and hear an argument. *Cutler* v. *Rae, supra.*

In *Dike* v. *The St. Joseph*, 6 McLean, 573, Mr. Justice McLean says: "The decision in the case of *Cutler* v. *Rae* was by a divided court, and it has not been satisfactory to the profession; nor was it a decision in accordance with the prior decisions of the Supreme Court."

It has been supposed that this decision excluded all claims for average, whether *in rem* or *in personam*, from the jurisdiction; but in *Dupont de Nemours* v. *Vance*, 19 How. 162, 15 L. ed. 584, it was decided that a suit *in rem* might be entertained. This virtually overrules *Cutler* v. *Rae, supra*, because of the axiom that the jurisdiction does not depend upon the form of action, but upon the subject-matter. *Nav. Co.* v. *Bank*, 6 How. 392.

The final blow to the authority of *Cutler* v. *Rae*, was given by Mr. Chief Justice Taney, who delivered the opinion in that case, in a dissenting opinion given in *Taylor* v. *Carryl*, 20 How. 583, 15 L. ed. 1028. In this he admits that the extent of the admiralty jurisdiction is correctly stated in the note to 1 Kent, Com. 370, except in one respect; and among the subjects there mentioned, are "averages, contributions and jettisons," without reference to the form of action.

The elementary writers treat this decision with as little respect as the justices of the Supreme Court.

See, 1 Pars. Mar. L. 1st ed. p. 334, and vol. 2d, note to page 511; Ben. Adm. Pr. 111, 167, and note; note to 1 Kent, 370. And, as has been shown, suits to recover averages, both *in rem* and *in personam*, were constantly entertained by the vice admiralty courts before the revolution.

There is no authority, entitled to consideration, against the exercise by the district courts sitting in admiralty, of jurisdiction over contracts of marine insurance, to be found in the books; and certainly none in the records of the courts, so far as they have been resorted to. In every reported case the jurisdiction has been maintained.

Mr. **Henry C. Hutchins,** for respondent:

The decisions of the American courts at the period of the revolution and immediately after, conclusively prove the restricted jurisdiction of admiralty, as fixed by the Constitution.

In *L'Arina* v. *Manwaring*, Bee, Adm. 200, 1803, Judge Bee said:

"Bills of lading, policies of insurance, and bottomry bonds, where the vessel is not hypothecated according to the marine law, are all suable at common law only. Yet these contracts are all more or less connected with a voyage."

So in *Dean* v. *Angus*, Bee, Adm. 375, 376, per Hopkinson, J., as early as 1785, the same is intimated.

So in *Shrewsbury* v. *The Two Friends*, Bee, Adm. 435, per Judge Bee, in the year 1786, it was held that admiralty extended only to maritime causes, and did not embrace "any transactions or contracts which arise on land."

So again in 1784, it was held in Pennsylvania that admiralty jurisdiction was confined to "things done upon the seas." *Talbot* v. *Commanders*, 1 Dall. 98.

A shipwright could not sue in the admiralty.

the universal admission that marine insurance is a maritime contract, we have this express authority in favor of the jurisdiction:

Three deliberate decisions of Mr. Justice Story, in point. The opinion of Mr. Justice Woodbury, that insurance is clearly a contract within the admiralty jurisdiction. The fact that Mr. Justice Curtis sustained the jurisdiction as a settled practice in the first circuit and, as counsel, took no exception to it. The statement by Mr. Justice Story, of his belief that if the appeal above mentioned had been prosecuted, the jurisdiction would have been maintained by this court. The decisions by Judge Sprague, Judge Ware, and Judge Lowell, of the district court, and the opinions of Mr. Dunlap, Mr. Benedict, and Judge Conkling.

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The jurisdiction claimed by Judge Story, Judge Ware, and others, for the admiralty courts of the United States, is not something new and before unknown; but is not so extensive as was actually exercised by the colonial courts.

If the jurisdiction, known to have been exercised by the admiralty courts before the revolution, is to be taken as the rule, it must be admitted that every case which can properly be defined as maritime, is a proper subject for the jurisdiction of the United States district court; and, of course, marine insurance.

The same conclusion must be drawn from the fact that admiralty jurisdiction was exercised by the vice-admiralty court of Massachusetts, over all maritime contracts and cases. The judge who presided in that court was at the same time the judge of the vice admiralty courts of New York, Pennsylvania, the Jerseys, New Hampshire, Connecticut, Maine, and Nova Scotia, and it must have been that he held and exercised the same jurisdiction, when holding court in the other colonies or provinces included in his commission, that he did when sitting in Massachusetts.

The argument to be derived from history is conclusive in favor of a literal construction of the words of the Constitution and statutes, giving the courts of the United States jurisdiction over all admiralty and maritime cases.

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It cannot now be questioned, that the framers of the Constitution intended to vest in Congress the power to establish courts to exercise admiralty jurisdiction over all admiralty and maritime cases.

Congress, in the exercise of its discretion,

such acceptances." The condition was that they should pay these liabilities and save LeClaire harmless. Cook & Sargent subsequently failed. On the 22d of December, 1859, they sold and assigned to LeClaire the banking house of Cook, Sargent, Downey & Co., in Iowa City, and all the assets, real, personal, and mixed, of that firm. The consideration stated is that LeClaire "has made and executed certain notes, drafts, and acceptances for the accommodation of Cook & Sargent, and is now liable to pay the same." No condition or trust is expressed. On the 12th of December, 1860, Cook & Sargent assigned to the defendant, George L. Davenport, their interest in the assets of the firm of Cook, Sargent & Parker, of Florence, in the territory of Nebraska, and covenanted that the interest thus transferred was worth the sum of $15,000. On the 2d of July, 1861, by a deed, absolute on its face, LeClaire conveyed to the defendant, Louis C. Dessaint, a large number of tracts of land. On the 15th of the same month an article of agreement was entered into between them, wherein it was recited that the prior conveyance had been made in trust to enable Dessaint to sell and pay a debt of LeClaire to the Merchants' Branch of the State Bank of Iowa, and Dessaint stipulated that, after accomplishing this object and paying the expenses of the trust, he would reconvey the residue of the lands to LeClaire. These trans-**230***] actions show *the relations of the parties at the dates of their occurrence, and in that view are not without importance in this case.

The encumbrances on the Rose Bank farm consisted of a deed of trust, executed by May to Charles Powers, since deceased, to secure a note of May to W. H. & A. T. Strippel, for $6,550, payable, with interest, on the 1st of May, 1858; a mortgage to George F. Kettle to secure a note of May to him of $3,125, with interest after due, payable on the 10th of November, 1857; and the liens of several judgments not necessary to be particularly specified. At the time the contract between May and LeClaire was entered into, LeClaire was well satisfied with the arrangement. Subsequently he became dissatisfied. John P. Cook afterwards denounced it, and declared that, as the friend and attorney of LeClaire, he considered it his duty "to protect LeClaire as far as possible against so gross an imposition." The most obvious and effectual way to accomplish that object was to sell the Rose Bank farm under the deed of trust, and thus put it out of the power of May to fulfil his part of the contract, and this purpose those concerned in the scheme proceeded to carry out.

In this connection we lay out of view the important declaration of Powers, the trustee, as incompetent against the other parties.

On the 12th of April, 1859, Adrian H. Davenport, regarding May as the owner of his notes and mortgage, which LeClaire had assigned and deposited, as before stated, submitted to May a written offer for a settlement and compromise, which May declined.

On the 28th of July, 1859, John P. Cook bought from Powers the note and mortgage of May to Kettle, and gave in payment his note for $3,255.87, indorsed by LeClaire and Ebenezer Cook. Cook, the assignee, sued May on the note in the circuit court of the United States for the northern district of Illinois, and recovered a judgment.

The day after May executed his deed to LeClaire he delivered possession of the Rose Bank farm to LeClaire, and *has not since [***231** had possession or any control over the premises, or any benefit from them.

On the 20th of July, 1859, Powers, the trustee, sold this property under the deed of trust. The evidence leaves no doubt in our minds that his conduct in making the sale was grossly fraudulent. He knew that May had arranged for funds more than sufficient to discharge the debt due to his *cestuis que trust*, which were ready to be paid over as soon as May could deliver to the lender, as security, two of the notes of Davenport. We are satisfied that, with ordinary candor and fair dealing on the part of Powers and the other parties implicated, the debt secured by the deed of trust could have been speedily discharged, and all the other encumbrances removed.

But such was not the object of LeClaire and his associates, of whom Powers was clearly one. In the midst of the negotiation between May and Powers at the banking house of Powers, with funds present, and ready to be paid over by May on the condition stated, Powers, upon the receipt of a note from John P. Cook, left abruptly, under a false pretense, and made a surreptitious sale of the property to Dessaint for $5,000. A deed was ready, with a blank for the name of the purchaser, and the blank was at once filled with the name of Dessaint. The consideration mentioned in the deed is the amount of his bid. The promises of Powers to annul the sale upon the payment of the debt were obviously false, and intended only to deceive and quiet May for the time being. Measures were taken to keep away competing bidders. The amount of the debt was $7,400. Dessaint testifies that he bought under an agreement with Powers that he should pay the full amount of the debt; that Powers should procure to be assigned to him May's liability for the difference between the amount of the debt and the amount at which the property should be struck off to him; and that he paid the full amount of the debt to Powers. This feature of the transaction requires no comment. Whether Dessaint was privy to the other frauds of Powers or not, a subject upon which we can hardly entertain a doubt, * he took the [***232** title in trust for May, and subject to all May's rights, as they were before the sale and conveyance were made by Powers. Jeremy, Eq. 95.

On the 27th of July, 1859, Dessaint conveyed by a deed of quitclaim to Ebenezer Cook. The evidence satisfies us that Cook had full notice of the frauds of Powers and of the infirmities of Dessaint's title. Whether this were so or not, having acquired his title by a quitclaim deed, he cannot be regarded as a bona fide purchaser without notice. In such cases the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey. *Oliver* v. *Piatt, et al.*, 3 How. 363. Cook occupied the same relations to the property as Dessaint, his grantor.

Cook, on the 16th of December, 1860, conveyed to George L. Davenport. At the same time the judgment in favor of John P. Cook against May was assigned to the grantee. The

Clinton v. *The Hannah*, Bee, Adm. 419, per Hopkinson (1781).

This case is cited with approbation in *Cunningham* v. *Hall*, 1 Cliff. 43, where it is held that the admiralty jurisdiction under the Constitution must be determined by reference to the usages and decisions of the courts at the time when the Constitution was formed; which decisions are herein cited.

A policy of marine insurance is not a maritime contract within the meaning of that clause of the Constitution which delegates to the judicial power of the United States, cognizance of all cases of admiralty and maritime jurisdiction.

1. Because this clause is to be construed with reference to the restricted jurisdiction of the admiralty, as recognized both in this country and England, at the time when the Constitution was adopted.

1 Kent, Com. 377; 1 Curt. Com. 33; *Bains* v. *The James Catherine*, 1 Bald. 544; *Commanders and Owners of Three Brigs*, 1 Dall. 98; *The Magnolia*, 20 How. 310, 311, 329, 331, 15 L. ed. 915, 916, 923, 924; *The Genesee Chief*, 12 How. 455, per Ch. J. Taney; *Cunningham* v. *Hall*, 1 Cliff. 43, 51, 52; *The Constitution* v. *The Young America*, 1 Newb. 105.

Admiralty has never claimed jurisdiction over insurance in England.

Am. Jur. Jan. 1841, per Mr. Curtis; 2 Arn. Ins. Perk. ed. (2d), 1259; 2 Brown, Civ. and Adm. Law, 82, 83, 188; Marsh. Ins. 5th ed. (Shee's) 542.

In pursuance of the Stat. 43 Eliz. ch. 12, a court was erected in England, having special jurisdiction over policies of insurance, called "the court of policies of insurance."

2 Bl. Com. 58.

Materialmen could not sue in admiralty.

O'Hara v. *The Mary*, Bee, Adm. 100, per Bee, J. (1798).

Nor could contracts for necessaries be sued upon, if furnished before the voyage was begun.

Bee, Adm. per Hopkinson, 345 (1785).

Nor ransom bills. Nor charter-parties. Bee, Adm. 375, Hopkinson (1785).

Nor was there any jurisdiction over cases of hypothecation, where the hypothecation took place before the commencement of the voyage, not even if the ship was hypothecated for necessaries, without which it could not proceed to sea.

Turnbull v. *The Enterprize*, Bee, Adm. 345; *Johnson* v. *Shippen*, 2 Ld. Raym. 982.

Nor could a master sue for his wages; nor a physician for his services, on a voyage.

1 Pet. Adm. 223, Penn. (1806).

This last case limits the jurisdiction to such claims as are either of themselves, or in their origin, liens on the ship. This was the rule which Judge Peters said he always observed in determining whether a given case was within the jurisdiction.

But certainly such a rule could not apply to policies of insurance; for they create no lien.

Suits *in personam* were not entertained at all in the admiralty at the period of the Revolution, except as incidental to suits *in rem;* seamen's wages excepted, which were always favored.

Ramsay v. *Allegre*, 12 Wheat. 614, 622.

And Mr. Justice Johnson, in that case, held that the doctrine should still be maintained.

The above cited cases are the decisions of Judges Bee, Hopkinson, and Peters, all revolutionary men, and who were well acquainted with the limits of the admiralty jurisdiction as understood by the jurists and statesmen who framed the Constitution. They furnish the most reliable means for construing the admiralty powers as conferred by the Constitution.

3. If we try this question by the test suggested by his Honor, Judge Clifford, in *Cunningham* v. *Hall*, 1 Cliff. 45, these libels cannot be maintained, because no case can be found in the history of the admiralty of this country prior to the case of *De Lovio* v. *Boit*, 2 Gall. 398, 1815, that affirms the jurisdiction of admiralty over a policy of insurance, before or after the Revolution.

Jurisdiction over insurance was not claimed by the vice admiral colonial courts. It is not mentioned in the commissions issued to the vice admirals. See form of commissions in Stoke's "View of the British Colonies." The actual practice of these courts was narrower than their commissions. Mr. Justice Woodbury says, these commissions only indicated what might be done, not what was actually done, under them. 5 How. 477.

The practice in the vice admiralty courts was the same as that in England, under the restraining statutes of Richard II. The English text books on this subject were in common use.

Stoke's "View of Brit. Col." ch. 13, 70; see, also, Woodcock, Brit. Col. p. 272.

Appeals were made from these courts to the courts of admiralty in England.

3 Bl. Com. 68, 69.

Not one adjudication can be adduced to show that the jurisdiction in the colonies was different from that of England.

The Magnolia, 20 How. 310, 311, 329, 331, 15 L. ed. 915, 916, 923, 924.

The only case prior to 1815, from which jurisdiction in admiralty over insurance may be inferred even, is *Stevens* v. *The Sandwich*, 1 Pet. Adm. 233, note, per Winchester, J., in the district court of Maryland, which holds that a shipwright may sue in admiralty, making no distinction between home and foreign ports. But this decision may be considered as overruled in *Ferry Co.* v. *Beers*, 20 How. 393, 15 L. ed. 961, and also in *Cunningham* v. *Hall*, 1 Cliff. 43.

See, also, *Ramsay* v. *Allegre*, 12 Wheat. 625, 626.

Mr. Justice Story cites *Stevens* v. *The Sandwich*, 1 Pet. Dec. in support of his doctrine in *De Lovio* v. *Boit*, 2 Gall. 398, but it decides nothing with reference to insurance.

4. The extension of admiralty jurisdiction is in abridgment of trial by jury, so carefully guarded by the Constitution. The encroachments of the admiralty were among the grievances of our revolutionary fathers. Is it reasonable, therefore, to suppose that, after they had achieved their independence, they would have formed a Constitution which guarantied the very thing they before complained of?

See address of the Continental Congress Oct. 21, 1774, to the people of Great Britain, drawn by John Jay, afterwards Ch. J., of the United States; also *Waring* v. *Clarke*, 5 How. 484; *Bains* v. *The James*, 1 Bald. 544, 550, 551.

From the foregoing authorities, the true con-

struction of the admiralty clause of the Constitution is obvious.

Insurance was clearly not within the minds of the framers of the Constitution, nor within the acknowledged scope of the admiralty courts of that period, either before or after the revolution.

The doctrine of *De Lovio* v. *Boit, supra*, so far as it pertains to policies of insurance, is unsound, and was not warranted by the precedents of the admiralty, either in this country or England. In the whole of that very lengthy decision, Mr. Justice Story does not adduce a single authority or case, either from the vice admiralty courts, or from the decisions subsequent to the formation of the Constitution, which directly goes to support the doctrine he maintains, that a policy of insurance is within the admiralty jurisdiction. The decisions to the contrary are unmentioned. He relies chiefly upon the general language of the vice admiralty commissions, in which policies of insurance are not named.

The only instance where insurance is mentioned as within the jurisdiction is in certain commissions issued during the period of Richard II. In the absence of any later authority, Mr. Justice Story undertakes to refer the jurisdiction of this country to that period, prior to the restraining statues of Richard II. But upon the authorities this view is untenable, if not unreasonable.

Taylor v. *Carryl*, 20 How. 615, 616, 15 L. ed. 1040, 1041, per Ch. J. Taney, and cases before cited.

The doctrine of *De Lovio* v. *Boit, supra*, has never been affirmed outside the first circuit, but has frequently been questioned in the Supreme Court of the United States, and by some of the judges expressly denied. It should also be remarked that Judge Davis, who had a large experience as an admiralty judge, dismissed the libel in the district court for want of jurisdiction, as appears by the record, although this is not stated in the decision.

In *Ramsay* v. *Allegre*, 12 Wheat. 614, 622, 638, 1827, Mr. Justice Johnson, in referring to *De Lovio* v. *Boit, supra*, said that a contrary decision had been made in the sixth circuit, and that they must both fall together, as nisi prius decisions were of no weight in the Supreme Court.

In *Waring* v. *Clarke*, 5 How. 461, the question of jurisdiction came up, and Justices Woodbury, Daniel and Grier dissented in favor of a limited jurisdiction.

In *Jackson* v. *The Magnolia*, 20 How. 335, 15 L. ed. 926, 1857, Mr. Justice Campbell says he thinks he speaks the universal opinion of the legal profession in saying that the judgment in *De Lovio* v. *Boit* was erroneous.

So, also, in *Taylor* v. *Carryl, supra*, Ch. J. Taney, in pronouncing his opinion in regard to admiralty jurisdiction, and referring to a note in 1 Kent, Com. 371, 372, said:

"I think it is stated too broadly, broader than this court has sanctioned; for, as regards the jurisdiction in policies of insurance, I believe it has never been asserted in any circuit but the first, and certainly it has never been brought here for adjudication."

In *Cutler* v. *Rae*, 7 How. 729, the case of *De Lovio* v. *Boit* is virtually overruled. This was a libel *in personam*, filed against the consignee of goods by the owner of the vessel, for contribution by way of general average. The ship was run ashore to save lives; but the cargo was saved, and delivered to the consignee. Taney, Ch. J., held that, by parting with the goods, the lien was lost; and the libel was dismissed for want of jurisdiction.

If put upon the ground of lien, as intimated, there could then be no jurisdiction over a policy of insurance where no lien exists.

This doctrine of lien was laid down by Judge Peters, 1 Pet. Adm. 223.

In Ins. Co. v. Younger, 2 Curt. 333, Mr. Justice Curtis refers to the case of *Cutler* v. *Rae*, and says it goes pretty far towards overruling *De Lovio* v. *Boit;* and although he adhered to the latter case in deciding the case before him, for special reasons, yet he intimated a doubt whether the doctrine would be sustained in the appellate court.

Nor is there jurisdiction in admiralty to enforce payment of a mortgage upon a ship.

Bogart v. *The John Jay*, 17 How. 399, 15 L. ed. 95.

Wayne, J., said that "such a contract had nothing in it analogous to those contracts which are subjects of admiralty jurisdiction." See 2 Wood. & M. 93, to same point.

So a libel *in personam* against the owners of a steamboat in California, by their agent, for balance of account for supplies and repairs, was dismissed for want of jurisdiction.

Minturn v. *Maynard*, 17 How. 477, 15 L. ed. 235; *Vanderwater* v. *Mills*, 19 How. 82, 15 L. ed. 554.

Grier, J., said: "There is nothing of the nature of a maritime contract in the case."

In *The General Smith*, 4 Wheat. 438, Story, J., incidentally held that material men might sue *in personam*. But this is not settled law in this country. In 12 Wheat. 611, this question came before the court; but the court expressly waived any decision upon it, and Mr. Justice Johnson unequivocally denied the doctrine.

So, also, in *Ferry Co.* v. *Beers*, 20 How. 393, 15 L. ed. 961, the *dictum* in *The Gen. Smith*, 4 Wheat. 438, is virtually overruled, and Catron, J., holds that shipwrights cannot sue in the admiralty, and cites the opinion of Judge Hopkinson in Bee, Adm. 419, decided in 1781, that "The practice of former times does not justify the admiralty taking cognizance of their suits."

See, also, *Pratt* v. *Reed*, 19 How. 359, 15 L. ed. 660.

So in *Cunningham* v. *Hall*, 1 Cliff. 43, recently decided in this court, the doctrine is maintained, that suits *in personam* by shipbuilders are not within the jurisdiction of admiralty, unless they can have a lien upon the ship, either local or maritime.

This case, and also *Cutler* v. *Rae*, 7 How. 729, and other cases before cited, would seem to make the jurisdiction to depend upon the existence of a lien, according to the rule laid down by Judge Peters, in *Gardner* v. *The New Jersey*, 1 Pet. Adm. 223.

If this is correct, then there can be no jurisdiction in admiralty over the subject of insurance.

The above authorities fully justify the assertion, that the broad doctrine of *De Lovio* v.

Boit, 2 Gall. 398, is not sustained by the courts of this country.

3. Aside from the authorities, it is submitted, from the reason of the thing, that a policy of insurance is not a maritime contract. It is an agreement to indemnify the owner of the ship, cargo or freight, against loss by perils of the seas. The suit is an action for damages for breach of the agreement. There is no lien, and the contract is in no sense maritime. It begins and ends on land. A maritime contract is where the thing to be done is itself maritime. "It must be in its essence maritime."

2 Wood. & M. 109; 2 Pars. Ship. Adm. 181.

4. It is not enough that as good a remedy may be afforded in admiralty as at common law. Such a rule would open the door of admiralty to suits of every kind, and end in confusion.

So long as a master cannot sue for his wages in admiralty (*The Orleans*, 11 Pet. 175), nor part owners, for matters of account between them; nor a mortgagee, to enforce payment of the mortgage (*Bogart* v. *The John Jay*, 17 How. 399, 15 L. ed. 95); nor a shipbuilder, for building a ship (*Ferry Co.* v. *Beers*, 20 How. 393, 15 L. ed. 961; 1 Cliff. 43); nor material men, who furnish supplies for a vessel in a home port (*Pratt* v. *Reed*, 19 How. 359, 15 L. ed. 660; nor any owner for contribution by way of general average (*Cutler* v. *Rae*, 7 How. 729); it is not easy to see how, or on what principle, a policy of insurance can be regarded as within the limits of admiralty jurisdiction. It is against law, precedent and reason; and to sustain the jurisdiction, and retain these libels, necessarily would virtually overrule the case of *Cunningham* v. *Hall*, 1 Cliff. 43, the most recent case on this subject.

2 Pars. Ship. & Adm. 181.

But it is said that a case of general average has been found in the admiralty records of Massachusetts, before the adoption of the Constitution, where jurisdiction was sustained; and it is claimed that the case supports the theory of jurisdiction, generally, in admiralty, over policies of insurance. If this is the proper inference from such a decision, it is equally true that, in *Cutler* v. *Rae*, the Supreme Court of the United States held that there was no jurisdiction in such a case.

Mr. Justice **Bradley** delivered the opinion of the court:

This case comes before us on a certificate of division in opinion between the judges of the circuit court for the district of Massachusetts on appeal from the district court of that district. When this division of opinion occurred the circuit court was being held by the associate justice of this court allotted to the first circuit and the circuit judge of that circuit, sitting together. It becomes necessary, therefore, in the first place, to decide whether a difference of opinion between these judges sitting in the circuit court may be certified to this court under the act of April 29, 1802. 2 Stat. at L. 159. The language of the act is broad enough to include the case. It is as follows: "Whenever any question shall occur before a circuit court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges, and certified under the seal of the court, to the Supreme Court, at their next session to be held thereafter, and shall by the said court be finally decided." But it has been suggested that, although the case is included in the terms of the act, it is not within its meaning, because the constitution of the circuit has been changed by the recent act creating circuit judges, passed April 10, 1869 (16 Stat. at L. 144). There is nothing in this act which alters the powers of the court, or obviates the difficulty which a certificate of division was intended to meet. That difficulty arose from *the fact that the court was constituted [*22 of two judges, between whom a difference of opinion would be likely often to occur, and thus block the wheels of justice. Other things being equal, a division of opinion is far more probable between two persons than is an equal division between any other even number of persons. This renders it desirable, when a court consists of the former number, to have some method provided for overcoming the intrinsic difficulty. Such a method was provided by the act of 1802 to meet the then constitution of the court, which consisted of a justice of the Supreme Court and the district judge. The act of 1869 has created a new circuit judge, it is true, but he is invested with precisely the same power and jurisdiction in his circuit as the justice of the Supreme Court has therein, whilst the powers of the latter, as judge of the circuit, are the same as before, and the court is to be held either by one of them or the district judge, or any two of the three. Thus the same necessity exists as before for the power to certify questions to the Supreme Court. As the mischief remains the same, and the terms of the act of 1802 are general and adequate to continue the remedy, such a construction of it as will have that effect seems to be fairly warranted. *Ex parte Zellner*, 9 Wall. 244, 19 L. ed. 665.

We, therefore, conclude that the case is properly brought before us by certificate.

The case, as thus presented, is as follows: A libel *in personam* was filed in the district court for the district of Massachusetts, by Dunham against the New England Mutual Marine Insurance Company, on a policy of insurance, dated at Boston, on the 2d day of March, 1863, whereby the insurance company, a corporation of Massachusetts, agreed to insure Dunham, the libelant, a citizen of New York, in the sum of $10,000, for whom it might concern, on a vessel called the Albina, for one year, against the perils of the seas and other perils in the policy mentioned; and the libelants alleged that within one year the said vessel was run into by another vessel on the high seas, through the negligence of those navigating the said other vessel, and sustained much damage, and that the libelant had expended large sums of money in repairing the same, of which he claimed payment of the insurance company; and the question is whether the district court, sitting in admiralty, has jurisdiction to entertain a libel *in personam*, on a policy of marine insurance, to recover for a loss.

This precise question has never been decided by this court. But, in our view, several decisions have been made which determine the

principle on which the case depends. The general jurisdiction of the district courts in admiralty and maritime cases has been heretofore so fully discussed that it is only necessary to refer to them very briefly on this occasion.

23*] *The Constitution declares that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction," without defining the limits of that jurisdiction. Congress, by the judiciary act passed at its first session, 24th of September, 1789 (1 Stat. at L. 73), established the district courts, and conferred upon them, among other things, "exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction."

As far as regards civil cases, therefore, the jurisdiction of these courts was thus made co-extensive with the constitutional gift of judicial power on this subject.

Much controversy has arisen with regard to the extent of this jurisdiction. It is well known that in England great jealousy of the admiralty was long exhibited by the courts of common law.

The admiralty courts were originally established in that and other maritime countries of Europe for the protection of commerce and the administration of that venerable law of the sea which reaches back to sources long anterior even to those of the civil law itself; which Lord Mansfield says is not the law of any particular country, but the general law of nations; and which is founded on the broadest principles of equity and justice, deriving, however, much of its completeness and symmetry, as well as its modes of proceeding, from the civil law, and embracing, altogether, a system of regulations embodied and matured by the combined efforts of the most enlightened commercial nations of the world. Its system of procedure has been established for ages, and is essentially founded, as we have said, on the civil law; and this is probably one reason why so much hostility was exhibited against the admiralty by the courts of common law, and why its jurisdiction was so much more crippled and restricted in England than in any other state. In all other countries bordering on the Mediterranean or the Atlantic the marine courts, whether under the name of admiralty courts or otherwise, are generally invested with jurisdiction of all matters arising in marine commerce, as well as other marine matters of public concern, such as 24*] crimes *committed on the sea, captures, and even naval affairs. But in England, partly under strained constructions of parliamentary enactments and partly from assumptions of public policy, the common-law courts succeed in establishing the general rule that the jurisdiction of the admiralty was confined to the high seas and entirely excluded from transactions arising on waters within the body of a county, such as rivers, inlets, and arms of the sea as far out as the naked eye could discern objects from shore to shore, as well as from transactions arising on the land, though relating to marine affairs.

With respect to contracts, this criterion of locality was carried so far that, with the exception of the cases of seamen's wages and bottomry bonds, no contract was allowed to be prosecuted in the admiralty unless it was made upon the sea, and was to be executed upon the sea; and even then it must not be under seal.

Of course, under such a construction of the admiralty jurisdiction, a policy of insurance executed on land would be excluded from it.

But this narrow view has not prevailed here. This court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as to that of England. "Its boundary," says Chief Justice Taney, "is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal government." *The St. Lawrence*, 1 Black, 527, 17 L. ed. 183. "Courts of admiralty," says the same judge in another case, "have been found necessary in all commercial countries, *not only for the safety [*25 and convenience of commerce, and the speedy decision of controversies where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed, to confine these rights to the states bordering on the Atlantic, and to the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes and the great navigable streams which flow through the western states." *The Genesee Chief*, 12 How. 454.

In accordance with this more enlarged view of the subject, several results have been arrived at widely differing from the long-established rules of the English courts.

First, as to the locus or territory of maritime jurisdiction; that is, the place or territory where the law maritime prevails, where torts must be committed, and where business must be transacted, in order to be maritime in their character; a long train of decisions has settled that it extends not only to the main sea, but to all the navigable waters of the United States, or bordering on the same, whether landlocked or open, salt or fresh, tide or no tide. "Are we bound to say," says Justice Wayne, delivering the opinion of the court in *Waring* v. *Clarke*, 5 How. 462, "Are we bound to say, because it has been so said by the common-law courts of England in reference to the point under discussion, that sea always means high sea or main sea? . . . Is there not a surer foundation for a correct ascertainment of the locality of marine jurisdiction in the general admiralty law than the designation of it by the common-law courts? . . . We think, in the controversy between the courts of admiralty and common law upon the subject of jurisdiction, that the former have the best of the argument; that they maintain the jurisdiction for which they contend with more learning, more directness of purpose, and without any of that verbal subtilty which is found in the arguments of their adversaries."

26*] *It was a long time, however, before the full extent of the admiralty jurisdiction was firmly established. The judiciary act expressly extended it to seizures, under laws of impost, navigation, or trade of the United States, where made on waters navigable from the sea by vessels of ten or more tons burthen as well as upon the high seas, thus at once ignoring the English rule; but for some time it was held that the jurisdiction could not go further, and that this grant was confined to tide-waters. But in the case of *The Genesee Chief, supra*, decided in 1851, it was expressly adjudged that tide was no criterion of admiralty jurisdiction in this country; that it extended to our great internal lakes and navigable rivers as well as to tide-waters. "It is evident," says Chief Justice Taney, "that a definition which would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers, in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are, undoubtedly, public waters and, we think, are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States." 12 How. 457. This judgment has been followed by several cases since decided, and the point must be considered as no longer open for discussion in this court.

Secondly, as to contracts, it has been equally well settled that the English rule which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon (making locality the test) is entirely inadmissible, and that the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions. Even in England the courts felt compelled to rely on this criterion in order to sustain the admiralty jurisdiction 27*] *over bottomry bonds, although it involved an inconsistency with their rules in almost every other case. In *Menetone* v. *Gibbons*, 3 T. R. 269, Lord Kenyon makes this sensible remark: "If the admiralty has jurisdiction over the subject-matter, to say that it is necessary for the parties to go upon the sea to execute the instrument, borders upon absurdity." In that case there happened to be a seal on the bond, of which a strong point was made. Justice Buller answered it thus: "The form of the bottomry bond does not vary the jurisdiction; the question whether the court of admiralty has or has not jurisdiction depends on the subject-matter." Had these views actuated the common-law courts at an eariler day it would have led to a much sounder rule as to the limits of admiralty jurisdiction than was adopted. In this court, in the case of *N. J. Nav. Co.* v. *Merch. Bk.* 6 How. 344, which was a libel *in personam* against the company on a contract of affreightment to recover for the loss of specie by the burning of the steamer Lexington on Long Island Sound, Justice Nelson, delivering the opinion of the court, says: "If the cause is a maritime cause, subject to admiralty cognizance, jurisdiction is complete over the person as well as over the ship. . . . On looking into the several cases in admiralty which have come before this court, and in which its jurisdiction was involved, it will be found that the inquiry has been, not into the jurisdiction of the court of admiralty in England, but into the nature and subject-matter of the contract, whether it was a maritime contract, and the service a maritime service, to be performed upon the sea or upon waters within the ebb and flow of the tide." [The last distinction based on tide, as we have seen, has since been abrogated]. Jurisdiction in that case was sustained by this court, as it had previously been in cases of suits, by ship carpenters and material men on contracts for repairs, materials, and supplies, and by pilots for pilotage: in none of which would it have been allowed to the admiralty courts in England. See cases cited by Justice Nelson, 6 How. 390, 391. In the subsequent case of **Morewood* v. *Enequist*, 23 How. 493, 16 [*28 L. ed. 516, decided in 1859, which was a case of charter-party and affreightment, Justice Grier, who had dissented in the case of *The Lexington*, but who seems to have changed his views on the whole subject, delivered the opinion of the court and, amongst other things, said: "Counsel have expended much learning and ingenuity in an attempt to demonstrate that a court of admiralty in this country, like those of England, has no jurisdiction over contracts of charter-party or affreightment. They do not seem to deny that these are maritime contracts, according to any correct definition of the terms, but rather require us to abandon our whole course of decision on this subject and return to the fluctuating decisions of English common-law judges, which, it has been truly said, 'are founded on no uniform principle, and exhibit illiberal jealousy and narrow prejudice.'" *Morewood* v. *Enequist, supra*. He adds that the court did not feel disposed to be again drawn into the discussion; that the subject had been thoroughly investigated in the case of *The Lexington*, and that they had then decided "that charter-parties and contracts of affreightment were 'maritime contracts' within the true meaning and construction of the Constitution and act of Congress, and cognizable in courts of admiralty by process either *in rem* or *in personam*." The case of *Ferry Co.* v. *Beers*, 20 How. 401, 15 L. ed. 964, being pressed upon the court, in which it had been adjudged that a contract for building a vessel was not within the admiralty jurisdiction, being a contract made on land and to be performed on land, Justice Grier remarked: "The court decided in that case that a contract to build a ship is not a maritime contract;" but he intimated that the opinion in that case must be construed in connection with the precise question before the court; in other words, that the effect of that decision was not to be extended by implication to other cases.

In the case of *The Moses Taylor*, 4 Wall. 411, 18 L. ed. 397, it was decided that a contract to carry passengers by sea as well as a contract to carry goods, was a maritime contract and cognizable in admiralty, *although a [*29 small part of the transportation was by land, the principal portion being by water. In a late

case of affreightment, that of *The Belfast*, 7 Wall. 624, 19 L. ed. 266, it was contended that admiralty jurisdiction did not attach, because the goods were to be transported only from one port to another in the same state, and were not the subject of interstate commerce. But as the transportation was on a navigable river, the court decided in favor of the jurisdiction, because it was a maritime transaction. Justice Clifford, delivering the opinion of the court, says: "Contracts, claims, or service, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty courts. Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon the locality."

It thus appears that in each case the decision of the court and the reasoning on which it was founded have been based upon the fundamental inquiry, whether the contract was or was not a maritime contract. If it was, the jurisdiction was asserted; if it was not, the jurisdiction was denied. And whether maritime or not maritime depended, not on the place where the contract was made, but on the subject-matter of the contract. If that was maritime the contract was maritime. This may be regarded as the established doctrine of the court.

The subject could be very copiously illustrated by reference to the decisions of the various district and circuit courts. But it is unnecessary. The authoritative decisions of this court have settled the general rule, and all that remains to be done is to apply the law to each case as it arises.

It only remains, then, to inquire whether the contract of marine insurance, as set forth in the present case, is or is not a maritime contract.

30*] *It is objected that it is not a maritime contract because it is made on the land and is to be performed (by payment of the loss) on the land, and is, therefore, entirely a common-law transaction. This objection would equally apply to bottomry and respondentia loans, which are also usually made on the land and are to be paid on the land. But in both cases payment is made to depend on a maritime risk; in the one case upon the loss of the ship or goods, and in the other upon their safe arrival at their destination. So the contract of affreightment is also made on land, and is to be performed on the land by the delivery of the goods and the payment of the freight. It is true that in the latter case a maritime service is to be performed in the transportation of the goods. But if we carefully analyze the contract of insurance we shall find that, in effect, it is a contract, or guaranty, on the part of the insurer, that the ship or goods shall pass safely over the sea, and through its storms and its many casualties, to the port of its destination; and if they do not pass safely, but meet with disaster from any of the misadventures insured against, the insurer will pay the loss sustained. So in the contract of affreightment, the master guaranties that the goods shall be safely transported (dangers of the seas excepted) from the port of shipment to the port of delivery, and there delivered. The contract of the one guaranties against loss from the dangers of the sea, the contract of the other against loss from all other dangers. Of course these contracts do not always run precisely parallel to each other, as now stated; special terms are inserted in each at the option of the parties. But this statement shows the general nature of the two contracts. And how a fair mind can discern any substantial distinction between them on the question whether they are or are not maritime contracts, is difficult to imagine. The object of the two contracts is, in the one case, maritime service, and in the other maritime casualties.

And then the contract of insurance, and the rights of the parties arising therefrom, are affected by and mixed up with all the questions that can arise in maritime commerce—jettison, *abandonment, average, salvage, capture, [*31 prize, bottomry, etc.

Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom. It was unknown to the common law; and the common-law remedies, when applied to it, were so inadequate and clumsy that disputes arising out of the contract were generally left to arbitration, until the year A. D. 1601, when the statute of 43 Elizabeth was passed creating a special court, or commission, for hearing and determining causes arising on policies of insurance. The preamble to that act, after mentioning the great benefit arising to commerce by the use of policies of insurance, has this singular statement: "And whereas, heretofore such assurers have used to stand so justly and precisely upon their credits as few or no controversies have arisen thereupon, and if any have grown the same have, from time to time, been ended and ordered by certain grave and discreet merchants appointed by the lord mayor of the city of London, as men, by reason of their experience, fittest to understand and speedily to decide those causes, until of late years that divers persons have withdrawn themselves from that arbitrary course, and have sought to draw the parties assured to seek their moneys of every several assurer by suits commenced in her Majesty's courts, to their great charges and delays." The commission created by this act was to be directed to the judge of the admiralty for the time being, the recorder of London, two doctors of the civil law, and two common lawyers, and eight grave and discreet merchants. The act was thus an acknowledgment of the jurisdiction to which the case properly belonged. Had it not been for the jealousy exhibited by the common-law courts against the court of admiralty, in prohibiting its cognizance of policies of insurance half a century before, 4 inst. 139, the *lat- [*32 ter court, as the natural and proper tribunal for determining all maritime causes, would have furnished a remedy at once easy, expeditious and adequate. It was only after the common law, under the influence of Lord Mansfield and other judges of enlightened views, had imported into itself the various provisions of the

law maritime relating to insurance, that the courts at Westminster Hall began to furnish satisfactory relief to suitors. And even then, as remarked by Sir W. D. Evans, "the inadequacy of the existing law to settle, *proprio vigore*, complicated questions of average and contribution, is very manifest and notorious. Such questions are, by consent, as matter of course, and from conviction of counsel that justice cannot be attained in any other way, referred to private examination; but a law can hardly be considered as perfect which is not possessed of adequate powers within itself to complete its purpose, and which requires the extrinsic aid of personal consent." Evans, Statutes, vol. 2, p. 226, 3d ed. The contrivances to which Lord Mansfield resorted, to remedy, in a measure, these difficulties, are stated by Mr. Justice Parke in the introduction to his work on insurance.

These facts go to show demonstrably, that the contract of marine insurance is an exotic in the common law. And we know the fact, historically, that its first appearance in any code or system of laws was in the law maritime as promulgated by the various maritime states and cities of Europe. It undoubtedly grew out of the doctrine of contribution and general average, which is found in the maritime laws of the ancient Rhodians. By this law, if either ship, freight, or cargo was sacrificed to save the others, all had to contribute their proportionate share of the loss. This division of loss naturally suggested a previsional division of risk: First, amongst those engaged in the same enterprise; and, next, amongst associations of ship owners and shipping merchants. Hence it is found that the earliest form of the contract of insurance, was that of mutual insurance which, according to Pardessus, dates back to the tenth century, if not 33*] earlier, *and in Italy and Portugal was made obligatory. By a regulation of the latter kingdom, made in the fourteenth century, every ship owner and merchant in Lisbon and Oporto was bound to contribute two per cent of the profits of each voyage to a common fund from which to pay losses whenever they should occur. 2 Pardes. Lois Mar. 369; 6 do. 303. The next step in the system was that of insurance upon premium. Capitalists, familiar with the risks of navigation, were found willing to guaranty against them for a small consideration or premium paid. This, the final form of the contract, was in use as early as the beginning of the fourteenth century (Pardessus, Lois Maritimes, vol. 2, pp. 369, 370; vol. 4, p. 566; vol. 5, pp. 331, 493), and the tradition is that it was introduced into England in that century by the Lombard merchants who settled in London and brought with them the maritime usages of Venice and other Italian cities. Express regulations respecting the contract, however, do not appear in any code or compilation of laws earlier than the commencement of the fifteenth century. The earliest which Pardessus was able to find were those contained in the Ordinances of Barcelona, A. D. 1435; of Venice, A. D. 1468; of Florence, A. D. 1523; of Antwerp, A. D. 1537, etc. Pardessus, vol. 5, pp. 493, 65; vol. 4, pp. 598, 37. Distinct traces of earlier regulations are found, but the ordinances themselves are not extant. In the more elaborate monuments of maritime law which appeared in the sixteenth and seventeenth centuries, the contract of insurance occupies a large space. The *Guidon de la Mer*, which appeared at Rouen at the close of the sixteenth century, was an elaborate treatise on the subject; but, in its discussion, the principles of every other maritime contract were explained. In the celebrated marine ordinance of Louis XIV., issued in 1681, it forms the subject of one of the principal titles. Lib. 3, title 6. As is well known, it has always formed a part of the Scotch maritime law.

Suffice it to say that in every maritime code of Europe, unless England is excepted, marine insurance constitutes one of the principal heads. It is treated in nearly every *one [*34 of those collected by Pardessus, except the more ancient ones, which were compiled before the contract had assumed its place in written law. It is, in fact, a part of the general maritime law of the world; slightly modified, it is true, in each country, according to the circumstances or genius of the people. Can stronger proof be presented that the contract is a maritime contract?

But an additional argument is found in the fact that in all other countries, except England, even in Scotland, suits and controversies arising upon the contract of marine insurance are within the jurisdiction of the admiralty of other marine courts. See Benedict's Admiralty, § 294, ed. 1870. The French ordinance of 1681 touching the marine, in enumerating the cases subject to the jurisdiction of the judges of admiralty, expressly mentions those arising upon policies of assurance, and concludes with this broad language: "And generally all contracts concerning the commerce of the sea." Sea Laws, 256. The Italian writer, Roccus, says: "These subjects of insurance and disputes relative to ships are to be decided according to maritime law, and the usages and customs of these are to be respected. The proceedings are to be according to the forms of maritime courts and the rules and principles laid down in the book called 'The Consulate of the Sea,' printed at Barcelona in the year 1592." Roccus, Insurance, note 80.

It is also clear that, originally, the English admiralty had jurisdiction of this as well as of other maritime contracts. It is expressly included in the commissions of the Admiral Benedict, § 48. Dr. Brown says: "The cognizance of policies of insurance was of old claimed by the court of admiralty, in which they had the great advantage attending all their proceedings as to the examination of witnesses beyond the seas or speedily going out of the kingdom." 2 Bro. Civ. & Adm. Law, 82. But the intolerance of the common-law courts prohibited the exercise of it. In the early case of *Crane* v. *Bell*, 38 Hen. VIII. (1546) a *pro- [*35 hibition was granted for this purpose. See 4, Co. Inst. 139. Mr. Browne says very pertinently: "What is the rationale, and what the true principle which ought to govern this question, *viz.*: What contracts should be cognizable in admiralty? Is it not this? All contracts which relate purely to maritime affairs, the natural, short, and easy method of enforcing which is found in the admiralty proceedings." 2 Browne, 88. Another consideration

bearing directly on this question is the fact that the commissions in admiralty issued to our colonial governors and admiralty judges, prior to the Revolution, which may be fairly supposed to have been in the minds of the convention which framed the Constitution, contained either express jurisdiction over policies of insurance or such general jurisdiction over maritime contracts as to embrace them. Benedict, ch. ix.

The discussions that have taken place in the district and circuit courts of the United States have not been adverted to. Many of them are characterized by much learning and research. The learned and exhaustive opinion of Justice Story, in the case of *De Lovio* v. *Boit*, 2 Gall. 398, affirming the admiralty jurisdiction over policies of marine insurance, has never been answered, and will always stand as a monument of his great erudition. That case was decided in 1815. It has been followed in several other cases in the first circuit. *Ins. Co.* v. *Younger*, 2 Curt. 332. In 1842 Justice Story, in reaffirming his first judgment, says that he had reason to believe that Chief Justice Marshall and Justice Washington were prepared to maintain the jurisdiction. What the opinion of other judges was he did not know. *Hale* v. *Ins. Co.* 2 Story, 183. Doubts as to the jurisdiction have occasionally been expressed by other judges. But we are of opinion that the conclusion of Justice Story was correct.

The answer of the court, therefore, to the question propounded by the Circuit Court will **36*]** *be that the District Court *for the District of Massachusetts, sitting in admiralty has jurisdiction to entertain the libel in this case.*

136*] *HENRY AMY, *Plff. in Err.*,

v.

JOHN BARKHOLDER *et al.*, Supervisors, etc.

(See S. C. "*Amy* v. *The Supervisors*," 11 Wall. 136–139.)

State and national courts cannot enjoin each other—ministerial act—mistake.

State and national courts are as independent as they are separate. Neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgments and decrees.

Where the law absolutely requires a ministerial act to be done by a public officer and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct.

A mistake as to his duty and honest intentions will not excuse the offender.

[No. 93.]

Argued Feb. 28, 1871. Decided Mar. 27, 1871.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

Suit was brought in the court below by plaintiff in error to recover damages from the defendants, for refusing to obey a certain writ of mandamus. Judgment having been given for the defendants, the plaintiff sued out this writ of error.

The case is fully stated by the court.

NOTE.—*When officer is liable for error in judgment; for neglect or refusal to perform judicial or ministerial duty; for tort or breach of trust*—see note, 11 L. ed. U. S. 506.

Federal courts enjoining proceedings in state courts—see notes, 16 C. C. A. 90; 27 C. C. A. 575.

State courts enjoining proceedings in Federal courts—see note, 45 C. C. A. 591.

Messrs. James Grant and **C. Whitaker**, for plaintiff in error:

A state court has no authority to interfere with or to stop proceedings in a Federal court, nor in any manner to interfere with or to stop the enforcement of its judgments.

Ex parte Holman, 28 Ia. 88, decided by the supreme court of Iowa, Oct. 11, 1869, but not yet reported.

Where the writ is mandatory and commands the officer to do a particular act, and the court issuing it has jurisdiction, it is a protection to him in all courts.

Buck v. *Colbath*, 3 Wall. 334, 18 L. ed. 257.

The writ of mandamus commanded the defendants to do a particular act; to levy a special tax; and, under the authority to the case last quoted, was a protection to them, even in the state court, against the injunction which they have set up in their answer.

A mistake of law cannot relieve a party from the legal consequences of his acts.

Champlin v. *Laytin*, 18 Wend. 415; Willard, Eq. Jur. ch. 1, § 2; *People* v. *Brooks*, 1 Den. 457.

(No counsel appeared in this court for the defendants in error).

Mr. Justice **Swayne** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of Iowa.

The plaintiff in error was the plaintiff in the court below. The declaration contains two counts. The first count alleges substantially that the plaintiff recovered a judgment against the county of Des Moines in the said circuit court; that afterwards such proceedings were had that a peremptory writ of mandamus was issued from that court and duly served upon the defendants as supervisors of said county, whereby they were commanded to levy a tax sufficient to pay the judgment and costs; that in September, 1868, it was their duty to levy such a tax, and that they neglected to do *so, whereby the plaintiff sustained [***137** damage to the amount of $12,108.03.

The second count sets forth substantially the same facts; and, further, the provisions of the Code of Iowa prescribing the duty of the defendants, as supervisors, under such circumstances, and declaring that a failure on their part to perform the duty enjoined, should render them personally responsible for the debt. It is further averred in this count that the judgment is in full force and unsatisfied, and that the defendants have levied no tax and made no provision for its payment, and that the plaintiff is thereby damaged in the sum stated in the first count.

The defendants, by their answer, set up three defenses:

(1) *Nil debet.*

(2) That the district court of Des Moines county had enjoined them from levying a tax to pay the judgment; that they were, nevertheless, proceeding to levy such tax when they were attached by order of that court for contempt of its process, and compelled to give bonds to answer said charge of contempt and to obey the injunction, and that those bonds were still in force and obligatory upon them.

(3) That before the peremptory writ of mandamus was issued the legislature of Iowa re-

pealed the statutory provision, whereby they were made individually liable for the delinquency charged against them and that, by reason of such repeal, they are not so liable.

The plaintiff demurred to the answer. The court overruled the demurrer and gave judgment for the defendants.

The counsel for the plaintiff in error has filed an able and elaborate brief. None has been submitted in behalf of the defendants. A few remarks will be sufficient to dispose of the case.

The circuit court had authority to issue the writ of mandamus. It was the process resorted to by the plaintiff to procure satisfaction of his judgment. The state court was powerless to prevent its execution. In so far as concerned the process in question the injunction was a **138***] nullity. In such *cases the two sets of tribunals—state and national—are as independent as they are separate. Neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgments and decrees. Where either is in possession of the *res* sought to be reached, the process of the other must pause until that possession has terminated. But this rule has no application in the case before us. These principles are a part of the checks and balances of our dual and combined polity, and are indispensable to the harmonious and beneficial working of the system. If the ground assumed by the state court in this case can be maintained, the Constitution of the United States, and the laws made in pursuance thereof, as regards their judicial administration, instead of being the supreme law of the land, would be subordinated to the authority of the courts of every state in the Union. If this writ may be paralyzed by the injunction relied upon, a writ of fieri facias and a writ of levari facias may be defeated in the same way. In point of principle, there is no distinction between them. Every judgment of a court of the United States may thus be rendered fruitless of any beneficial result. These views are conclusively maintained by *Riggs* v. *Johnson Co.* 6 Wall. 166, 18 L. ed. 768, and the principle involved has since been reaffirmed in the cases which followed, and were controlled by that judgment.

It is not necessary to consider the effect of the repeal of the provision of the Code which enacted that the delinquent parties shall be personally liable. There is a common-law liability which was not affected by the repeal. The statute was only cumulative on the subject.

The rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender. The question of the rule **139***] *by which the measure of damages is to be ascertained is not before us, and we do not feel called upon to express any opinion upon the subject.

The defenses set up in the answer of the defendants are clearly bad. The demurrer should have been sustained.

The judgment of the Circuit Court is reversed, and the cause will be remanded, with instructions to that court to proceed in conformity to this opinion.

JAMES FARR, JR., *Plff.*,
v.
GEORGE A. THOMPSON *et al.*

(See S. C. 11 Wall. 139.)

Personal suit against members of city council who refuse to obey a mandamus.

Amy v. Barkholder, *ante*, 101, followed.

A suit will lie personally against members of a city council, for their refusal to obey a writ of mandamus from the U. S. circuit court commanding them to levy a tax to pay judgments in that court against the city.

[No. 73.]

Argued Jan. 18, 1871. Decided Mar. 27, 1871.

IN a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of Wisconsin.

Suit was brought in the court below by the plaintiff, to recover damages from the defendants, members of the city council of Racine, for their refusal to obey a writ of mandamus from that court, commanding them to levy a certain tax for the payment of judgments obtained in that court by the plaintiff against the said city.

The court below being equally divided as to the sufficiency of said declaration certified the case to this court.

Mr. **Matt. H. Carpenter,** for plaintiff.

(No counsel appeared in this court for defendants).

Mr. Justice **Swayne** delivered the opinion of the court:

This case comes before us upon a certificate of division of opinion between the judges of the circuit court of the United States for the district of Wisconsin.

Upon looking into the record, we find the question certified up for our determination to be, whether the declaration in the case shows a cause of action.

A full and able brief has been submitted on behalf of the plaintiff. There is none upon the other side.

The declaration, in all substantial respects, presents the same state of facts as the declaration in the case of *Amy* v. *Barkholder, ante*, 101, just decided. The proper solution of the question submitted is too clear to admit of doubt or require discussion.

It was formally decided in the case referred to.

The question must be answered by this court in the affirmative.

SAMUEL G. SMITH, *Plff. in Err.*
v.
SAC COUNTY, in the State of Iowa.

(See S. C. 11 Wall. 139-164.)

Holder of negotiable paper, when must prove value paid—insufficient finding—holder of bonds.

If there is any proof of fraud or illegality which can be left to the jury, such proof will cast on the plaintiff the *onus* of showing that he gave value for negotiable paper sued on.

A finding of fact that the plaintiff became the

NOTE.—*Burden of proof where there is fraud or illegality in the inception of the negotiable paper* —see note 17 L. R. A. 328.

holder by transfer before maturity, does not imply that he was a purchaser in any sense, or received the coupons sued upon on any consideration whatever.

Where there is no proof on these points, the plaintiff can occupy no better position than the one to whom the bonds were originally delivered.

[No. 99.]

Argued Mar. 6, 1871. Decided Mar. 27, 1871.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

Suit was brought in the court below by the plaintiff in error, to recover upon certain bonds. The court, without a jury, found as follows:

1. That an order and proclamation was made by Eugene Criss, county judge of said county of Sac, for submitting to the vote of the people of said county, "Whether or not a court-house should be erected in said county, to cost $10,000, in bonds drawing ten per cent interest per annum; the interest due, and $1,000 of the principal, to be paid annually until the debt is paid; and whether or not a tax shall be levied annually, sufficient to liquidate the demands as they became due," in manner and form as the same is alleged and set forth in the plaintiff's petition herein.

2. That a special election was held in said county July 7, 1860, in accordance with and in pursuance of said order and proclamation; and that said proposition was adopted by a majority of the votes cast at said election.

3. That the said proposition and the order for the submission of the same, together with a statement of the result of said election, was afterwards, by and under the directions of the said county judge, entered and recorded at large in the office of the said county judge in the minute book of the county judge and county court. in manner and form as the same are here set forth, and copied in the petition of the plaintiff herein.

That, by the said record entry, the said order for the submission of the said proposition to the vote of the people appears and purports to have been made at a session of the county court June 4, 1860; but that said record was not in part made and entered in said minute book at that time, nor until after the execution and delivery of the bonds as hereinafter found; and that the said order was entered in said minute book in June, 1861, after the said Criss had ceased to have any power or jurisdiction over the financial business of the defendant.

4. That the said Eugene Criss, county judge of said county, having entered into a contract in behalf of said county with one W. N. Meservy, for the erection by the said Meservy of a court-house in and for said county, did, on or about Oct. 1, 1860, execute in behalf of said county, by affixing thereto his signature as such county judge. and the lawful seal of said county. and deliver to said Meservy in pursuance of the terms of said contract, ten certain bonds or instruments purporting to be the bonds of said county, dated Oct. 1, 1860, each being for the payment to the bearer of $1,000, with interest thereon at the rate of ten per cent per annum, payable annually; and which said bonds were severally and respectively payable in one, two, three, four, five, six, seven, eight, nine, and ten years after date, at the Metropolitan bank in the city of New York. And said county judge also executed in like manner, coupons or interest warrants annexed to said bonds and each of them, for the several annual instalments of interest to grow due thereon as aforesaid, being for $100 each, and payable to bearer at said bank, or receivable for taxes at the county treasury of said county, at the option of the holder. Said bonds and coupons were all expressed in the same words and figures precisely, except as to the numbers and date of maturity thereof, and correct copies thereof are contained and set forth in plaintiff's petition herein.

5. That the said county judge in fact signed, sealed, and delivered said bonds and coupons as aforesaid, at Fort Dodge, in the county of Webster, and state of Iowa, and not within the county of Sac; and that the contractor, Meservy, gave one of said bonds for $1,000 as a gratuity to the county judge, as soon as the same were delivered by said county judge to said Meservy; and no court-house was, in fact, ever built by said contractor or any other person, in pursuance of said contract.

6. That the plaintiff, Samuel C. Smith, was at the time of commencing this action and still is, the holder and owner of twenty-five of the coupons or interest warrants aforesaid, being those specified and declared on in the petition herein; that because such holder by transfer thereof to him before maturity and after the entry of said proceedings in the minute book as hereinbefore found; that said coupons were at the commencement of this action, and still are, wholly unpaid.

And as a matter of law arising upon and resulting from the facts hereinbefore found, the court is of opinion and adjudges that the said bonds and coupons are wholly void as against the said county of Sac, and that the defendant is entitled to judgment; that plaintiff take nothing by his suit and for its cost; to which opinion and judgment the plaintiff excepts.

The case is further stated by the court.

Messrs. **John N. Rogers** and *D. C. Richman & Carskaddan*, for plaintiff in error:

Where a municipal corporation has power, under any circumstances, to issue negotiable security, it will be conclusively presumed in favor of a bona fide holder for value, that they were in fact issued under the circumstances which would authorize them.

Gelpcke v. *Dubuque*, 1 Wall. 175, 17 L. ed. 520; *Knox Co.* v. *Aspinwall*, 21 How. 539, 16 L. ed. 208; *Rogers* v. *Burlington*, 3 Wall. 654, 18 L. ed. 79; *Supervisors* v. *Schenck*, 5 Wall. 772, 18 L. ed. 556.

The corporation is estopped as to such matters by the recitals on the face of its bonds.

Moran v. *Miami Co.* 2 Black, 722, 17 L. ed. 342; *Mercer Co.* v. *Hackett*, 1 Wall. 83, 17 L. ed. 548; *Van Hostrup* v. *Madison*, 1 Wall. 291, 17 L. ed. 538; *Meyer* v. *Muscatine*, 1 Wall. 384, 17 L. ed. 564.

The court below has found that all the statutory prerequisites were, in fact, complied with; unless it be claimed that the power to issue is derived, not from the actual adoption by popular vote of the proposition submitted by the county judge, but upon the formal entry thereof of record; and that this latter step must precede the execution of the bonds, or

they will be void, even in the hands of a bona fide holder who purchased them after the record had been duly made up, and without notice of its having been done after the execution of the bonds, and with the statement on the face of the bonds that this step had been duly had and taken.

The record was made under the direction of the proper officer, the county judge. The finding that it was made after he had ceased to have any jurisdiction over the financial affairs of the county, does not mean that he had gone out of office, which was not the fact; but refers to a change in the law, which took effect Jan. 1, 1861, transferring the management of the financial affairs of the county from the county judge to a board of supervisors.

Rev. of 1860, ch. 22, art. 11, p. 48; § 324, p. 53.

The fact on which the judgment below for the defendant was entirely rested was that the county judge in fact signed, sealed, and delivered the bonds on behalf of his county, at a place beyond its territorial limits. This was held to render them void, even as against a holder for value without notice, and though directly contradictory to an express recital on their face.

It is the delivery, not the signing and sealing, which gives effect to the instrument. The particular locality where the signature and seal are affixed is of no importance.

The plaintiff is protected by the rules applicable to bona fide transferees of negotiable paper. If the negotiable bonds of the county authorized by law, and authenticated on their face by the proper official signatures and seals; get into circulation improperly through the malfeasance or misfeasance of the county officers, the same consequences follow as in case of a private individual, whose notes, bearing his genuine signature, are improperly put into circulation by his agent. If, before maturity, they come into the hands of bona fide holders for value, in either case they must be paid.

Ill. v. *Delafield*, 8 Paige, 527, 2 Hill, 159, per Bronson, J.; *Supervisors* v. *Schenck*, *supra*.

Mr. **Galusha Parsons,** for defendant in error:

After the evidence given by the defendant as to the issuing of the bonds, it was incumbent upon the plaintiff to prove that he received the coupons for value, and without notice.

2 Pars. Bills & N. 438; Story, Prom. N. 196; *Munroe* v. *Cooper*, 5 Pick. 412.

When a bill or note is shown to have originated in illegality or fraud, a presumption arises that a subsequent holder gave no value for it, and such a presumption will support a plea that the holder is a holder without consideration, unless rebutted by the plaintiff's showing that he gave value.

6 B. Jones, 24 L. J. Q. B. (N. S.) 293.

Mr. Justice **Miller** delivered the opinion of the court:

The plaintiffs sued the county of Sac, on certain interest coupons attached to bonds, purporting to have been issued by the county for the erection of a court-house.

According to the form of pleading in the Iowa court by petition and answer, which is adopted in the circuit court for that district, the plaintiff sets out in his petition all the proceedings by vote of the county, which he deems necessary to authorize the issue of the bonds, with a copy of one of the bonds and coupons; and after describing by number and otherwise twenty-five of the coupons, avers that he is the owner and holder of them, that he received them in good faith before maturity and paid value therefor, and that the same are valid and legal claims against the county.

The defendant answers, denying each and every allegation of the petition, and then sets up that the bonds were issued without authority of law, failure of consideration, and other defenses.

The denials of the first part of the answer, though not strictly in the form required by the rule, put in issue every material fact alleged in the petition. It, therefore, made an issue on the plaintiff's allegation that he became the holder of said coupons before maturity, and that he paid value therefor, so far as that might become material to be shown on the trial.

The parties having, by stipulation, submitted the case to the court without a jury, and the court made a special finding of facts, on which it held the law to be for defendant, and rendered a judgment accordingly, the question before us is, whether the judgment is justified by the facts found.

Treating the bonds and coupons sued on in this case, *which are payable to bearer, [*147 as negotiable paper, and conceding to its fullest extent the protection which commercial usage throws around such paper in the hands of a bona fide purchaser for value before maturity, it is, nevertheless, undoubtedly true that circumstances may be shown in connection with the origin of such paper, which will devolve upon the holder the burden of showing that he did give value for it before maturity. This principle is asserted in the text books of Chitty (Chit. Bills, 260, 648), Story (Story, Prom. N. § 196), Parsons (2 Pars. Notes & B. 438), and others, and is so laid down and sustained by numerous citations of authorities by the learned American annotator of Smith's Leading Cases, p. 752. In one of the latest of the English cases, *Hall* v. *Featherstone*, 3 Hurlst. & N. 284, C. B. Pollock, says: "If there are any circumstances in the nature of fraud or illegality which can be left to the jury, proof of these circumstances will cast on the plaintiff the onus of showing that he gave value for the bill." To which Martin, Baron, added: "I think there was, at the close of the defendant's case, evidence for the jury in support of the plea. The authorities have established a principle which is contrary to the general rule, by which a defendant is bound to prove all the facts necessary to constitute a defense." And Bramwell said: "The cases have established that if there be fraud or illegality in the inception of a bill or in the circumstances under which it was taken by the person who indorsed it to plaintiff, he must prove consideration. That is established beyond controversy."

With this statement of the law on that subject, we approach the examination of the facts found by the court.

The fifth finding is "that the county judge in fact signed, sealed, and delivered said bonds

and coupons at Fort Dodge, in the county of Webster, and state of Iowa, and not within the county of Sac; and that the contractor Meservy, gave one of said bonds as a gratuity to 148*] the county judge as soon *as the same were delivered by said county judge to said Meservy, and no court-house was ever built by said contractor or any other person in pursuance of said contract."

Now, the coupons sued on being part of the transaction here referred to, was there not enough in what the court finds to devolve upon the plaintiff the necessity of showing that he purchased for value? In the language of C. B. Pollock, "were there not circumstances in the nature of fraud, proof of which cast on the plaintiff the onus of showing that he gave value for the bonds?" They are circumstances from which no court or jury could fail to find fraud in the inception of the bonds on which he sued. Besides he had, perhaps unnecessarily, but expressly averred that he had paid value, and this had been denied by defendant, so that the issue was fairly raised by the pleadings. He not only failed to prove that he gave value, but it does not appear that he offered any evidence to that effect. The bill of exceptions, which recites much that was offered and submitted in evidence, is silent on this point.

The sixth finding of the court is that the plaintiff was, at the time of commencing this action, and still is, the holder and owner of the twenty-five coupons declared on in the petition; that he became such holder by transfer thereof to him before maturity, and after the entry of the proceedings on the minute book, etc.

It must be taken, then, that plaintiff did not show that he was a holder for value. There is neither finding nor evidence that he gave value, and the statement that he became the holder by transfer before maturity, does not imply that he was a purchaser in any sense or received them on any consideration whatever.

Under these circumstances the plaintiff can occupy no better position than Meservy, to whom the bonds were originally delivered by the county judge.

If Meservy had been plaintiff, ought the judgment to have been other than what it is on the record presented to us?

He contracted to build the court-house and 149*] never built it *or attempted to do so. He received under this contract $10,000 of what purported to be the bonds of the county. These bonds were signed, and the county seal, which was necessary to their validity, affixed by a person assuming to act as county judge in another county, at the place where Meservy resided, and as soon as the transaction was completed one of the bonds was given by Meservy as a gratuity to the person who had thus played the part of county judge. That the county judge should have left his own county and his official place of business, should have put the seal of the county in his pocket, and gone to meet Meservy in a place without the limits of his jurisdiction, should there have concocted these bonds, and on delivering ten of them to Meservy have received back one of them without any consideration but Meservy's satisfaction at the completion of the transaction, and that this should create in Meservy's favor a right of action against the county, is more than we can affirm. That the court-house was not built is only the natural result of such a proceeding. That the bonds should turn up in the possession of some one else was to be expected. But to hold that, after all this was shown in defense, such holder should have a judgment on those bonds, without any proof that he purchased them for value or that he gave any consideration for them at all, is in our judgment pushing the doctrine which gives sanctity to negotiable paper beyond any just principle or any decided case.

We think the judgment of the Circuit Court was right, and it is, accordingly, affirmed.

Mr. Justice **Clifford**, dissenting:

Coupons attached as interest warrants to bonds for the payment of money lawfully issued by municipal corporations are negotiable instruments, and as such, when they are payable to order and are indorsed in blank, or are made payable to bearer, are transferable by delivery and are subject to the same commercial rules and regulations, so far as *re- [*150 spects the title and rights of the holder, as negotiable bills of exchange and promissory notes. *White* v. *R. Co.* 21 How. 575, 16 L. ed. 221; *Murray* v. *Lardner*, 2 Wall. 110, 17 L. ed. 857; *Moran* v. *Miami Co.* 2 Black, 722, 17 L. ed. 342; *Mercer Co.* v. *Hackett*, 1 Wall. 83, 17 L. ed. 548; *Gelpcke* v. *Dubuque*, 1 Wall. 176, 17 L. ed. 520; *Meyer* v. *Muscatine*, 1 Wall. 385, 17 L. ed. 564.

Holders of such instruments, if the same are indorsed in blank or are made payable to bearer, stand upon the same footing as the holders of negotiable bills of exchange or promissory notes, and are as effectually shielded from the defense of prior equities between the original parties to the instrument, if unknown to them at the time of the transfer, as the holders of any other class of negotiable instruments. *Chester* v. *Dorr*, 41 N. Y. 282; *Turnbull* v. *Bowyer*, 40 N. Y. 460.

Such instruments are protected from defenses of the kind when in possession of an indorsee, not merely because they are negotiable but also because they are regarded as commercial instruments, and as such are favored as well on account of their negotiable quality as their general convenience in mercantile affairs. *Thompson* v. *Lee Co.* 3 Wall. 327, 18 L. ed. 177; *Park Bank* v. *Watson*, 42 N. Y. 492.

Bonds for the payment of money, with interest warrants attached, are now universally classed with bills of exchange and promissory notes as negotiable instruments, and as such are everywhere encouraged as a safe and convenient medium for the settlement of balances among mercantile men; and any course of judicial decision calculated to withdraw such instruments from the operation of the general rules of commercial law usually applied in controversies respecting the title to the same, or to restrain or impede their free and unembarrassed circulation, would be contrary to the soundest principles of public policy. *Goodman* v. *Simonds*, 20 How. 364, 15 L. ed. 940.

On the first day of October, 1860, ten bonds, each for the sum of $1,000, payable to bearer, one each succeeding year till the whole sum was paid, with interest at the rate of ten per centum per annum, were issued, by the defend-

ant corporation "for the purpose of erecting a 151*] court-house *in Sac City, the county-seat of the county," as alleged in the recitals of each bond. They were numbered from one to ten inclusive, and they also contained the recital that they "were issued by the county in accordance with a vote of the legal voters thereof" at a special election, holden on the day therein mentioned, pursuant to a proclamation made by the county judge, according to the statutes of the state in such case made and provided.

Annexed to the several bonds were the coupons, one or more, as provided in the same, for the payment of the annual interest, and the plaintiff being the holder of twenty-five of those coupons instituted the present suit to recover the amount, together with six per cent. interest from their maturity, and he alleged in his declaration that he was the holder and owner of the coupons therein described; that he received the same in good faith before their maturity; and that he paid value for the same at the time of their transfer; that the bonds and coupons were issued by the county under and by virtue of a legal and competent authority conferred upon the officers and agents of the county, and that the same are valid and legal claims against the defendant corporation.

Most of the allegations of the declaration are denied in the answer, but the defendants do not specifically deny that the plaintiff paid value for the coupons at the time he became the holder and owner of the instruments. They deny that any such election as that set forth was ever called or held, or that the county judge had any authority to call such an election, or to make any contract to build a court-house or to issue any such bonds or coupons, or that any such bonds or coupons were ever issued, and they append to those specific denials a general denial of each and every allegation of the declaration, which really amounts to nothing in any case in that jurisdiction, as the Code of the state, which is adopted by the circuit court, provides that every material allegation of the declaration not denied in the answer shall be considered as admitted. Revision, 531. Where 152*] the general issue may *be pleaded, the rule would be different; but the Code expressly abolishes the general issue and adopts the rule that every material allegation of the declaration is admitted unless it is specifically denied in the answer. Revision, 508, 519.

Apart from the proceeding denials, the defendants also allege that the bonds and coupons were issued without authority, and that the plaintiff, at the time he purchased the same, had full knowledge of those facts.

Special matters in avoidance of the claim of the plaintiff are also set up as a defense in the third article of the answer, in which the defendants allege that the county judge, or the person claiming to act as such, entered into a contract for the building of a court-house at Sac City, the county-seat of the county, to be commenced and completed at the times therein specified: that the county judge agreed and undertook in behalf of the county to pay the contractor for erecting and completing the court-house the sum of $10,000, and to issue the bonds of the county to that amount, as described in the declaration; that the bonds and coupons were subsequently issued in pursuance of the contract, and that they were delivered to the contractor, but that the contractor wholly failed and refused to build the court-house, whereby the consideration of the bonds and coupons wholly failed; and the defendants allege that the plaintiff, at the time he purchased the bonds, had full and complete knowledge of all these facts, and that he took the same subject to the rights and equities of the defendant corporation.

Before the trial, the parties filed a stipulation in writing, agreeing that the case might be heard and determined by the court, without the intervention of a jury, and the record shows that it was so determined. Where the case is so tried the finding of the court may be either general or special, and the express provision is, that the finding shall have the same effect as the verdict of a jury. 13 Stat. at L. 501.

Exceptions may be taken to the rulings of the court made in the progress of the cause, and when the rulings are duly *presented by [*153 a bill of exceptions, they may be re-examined in this court by writ of error, if it is an action at law, or by appeal if it is a suit in equity. Evidently, when the finding is general, the legal effect of the proceeding is in every respect the same as the verdict of a jury at common law, as nothing is open to re-examination except the rulings of the court; but when the finding is special, it is expressly enacted that "the review may also extend to the determination of the sufficiency of the facts found to support the judgment."

Special findings were made by the court, from which it appears that the questions, whether a court-house should be erected to cost $10,000 in the bonds of the county, and whether a tax sufficient to liquidate the demands as they became due should be annually levied, were duly submitted to the voters of the county; that the propositions were adopted, at a special election held on the day therein mentioned, by a majority of all the votes cast at the election, and that the proposition and the order for the submission of the same, together with a statement of the result of the election, were afterwards entered and recorded at large in the minute book of the county court, as alleged by the plaintiff; that the county judge made the contract for the erection of a court-house, as alleged, and that he executed in behalf of the county the ten bonds described in the declaration, affixing thereto his signature as such county judge and the lawful seal of the county, and that he delivered the same to the contractor in pursuance of the terms of the contract, and that correct copies of the bonds and coupons are contained and set forth in the record. Had the findings of the court stopped there, all, undoubtedly, would agree that the plaintiff ought to recover, as it is universally admitted that the transferee of a negotiable instrument, made payable subsequent to its date, holds it clothed with the presumption that it was negotiated to him, at the time of its execution, in the usual course of business and for value, and without notice of any equities between the prior parties to the instrument. *Goodman* v. *Harvey*, 4 Ad. & Ell. 870; *Goodman* v. *Simonds*, 20 How. 365, 15 L. ed. 941; *Noxon* v. *DeWolf*, 10 Gray, 346.

*Such is the settled rule of commer- [*154

cial law applicable to negotiable instruments, and it was so framed and is so administered in order to encourage the free circulation of negotiable paper by giving confidence and security to those who receive it for value, and this principle is so comprehensive in respect to such negotiable instruments as pass by delivery, that the title and possession are considered as one and inseparable, and in the absence of any explanation, the law presumes that the party in possession holds the instrument for value until the contrary is made to appear, and the burden of proof is on the party impeaching his title. *Wheeler* v. *Guild*, 20 Pick. 551; *Collins* v. *Martin*, 1 Bos. & P. 648; *Miller* v. *Race*, 1 Burr. 452; *Peacock* v. *Rhodes*, 2 Doug. 633; *Grant* v. *Vaughan*, 3 Burr. 1516; *Lawson* v. *Weston*, 4 Esp. 56.

In the ordinary course of business the holder is presumed to be prima facie a holder for value and he is not bound to introduce any evidence to show that he gave value for the instrument until the other party has clearly proved that the consideration of the instrument was illegal, or that it was fraudulent in its inception, or that it had been lost or stolen before it came to the possession of the holder. Story, Bills, 4th ed. § 416; Byles, Bills, 10th ed. 119; *Mills* v. *Barber*, 1 Mees. & W. 425; *Sistermans* v. *Field*, 9 Gray, 336.

Possession, even without any explanation, is prima facie or presumptive evidence that the holder is the proper owner or lawful possessor of the instrument, and Judge Story says that nothing short of fraud, not even gross negligence, is sufficient to overcome that presumption and invalidate the title of the holder as inferred from possession. Story, Bills, § 415; *Uther* v. *Rich*, 10 Ad. & Ell. 784; *Bailey* v. *Bidwell*, 13 Mees. & W. 73; *Raphael* v. *Bk. of England*, 33 Eng. L. & E. 276; *Stephens* v. *Foster*, 6 Carr. & P. 289; *Arbouin* v. *Anderson*, 1 Ad. & Ell. (N. S.) 498.

In this last case Lord Denman said: "The owner of a bill is entitled to recover upon it if he came by it honestly, and that fact is implied prima facie by possession, and to meet the inference so raised, fraud, felony, or some such matter, must be proved." *Wyman* v. *Fisk*, 3 Allen, 238; *Bailey* v. *Bidwell*, 13 Mees. & W. 76; *Smith* v. *Braine*, 16 Ad. & Ell. (N. S.) 244. 155*] *Coupon bonds of the ordinary kind, payable to bearer, said the court in the case of *Murray* v. *Lardner*, 2 Wall. 121, 17 L. ed. 859, pass by delivery, and a purchaser of them in good faith is unaffected by want of title in the vendor, adding, what is undoubted law, that the burden of proof on a question of such faith lies on the party who assails the possession. *Ranger* v. *Cary*, 1 Met. 369.

Apply those rules in a suit in the name of the transferee against the maker, and it is clear that the plaintiff, where the case is tried to the jury under the general issue, has nothing to do except to prove the signatures to the instrument and introduce the same in evidence, as the instrument goes to the jury clothed with the presumption that the plaintiff became the holder of the same for value at its date in the usual course of business, without notice of anything to impeach his title. *Pettee* v. *Prout*, 3 Gray, 503; *Bk. of Leighton*, Law Rep. 2 Exch. 61; *Way* v. *Richardson*, 3 Gray, 413.

Clothed, as the instrument is, with those several presumptions, the plaintiff is regarded as a bona fide holder for value, without notice of any equities between the antecedent parties and, therefore, is entitled to recover upon the instrument notwithstanding any defect or infirmity in the title of the person from whom he derived it, as, for example, even though such person may have acquired it by fraud, or even by theft or robbery.

Chit. Bills, 12th ed. 257; *Bk.* v. *Macleod*, 7 Moore, P. C. 35; *Backhouse* v. *Harrison*, 5 Barn. & Ad. 1105.

Comment was made at the argument upon the matter stated in the third finding, that the order for the submission was not, in fact, recorded in the minute book of the county court at the time it purports to have been entered; but the same finding shows that it purports to have been recorded at that time; and the sixth finding shows that the plaintiff became the holder and owner of the twenty-five coupons described in the declaration, before maturity, and after the entry of the proceedings in the minute book, which shows to a demonstration that he, as the transferee of the coupons, cannot *be affected by any delay of the re- [*156 cording officer in entering the proceedings in the minute book of the county court.

Money may be borrowed by a county to aid in the erection of public buildings, and it is well settled law that a municipal corporation, in exercising such an authority, may issue its bonds as the means of accomplishing the object.

Code, § 114; Revision, § 250; *Hull* v. *Marshall Co.* 12 Iowa, 142; *Rogers* v. *Burlington*, 3 Wall. 666, 18 L. ed. 83; *Seybert* v. *Pittsburg*, 1 Wall. 272, 17 L. ed. 553.

When a corporation has power, under any circumstances, to issue negotiable securities, the settled rule in this court is that the bona fide holder has a right to presume that they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper. *Supervisors* v. *Schenck*, 5 Wall. 784, 18 L. ed. 559; *Gelpcke* v. *Dubuque*, 1 Wall. 203, 17 L. ed. 524; *Society for Savings* v. *New London*, 29 Conn. 174; *Tash* v. *Adams*, 10 Cush. 252.

Objection to the validity of the bonds and coupons is also made because the third finding of the court shows that the proceedings were not recorded till after the county judge had ceased to have jurisdiction over the financial business of the county. Reference is there made to the fact that the power to make such orders and to submit such questions to the people of the county had before the proceedings were recorded, been transferred from the county judge to the supervisors of the county, but this court held, in the case of *Supervisors* v. *Schenck*, 5 Wall. 780, 18 L. ed. 558, that such an irregularity would not invalidate such securities in the hands of subsequent holders without notice, and there can be no doubt that the rule as there laid down is correct. By the findings it appears that the plaintiff became the holder and owner of these coupons before maturity and after the proceedings were correctly entered in the minute book, and it is

not found, nor could it be, that he had any notice whatever of the supposed irregularities. *Ill.* v. *Delafield*, 8 Paige, 533, 2 Hill, 177.

157*] *Evidence that he had notice of any defect in the title is entirely wanting, but the case of the plaintiff, in respect to the payment of value, does not depend solely nor chiefly upon the presumption to that effect, which always arises in favor of a transferee from the possession of the instrument. Usually that presumption is considered sufficient, but the case of the plaintiff is much strengthened from the fact that the allegation in the declaration that he paid value for the coupons is not specifically denied in the answer. Taken together, as these several matters must be, they establish the conclusion that the plaintiff did pay value for the coupons at the time of the transfer, and if so, then he clearly is entitled to recover, as it is expressly found by the court that they were transferred to him before maturity, and it is not pretended that he had any notice whatever of the supposed defects in the proceedings, or of any equities between the obligors of the bonds and any prior holder of the coupons.

No court-house was ever built by the contractor, but a valid contract for the erection of such a public building was made between the contractor and the county judge, acting in behalf of the county, at the time the bonds and coupons were executed and delivered, and it is well-settled law that such an executory contract is a good consideration for a negotiable instrument, and that the failure to perform the contract is no defense to the negotiable instrument in the hands of an innocent holder. If one will issue his negotiable paper and send it into the world in consideration of an engagement of the party with whom he deals to do some act for his benefit in the future, he declares, in effect, that he will pay the note or bill according to its terms to anyone who shall become the holder for value in the usual course of business. *Davis* v. *McCready*, 17 N. Y. 232.

Considerations founded upon reciprocal promises of the parties are of common occurrence in business, and bills and notes supported by such considerations have always been held valid, and the principle is as applicable to corporations as individuals.

158*] *Interest warrants or coupons, each for the sum of $100 for the annual instalments of interest, were annexed to each bond, payable at the Metropolitan Bank in the city of New York, and the concluding recital of each bond was as follows: "In witness whereof I, Eugene Criss, county judge of said county of Sac, have hereunto affixed my name and caused the seal of Sac county to be attached, at Sac City, the first day of October, A. D. one thousand eight hundred and sixty."

Title and possession of such coupons are one and inseparable, as the holder is entitled to the same privileges and immunities as an indorsee having taken a note by indorsement in the course of business before it has become due. He is not subject to any equities as between the promisor and the original payee, nor to the set-off of any debt, legal or equitable, which the latter may owe to the former.

By giving a negotiable instrument payable to bearer at a future day the maker of the instrument promises to pay the amount to any person to whom it may be transferred before the day of payment, without claiming to set off any demand which he then has or may acquire against the promisor. Possession is plenary evidence of title "until other evidence is produced to control it." *Pettee* v. *Prout*, 3 Gray, 503; *Magee* v. *Badger*, 34 N. Y. 248; *Hoge* v. *Lansing*, 35 N. Y. 137.

Where the theory that the plaintiff paid value for the instrument depends solely upon the prima facie presumption arising from the possession of the instrument, the defendant may, if the pleadings admit of such a defense, prove that the instrument originated in illegality or fraud, and the rule is, if he establishes such a defense, that a presumption arises that a subsequent holder gave no value for it, and it is also true that such a presumption will support a plea that the holder is a holder without consideration, unless the presumption is rebutted by the plaintiff by showing that he gave value, in which event the plaintiff is still entitled to recover. *Fitch* v. *Jones*, 5 Ell. & Bl. 238; *Smith* v. *Braine*, 16 Q. B. (N. S.) 244; *Hall* v. *Featherstone*, 3 Hurls. & N. 287; *Tucker* v. *Morrill*, 1 Allen, 528; 2 Pars. Bills & N. 438.

*But the defendant is not permitted [*159 to put the plaintiff to proof of the consideration he gave for the instrument unless the defendant can prove that the instrument was obtained from the defendant or from some intermediate party by undue means, as by fraud or force, or that it was lost or stolen, or that it was originally infected with illegality. Byles, Bills, 10th ed. 119; *Harvey* v. *Towers*, 6 Exch. 656; *Mather* v. *Maidstone*, 1 C. B. (N. S.) 273; *Mills* v. *Barber*, 1 Mees. & Wels. 425; *Percival* v. *Frampton*, 2 C. M. & R. 180.

Nothing of the kind was found by the circuit court, and the only evidence introduced to support any such theory was what is detailed in the fifth finding of the court, by which it appears that the county judge signed, sealed and delivered the bonds and coupons to the contractor at Fort Dodge, in the county of Webster, in that state, and not in the county of Sac, as recited in the respective bonds; and that the contractor gave one of the bonds as a gratuity to the county judge as soon as the same were delivered to him by the contractor.

Such evidence, if it had been introduced to a jury, might possibly have had some slight tendency to prove fraud in the inception of the instruments, and it may also be conceded that the fact reported that the contractor gave one of the bonds to the county judge, would have been admissible in evidence, as a circumstance tending to prove the same theory, but if the jury did not find that the instruments were fraudulent in their inception, a court of errors could not supply the omission, as the act of Congress does not give to this court power to do more than "to review the questions presented in the bills of exception, and to determine, where the finding is special," whether the facts found are sufficient to support the judgment.

Unless the finding is special the act of Congress does not give this court jurisdiction to re-examine anything except the rulings of the court, but when the finding is special the court may also determine the question whether the facts *found are sufficient to support [*160

operative as a concluded compact or agreement.

(1) The general duty of a state to preserve itself in all its parts, and not to cut off by cession of territory and jurisdiction any of its people and their property, is clear and acknowledged. This duty yields only to some necessity incumbent on the state, or to considerations arising from the wishes of that part of its people whose cession is in question.

Vatt. Law Nat. 4, 5; Lawr. Wheat. 874-876.

(2) This duty is clearly recognized by the legislation of Virginia respecting these cessions.

(3) The requirement of the consent of a majority of the legal voters in each of the counties, after a fair opportunity to express their wishes according to the established and legal course, was a fundamental condition of the proposal of cession; and if a cession had been made without such consent, it has been made without the consent of Virginia, and contrary to its expressed will.

IV. The means prescribed for the ascertainment of that consent were deemed to be sufficient. But if, through fraud and falsehood, they proved to be wholly insufficient, the commonwealth of Virginia was not precluded and estopped from knowing the truth and acting upon it.

V. If this were a question between two private persons respecting a grant of land, and it were to appear that the conveyance, though fully executed, was made under a mistake of the magnitude and produced by the means shown in this, bill, a court of equity would annul the grant.

VI. A compact between two states, though fully concluded, may, according to principles of public law, be annulled by one of them upon discovery of a mistake concerning facts, which the compact itself shows were fundamental.

Lawr. Wheat. 453.

A fortiori may one of the parties withdraw its assent before the compact has been fully concluded, and whatever has been done has been only *sub spe rati*, and upon discovery that a condition, shown upon the face of the proceedings to be fundamental, has not been complied with.

Messrs. **Reverdy Johnson, B. Stanton,** and **Chas. J. Faulkner,** for respondent:

The complainant, at the filing of the bill, was not a state of the Union, within the meaning of the judicial clause in the 3d article of the Constitution of the United States, which gives to a state the right to invoke the original jurisdiction of this court. She was then denied representation in Congress by the legislative department of the government, and has only been recently admitted to such representation, and that department claims to have the sole right to decide that question. If that proposition is true, Virginia was not a state entitled to file this bill.

Whether a state, in the sense of the Constitution, is a state of the United States, is a political inquiry, to be decided by the political department of the government. If so, Virginia was not such a state when this bill was filed. That that department held that she was not such a state, is clear from the various laws which were passed, upon the recommendation of a majority of the joint committee of both Houses, appointed under the concurrent resolutions of December 13, 1865, and from the reasons contained in such report in support of such laws.

Second. But, supposing this objection to be unsound, the second question is whether the case, as made by the bill, gives the complainant a right to the relief prayed. Under this head, it will be contended that, by the acts of Virginia before referred to, of January and February, 1863, the governor of the state was made the exclusive judge to decide whether the elections directed by those laws to be held in the counties in controversy, Jefferson and Berkeley, were duly held and conducted, and whether a majority of the people at such elections voted in favor of annexation to West Virginia; that this court, consequently, cannot go behind the governor's decision. That the governor did decide these questions is not denied. His certificate to the governor of West Virginia, the authenticity of which is not controverted, is also conceded, and that the governor of the latter state, acting upon that certificate, proclaimed the counties to be a part of West Virginia.

The principle upon which it is maintained, that the certificate of the governor of Virginia is conclusive, it is submitted, is settled by the cases of *Knox Co.* v. *Aspinwall*, 21 How. 539, 16 L. ed. 208; *Bissell* v. *Jeffersonville*, 24 How. 287, 16 L. ed. 664; *Moran* v. *Miami Co.* 2 Black, 722, 17 L. ed. 342.

The bill does not aver that the authorities of West Virginia were parties or privies to any fraud alleged to have been perpetrated, or to any substantial defect in the elections had under the acts of Virginia of January and February. West Virginia, therefore, is to be considered as having acted in good faith in assuming possession and jurisdiction over the counties in question and their people, and that, upon the facts before her, she had a right to do so.

Third. But it is said that before Congress gave any assent to the transfer of the counties from Virginia to West Virginia, the former state, by the act of December 5, 1865, withdrew her assent by repealing the said acts of January and February; and that, until such congressional assent was given, Virginia had a right to pass such repealing act. This proposition is denied. The provision in the Constitution upon the subject is, that "no state shall, without the consent of Congress, enter into any agreement or compact with another state," etc. Art. 1, § 10.

The time when this consent is to be given, whether before or after or simultaneous with such agreement or compact, or the form in which it is to be given, the Constitution does not provide. The clause clearly assumes the authority of a state to enter into such compacts, and its object is merely to prevent their becoming binding upon the other states, without the sanction of Congress.

Green v. *Biddle*, 8 Wheat. 1.

That the states are authorized to enter into compact with each other, subject to the qualification of Congressional sanction for their absolute validity, has been adjudged.

Poole v. *Fleeger*, 11 Pet. 209, and *Rhode Island* v. *Mass.* 12 Pet. 725.

upon their face appear to have been duly issued by the corporation, and in conformity with the provisions of their charter, are valid in the hands of a bona fide holder thereof without notice, although such securities were, in point of fact, issued at a place and for a purpose not authorized by the charter of the corporation. *Supervisors* v. *Schenck*, 5 Wall. 784, 18 L. ed. 559; *Stoney* v. *Ins. Co.* 11 Paige, ch. 635.

Unquestionably, these securities are in due form, and purport on their face to have been executed at Sac City in the county of Sac, and there is not a scintilla of evidence that the plaintiff, as a subsequent transferee, had the slightest knowledge that the recitals did not speak the truth.

Evidence was also offered, as appears by the fifth finding, that the contractor gave one of the bonds as a gratuity to the county judge as soon as they were delivered in execution of the contract. Such evidence might have some tendency to prove fraud in the transaction, but it is not the same thing as fraud. On the contrary, it was only a circumstantial fact from which an inference of fraud might or might not be drawn by a jury or other tribunal authorized to draw such inference from all the evidence in the case.

Inferences of fact, said Tindal, Ch. J., in *Tancred* v. *Christy*, 12 Mees. & W. 323, "must be drawn by the jury, and cannot be drawn by a court of errors." Ultimate facts, said Mr. Justice Miller, or propositions which the evidence is intended to establish, is what is required, and not the evidence on which those ultimate facts are supposed to rest, and he added that the finding must be sufficient in itself, without inferences or comparisons or balancing of testimony or weighing evidence. *Burr* v. *Des Moines Co. supra;* 1 Archb. Pr. 11th ed. 451.

164*] *Apply those rules to the present case, and it is clear that the findings are not sufficient to support the judgment, and that there should be a new venire, giving the defendants an opportunity to show, if they can, that the bonds were fraudulent in their inception, and the plaintiff an opportunity to show, if he can, that he paid value for the coupons at the time of the transfer.

Also dissenting, Mr. Justice **Strong.**

193*] *LOUIS F. GENERES, *Plff. in Err.*,
v.
WALTER L. CAMPBELL.

(See S. C. 11 Wall. 193-199.)

Bill of exceptions, need not be sealed—writ of error—finding of court stands as verdict of jury.

Bill of exceptions need not be sealed; the signature of the judge is sufficient.

For any error in relation to the facts, a writ of error is not the proper remedy.

According to the act of March 3, 1865, the finding of the court stands as would the general verdict of a jury, and has the same effect.

Where the propositions upon which the plaintiff in error insists are not so presented that this court can take cognizance of them, judgment will be affirmed.

[No. 100.]

Argued Mar. 6, 1871. Decided Mar. 27, 1871.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

Suit was brought in the court below by the defendant in error, to recover upon a certain promissory note. Judgment having been given for the plaintiff by the court, sitting without a jury, the defendant sued out this writ of error. The plaintiff in error presented this bill of exceptions, *viz.:*

Be it known that on the trial of this cause, the counsel for defendant argued as follows, *viz.:*

The evidence shows that the plaintiff was doing business in New Orleans, and the note sued upon was dated at New Orleans, April 4, 1861, payable at the counting-house of Abat, Generes & Co. in New Orleans, two years after its date, to the order of and indorsed by the defendant. The suit was brought on the 18th November, 1868, and the petition alleges that at the maturity of the note, to wit, the 7th April, 1863, there was a civil war existing in Louisiana and other states of the Union, and that all intercourse between New Orleans and the place of the then residence of the plaintiff, *viz.:* the Parish of St. Helena, in Louisiana, was interrupted; and that the petitioner was wholly unable to make a presentment and demand of said note. But the evidence shows that said plaintiff left New Orleans in the fall of 1861; he was doing business here; was a regular negro trader in the city of New Orleans; had obtained possession of the notes sued on, and in the course of his business, when, in the fall of 1861, the city of New Orleans being then besieged by the Federal fleet, the plaintiff closed his business and went to his summer residence, on the line of the New Orleans & Jackson Railroad in the parish of St. Helena. The said counsel argued upon this statement of facts, that the impossibility to make a presentment of the note at its maturity was not what was termed by the law *vis major*, but a matter entirely of plaintiff's own seeking. The plaintiff, being shown to have spontaneously so circumstanced himself as to bring upon him the alleged impossibility to act at the maturity of the note, is not entitled to the favor of the doctrine *contra non valentem*, etc. Furthermore, the said counsel argued that long before the maturity of said note, New Orleans was in the possession of the government, and in virtue of the President's proclamation, inviting all loyal citizens to return, the plaintiff might have been here attending to his business, if he thought proper.

It is shown by the evidence that the road from the plaintiff's house in St. Helena to the city of Baton Rouge, was only about fifty miles; that there were a great many people who made it a trade throughout the duration of the war, to travel between Baton Rouge and the plantations on the river coast, to and from the Jackson railroad station. A witness says, and he is not contradicted: "I can't say when Baton Rouge was occupied by the Federals, but I believe it was in 1862. The communications between Baton Rouge and the stations on the Jackson railroad were very frequent."

Said counsel urges that, as the plaintiff had gone into the lines of the opposite side, he might have returned and, consequently, the al-

leged *vis major* had no existence in fact. But the court overruled the pleas of prescription and of want of protest urged by the defendant.

The said counsel furthermore urged that the plaintiff failed to make a presentment and a protest of the note, so soon as freedom of action had been resumed throughout the country. It is in proof that the plaintiff returned to New Orleans in the summer of 1865, to wit, on the 12th of June, 1865, which was about two years and three months after his note had matured. no protest from that time was ever made. The present suit was filed on the 18th of November, 1868. The said counsel argued that under the circumstances shown, even if there had been hitherto a room for the plea of *vis major*, there was a clear laches in not protesting in reasonable time.

But this plea was likewise overruled by the court.

The said counsel argued that, under the provisions of the Civil Code of Louisiana, *viz.*: arts. 3420, 3487, 2512, 3488, *et seq.*, the rule *contra non valentem* will not apply, except in cases expressly mentioned, and that these exceptions do not apply to the present cause.

But this plea was likewise overruled by the court.

And lastly, the said counsel argued, that the consideration of the note was proved in the evidence to be for slaves sold to the maker and was, therefore, illegal. The testimony on this point is as follows: "The note, the whole of it, was given to Mr. Campbell, for a purchase of slaves by my mother from him. Mr. Campbell, at that time, was a slave dealer in New Orleans. He was a regular slave dealer, and was engaged in that business for several years."

The said counsel argued, that such actions could not be held upon general principles, and particularly were prohibited by art. 128 of the Constitution of Louisiana, as follows: "Contracts for the sale of persons are null and void, and shall not be enforced by the courts of this state."

But this plea was also overruled by the court.

To all which rulings the counsel for said defendant respectfully excepts, and presents this, his bill of exceptions, for the signature of his Honor, the judge.

(Signed) E. H. Durell, Judge.

The case is further stated by the court.

Mr. **L. Janin**, for plaintiff in error:

While the want of a seal to the bill of exceptions may be a valid objection in a case originating in a common-law state, it is not in a Louisiana case. A seal is a perfectly meaningless matter in the law of Louisiana, or of the other civil law countries.

This is a very good bill of exceptions. It combines a concise and clear statement of the facts of the case, with an equally clear explanation of the points of law which the counsel desired the court to rule. If in a few words it differs from the usual style employed in such documents, this may be attributed to the circumstance that English is not the mother tongue of the able counsel who drew it up. But its meaning cannot for a moment be misunderstood by any candid reader.

It has the very substantial merit of bringing the whole case, both the facts and the law, before the court, and this is best proved by the fact that it embodies every point noticed in the brief of the counsel for the defendant in error.

No reason can be shown why this court should believe that the judge did not know what he was signing, whenever a statement of fact in the bill of exceptions commences with the words, "it is in evidence, or in proof." The signature of the judge at the foot of this paper, certifies it as stating correctly both the facts and the points of law that were made.

Messrs. **Duncan G. Campbell** and *J. A. Campbell*, for defendant in error:

The plaintiff, Generes, filed a bill of exceptions, which was signed, though not sealed (*Thompson* v. *Riggs*, 5 Wall. 663, 18 L. ed. 704) by the court, to which objection is now taken. The plaintiff reports the argument of his counsel, and concludes "that the court overruled the pleas of prescription and of protest urged by the defendant." The court does not find the facts, nor does it state upon what facts or arguments the conclusions of the court were founded. The written testimony is contained in the record, and some portions of it—those selected by the counsel of the plaintiff—as was most favorable to his argument, is referred to, but it does not appear that the court proceeded upon that evidence or that it accepted the statements of the argument as facts.

See case *Norris* v. *Jackson*, 9 Wall. 125, 19 L. ed. 608, as to the manner of making up these cases for Supreme Court.

Mr. Justice **Swayne** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of Louisiana. The plaintiff in error was the defendant in the court below. The action was brought against him as the indorser of a promissory note. The parties, pursuant to the act of Congress of March 3, 1865, filed a written stipulation waiving a jury, and the cause was tried by the court. A judgment was rendered against the defendant. He took a bill of exceptions. No facts were specially found by the court.

The act referred to provides that the finding of the court upon the facts—which finding may be either general or special—shall have the same effect as the verdict of a jury; that *the rulings of the court in the progress [*198 of the cause may be reviewed by this court, when properly presented by a bill of exceptions, and that where the finding is special this review may extend to the sufficiency of the facts found to support the judgment. This act is general in its terms as to the scope of its operation, and embraces the district of Louisiana.

There being no special finding of the facts, the inquiry as to their sufficiency to support the judgment does not arise.

Our examination of the case must be confined to the bill of exceptions.

It is objected that this instrument was not sealed, as well as signed, by the judge. The statute of Westminster prescribes a seal, but no act of Congress and no rule of this court contains such a requirement. Though usual in the practice of the courts of the United States, it is not necessary. The signature of the judge is sufficient.

It does not appear that the defendant objected to any of the testimony which was ad-

mitted. No question relating to the subject is presented for our consideration.

It is shown by the bill of exceptions that sundry legal propositions were argued by the counsel of Generes and were overruled by the court. The entire bill is a series of interlocutions between the counsel and the court, in which the evidence is referred to; but the bill does not purport to give all the evidence upon either of the subjects to which the exceptions relate.

In the entry of the judgment it is stated that it is given "for reasons orally assigned by the court." What those reasons were is not set forth. Whether they were that there was other evidence besides that referred to in the bill of exceptions, or that the court drew different conclusions from those deduced by the counsel, or that the court entertained different legal views from those upon which the counsel insisted, is not disclosed. Had the facts been specially found no such doubt could have existed. The **199***] case *would then have presented clearly all the propositions to which the attention of the court below was called, and in relation to which it is insisted errors were committed.

For any error in relation to the facts a writ of error is not the proper remedy. If all the testimony given were set out in the record we could not examine it with the view of determining whether it is sufficient to support the judgment. *Pennock* v. *Dialogue*, 2 Pet. 1. If sufficient, the remedy was a motion for a new trial, or by having the facts specially found. In the latter case a writ of error would lie to correct the wrong, if any were done. According to the statute the finding of the court stands as would the general verdict of a jury, and has the same effect. The plaintiff in error is in the same position as if he were here complaining that the jury erred in overruling the points and propositions which were argued to them in his behalf, and had found for the plaintiff when they should have found for the defendant. The evidence was closed, and the court was sitting in place of a jury when his exceptions were taken.

We are all of opinion that the propositions upon which the plaintiff in error insists are not so presented that we can take cognizance of them.

The judgment of the Circuit Court is affirmed.

204*] *THE PHŒNIX INSURANCE COMPANY, *Plff. in Err.*,

v.

THOMAS A. GARDINER, County Treasurer of Kings County.

(See S. C. 11 Wall. 204-210.)

Jurisdiction over state judgment—construction of state statute, when Federal question.

It must appear from the record, and not from any opinion of the court, that a Federal question was raised, in order to give this court jurisdiction over a state judgment.

The construction of state statutes belongs to the state courts, and is not a Federal question, which this court can revise on a writ of error to a state court, unless the state court gives such a construction to a state statute as to make it conflict with the Constitution or laws of the United States, and thereby deprives a party of his rights under such Constitution or laws.

Where it does not appear what construction was given to the state statute, this court has no jurisdiction.

[No. 107.]

Argued Mar. 9, 1871. Decided Mar. 27, 1871.

IN ERROR to the Supreme Court of the State of New York.

This case arose upon an alternative writ of mandamus issued out of the supreme court of the state of New York, in Kings county, to compel the issue of a certain certificate of indebtedness.

Upon the return thereto, judgment was given for the respondent. The plaintiff took an appeal to the general term of said court, and then to the court of appeals of the state, said judgment being affirmed by each court; whereupon the plaintiff sued out this writ of error.

The case is further stated by the court.

Messrs. E. C. Benedict and **Alvin C. Bradley**, for plaintiff in error:

The case made in the writ clearly and emphatically called in question the validity of the authority of the state of New York to tax the United States certificates of indebtedness owned by the plaintiff in error—whereby those taxes were legally imposed, assessed, and collected and, therefore, the plaintiff was entitled to have, and it was the defendant's duty to issue, the certificates of county indebtedness demanded. The state court, by denying the peremptory writ and giving absolute judgment for the defendant, in effect decided that the authority so questioned was valid and the tax legal, and that the plaintiff in error was, consequently, not entitled to receive, nor was the defendant bound to issue to it the certificates demanded. The case is not distinguishable from the *Bank Tax Cases*, 2 Wall. 200, 17 L. ed. 793, and *The Bank* v. *Mayor*, 7 Wall. 16, 19 L. ed. 57.

If the record shows, either by express averment or by clear and necessary intendment, that the constitutional provision did arise, and that the court could not have reached the conclusion and judgment it did reach, without applying it to the case in hand, then the jurisdiction of this court attaches. It need not appear that the state court erred in its judgment. It is sufficient to confer jurisdiction, that the question was in the case, and that the court by it was induced to make the judgment it did. *Furman* v. *Nichol*, 8 Wall. 45, 19 L. ed. 370.

In truth, the record in the case now at bar presents no question but whether certificates of indebtedness were or were not illegally taxed in the state of New York, in the years 1863 and 1864.

That certificates of indebtedness issued by the government of the United States were not taxable was adjudged by this court in both of the last cases cited, and the matter is *res judicata*.

The return was utterly bad, in that it attempted to put in issue matter of judicial cognizance, to wit, matters of judicial decision. No question more frequently arises than whether so or so has ever been decided.

But it is not often that courts answer that question by the intervention of juries. Is it possible to state matter more exclusively within

NOTE.—*What adjudication of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts*—see note, 62 L. R. A. 513.

judicial cognizance than whether it had ever been judicially decided that United States certificate of indebtedness was or was not exempt from taxation?

Mr. **P. S. Crooke,** for defendant in error: There does not appear on the record:

1. "That some one of the questions stated in the 25th section of the judiciary act of 1789, did arise in the court below, and,

2. That a decision was actually made thereon by the same court, in the manner required by the section."

If both of these do not appear on the record, the appellate jurisdiction fails.

1 Kent. Com. 327, note *c.* 11th ed.; *Craig* v. *State of Missouri*, 4 Pet. 410; *Crowell* v. *Randell*, 10 Pet. 368; *Choteau* v. *Marguerite*, 12 Pet. 507, S. P.; *Ocean Ins. Co.* v. *Polleys*, 13 Pet. 157, S. P.; *Coons' Lessee* v. *Gallagher*, 15 Pet. 18, S. P.; Conk. Tr. 4th ed. p. 34; *Armstrong* v. *Treasurer Athens Co.* 16 Pet. 281.

Specifying cases of appeal giving jurisdiction.

"It must be entered on the record of the proceedings in the appellate court, in cases where the record shows that such a point may have arisen and been decided, that it was, in fact, raised and decided.

And this entry must appear to have been made by order of the court, and certified by the clerk, as a part of the record in the state court."

See, to the like effect: *Commercial Bank of Cincinnati* v. *Buckingham's Executors*, 5 How. 317; *Grand Gulf R. Co.* v. *Marshall*, 12 How. 165; *Christ Church* v. *Co. of Philadelphia*, 20 How. 26, 15 L. ed. 802.

"Where it appears from the record that the decision of the state court turned upon the construction of the state law, and that the question of its validity was not raised, the court has no jurisdiction."

Grand Gulf R. Co. v. *Marshall*, 12 How. 165, and cases cited in Conk. Pr. 4th ed. 34.

Nothing outside the record can be taken in consideration.

Walker v. *Villavaso*, 6 Wall. 124, 18 L. ed. 853; *Gibson* v. *Choteau*, 8 Wall. 314, 19 L. ed. 317; *Furman* v. *Nichol*, 19 L. ed. 370; *Worthy* v. *Commissioners*, 9 Wall. 611, 19 L. ed. 565.

It does not appear affirmatively that the decision of the supreme court of the state of New York was not made against the rights set up by the party under the statute of the United States.

See *People* v. *Gardiner*, 48 Barb. 608.

The decision of the supreme court was made on a question of pleading, and the affirmance by the court of appeals must be presumed to have been made on the same ground.

Armstrong v. *Athens Co.* 16 Pet. 281.

Where a party claims below, wholly in virtue of the laws of a state, and the highest court of the state decides that under these laws the claimant has no case, no writ of error lies.

Worthy v. *Commissioners*, 9 Wall. 611, 19 L. ed. 565.

Where a state law is valid, and the only question is whether it has been correctly construed, the Supreme Court of the United States has no jurisdiction.

Commercial Bank of Cincinnati v. *Buckingham's Executors*, 5 How. 317; *Congdon* v. *Goodman*, 2 Black, 574, 17 L. ed. 257.

Error does not lie to a state court on a mere question of pleading and evidence.

White v. *Wright*, 22 How. 19, 16 L. ed. 279.

Mr. Justice **Bradley** delivered the opinion of the court:

A state statute directed a county treasurer to give certificates of indebtedness to any bank in the county for the amount of tax paid on its investment in the public indebtedness of the United States; "which taxes have been judicially decided to have been illegally imposed and collected." To an alternative mandamus, to compel the treasurer to give such certificate, he answers that it has not been judicially decided that the particular tax is illegal. A peremptory mandamus was refused by the state court. Held, that, although this court has since decided the tax to be illegal, yet, as it did not appear by the record that the state court passed on the legality or illegality of the tax, but might have decided the case on the construction of the state statute, this court has no jurisdiction to review the decision of the state court.

In order to give this court jurisdiction by writ of error, under the 25th section of the judiciary act, it must appear by the record (or certificate of the state court) that a Federal question was raised.

This case is brought before us upon a writ of error to the supreme court of the state of New York, under the 25th section of the judiciary act, or rather, under the act of February 5, 1867, which has been substituted for that section.

The plaintiff in error is a corporation of the state of New York, doing business in Brooklyn and was assessed for the taxes of 1863 and 1864, upon its investments in United States "certificates of indebtedness," issued pursuant to the acts of Congress passed March 1 and 17, 1862. 12 Stat. at L. 352, 370. These taxes amounted to over $3,000, and were paid into the county treasurer's office of Kings county, in December, 1863, and November, 1864. They were levied under an act of the legislature of the state of New York, passed April 29, 1863, making all banks and other moneyed corporations liable to taxation, on a valuation equal to the amount of their capital stock paid in and their surplus earnings (less ten per cent of such surplus). Under this law authority was claimed by the state officers, to include in that valuation the investments *made by those com- [*205 panies in the public indebtedness of the United States, including the national bonds or stocks, certificates of indebtedness, and all other national securities. This tax, so far as it was laid on the valuation which embraced the government bonds or stocks was adjudged illegal in this court in the *Bank Tax Case*, reported 2 Wall. 200, 17 L. ed. 397, which was decided in the term of December, 1864. If the cases then brought before the government embraced certificates of indebtedness as well as government bonds, the attention of the court was not specially directed to that fact, and the opinion does not notice it.

After this decision the legislature of New York, on the 6th of April, 1866, passed an act authorizing and directing the board of super-

visors of the county of Kings, to levy and collect by tax the several sums paid in said county, by the several incorporated companies in said county, in the years 1863 and 1864, for taxes assessed on their investments in the public indebtedness of the United States, and interest thereon, "and which taxes have been judicially decided to have been illegally imposed and collected," and directing the treasurer to refund those taxes to said companies, out of said moneys, requiring him in the meantime to issue county certificates of indebtedness for the respective amounts, on receiving a certified copy of the act.

The plaintiff in error, on the 12th of May, 1866, demanded of the county treasurer (who had received a copy of the act), the county certificate of indebtedness to which it was supposed the act entitled it; the treasurer declined to give it. Thereupon, the plaintiff in error sued **206***] out of the state supreme court an alternative mandamus, calling on the treasurer to show cause for such refusal. His answer to the writ was that taxes on "certificates of indebtedness" had not been judicially decided to have been illegally imposed or collected and, therefore, that the case was not within the purview of the act, and he had no authority to issue the certificates. He did not attempt to deny that the tax was illegal, but insisted that it had not been judicially declared illegal. This answer was filed December 3, 1866, before our decision in the case of *The Banks* v. *The Mayor*, 7 Wall. 16, 19 L. ed. 57, in which we expressly decided that the "certificates of indebtedness" of the government were exempt from taxation.

Upon this alternative mandamus, and the answer thereto, the case went up to the supreme court and the court of appeals, which concurred in refusing to issue a peremptory mandamus. The opinion of the supreme court is before us, and places the case upon the ground that these "certificates of indebtedness" were not exempt from taxation. But no opinion of the court of appeals seems to have been written. At least none appears; and we cannot tell on what ground that court placed its decision. And, indeed, it ought to appear from the record, and not from any opinion of the court, that a Federal question was raised in order to give this court jurisdiction of the case. For all that appears from the record, the decision of the court of appeals may have been passed simply on its construction of the state statute. It may have been placed on the ground that that statute only applied to cases "in which the taxes had been judicially decided to have been illegally imposed and collected," and that up to that time the taxation of certificates of indebtedness had not been judicially decided to be illegal. If it were placed on this ground—and, so far as the record goes, *non constat* that it was not—that would have been a decision of the case upon a construction of the state act of 1866. Now, we have repeatedly held that the construction of state statutes belongs to the state courts, and is not a Federal question which we can revise in a writ of error to a state court. It is true, if the state court gives such a con- **209***] struction to a state statute *as to make it conflict with the Constitution or laws of the United States, and sustains its validity after giving it such construction, and thereby deprives a party of his rights under the said Constitution or laws, then a Federal question is raised, and we can review the decision on the point of the validity of the statute. But in this case it does not appear what construction was given to the state statute. All that can certainly be gathered from the records is, that the state statute, in the opinion of the court of appeals, did not oblige the county treasurer to issue county certificates to the plaintiffs in this particular case. For aught that appears, the court may have regarded the statute as only furnishing a remedy for cases expressly adjudicated upon. Such a construction of the statute is not without plausibility, and was insisted upon by the treasurer in his answer to the alternative writ.

Had the state courts decided against the right of the plaintiffs, and had it so appeared by the record, the jurisdiction of this court would have attached to the case. But that does not appear. It only appears that they have decided that the plaintiff has no remedy under this statute. Its right to recover the illegal tax is undisputed, but not to recover it in this way.

We are referred to the case of *The Banks* v. *The Mayor*, 7 Wall. 16, 19 L. ed. 57, where it was decided, under another act of the New York legislature, that a mandamus in a somewhat similar case was wrongfully withheld. It appears that a few days after the passage of the act relating to King's county, on which the present case arises, the legislature passed a like act relating to the city of New York, but without the descriptive words, relating to a judicial decision, which are relied on in this case. A mandamus to compel the issue of city bonds for the amount of the illegal taxes was applied for and refused. But that case was placed, both in the state courts and in this court, solely on the ground of the illegality of the tax. No question respecting the construction of the state *statute was raised, either by the record [***210** or the argument. Being satisfied, in that case, that the tax was illegal, and that the mandamus ought to have been granted, we felt bound to reverse the judgment of the state court; and nothing in the present opinion is intended to call that decision in question.

The writ of error in this case must be dismissed.

THE STEAMSHIP FANNIE, The Baltimore and Savannah Steamship Company, *Claimant, Appt.*,

v.

THE SCHOONER ELLEN FORRESTER, Daniel Allen, *et al.*, *Claimants.*

(See S. C. *"The Fannie"* 11 Wall. 238-243.)

Rules of navigation—duty of steamer meeting sailing vessel—lookout.

Where a schooner and steamer are approaching each other, the steamer is bound to keep out of the

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NOTE.—*Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting*—see notes, 13 L. ed. U. S. 537; 25 L. ed. U. S. 168; 28 C. C. A. 532; 29 C. C. A. 368.

Rules for avoiding collision; steamer meeting steamer—see notes, 14 L. ed. U. S. 68; 35 L. ed. U. S. 453; 30 C. C. A. 630.

way of the schooner, and to allow her a free and unobstructed passage.

The duty of the schooner is to keep on her course.

Whether the lookout on the schooner was sufficient can make no difference, where the want of a proper lookout did not contribute to the disaster.

[No. 106.]

Argued Mar. 8, 1871. Decided Mar. 27, 1871.

APPEAL from the Circuit Court of the United States for the District of Maryland.

The libel in this case was filed in the district court of the United States for the district of Maryland, by the defendants in error, to recover damages resulting from a certain collision. A decree having been entered in favor of the libellants, the claimants of the steamer Fannie took an appeal to the circuit court, by which the said decree was reversed, and the decree entered in favor of the claimants of the steamship Fannie; whereupon the libellants took an appeal to this court.

The case is stated by the court.

Messrs. **A. Sterrett Ridgeley** and **R. Johnson** for appellants.

Mr. **H. H. Stockbridge** for appellees.

Mr. Justice **Strong** delivered the opinion of the court:

This is a case of collision between the schooner Ellen Forrester and the steamship Fannie.

The substantial facts, as they are made to appear by the evidence, are these: On the morning of the 28th of April, 1868, the schooner, a vessel of sixty-nine tons burden, laden with one hundred tons of pig iron, was proceeding down the Chesapeake bay from Baltimore, toward the capes on her voyage to Providence, Rhode Island. The wind was fair, blowing from the northeast, and the course of the schooner was south by east one half east. Her speed was about seven knots an hour. She was in good condition, and her lights were displayed as required by law.

At the same time the steamer Fannie, on her voyage from Savannah to Baltimore, was proceeding up the bay at a speed of about nine knots an hour, her general course being north by west. The two vessels were thus approaching each other on nearly parallel lines, with a difference of half a point in their courses. The steamer's lights were all in their proper places, and fully displayed. About opposite **240***] *Point Lookout, where the bay is twelve miles wide, and where there are six miles in width of clear deep water, nearly in the middle of the bay, the vessels encountered each other head on, the bow of the steamer striking the bows of the schooner. The effect of the collision was to break in the bow of the schooner and cause her to sink in from five to ten minutes. The steamer passed on without stopping or slackening her speed, or offering assistance, but continued on her course to Baltimore, where she made no report of the encounter.

From this statement of the leading facts, none of which are controverted, it is very obvious there can be no excuse for the collision. There was ample sea room for the movement of both vessels, the lights of both were well displayed, and there was no fog or stress of weather. Plainly, one or both of the vessels was grievously in fault. The district court, after considering the evidence, held that the fault was chargeable to the steamer alone, and condemned her to pay to the owners of the schooner $16,365, and the circuit court, on appeal, made a similar decree.

In this court there has been no controversy respecting the law applicable to the case. The efforts of the appellants have been directed almost exclusively to an elaborate criticism of the evidence, in the hope of convincing us that both the district and circuit courts were mistaken, and that the schooner was in fault. We are not, however, thus convinced.

The duties of vessels approaching each other, as these vessels were, are too well defined to need more than a simple statement. The steamer was bound to keep out of the way of the schooner, and to allow her a free and unobstructed passage. Whatever was necessary for this, it was her duty to do, and whatever obstructed or endangered the schooner in her course it was the duty of the steamer to avoid. There was but a single obligation resting on the schooner. It was passive rather than active, the duty to keep on her course. If, therefore, the schooner did not change her course, so as *to embarrass the steamer and [***241** render it impossible or at least difficult for her to avoid a collision, there can be no doubt that the steamer alone is answerable for the damages. In reference to this we have carefully examined the evidence. It is to be found in the testimony of the mate and a seaman of the Ellen Forrester, who composed the watch at the time of the collision, and in the testimony of the mate and two seamen of the steamer. Both the mate and the wheelsman of the schooner state positively that there was no change in her course from the time the captain left the deck (twelve o'clock) until the collision took place. When the watch of the mate commenced, the course of the vessel was south by east one half east. The witnesses on both sides agree that this was the right course to pursue in sailing down the bay. Bryant, the man at the wheel, was in a position to know whether the course was changed, and he could not be mistaken. It is not to be presumed that he changed the course of the vessel without orders. And the mate must know whether he gave any orders to port or starboard the wheel. The testimony of these witnesses, therefore, is not a mere statement of an inference drawn from appearances. It is direct and positive, and both of them state that the course of the schooner continued unchanged from the time the captain left the deck. In addition to this is the improbability of any change. The course south by east one half east was the right course to be pursued in passing down the bay and out of the capes. Any deviation from it would have retarded the voyage. Either luffing into the wind, or falling off, would have been a departure from the proper course. And there was nothing to induce it. The wind was fair, and the schooner was nearly midway in the bay, with abundant sea room on each quarter. There was no motive for a change of course, therefore, but every reason for holding on.

In opposition to this we have the testimony of Billups, the mate, and two seamen of the steamer. They infer from their observation of the schooner's lights that she changed her

course twice, first luffing into the wind, and 242*] then immediately *bearing away to the westward. At best this is not the most satisfactory evidence, for it is liable to double mistake; mistake of the facts, and mistake of the inferences deduced from the facts. Thus it was said in the case of *The Steamboat Neptune*, Olcott, 495: "What a witness asserts he did, or did not do, on his own vessel at the time, is generally more satisfactory evidence of the facts than the opinion and belief of a dozen others formed from what they supposed they saw or heard on another vessel." But the testimony is subject to more serious objections. It is confused, contradictory, and inherently improbable. Some of it wears the appearance of being uncandid. The schooner's lights were seen from the steamer when the vessels were three or four miles apart, apparently one point off the steamer's port bow. Billups, the steamer's mate, states that he saw the red light. He leaves it to be inferred that he saw the red light only. Yet if the vessels were sailing on the courses which it is not denied they were at the time, with only a half point difference between them, the green light of the schooner must have been as plainly visible to those on the steamer as was her red light. Billups says, that a few seconds afterwards he ordered the helm a-port. But the man at the wheel testifies that the vessels were pretty close together when the order to port was given, and that, after porting, the steamer hardly ran fifty yards before an order was given to starboard, followed by a second order to port, before the steamer had run to port twenty yards. The collision then immediately followed. In these particulars the testimony of the lookout on the steamer is substantially the same. Comparing it with the account these witnesses give of the movements of the schooner, the unreliability of their impressions becomes manifest. It is clear that the first order to port, if given at all, was not given until the vessels were close together. The course of the steamer, after she passed the light-boat off Smith's point, was north by west. That carried her across the course of the schooner, which 243*] was, as we have seen, south *by east one half east, and that accounts for the appearance of the schooner's green light, and for the impression of the mate that she was sailing across the bow of the steamer, having changed her course. It must have been then that the order to port was given, followed almost immediately by an order to starboard, and a second order to port. All this was perfectly consistent with the testimony of the witnesses for the appellees that there was no change in the course of the schooner. The account given by the appellant's witnesses is very improbable. They say the schooner luffed across the steamer's bow, and sailed on her changed course not more than fifty yards before she fell off again to the westward. Billups swears that when she thus headed across the steamer's bow, she was "some feet" distant, or, as he afterwards defined, from seventy-five to a hundred feet. It was after this he ordered the helm to starboard and to port. He did not slacken the speed of the steamer, or order the engines reversed. The changes described by him in the course of the vessels could not have been made in such rapid succession as is stated by the appellant's witnesses. The schooner could not have luffed up into the wind, sailed fifty yards on her new course, and then borne away to the westward, while the steamer with unslacked speed was moving seventy-five or a hundred feet. No wonder, therefore, both the courts below held the steamer solely in fault. The evidence was wholly insufficient to justify the belief that the schooner did not keep on her course as the rules of navigation require.

We do not think it worth while to discuss the question whether the lookout on the schooner was sufficient. If it was not, it can make no difference, for the want of a proper lookout did not contribute to the disaster. If the schooner held her course, it was all that the steamer had a right to require and, whether she had a proper lookout or not, it was her duty to do precisely what she did.

The decree of the Circuit Court is affirmed.

THE STATE OF MISSOURI, *Complainant*, *v.* THE STATE OF KENTUCKY.

(See S. C. 11 Wall. 395–411.)

Middle of Mississippi river is boundary between Missouri and Kentucky—Wolf island belongs to Kentucky—change in channel of such river does not change original boundary—early maps as evidence.

By the treaty between France, Spain, and England, in February, 1763, the middle of the river Mississippi was the boundary between the British and the French territories, and became the boundary between Missouri and Kentucky when the former state was admitted into the Union in 1820.

If Wolf island, in 1763, or in 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction of Kentucky rightfully attached to it.

If the river has subsequently turned its course, and now runs east of the island, the boundary between the states remains as before and the island does not, in consequence of this action of the water, change its owner.

The maps of the early explorers of the river and the reports of travelers are mere hearsay evidence of little value, if such evidence differs from that of living witnesses, based on facts.

This court holds, on full consideration of all the evidence in the case, that the state of Missouri has no just claim to the possession of Wolf island.

[No. 2 Orig.]

Argued Jan. 25, 26, 27, 30, 31, Feb. 1 and 2, 1871. Decided Mar. 27, 1871.

BILL in Equity.

The bill in this case was filed in this court by the complainant, to obtain possession, jurisdiction and sovereignty over a certain island in the Mississippi river.

The case is fully stated in the opinion of the court.

Messrs. **M. Blair, F. A. Dick,** *R. A. Hatcher, J. W. Noell, S. H. Boyd,* and *E. Casselbury,* for complainant:

The treaty between the United States and France, of April 30, 1803, ceding Louisiana to the United States, does not define the boundaries, but says "the province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it." 9 Stat. 202.

The treaty of the United States with Spain, of Oct. 27, 1795, art. 4, says the western boundary of the United States, which separates it from the Spanish colony of Louisiana, "is in

the middle of the channel or bed of the river Mississippi." 9 Stat. 140.

409*]

Continuous lines represent old banks of the river. Dotted lines, the present banks.

B—Represents made land, timber small: age of timber, twenty-five to thirty years.
C—Point on Missouri shore now washed off.
D—Sharp point of Iron Bank bluffs, now washed away.
E—Toney's point, now washed away.
F—Chalk Bank bluff.
G—Ground below chalk banks washed off.
H—East side of the island washed away.
I—Accretions on west side of island, with young timber twenty-five to thirty year old.
K—High bluffs.
L—Range of hills.

The Congress of the United States, in admitting Missouri into the Union, understands this language as meaning "in the middle of the main channel of the river."

By the middle of the channel is meant the thread of the stream, or *filum aquæ;* that is, "the middle line between the shores upon each side, without regard to the channel or lowest and deepest part of the stream. And in ascertaining the shores or water lines on each side to measure, it will be proper to find what these lines are when the water is in its natural and ordinary stage, at a medium height, neither swollen by freshets, nor shrunk by drought." Ang. Wat. § 10, p. 16, note 2, ed, of 1869.

The constant changes which are taking place in the bed of a river by the operation of natural causes, such as the formation of sand bars, or excavations caused by accumulation of water in times of flood, would, if any attempt were made to fix and settle the rights of parties according to the quantity of water which flowed nearer one shore than to the other, leave them in a state of constant confusion and uncertainty. Ang. Wat. § 101, *a*, p. 116.

It was this principle which was applied by this court in *Harding's Lessee* v. *Anthony*, 5 Wheat. 374.

In this case the defendant's witnesses generally say, that it is only a question of time as to the filling up of the western channel. If so, on the principle above declared, Wolf island would then become a part of Missouri.

In the case of *Alabama* v. *Georgia*, 23 How. 505, 515, 16 L. ed. 556, 560, this court defines the bed of a river to be "that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn."

Messrs. **Garrett Davis, Henry Stanbery,** *R. Johnson,* and *J. J. Crittenden,* for respondent:

Article 7 of the treaty between France, Spain, and England, of date Feb. 10, 1763, is in these words: "In order to establish peace on solid and durable foundations, and to remove forever all subjects of dispute with regard to the limits of the British and French territories on the continent of North America, it is agreed, that for the future, the confines between his Britannic Majesty and his Most Christian Majesty, in that part of the world, shall be fixed irrevocably by a line drawn along the middle of the river Mississippi, from its source to the river Iberville, and from thence by a line drawn along the middle of the river," etc.

Article 4 of the treaty between Spain and the United States, of date October 20, 1795, contains these words: "It is likewise agreed that the western boundary of the United States, which separates them from the Spanish colony of Louisiana, is the middle of the channel or the bed of the river Mississippi, from the northern

boundary of the said states to the completion of the thirty-first degree of latitude, north of the equator," etc.

The treaty of Oct. 1, 1800, between Spain and France, has this provision: "His Catholic Majesty promises and agrees to restore to the French Republic, six months after the full and entire execution of the above-mentioned conditions and stipulations concerning his Royal Highness, the Duke of Parma, the colony or province of Louisiana, with the same extension which it actually has in the possession of Spain, and which it had when possessed by France, and such as it ought to be by virtue of the various treaties made since, between his Catholic Majesty and other states."

In the treaty between France and the United States, the preceding provision of the treaty between France and Spain is set forth at length, and is followed by this stipulation: "And whereas, in pursuance of said treaty, and particularly of the 3d article, the French Republic has an incontestable right to the dominion and to the possession of the territory, the first consul of the French Republic, desiring to give to the United States a strong proof of his friendship, doth hereby cede to the United States, in the name of the French Republic, forever and in full sovereignty, the said territory, with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French Republic, in virtue of the above-mentioned treaty concluded with his Catholic Majesty."

The Mississippi river, above the parallel of 36° 30′, was always the unquestionable boundary between Louisiana and Virginia, both as a colony and as a state, until the formation of the state of Kentucky, and then between Kentucky and Louisiana; and the treaties before quoted from, recognize that boundary. But the right and possession of Virginia to the country east of, and to the middle of the Mississippi river, was prior to those treaties.

Virginia was discovered and taken possession of by the English, in 1607-8.

By the definitive treaty between Great Britain and the United States, in which their sovereignty and independence are recognized, a portion of their boundary is set forth in this language: "Thence along a line to be drawn along the middle of the said Mississippi river, until it shall intersect the northernmost part of the thirty-first degree of north latitude," etc.

The boundary of Virginia, as described in her charter, was not clearly defined, but always, as a colony and a state, her territory and possession west was to the Mississippi river, and along that river, from the mouth of the Ohio river to its intersection with the parallel of 36° 30′ north latitude.

The right and possession of Virginia to that section of the Mississippi and the country east of it, was prior to the discovery of Louisiana by the French. The ancient right and possession of Virginia passed to and continued in Kentucky.

In 1820 Missouri became a state by a descriptive boundary, from which I make this extract: "Thence due east to the middle of the main channel of the Mississippi river; thence down, and following the course of the Mississippi river, in the middle of the main channel thereof, to the place of the beginning."

Missouri must recover upon the strength of her right, the evidence in the case must establish it, and she is not entitled to the judgment of the court, unless the record shows each and all these propositions to be true: (1) That the middle of the main channel of the Mississippi river, in 1820, when Missouri became a state, was east of Wolf island; (2) that, in 1762, when Louisiana was ceded by France to Spain, the middle of the main channel of the Mississippi river was east of Wolf island; (3) that, during the long period that Virginia, first a colony and then a state, owned and held possession of the country east and up to the Mississippi river, the middle of the main channel of that river was east of Wolf island. We maintain that the record does not show the truth of all these propositions, or any one of them, and that neither of them is true in fact.

Mr. Justice **Davis** delivered the opinion of the court:

The purpose of this bill is to ascertain and establish by a decree of this court the boundary between the states of Missouri and Kentucky, at a point on the Mississippi river known as Wolf island, which is about twenty miles below the mouth of the Ohio. The state of Missouri insists that the island is a part of her territory, while the state of Kentucky asserts the contrary. The bill alleges that both states are bounded at that point by the main channel of the river, and that the island, at the time the boundaries were fixed, was and is on the Missouri side of the channel.

The answer states that Kentucky formed out of territory originally embraced within the state of Virginia, was admitted into the Union on the first day of June, 1792, and that she has always claimed her boundary on the Mississippi, to the middle of the river as Wolf island, to be within her jurisdiction and limits, as derived from Virginia. And it denies that the island belongs to Missouri, or that the main channel was on the eastern side of it, when the boundaries of the state were fixed.

*It is unnecessary, for the purposes of [*401 this suit, to consider whether, on general principles, the middle of the channel of a navigable river which divides coterminous states, is not the true boundary between them, in the absence of express agreement to the contrary, because the treaty between France, Spain, and England, in February, 1763, stipulated that the middle of the river Mississippi should be the boundary between the British and the French territories on the continent of North America. And this line, established by the only sovereign powers at the time interested in the subject, has remained ever since as they settled it. It was recognized by the treaty of Peace with Great Britain of 1783, and by different treaties since then, the last of which resulted in the acquisition of the territory of Louisiana (embracing the country west of the Mississippi) by the United States in 1803. The boundaries of Missouri, when she was admitted into the Union as a state in 1820, were fixed on this basis, as were those of Arkansas in 1836. 3 Stat. at L. 545; 5 Stat. at L. p. 50. And Kentucky succeeded, in 1792 (1 Stat. at L. 189), to the ancient right and possession of Vir-

ginia, which extended, by virtue of these treaties, to the middle of the bed of the Mississippi river. It follows, therefore, that if Wolf Island, in 1763, or in 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction of Kentucky rightfully attached to it. If the river has subsequently turned its course, and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the states, and the island does not, in consequence of this action of the water, change its owner. Heffter, p. 143, § 66; Caratheodéry Du Droit Inter. p. 62.

That Virginia claimed the ownership of the island as early as 1782 is very certain, for at that date the arable land on it was entered in the proper office of Virginia as vacant land lying within the territorial limits of the state, 402*] although it *seems the entry was never surveyed or carried into a grant. And that Kentucky is now, and has been for many years prior to the commencement of this suit, in the actual and exclusive possession of the island, exercising the rights of sovereignty over it, is beyond dispute. The island lies opposite to and forms part of Hickman county, one of the counties of the state, and the lands embraced in it were, in May, 1837, surveyed under state authority, and have since then been sold and conveyed to the purchasers by the same authority. The people residing on it have paid taxes and exercised the elective franchise according to the laws of the state. In 1851, a resident of the island was elected to represent the county in the general assembly, and served in that capacity. And as early as 1828, a minor living there with one Samuel Scott, was bound an apprentice to him by the proper court having jurisdiction of such subjects. This possession, fully established by acts like these, has never been disturbed. If Missouri has claimed the island to be within her boundaries, she has made no attempt to subject the people living there to her laws, or to require of them the performance of any duty belonging to the citizens of a state. Nor has there been any effort on her part to occupy the island, or to exercise jurisdiction over it. If there were proof that the island, by legislation, had been included in the limits of New Madrid county, then the service of a writ in 1820, on the solitary settler there, by the sheriff of the county, would be an exercise of sovereign power on the part of the state. But in the absence of this proof, there is nothing to connect the state with the transaction, or from which an inference can be drawn that the sheriff was authorized to go on the island with his process. And for the same reason, it is hard to see how the fact, conceding it to be true, that a person occupying the position of a circuit judge of Missouri, once lived on the island (when or how long we are not informed), tends to show that the state intended to take possession of it.

These things may prove that, in the opinion of the judge and sheriff, the island belonged to 403*] Missouri, but they do not *go further and put the state in any better position than she was, if they had not occurred. And so with the location of the New Madrid claim in 1821. He, doubtless, believed he had authority to locate his warrant on the island, but surely the state cannot claim that she acquired any right by this proceeding. There is, therefore, nothing in this record which shows that Kentucky has not maintained, for a long course of years, exclusive possession and jurisdiction over this territory and the people who inhabit it. It remains to be seen whether she shall remain in possession and continue to exercise this jurisdiction, or whether she shall give way to Missouri. The case is certainly not without its difficulties, but we think these difficulties can be removed by a fair examination of the testimony, and the right of the contestants properly determined.

The evidence to be considered consists of the testimony of living witnesses, the physical changes and indications at and above the island, and the maps and books produced by the complainant. In a controversy of this nature, where state pride is more or less involved, it is hardly to be expected that the witnesses would all agree in their testimony. And as this conflict does exist, it is necessary to consider the evidence somewhat in detail, in order to justify the conclusions we have reached concerning it.

There are eight witnesses called for the complainant, who testify confidently, that the main channel of the Mississippi river was always east of Wolf island, and one of them (Swon), an experienced river man, who navigated the river from 1821 to 1851, in all stages of water, says there are no indications that the main channel was ever on the west side. Only three of them knew the river prior to 1820, and they were engaged in the business of flat boating, which is hardly ever undertaken in a low stage of water. There is nothing to show that any one of them ever made a personal examination of the channels and surrounding objects at this point, and there is a remarkable absence of facts to sustain their opinions. It is also noticeable, in connection with this evidence, that none of the witnesses (Hunter may be an exception) *ever lived in the vicinity of [*404 the island, or remained there any length of time, and that all the knowledge any of them acquired of the state of the river was obtained by passing up or down it at different times, either on flat-boats or steamboats. Notwithstanding they swear positively that the channel was always east of the island, yet Watson says it changed for about three years, and Ranney testifies that on one occasion, when the main channel was divided into three parts, the deepest water for a short time in the fall of the year was found on the west of the island, and steamboats passed on that side. But they do not prove a deficiency of water at any time in the Missouri channel, or that any boat, from that or any other cause, was ever hindered in any attempt to run it. It is undoubtedly true that the Kentucky channel, when the river was full, for many years has afforded a safe passage for boats, because at such a time, if the obstructions were not submerged they could be avoided, and navigators would take it, as it was five miles the shortest. And passing the river only occasionally, and without any knowledge of where the volume of water flowed when the river was low, they would naturally conclude it was the main channel. It is equally true that now it is the main highway for the busi-

ness of the river; but the point to be determined is: was it so as far back as 1763, or even 1820? If in the investigation of such an inquiry, positive certainty is not attainable, yet the evidence furnished by the defendant affords a reasonable solution of it. And, at any rate, it greatly outweighs the evidence on the other side, and in such a case the party in possession has the better right. The proof on behalf of the defendant consists of the testimony of twenty-seven witnesses. Many of them have been acquainted with the river from an early period in this century, and quite a number have spent their lives near their disputed territory and, therefore, had better opportunities for observing the condition of the river at this point than the witnesses for the complainant, who only passed there occasionally. Nearly all of them are old men, and there is no diversity of opinion between them concerning the location **405*]** *of the main channel of the Mississippi river at Wolf island. All who testify on the subject—there are only a few who do not—agree that until a comparatively recent period it ran west of the island, and to fortify their opinions they describe the state of the respective channel at different times, and tell what was done by themselves or others about the navigation of the river. They concur in saying that in early times it was difficult for flat-boats, even in the highest stage of water, to get into the Kentucky chute, owing to the current running towards the Missouri side, and that if they succeded in doing it, the navigation was obstructed on account of the narrow and crooked condition of the stream, which was filled with tow-heads, sandbars, driftwood, and rack heaps. One of the witnesses, in describing the appearance of this chute in 1804, states that it looked like lowlands, with cottonwood and cypress on it, and that there was only a narrow channel close to the island; all the other space to the Kentucky shore, now open water, was then covered with large cottonwood timber.

Other witnesses corroborate this testimony, and unite in saying that in early times, at an ordinary stage of water, it was impossible to take the Kentucky channel at all, on account of these obstructions, while the Missouri channel was wide, deep and unobstructed. And one of them expresses the opinion that in low water anyone could have got to the island from the Kentucky shore without wetting his feet, by crossing the small streams on the driftwood. But we are not left to conjecture on this point, for Ramsey, an old inhabitant of the country, swears that on one occasion he walked over from the Kentucky side to the island, nearly all the way on dry land, and the residue on driftwood, and noticed while on the island, that there was plenty of water in the Missouri channel.

Can it be possible that such a stream at this time was the main channel of the Mississippi river? Although the Kentucky channel, from natural causes, had improved in 1825, still in the low water of that year it did not have a depth of over two and a half feet nor a width **406*]** exceeding one hundred *and fifty yards, while steamboats passed through the Missouri channel without any difficulty. The witness who testifies to this state of things, at that time, had his attention especially called to the subject as he kept a wood-yard on the Kentucky side opposite the island, and missed the opportunity of supplying boats that ran the Missouri channel.

And there is no one who speaks of a scarcity of water in the Missouri channel, until after Captain Shreve operated in this locality with his snag boats, which had the effect of opening and deepening the Kentucky channel, so that it has now become the navigable stream. Judge Underwood says that in 1820 the west channel was between four and five hundred yards wider than the east one, and must have discharged nearly double the quantity of water. And one witness testifies that the east channel was formerly so narrow that two steamers could not pass in it abreast. It would seem, therefore, that the condition of this channel, as told by these witnesses, was proof enough that the main channel was west of the island; but this is not all the proof on the subject. Russell, who was appointed superintendent of river improvements in 1842, and knew the island since 1814, and spent five months there in 1819, swears that in descending the river in 1830 or 1831 he sounded the Kentucky channel and, not finding water enough in it by two or three feet to float his boat, was compelled to go down on the Missouri side, where there was nine or ten feet of water. To the same effect is the evidence of Holton, who, in 1828, being unable to get up the east channel with a steamer drawing upwards of six feet of water, went over to the Missouri side and passed through without any trouble. And, three years later, Peebles saw three or four steamers attempt to run up the Kentucky channel, and failing to get through, back out and easily ascend the other. Christopher, who ran the river from 1824 to 1861, on one occasion could not pass the bar at the foot of the Kentucky chute with a boat drawing twelve feet of water, and was compelled to change to the other side, and got up without any difficulty; and there are other witnesses who testify to the inability of boats to *pass east of the island, and to their [***407** safe passage west of it. Indeed, the concurrent testimony of all the persons engaged in the navigation of the river is, that they could never safely go east of the island, unless in high water, and that they uniformly took the west channel in dry seasons; and the flat-boat men, in early times, even in high water, were frequently compelled to uncouple their boats in order to descend the Kentucky channel, and then were obliged to pull through by trees, on account of the narrowness of the channel. In low water they would quite often get aground and have to wait for a rise of the river to take them out. It will readily be seen that this class of men would naturally take risks in order to save five miles of navigation. Moseby, who has lived in the vicinity for forty-two years, testifies to the greater volume of water in the Missouri channel, and to boats usually taking it; and all the witnesses agree that since they knew the river the chutes around the island have undergone great changes, and that the east one is now, in depth, width and freedom from obstructions, wholly unlike what it was formerly. In this state of proof, how can it be successfully contended that Missouri has any just claim to the island?

All that we have contended for is the common liability of the state officers for their property.

Taxation of the incomes of state officers, derived from their salaries, is exactly what the state does do; therefore, the right to do the same for certain objects was granted to the United States, under the general power of concurrent taxation.

In the leading case of *McCulloch* v. *Md.* 4 Wheat. 316, the state undertook to tax the issues of notes of a bank of the United States. The court held that this was a tax on the means used by the general government to execute one of its powers, and that the sovereignty of the state did not extend to those means. But the court said that the real estate of the bank, and the property of the citizens of the state in the bank, which are subject to the sovereignty of the state, were liable to state taxation.

The same principles were reaffirmed in *Osborn* v. *Bank*, 9 Wheat. 738.

In *Weston* v. *Charleston*, 2 Pet. 449, the city of Charleston undertook to tax six and seven per cent stock of the United States. The court said that this was a tax upon the contract subsisting between the United States and the individual; a tax on the power to borrow money on the credit of the United States, which was not within the sovereignty of the state. Two justices, Johnson and Thompson, dissented, on the ground that, in their judgment, the tax was not a tax on the contract, but only an income tax, and, as such, constitutional.

In *Bk. of Commerce* v. *N. Y.* 2 Black, 620, 17 L. ed. 451, the court decided, on the authority of *Weston* v. *Charleston*, that a state cannot tax United States stock constituting a part of the property of a bank.

The same principle was followed in the *Bank Tax Case*, 2 Wall. 200, 17 L. ed. 793.

In the case of *Dobbins* v. *Erie Co.* 16 Pet. 435, the agreed statement of facts stated that the plaintiff had been rated and assessed with county taxes, as an officer of the United States, for his office, as such, valued at $500. And the statute of Pennsylvania authorized an assessment upon all officers and posts of profit. The court held that statute could not comprehend the offices of the United States. It is true that much of the reasoning in the opinion of Mr. Justice Wayne would be pertinent had the statute merely subjected the plaintiff's income to a tax in common with other incomes; but the point decided was as above stated; and fell precisely within the principles laid down in *McCulloch* v. *Md.* and followed in *Weston* v. *Charleston*, namely: that a state cannot tax the means used by the government of the Union to execute its powers. The court also held that no state could diminish, by taxation, the amount of the compensation paid by the United States to its officers; but that this principle could not serve also to exempt state officers from taxation by the United States, is more than intimated in the following sentence from the opinion of the court: "The officers execute their offices for the public good. This implies their right of reaping from thence the recompense the service they may render may deserve, without that recompense being in any way lessened, except by the sovereign power from whom the officer derives his appointment, or by another sovereign power to whom the first has delegated the right of taxation over all the objects of taxation in common with itself, for the benefit of both." This latter cause aptly describes the position taken by the plaintiff in error, in the case now under discussion.

If we apply to the tax in question the test laid down by Chief Justice Marshall in *McCulloch* v. *Md.*, if we measure the power of taxation by the extent of sovereignty, we find a distinct grant from the state to the United States, of sovereignty, and of the sovereign power of taxation over all the objects of taxation except exports, exclusive as regards imports, concurrent with the states as regards everything else. We find this defendant's income derived from his salary as judge of probate, regarded as a proper object of taxation by the state, and taxed as other property. The inference is unavoidable that it is equally taxable by the United States.

But if it be argued that the sovereignty of the states requires that the same exemptions should be made from the taxation of the United States, which have been made from the taxation of the states, in favor of the means used by the general government to execute its sovereign powers, we maintain:

That it has never yet been held that a state cannot tax the income of an officer of the Federal government, as property. The tax in the case of *Dobbins* v. *Erie Co.* was a tax on the office; and though the court says that the salary of an officer of the United States cannot be diminished by the taxation of a state, yet it must be remembered that the question was not present in that form. That a state can tax the property, including the income derived from his salary, of an officer of the United States, in common with the property of all other citizens of the state, and not make it a tax on the office, has been thought legal by Thompson, J., in *Weston* v. *Charleston*, 2 Pet. 449, 483; and by the supreme judicial court of Massachusetts, in *Melcher* v. *Boston*, 9 Met. 73.

But the conclusive answer to this argument is, that this court has already decided otherwise in *Veazie* v. *Fenno*, *supra*.

This was a case almost parallel to *McCulloch* v. *Md.* 4 Wheat. 316, when the question was, whether a tax of ten per cent on the issues of a state bank was valid, and the court held that it was valid. It was there held that the United States could lawfully tax the operations of a state bank, even with the purpose of driving its issues of notes out of circulation.

But to this point it is not necessary for us to go in the case before us. All the courts were agreed that the property of the banks and of all other incorporated institutions of the states could be taxed by the United States, the same as that of individuals. That is to say, that property, acquired under a grant from a state in the exercise of one of its sovereign powers, is subject to that uniform taxation which the Federal government can impose upon all the property in the country. That property, paid to an individual as an officer of a state by a state, in the exercise of its constitutional power to have such officers, is subject to the same taxation from the Federal government, is

all we contend for in this case. The statute under consideration imposes no tax on the office nor on the officer as such; nor on the money in the state treasury; the incumbent of the state office is viewed simply as a citizen of the United States, and, as such, liable to pay a proportion of his property, however acquired, to the government of the United States.

Mr. **Dwight Foster,** for defendant in error: Each state of the Union, within the limits of its jurisdiction, is just as independent of the Federal government as that government, within its enumerated powers, is independent of the states. "The powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres." The sphere of action appropriated to each is as far beyond the reach of the other as if the line of division was traced by landmarks and monuments visible to the eye. The complex character of the two governments is such that there exist two "distinct and separate sovereignties within the same territorial space; each of them restricted in its powers and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other."

Ableman v. *Booth,* 21 How. 516, 16 L. ed. 173.

Each is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised. *Bk. of Commerce* v. *N. Y.* 2 Black, 635, 17 L. ed. 456.

The people of each state compose a state, having its own government and endowed with all the functions essential to separate and independent existence. In many articles of the Constitution, the necessary existence of the states, and within their proper spheres, the independent authority of the states is distinctly recognized.

Lane Co. v. *Oregon,* 7 Wall. 75, 19 L. ed. 104.

The power of taxation is an inherent attribute of sovereignty which every government must possess as indispensable to its independent existence; and, except where there are constitutional restrictions upon it, this power is coextensive with and measured by, the extent of the sovereignty which imposes the tax. It is a right which, in its nature, acknowledges no other limits. "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, are propositions not to be denied. *McCulloch* v. *Md.* 4 Wheat. 430. "The right of taxation, when it exists, is necessarily unlimited in its nature. It carries with it, inherently, the power to embarrass and destroy." *Austin* v. *Boston,* 7 Wall. 699, 19 L. ed. 226.

"A government whose powers, executive, legislative, or judicial, are subject to the control of another distinct government, cannot be sovereign or supreme, but is subordinate and inferior to the other. Its functions and the means essential to the administration of the government and the employment of them, are liable to constant interruption and possible annihilation. What avail is the function or means, if another government may tax it at its discretion? It is apparent that the power, functions, or means, however important and vital, are at the mercy of that government. *Bk. of Commerce* v. *N. Y. supra.*

The precise converse of the present case was decided in *Dobbins* v. *Erie Co.* 16 Pet. 435. There, under a law of the state of Pennsylvania, a tax was imposed on the emoluments of the office of the captain of a United States revenue-cutter. It was said by the court to be levied on a valuation of the income of the office. And it was held that this could not be done constitutionally. By parity of reasoning, this authority is decisive of the question now under discussion. The plaintiff in error can escape from it only by denying that the states have any powers co-ordinate with those of the United States. He must concede that when one government has the power to tax another, the one liable to be taxed is necessarily subordinate to the one which has the power to tax. According to the theory which he is bound to maintain, it follows inevitably that we do not live under a complex system of state and Federal governments, each independent within its sphere; but that the continued existence of the states depends upon the moderation and forbearance of the United States, in the exercise of its taxing powers.

The decisions already cited conclusively prove that the right of the state to exist as a body politic, to have a government with executive, legislative, and judicial departments, to have state offices filled and their duties performed, does not depend on the will or forbearance of Congress. But if state offices or their emoluments are taxable at all by the Federal government, that taxation may be carried to the point of destruction. To admit the principle is to admit the power of Congress to tax every state government out of existence.

In *Veazie Bk.* v. *Fenno,* 8 Wall. 547, 19 L. ed. 487, it was conceded by a majority of the court that "the reserved rights of the states, such as the right to pass laws, to give effect to laws through executive action; to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress." The minority of the court expressed themselves as follows: "This taxation of the powers and faculties of the state governments which are essential to their sovereignty, and to the efficient and independent management and administration of their internal affairs, is for the first time advanced as an attribute of Federal authority. It finds no support or countenance in the early history of the government, or in the opinions of the illustrious statesmen who founded it. These statesmen scrupulously abstained from any encroachment upon the reserved rights of the states; and, within these limits, sustained and supported them as sovereign states." The division of opinion among the members of the court seems to have related solely to the character of the particular tax, the validity of which was contested, *viz.,* a tax on the circulation of banks incorporated by state legislation. Apparently there was entire unanimity in recog-

nizing, as an indisputable principle of constitutional law, the exemption of the reserved powers of the states from impairment by taxation. If any such principle exists, surely the present case falls fully within its scope.

No valid distinction can be drawn between the taxation of an office, itself, *eo nomine*, and the taxation in a general assessment, upon incomes of the salary or emoluments of an office, which are the legal compensation for the performance of official duties, and are presumed to be only such adequate remuneration as is requisite to secure the services of a competent incumbent. In each case it is held to be a fatal objection to the power to lay such a tax; that if admitted to exist at all, there can be no limit to the extent to which the imposition may be carried. The office taxed exists only at the mercy of the taxing power.

The taxes adjudged invalid in *Weston* v. *Charleston*, 2 Pet. 449, and in *Dobbins* v. *Erie Co. supra*, were income taxes, and this point was fully discussed in each of those cases. The same distinction was again brought before the court in *Bank of Commerce* v. *N. Y. City*, 2 Black, 630, 17 L. ed. 454.

In that case, as it had been uniformly before, the distinction was rejected as untenable, although it had been sustained by the court of appeals, 23 N. Y. 192. It is, therefore, believed to be unnecessary, in the present state of the authorities, to re-open its discussion. An income tax, assessed in general terms, diminishes the compensation of a public officer, just as effectually as if specifically imposed on his office. The fatal difficulty remains, that the power of one government to tax in any way the functions, instrumentalities or revenues of another, or the compensation paid by another government to its public officers, is wholly incompatible with any power of self-preservation or right of independent existence on the part of the government liable to such taxation.

Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of Massachusetts.

Day, the plaintiff in the court below and defendant in error, brought a suit against Buffington, collector of the internal revenue, to recover back $61.51 and interest, assessed upon his salary in the years 1866 and 1867, as judge of the court of probate and insolvency for the county of Barnstable, state of Massachusetts, paid under protest. The salary is fixed by law, and payable out of the treasury of the state. The case was submitted to the court below on an agreed statement of facts, and upon which judgment was rendered for the plaintiff. It is now here for re-examination. It presents the question, whether or not it is competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a state.

In the case of *Dobbins* v. *Erie Co.* 16 Pet. 435, it was decided that it was not competent for the legislature of a state to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be interfered 123*] *with by taxation or otherwise by the states, and that the salary or compensation for the service of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office, was also, for like reasons, equally exempt.

The cases of *McCulloch* v. *Md.* 4 Wheat. 316, and *Weston* v. *Charleston*, 2 Pet. 449, were referred to as settling the principle that governed the case, namely: "that the state governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers. The soundness of this principle is happily illustrated by the Chief Justice in *McCulloch* v. *Md.* "If the states," he observes, "may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of the government." "This," he observes, "was not intended by the American people. They did not design to make their government dependent on the states." Again, p. 427, "That the power of taxing it (the bank) by the states may be exercised so far as to destroy it, is too obvious to be denied." And, in *Weston* v. *Charleston*, he observes: "If the right to impose the tax exists, it is a right which, in its nature, acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it which the will of each state and corporation may prescribe."

It is conceded in the case of *McCulloch* v. *Md.* that the power of taxation by the states was not abridged by the grant of a similar power to the government of the Union; that it was retained by the states, and that the power is to be concurrently exercised by the two governments; and also that there is no express constitutional prohibition upon the *states [*124 against taxing the means or instrumentalities of the general government. But, it was held, and we agree properly held, to be prohibited by necessary implication; otherwise, the states might impose taxation to an extent that would impair, if not wholly defeat, the operations of the Federal authorities when acting in their appropriate sphere.

These views, we think, abundantly establish the soundness of the decision of the case of *Dobbins* v. *Erie Co. supra*, which determined that the states were prohibited, upon a proper construction of the Constitution, from taxing the salary or emoluments of an officer of the government of the United States. And we shall now proceed to show that, upon the same construction of that instrument, and for like reasons, that government is prohibited from taxing the salary of the judicial officer of a state.

It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the state governments by their respective constitutions, remained unaltered and unimpaired except so far as they were granted to the government of the United States.

That the intention of the framers of the Constitution in this respect might not be misunderstood this rule of interpretation is expressly declared in the 10th article of the Amendments, namely: "The powers not delegated to the United States are reserved to the states respectively, or to the people." The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

The general government, and the states, although both exist within the same territorial limits, are separable and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; but the states within the limits of their powers not granted; or, in the language of the 10th Amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the states. **125*]** *The relations existing between the two governments are well stated by the present Chief Justice in the case of *Lane Co.* v. *Oregon*, 7 Wall. 76, 19 L. ed. 104. "Both the states and the United States," he observed, "existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a national government, acting with ample powers directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the states. But, in many of the articles of the Constitution, the necessary existence of the states, and within their proper spheres, the independent authority of the states are distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them, and to the people, all powers, not expressly delegated to the national government, are reserved." Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the states.

Two of the great departments of the government, the executive and legislative, depend upon the exercise of the powers, or upon the people of the states. The Constitution guarantees to the states a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the states in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired; should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits **126*]** but the will of the legislative *body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the states, under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might. We have said that one of the reserved powers was that to establish a judicial department, it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen states were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the states by their constitutions which remained unaltered and unimpaired, and in respect to which the state is as independent of the general government as that government is independent of the states.

The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power "to lay and collect taxes" enables the general government to tax the salary of a judicial officer of the state, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the states.

We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the state, disables the general government from levying the tax, as that depends upon the express power "to lay and collect taxes," but it shows that it is an original inherent *power never parted with, and in re- [***127** spect to which the supremacy of that government does not exist, and is of no importance in determining the question; and further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government, stand upon as solid a ground and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in *Dobbins* v. *Erie Co. supra*, from taxation by the state; for, in this respect, that is, in respect to the reserved powers, the state is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are necessarily, and, for the sake of self-preservation, exempt from taxation by the states, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing

the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?

But we are referred to *The Veazie Bk.* v. *Fenno*, 8 Wall. 533, 91 L. ed. 482, in support of this power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in *McCulloch* v. *Md. supra*, namely, "that the power to tax involves the power to destroy."

128*] *The power involved was one which had been exercised by the states since the foundation of the government and had been, after the lapse of three quarters of a century, annihilated from excessive taxation by the general government, just as the judicial office in the present case might be, if subject, at all, to taxation by that government. But notwithstanding the sanction of this taxation by a majority of the court, it is conceded, in the opinion, that "the reserved rights of the states, such as the right to pass laws; to give effect to laws through executive action; to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress." This concession covers the case before us, and adds the authority of this court in support of the doctrine which we have endeavored to maintain.

The judgment of the court below is affirmed.

Mr. Justice **Bradley**, dissenting:

I dissent from the opinion of the court in this case, because it seems to me that the general government has the same power of taxing the income of officers of the state governments as it has of taxing that of its own officers. It is the common government of all alike; and every citizen is presumed to trust his own government in the matter of taxation. No man ceases to be a citizen of the United States by being an officer under the state government. I cannot accede to the doctrine that the general government is to be regarded as in any sense foreign or antagonistic to the state governments, their officers, or people; nor can I agree that a presumption can be admitted that the general government will act in a manner hostile to the existence or functions of the state governments, which are constituent parts of the system or body politic forming the basis on which the general government is founded. The taxation by the state governments of the instruments employed by the general government in the exercise of its powers is a very different thing. Such taxation involves an interference with the 129*] powers of *a government in which other states and their citizens are equally interested with the state which imposes the taxation. In my judgment, the limitation of the power of taxation in the general government, which the present decision establishes, will be found very difficult to control. Where are we to stop in enumerating the functions of the state governments which will be interfered with by Federal taxation? If a state incorporates a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements, reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from Federal taxation? How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a fallacy, and that it will lead to mischievous consequences. I am as much opposed as anyone can be to any interference by the general government with the just powers of the state governments. But no concession of any of the just powers of the general government can easily be recalled. I, therefore, consider it my duty to at least record my dissent when such concession appears to be made. An extended discussion of the subject would answer no useful purpose.

THE SHIP SAPPHIRE, etc., G. G. Truefant and J. R. Tibbetts, Claimants, *Appts.*

v.

NAPOLEON III., Emperor of the French.

(See S. C. "*The Sapphire*," 11 Wall. 164-171.)

Foreign sovereigns may prosecute in our courts —suit not abated by deposition—damages divided in collision.

*1. A foreign sovereign can bring a civil suit in the courts of the United States.

2. A claim arising by virtue of being such sovereign (such as an injury to a public ship of war) is not defeated, nor does suit therefor abate, by a change of the person of the sovereign. Such change, if necessary, may be suggested on the record.

3. If an injury to any party could be shown to arise from a continuation of the proceedings, after a change in the person of the sovereign, the court, in its discretion, would take order to prevent such a result.

4. If a vessel at anchor in a gale could avoid a collision threatened by another vessel, and does not adopt the means for doing so, she is a participant in the loss, and must abide the loss with the other vessel.

[No. 132.]

Argued Feb. 17, 1871. Decided Apr. 3, 1871.

APPEAL from the Circuit Court of the United States for the District of California.

The history and facts of the case are fully stated by the court.

Mr. **C. B. Goodrich**, for appellants:

The sovereign of a country, the public rights or property of which have been destroyed or injured by a citizen of another country, cannot maintain suit against such citizen in the judicial tribunals of the country to which such citizen belongs, to recover compensation for the injury. The remedy and the only remedy of the foreign sovereign is by diplomatic correspond-

*Headnotes by Mr. Justice BRADLEY.

NOTE.—*Suits by a foreign government or sovereign; when either can be made defendant.*

The authority of a foreign government to sue in the courts of England is fully established. Nabob of Carnatic v. East India Co. 1 Ves. 371; Barclay v. Russell, 3 Ves. 431; Huilet v. King of Spain, 2 Bligh, N. S. 31, 1 Dow & Cl. 169; 1 Cl. & Fin. 333; King of Spain v. Machado, 4 Russ. 225; United States of America v. Wagner, 2 L. R. Ch. 582; 35 L. J. Ch. 624; Emperor of Austria v. Kossuth, 2

ence and arrangement between the two countries.

The case before the court illustrates the propriety of the principle and reason upon which the position is taken. The claimants cannot call upon Napoleon, to answer interrogatories, upon oath, under the admiralty rule which requires libelants to answer. The owners of the Sapphire, in their answer, say that the collision was caused by the fault of the French transport. If this be true, they cannot obtain a warrant for the arrest of a vessel belonging to the Navy of France, which is in our harbor in the charge of a lieutenant.

Duke of Brunswick v. *King of Hanover*, 6 Beav. 1, 2 H. of L. Cas. 1; *Hullet* v. *King of Spain*, 1 Dow. & Cl. 169, 1 Cl. & F. 333; *Prioleau* v. *U. S.*, L. R. 2 Eq. Cas. 659.

The cases cited say that a foreign sovereign, by the institution of a suit, submits to the jurisdiction of the court devested of his sovereign rights; must answer to a cross-bill, upon oath; make discovery or put some one forward as party to the suit who can. This shows that his sovereign rights cannot, with propriety, become the subject of a suit.

Brown v. *Duchesne*, 19 How. 183, 15 L. ed. 595.

This shows that the French transport is not liable to arrest.

The Exchange v. *McFaddon*, 7 Cranch, 116; *King of Spain* v. *Oliver*, 2 Wash. (C. C.) 431; *The Pizarro* v. *Matthias*, 10 N. Y. Leg. Obs. 97; *The Athol*, 1 W. Rob. 374.

The Constitution provides that the judicial power of the United States shall extend to all cases, in law and equity, between a state and the citizens thereof, and foreign states, citizens, and subjects. By an amendment it is provided, that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state."

If these provisions are construed literally, a foreign state or sovereign, if permitted to sue in any case, may sue a state of the Union, by original process from the Supreme Court of the United States. This result can be avoided, only by holding that a foreign state or sovereign cannot maintain a suit, in any court of the United States, or of any one of the several states, to enforce a sovereign, or public right, either of property or of contract. In the early English cases, it seems to have been taken for granted, that a foreign sovereign might sue or be sued in the courts of England. This theory is impracticable and inconsistent with the character and harmony which should pervade and control the intercourse of nation with nation. The error of the English theory is manifest from the condition and embarrassment to which it brought the court, in the case of *Prioleau*. In all the cases which have been before the English courts, it has been conceded that a foreign sovereign could not be sued for any act or matter, right or wrong, growing out of the exercise of his sovereign prerogatives. Upon principle it is submitted that it is equally clear that a foreign sovereign or state should not be allowed to enforce sovereign rights, or obtain redress for an injury thereto, by suit against a private citizen, by whom such rights may have been invaded, or by whom the injury may have been produced.

Messrs. **C. Cushing** and *Milton Andros*, for appellee:

1. In Great Britain the right of a foreign government, whether monarchical or republican, to sue, in any and all the courts of that Kingdom, is now and always has been recognized, and even with the assertion or admission that the denial of such right would afford just cause of war to the aggrieved foreign government.

2. The same right is recognized by the tribunals of Continental Europe and especially by France, on behalf of the United States.

3. Expositors of the law of nations unanimously declare, as the rule of all the countries belonging to the great Christian republics of

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Giff. 628; 7 Jur. N. S. 483; 4 L. T. N. S. 274; aff'd, 7 Jur. N. S. 639; 30 L. J. Ch. 690; 9 W. R. 712; 4 L. T. N. S. 494; 3 DeG. F. & J. 217.

The Constitution of U. S., art. 3, § 2, authorizes suit by foreign government in U. S. court.

In New York this right has also been clearly settled by the courts. Republic of Mexico v. Arangoiz, 5 Duer, 634, 11 How. Pr. 576.

The restriction to this right is that the foreign government should be an independent and acknowledged sovereignty and the two governments at peace with each other. Republic of Mexico v. Arangoiz, cited above, and City of Berne, in Switzerland, v. Bank of England, 9 Ves. 347; Dolder v. Bank of England, 10 Ves. 353; Dolder v. Lord Huntington, 11 Ves. 283.

A sovereign state or government cannot be sued in the courts of another state or government. It may be made defendant. The joinder in such case is a mere invitation to appear, and, if disregarded, is a nullity. Manning v. Nicaragua and The A. T. Co. 14 How. 517; Duke of Brunswick v. King of Hanover, 24 H. L. Ca. 1; De Haber v. Queen of Portugal; Wandsworth v. Queen of Spain, 16 Jur. 164; 20 L. J. Q. B. 488; 17 Q. B. 171.

Where a sovereign of a foreign country has been displaced by a usurping government *de facto*, upon his restoration to authority he succeeds to all the rights of the usurping government and to its public property, and is the proper person to sue in respect to it. United States of America v. Prioleau, 11 Jur. N. S. 792; 35 L. J. Ch. 7; 13 W. R. 1062; 13 L. T. N. S. 92.

For a minister cannot sue in his own name in respect to his sovereign's property. Baron Penedo v. Johnson, 29 L. T. N. S. 452; 22 W. R. 103.

An action *in rem* being an indirect method of impleading the owner cannot be brought against the property of a foreign sovereign. The immunity of a public ship is not lost by her being used partially and subordinately for trading purposes. The Parlement Belge, 5 L. R. P. Div. 197; 42 L. T. N. S. 273; 28 W. R. 642.

Foreign sovereign cannot be served with writ or process. These are two apparent exceptions: (1) When the sovereign comes into court as plaintiff, defendant may assert a counter claim or bring cross-action that complete justice may be done; (2) where both plaintiff and a foreign sovereign have claims on funds in a third person's hands, the foreign sovereign or state may be joined as defendant, so he may assert his claim to the funds. Strousberg v. Costa Rica, 44 L. T. N. S. 199; 29 W. R. 125; Republic of Costa Rica v. Erlanger, Law Rep. 1 Ch. Div. 171.

A person is not liable to suit in this country for acts done by him as sovereign of another nation even though he has ceased to be such sovereign. Hatch v. Baez, 7 Hun, 596.

Suit by a foreign state may be stayed till it name a person to be made defendant in a cross-action for the purpose of making upon oath the discovery required. Republic of Peru v. Weguelin, 13 Moak's Eng. R. 679; Law Rep. 20 Eq. Ca. 140; United States of America v. Wagner, Law Rep. 2 Ch. 582.

Courts have no power nor authority over foreign governments nor their property; notwithstanding such property is within our territorial limits, as funds in the hands of agents. Leavitt v. Dabney, 37 How. Pr. 264; 7 Rob. 350; 3 Abb. Pr. N. S. 469.

of decisions in trials at common law in the courts in the United States.

By the Code of Louisiana, bills and notes are prescribed by five years reckoning from their maturity.

This prescription is peculiar, for it runs against minors and interdicted persons, and also against persons residing out of the state.

Arts. 3505, 3506.

There is a marked distinction between this and the stat. of 21 Jac. 1, which specially saves the rights of such persons.

A fixed and received construction by a state in its own courts makes a part of the statute law, and must be considered as final by the Supreme Court.

Shelby v. *Guy*, 11 Wheat. 361; *Greene* v. *Neal*, 6 Pet. 298.

Counting five years from the maturity of the notes, brings us to February, 1866. From the close of the war to this latter period, there was still nine months in which the parties could have brought their suit. This they did not avail themselves of, but took their first action three years after the termination of the war.

In *Rabel* v. *Pourciau*, 20 La. Ann. 131, February term, 1868, the supreme court of Louisiana says: "On 30th January, 1866, the prescription on the note would have expired; but of this time there were two years, during which judicial action was suspended in the parish where defendant resided, and we are now to determine whether the plaintiff, having failed to sue within five years, although there was no impediment during the last six months of the legal delay, his action subsequently instituted is not prescribed."

After a full discussion and a learned argument by a former chief justice, on a motion for rehearing, the court decided that the maxim, *contra non valentem agere nulla currit præscriptio*, could not be invoked to relieve the note from the effect of prescription; that the maxim has no application to the prescription of bills and notes, when suit might have been brought before prescription obtained.

This decision was reaffirmed in *Durben* v. *Spiller*, 20 La. Ann. 219; *Payne* v. *Douglass*, 20 La. Ann. 280; *Durand* v. *Hienn*, 20 La. Ann. 345; *Marcy* v. *Steele*, 20 La. Ann. 413; *Norwood* v. *Mills*, 20 La. Ann. 422; *Lemon* v. *West*, 20 La. Ann. 427; *Watts* v. *Bradley*, 20 La. Ann. 523; *Schlenker* v. *Taliferro*, 20 La. Ann. 565.

These decisions are founded on the authority of eminent civilians, who have commented on the Code Napoleon, from which the Louisiana Code is derived.

Messrs. **S. M. Johnson** and **C. F. Peck**, for defendants in error:

The plaintiffs in the court below did institute suit, by the defendant's own admission May 4, 1868, on the same cause of action; nor does it appear by any act of theirs that that suit was discontinued.

It is proper to observe that Louisiana was long under the dominion of Spain, and in its Civil Code has adopted the Roman law. Properly speaking, it has no statute of limitation, but has adopted in its stead the law of prescription, which differs from the American and English laws in this: that while those statutes only bar the remedy, without extinguishing the right, the law of prescription of Louisiana, as of Spain, bars both remedy and right.

Prescription is a manner of acquiring property or of discharging debts by the effect of time. Civil Code, art. 3420.

Whether the circuit court of the United States was bound to follow the supreme court of Louisiana upon the law of prescription of the state of Louisiana, is certainly a grave question, under the peculiar circumstances of this case.

By the act of Feb. 5, 1867, 14 Stat. at L. 385, power is given to this court in certain cases to re-examine, reverse or affirm the final judgments of the highest courts of any state; and it is expressly provided that whenever the highest court of any state shall affirm the validity of a statute of, or an authority exercised under, any state, which "are repugnant to the Constitution, treaties, or laws of the United States," this court may re-examine, reverse, or reaffirm such judgment.

The 34th section of the judiciary act of 1789, 1 Stat. at L. 85, is referred to, and it is claimed that the Supreme Court of the United States is bound to follow the rules of construction of the state courts, upon questions arising under state laws.

The question presented here, in no practical sense, involves the construction of the law of prescription; but it is whether that law was a valid law during the war; whether the acts of the state and the United States did not operate *ipso facto*, to suspend the law during the war. The defendants in error here insist that by virtue of the decision of this court in the case of *Hanger* v. *Abbott*, reported in 6 Wall. 532, 18 L. ed. 939, they have a right to claim that prescription was so suspended.

Inter arma silent leges is the rule which applied to the state from 1861 to 1865. The statute of prescription pleaded by the defendant in the court below, was inoperative as against the plaintiffs, who resided in New York when the notes matured, and during the whole period of the war.

Bailey v. *Jackson*, 16 Johns. 214; Wheat. 541, 546; 1 Kent, 67, 68; *Hanger* v. *Abbott*, *supra*.

Mr. Justice Swayne, speaking of adverse decisions of the state courts, and the power and duties of this court, in respect to cases arising under the 25th section of the judiciary act of 1789, says:

"This duty carries with it investigation, reflection and the exercise of judgment. It cannot be performed on our part by blindly following in the footsteps of others, and substituting their judgment for our own.

"In all the cases brought here under the 25th section of the judiciary act, this court has never hesitated to determine for itself the construction and effect of any statute of a state brought here under review, without reference to previous adjudications of the highest court of the state upon this subject."

Butz v. *Muscatine*, 8 Wall. 575, 19 L. ed. 490.

Mr. Justice **Clifford** delivered the opinion of the court:

Statutes of limitations exist in all the states, and with few exceptions they have been copied from the one brought here by our ancestors in

the continent as to what circumstances, if any, suffice to subject the property of a foreign sovereign and, as incidental thereto, his person, nominally, to the local jurisdiction.

But no question has been made as to the right of a foreign sovereign or state to sue.

It suffices to say, as to those countries, that France has admitted the United States as plaintiff in her judicial tribunals against sundry persons, subjects or citizens of France, to recover compensation for the injury done by such persons to the American government.

U. S. v. *Arman* (Cour Imperiale).

II. The law of nations.

It would be superfluous to make any citations of this class. It suffices to refer to Phillim. Com. Int. Law, §§ 109–113.

The plaintiff's own brief shows that at a very early day the right of a foreign government to sue here was recognized by the courts of the United States.

The King of Spain v. *Oliver*, 2 Wash. (C. C.) 431.

It seems strange to find the plaintiff's counsel suggesting constitutional objections to the exercise of this right, in the presence of the fact of the right being expressly accorded by the Constitution. Art. 3, § 2.

No inconvenience can stand in the way of the unequivocal provision of the Constitution.

Mr. Justice **Bradley** delivered the opinion of the court:

This is an appeal from the circuit court of the United States for the district of California. It is a case of collision between the American ship Sapphire and the French transport Euryale, which took place in the harbor of San Francisco, on the morning of December 22, 1867, in which the Euryale was considerably damaged. A libel was filed in the district court in the name of the Emperor Napoleon III., as owner of the Euryale against the Sapphire. The claimants filed an answer, depositions were taken, and the court decreed in favor of the libelant and awarded him $15,000, the total amount claimed. The claimants appealed to the circuit court, which affirmed the decree. They then appealed to this court.

The first question raised is as to the right of the French Emperor to sue in our courts. On this point not the slightest difficulty exists. A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling. Such a suit was sustained in behalf of the King of Spain in the third circuit by Justice Washington and Judge Peters in 1810. 2 Wash. (C. C.) 431. The Constitution expressly extends the judicial power to controversies between a state, or citizens thereof, and foreign states, citizens or subjects, without reference to the subject-matter of the controversy. Our own government has largely availed itself of the like privilege to bring suits in the English courts in **168*]** cases growing *out of our late Civil War. Twelve or more of such suits are enumerated in the brief of the appellee, brought within the last five years in the English law, chancery, and admiralty courts. There are numerous cases in the English reports in which suits of foreign sovereigns have been sustained, though it is held that a sovereign cannot be forced into court by suit. *Hullett* v. *King of Spain*, 1 Dow. & Cl. 169; S. C. 1 Cl. & F. 333, 2 Bligh, N. S. 31; *Emp. of Brazil* v. *Robinson*, 6 Ad. & E. 801; *Queen of Port.* v. *Glynn*, 7 Cl. & F. 466; *King of Spain* v. *Machado*, 4 Russ. 225; *Emp. of Austria* v. *Day*, 3 De Gex, F. & J. 217; *King of Grecce* v. *Wright*, 6 Dow. Pr. Cas. 12, 1 Jurist, 944; *Prioleau* v. *U. S.*, 2 L. R. Eq. Cas. 659; *U. S.* v. *Wagner*, 2 L. R. Ch. App. 582; *Duke of Brunswick* v. *King of Hanover*, 6 Beav. 1, 2 H. of L. Cas. 1; *De Haber* v. *Queen of Port*, 17 Q. B. (N. S.), 171; also 2 Phill. Int. Law, part VI., ch. 1; Dan. Ch. Pr. ch. II. § 2.

The next question is whether the suit has become abated by the recent deposition of the Emperor Napoleon. We think it has not. The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the Euryale, not as an individual, but as sovereign of France. This is substantially averred in the libel. On his deposition the sovereignty does not change, but merely the person or persons in whom it resides. The foreign state is the true and real owner of its public vessels of war. The reigning Emperor, or National Assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. The next successor recognized by our government is competent to carry on a suit already commenced and receive the fruits of it. A deed to or treaty with a sovereign, as such, inures to his successors in the government of the country. If a substitution of names is necessary or proper it is a formal matter, and can be made by the court under its general power to preserve due symmetry in its forms of proceeding. No allegation has been made that any change in the *real and substantial own- [***169** ership of the Euryale has occurred by the recent devolution of the sovereign power. The vessel has always belonged and still belongs to the French Nation.

If a special case should arise in which it could be shown that injustice to the other party would ensue from a continuance of the proceedings after the death or deposition of a sovereign, the court, in the exercise of its discretionary power, would take such order as the exigency might require to prevent such a result.

The remaining question relates to the merits of the case. And on the merits of the case, as presented by the record, we think that the court below erred in imposing the whole damage upon the Sapphire. We think that the Euryale was equally in fault, and that the damage ought to be divided between them. It is not our general practice to scrutinize very carefully the weight of evidence in cases of collision, where the evidence is substantially conflicting, and where both district and circuit courts have concurred in a decree upon the merits. Our views upon this subject will be found quite fully expressed by Mr. Justice Clifford in the case of *The Baltimore*, 8 Wall. 382, 19 L. ed. 463. But this case depends upon a narrow point, the evidence on

which is in our view so decidedly adverse to the sole liability of the Sapphire that it becomes our duty to notice it.

The Euryale came to anchor in the harbor on the 14th of December, about six hundred yards from the wharf. She was of four hundred and fifty tons burden, drew thirteen feet of water, and had out fifty-six fathoms of chain, and an anchor weighing 3,500 pounds. The Sapphire, of thirteen hundred tons burden, came to anchor about the 18th of December, about three hundred yards (as alleged both in the libel and answer) to the southeasterly of the Euryale, at a point farther up the harbor, and farther from the wharf. She had out about fifty fathoms of chain, and an anchor weighing 3,600 to 3,800 pounds, and she was heavily laden, drawing about twenty-three feet of water.

170*] *On the night of the 21st of December it commenced to blow pretty strong from the southeast, by midnight blowing a six knot breeze, and it kept increasing up to the time of the collision at five o'clock the next morning, when it seems to have been blowing a gale. At half past three in the morning the tide changed from ebb to flood, the direction of flood tide being southeasterly, directly contrary to that of the wind. And the captain of the Euryale says (and he is not contradicted) that the wind was twice as strong as the tide. The weight of the evidence is that the Sapphire, under the force of the wind, dragged her anchor and got inside of the Euryale; that is, between her and the city. At a few minutes past five the collision occurred.

The libelant insists that the Sapphire was in fault in two points: (1) In anchoring too near the Euryale in the first instance; (2) in not having out sufficient anchors. We think that the first charge is not sustained. Experienced pilots testified that two hundred and fifty yards distance is a good and sufficient berth in that harbor. And it is to be noted that the master of the Euryale made no complaint of too great proximity, although she and the Sapphire were lying in the same relative position for several days. On the other point, we agree with the district and circuit courts that the Sapphire was in fault. Had a second anchor been put out at an earlier period the collision in all probability would not have occurred. Indeed, the captain of the Sapphire gave orders to the first officer that if she was likely to start, to put the second anchor down. But it was not done till the collision itself broke the ring stopper and let it down. A more careful watch would have led to the discovery of the vessel's having started, and would have prevented the catastrophe which ensued.

But we are also satisfied that the Euryale was not free from fault. The captain was not on board. The first officer, though on board, was not on deck from eleven o'clock until after the collision. Le Noir, the third officer, was officer of the deck that night. He was called up by the head or chief of the watch at three o'clock 171*] to observe that the Sapphire *was approaching nearer to them than she had been. He attributed it to her letting out more chain, and returned below, and did not come on deck again until five o'clock, a few moments before the collision, when it was too late to avoid it. The instant he came on deck he ordered done the thing that could have saved them had it been done earlier—the jib to be hoisted. It would have sheered the vessel off, and allowed the Sapphire to pass her. Such is the testimony of the libelant's own witnesses. It is the judgment of the first officer of the ship. Why was not this done before? Why was not the officer, on such a night, in such a gale, at his post? At four o'clock the man in charge of the watch saw the Sapphire approaching, and says he made a report to that effect. The first officer says that no report was made to him. But the third officer, who was officer of the deck, does not say that it was not made to him. If the fact was not communicated to the proper officer, that was in itself a fault. If it was communicated and not attended to, the case of the libelant is not bettered. But the evidence is very strong that the officer received the information. Deveaux, the head of the watch, says that he reported the fact at four o'clock; and Bioux, who had charge of the watch between four and five o'clock, says that between those hours he saw the Sapphire with the wind astern, and heading the current, coming towards the Euryale; that she continued to approach gradually, and that he reported this to Mr. Le Noir between four and five o'clock. Here, then, was a clear neglect of proper precautions for an entire hour immediately preceding the collision.

We cannot avoid the conviction that there was a want of proper care and vigilance on the part of the officers of the Euryale, and that this contributed to produce the collision which ensued. Both parties being in fault, the damages ought to be equally divided between them.

Decree of the circuit court reversed, and the cause remitted to that court, with directions to enter a decree in conformity with this opinion.

UNITED STATES, *Appt.*,
v.
JAMES O'KEEFE.

(See S. C. 11 Wall. 178-184.)

British subjects may sue in the court of claims.

Great Britain accords to our citizens the right to prosecute claims against that government in its courts by the petition of right, which is a judicial proceeding, to be tried like suits between subject and subject.

British subjects for that reason have the right to sue in the court of claims, under the act relating to captured and abandoned property.

[No. 280.]

Argued Mar. 21, 1871. Decided Apr. 3, 1871.

APPEAL from the Court of Claims.

The petition in this case was filed by the appellee in the court below, to recover the value of certain bales of cotton.

Judgment having been given for the claimant, the defendant took an appeal to this court.

The case is further stated by the court.

Messrs. **Amos T. Akerman,** *Atty. Gen.*, and *Asst. Atty. Gen.* **Talbot,** for appellant:

The facts, upon which the court of claims bases its conclusion of law, that the government of England accords to citizens of the United States the right to prosecute claims against such government, are thus set forth in the findings:

"4. That the government of England accords to its subjects and aliens the right to prosecute claims against it by petition of right given by the common law of England, and regulated by statutes 23 and 24 Victoria, July 3, 1860, as to the mode of procedure; in which the petition addressed to the King is, by his fiat, indorsed thereon, directed to a court of his kingdom to hear and determine the case. The fiat, except in a very extraordinary case, is granted as a matter of right to any suppliant, subject or alien. The petition is in form addressed to the grace and favor of the King, but in practice is left at the office of the home secretary, and the fiat is then obtained as a matter of official routine."

The facts thus found are not sufficient to support the conclusion of law, which is rested upon them.

The mode of proceeding is by petition of right, which petition is addressed to the sovereign, and first deposited at the home office of one of the executive departments of the English government, in order to obtain the indorsement thereon of the sovereign's permission that the suit may be brought in court. This permission is not granted as a matter of course, but a royal discretion, which withholds it when royalty deems fit.

A right differing from this altogether is that which was provided by a statute of the United States, establishing the court of claims. The words of that enactment are: "And the said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, which may be suggested to it by a petition filed therein;" and further, by way of conferring an additional privilege under conditions, "Also all claims which may be referred to said court by either House of Congress." Act Feb. 24, 1855. § 1; 10 Stat. at L. 612.

Suppose, now, that this enactment were altered by inserting after the words "said court" these words, namely, "the President in each case consenting thereto," so that the enactment should read: "Said court, the President in each case consenting thereto, shall hear and determine all claims founded." etc.

The right to sue the United States in the court of claims, which is now unconditioned, would then be subject to the will of the Executive. No petitioner could obtain hearing in that court, until he first obtained the consent to such hearing of the President, the supreme head of the departments, against the action of one of which he wished to obtain a judgment.

Upon examination of the 15th section of the act of Parliament under consideration, it appears that proceedings in courts upon a petition of right are not regulated by the same freedom of discretion, which is the distinctive mark of true judicial authority. Unlike proceedings between private parties, they are subject to the direct control of the royal authority. The sovereign may, by proclamation inserted in the London Gazette, suspend the rules adopted by the courts to regulate such proceedings, so that the same shall not be binding and obligatory on the said courts.

The act of July 27, 1868, requires in reciprocity only, as against a foreign government, a juridical remedy; a remedy in court. The enforcement of a judgment is made neither directly nor indirectly, a criterion of the alien's right to sue in the court of claims; but should the point be made (aside from the main issue) that the payment of any judgment of the court of claims against the United States, depends upon the will of Congress as exercised in an act making an appropriation of money for that purpose out of the National Treasury, it will be seen that in England payment of judgments against the sovereign upon petitions of right, is subject to equal, if not greater, restriction. See § XIV. of the act of 23d and 24th Victoria.

It there appears that where the petition relates to any public matter, judgment in favor of the petitioner is to be paid out of any money in the hands of the commissioners of the Treasury "for the time being applicable thereto, or which may be hereafter voted by Parliament for that purpose;" that is, out of moneys which have been or may be appropriated by Parliament. In cases of the other class, there is still a further condition; another will, besides that of the National Legislature, is to be consulted. In any case affecting her Majesty in her private capacity, the payment is to be made (runs the statute) "out of such funds or moneys as her Majesty shall be graciously pleased to direct to be applied for that purpose."

It thus appears, that a judgment of an English court, upon a petition of right in favor of the petitioner, is in no case of more force than a judgment of the court of claims in favor of a claimant, while the right to proceed by petition of right, is under a qualification, such as does not attach to the right of suit in the court of claims.

The right to prosecute claims against the British government in the British courts is not accorded to any person, citizens of the United States or others; nothing is so accorded, but the privilege to prosecute such suits when the sovereign of Britain consents thereto.

In Great Britain there is no such right of prosecution, save as existing at common law; and the common law, as well known, recognizes the sovereign as exempt from liability to suit. *Bonner* v. *U. S.*, 9 Wall. 156, 19 L. ed. 666.

On the other hand, in the United States, by departure of even the principles of the common law, the nation has made itself liable to be sued as private individuals are sued. Herein the statute of July 27, 1868, calls for reciprocity, and the appellee does not show such reciprocity on the part of his government.

Messrs. Cooley, Clark, **Thomas Wilson,** and **John J. Weed,** for appellee:

In the court of claims, therefore, the inquiry was: Does the government of Great Britain accord to citizens of the United States the right to prosecute claims against such government in its courts? This question was answered by the court of claims in the affirmative, and that court find as a fact the existence of this right.

These findings of fact are in the nature of a special verdict, and are not subject to review here.

U. S. v. *Adams*, 6 Wall. 112, 18 L. ed. 794; *Burr* v. *Nav. Co.*, 1 Wall. 102, 17 L. ed. 562.

What the foreign law of a country may be, is exclusively a question of fact.

Mostyn v. *Fabrigas*, Cowp. 174; *Smith* v. *Bartram*, 11 Ohio St. 690; *Beach* v. *Workman*, 20 N. H. 379; *Church* v. *Hubbart*, 2 Cranch, 187; *Hempstead* v. *Reed*, 6 Conn. 480; *Thrasher* v. *Everhart*, 3 Gill & J. 334; *Pickard* v. *Bailey*, 6 Fost. (N. H.) 152; *Bryant* v. *Kelton*, 1 Tex. 434; *Tyler* v. *Trabue*, 8 B. Mon. 306; *Adams* v. *Gay*, 19 Vt. 358.

The argument of the Attorney General is furnished from the "Petitions of Right Act," passed July 3, 1860, which amends and prescribes the mode of procedure under petitions of right.

But the petition of right is older than this statute and does not depend upon any statute for its existence or authority; and even if this statute were the source from which the petition of right derived its origin, the right to institute the petition is clearly given by the 1st section of the act, in which it is provided as follows:

A petition of right may, if the suppliant think fit, be instituted in any one of the superior courts of common law or equity at Westminster, in which the subject-matter of such petition, or any material part thereof, would have been cognizable if the same had been a matter of dispute between subject and subject.

The extent to which the petition of right is accorded and the purposes for which it may be instituted, are indicated in the following authorities:

Feather v. *The Queen*, 6 B. & S. 257; *Tobin* v. *The Queen*, 16 C. B. (N. S.) 310; 3 Bl. 255, 356; Manning, Exch. Pr. 84, 85.

The court of claims finds that the fiat, "except in very extraordinary cases, is granted as a matter of right." The granting of the fiat is only a matter of official routine, and is in the nature of suing out or issuing process in suits between subject and subject. No suit can be commenced against a subject without a writ, which is in form a command of the King directing something to be done; and the same form is preserved in this country. It is the writ that gives jurisdiction to the court; for without a writ and the service of a writ, no court has jurisdiction, either in this country or in England.

But, says Tidd: "No writ can issue against the King, because he could not command himself, and therefore the plaintiff must proceed by petition." Prac., p. 1075. It is obvious that the fiat, "*Soit droit fait*," in the proceeding by petition, is precisely equivalent to the "*Præcipe quod reddat*," or other writ in common-law cases.

Certainly a state has a right to sue in the Supreme Court of the United States; and yet no state can file a bill therein, without actual leave first obtained on motion, after submitting a copy of the bill proposed to be filed.

Because in any particular case the law may not be executed, it does not follow that parties have no rights under the law. Such is merely a case where the private right yields to public exigencies; it does not prove that the right does not exist.

Mr. Justice **Davis** delivered the opinion of the court:

The controversy in this case turns on the right of the appellee, a subject of Great Britain, to prosecute this suit in the court of claims. If he has the right, then it is conceded that the judgment of that court should be affirmed. The suit was instituted to recover the proceeds of captured and abandoned property, and the law conferring on citizens the privilege to sue, extends it "To the subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts." It is insisted that Great Britain does not accord this right to our citizens, because the mode of proceeding in that country for the recovery of claims against the government depends on the will of the Crown, while with us the right is absolute.

It is a familiar principle that all governments possess an immunity from suit, and it is only in a spirit of liberality and to promote the ends of justice, that they ever allow themselves to be brought into court. If the privilege be granted at all, necessarily the regulations concerning it and *the mode of proceeding will differ, [*183 as much as the governments themselves differ.

In England, it is easy to see that the method of redressing injuries to which the Crown is a party, would be different from the remedy adopted in this country in case the United States be the aggressor, because of the principle underlying the English Constitution, that the King can do no wrong. On this account, although it would not do to issue mandatory process against the sovereign, yet the law being unwilling that private rights should be invaded in the conduct of public affairs and not redressed, has furnished the subject who is thus injured with a mode of obtaining redress, which is consistent with the idea of kingly prerogative. The law allows him by petition to inform the King of the nature of his grievance, and "as the law presumes that, to know of any injury and to redress it, are inseparable in the royal breast, it then issues, as of course, in the King's own name, his orders to his judges to do justice to the party aggrieved." 3 Bl. Com. 255.

This valuable privilege, secured to the subject in the time of Edward the First, is now crystallized in the common law of England. As the prayer of the petition is grantable *ex debito justitiæ*, it is called a petition of right, and is a judicial proceeding, to be tried like suits between subject and subject.

It does not exist by virtue of any statute, nor does the recent legislation in England concerning it do more than to regulate the manner of its exercise and to confer on the petitioner the privilege, not before granted, of instituting his proceeding in any one of the superior courts of common law or equity in Westminster.

In this condition of the law regarding the petition of right, which is conceded to aliens as well as subjects, how can it be contended that the British government does not accord to citizens of the United States the right to prosecute claims against it in its courts? It is of no consequence that, *theoretically speaking, [*184 the permission of the Crown is necessary to the filing of the petition, because it is the duty of the King to grant it, and the right of the subject to demand it. And we find that it is never refused, except in very extraordinary cases, and this proves nothing against the existence of the right. It is easy to see that cases might arise, involving political considerations, in which it

would be eminently proper for the sovereign to withhold his permission; but Congress did not legislate with reference to such a state of things. It would be a severe rule of interpretation that would exclude all British subjects from the court of claims, because in a few sporadic cases, from motives of state policy, the petition of right was denied. And we cannot impute to the legislature an intention that would produce such a result, in the absence of an express declaration to that effect. Evidently Congress meant to confer on the British subject the right to sue in the court of claims under the act relating to captured and abandoned property, if in the ordinary course of the administration of justice in England, the law secures to the American citizen the right to prosecute his claim against the government in its courts. That the petition of right accomplishes this object, cannot admit of question. If the mode of proceeding to enforce it be formal and ceremonious, it is, nevertheless, a practical and efficient remedy for the invasion, by the sovereign power, of individual rights. Indeed, it is not less practical and efficient than a suit in the court of claims. And in one important particular the two proceedings are alike, for both end with the recovery of the judgments. After they are obtained, it depends in England on the Parliament and in this country on Congress, whether or not they shall be paid.

We all agree that O'Keefe had the right to bring his action in the Court of Claims, and the judgment of that court is, therefore, affirmed.

C. CASE, Receiver, and H. R. Hurlburd, Comptroller of the Currency, United States, *Appts.*

v.

A. TERRELL *et al.*, Creditors of the First National Bank of New Orleans.

(See S. C. 11 Wall. 199-203.)

Judgment against United States—court of claims—jurisdiction of—circuit court cannot render judgment for money against United States.

A money judgment cannot be rendered against the United States in any Federal court, except the court of claims.

The Comptroller of the Currency has no authority to submit the rights of the government to litigation in any court, without some provision of law authorizing him to do so.

If the government is liable on contract, the court of claims has jurisdiction, and no other court has.

Where the only substantial relief, asked by a bill in the circuit court or granted by the decree, is against the United States, the decree will be reversed, with directions to the court below to dismiss the bill.

[No. 105.]

Argued Mar. 7, 1871. Decided Apr. 3, 1871.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. Amos T. Akerman, Atty. Gen., **C. H. Hill,** *Asst. Atty. Gen.*, and **B. H. Bristow,** *Solicitor Gen.* for appellants:

Neither the Comptroller nor the receiver was authorized, by entering his own appearance or that of the United States, to give to the circuit court jurisdiction of the questions presented in this bill.

The circuit court of the United States for the district of Louisiana having no jurisdiction of this case, it results that the case must be reversed and remanded, with directions to dismiss.

Hornthall v. *The Collector*, 9 Wall. 560, 19 L. ed. 560; *Ins. Co.* v. *Ritchie*, 5 Wall. 541, 18 L. ed. 540.

Messrs. **J. A. Campbell, Henry B. Kelley,** and *D. G. Campbell*, for appellees.

*Mr. Justice **Miller** delivered the [*201 opinion of the court:

This is a suit in chancery, brought in the circuit court for the district of Louisiana, by certain creditors of the First National Bank of New Orleans, against Charles Case, receiver of said bank, H. R. Hurlburd, Comptroller of the Currency, Thomas P. May, and G. P. Beauregard, citizens of Louisiana.

The prayer for relief is that the debt of the United States against the bank be ascertained; that they, the United States, be charged with certain sums and required to account for them, and that a writ of injunction issue, restraining the Comptroller from making a dividend of the funds of the bank until this account be adjusted.

The final decree, besides making a general order on the Comptroller to distribute the funds of the bank in his hand ratably among its creditors, as the law directs, decrees against the United States in favor of the creditors of the bank, for the sum of $206,039.91, and that no claim of the United States shall have any priority in the distribution of the funds of the bank, except as to the bonds pledged to secure its circulation.

It is seen, from the bill and decree, that while the United States was not made a defendant, and while it is well settled that it could not be sued in the court below, the only relief prayed by the bill was relief against the United States, and the only decree rendered which was not merely formal, was a decree against the United States for over $200,000, and a further decree barring the right to assert her priority as a creditor of the bank in the distribution of its funds.

It is strange that in any court professing to administer the English system of equitable jurisprudence such a decree could be rendered against any one not made a party to the suit, and who had in no manner appeared in the case; and it is almost incredible that in any Federal court of this Union, except the court of claims, a moneyed judgment could be rendered against the United States.

The contrary has been so repeatedly decided that it is a waste of time to reargue the proposition, which will be found fully asserted in the recent case of *De Groot* v. *United States*, 5 Wall. 419, 18 L. ed. 700; *United States* v. *Eckford*, 6 Wall. 484, 18 L. ed. 920; *The Siren*, 7 Wall. 152, 19 L. ed. 129, and *The Davis*, 10 Wall. 15, 19 L. ed. 875. In the case of *United States* v. *Eckford* it was held that, although in a suit in which the United States was plaintiff, a set-off could be pleaded and allowed; yet no judgment could be rendered for a balance found to be due to the defendant by the ver-

dict of the jury, either in the circuit court, where the case was tried, or in the court of claims, where suit had been brought on the verdict. It is true, that in the last two cases cited above it was held that in a case in admiralty, where the *res* was rightfully before the court, and was taken into possession by its officer without the necessity of suit or process against the United States, it could be subjected to certain maritime liens, though the ownership was in the government. But in these cases the government came into court of its own volition to assert its claim to the property, 202*] *and could only do so on condition of recognizing the superior rights of others.

We are quite at a loss to know on what principle the jurisdiction in the present case is asserted, for the briefs for the appellees are devoted wholly to the merits of the controversy. But we must suppose that it is claimed on the ground that the receiver and comptroller, both of whom appeared and answered the bill, represent the United States, and can subject the government to the jurisdiction of the court.

As to the receiver, the claim, if any such be made, is not worth serious consideration. He represents the bank, its stockholders, its creditors, and does not in any sense represent the government.

Nor can such authority be conceded to the Comptroller of the Currency. It may very well admit of doubt whether it is within his competency to submit himself, in the exercise of duties specially confided to him by acts of Congress, to the control of the courts, and especially of those which can assert no such jurisdiction by reason of their territorial limits. We are not called upon here to decide this question. But we have no hesitation in holding that, however he may submit himself to the jurisdiction of those courts and consent to be governed in his official action by their decrees so far as they affect rights of parties who may come into court and be impleaded in the same suit, he has no authority to subject the United States to such jurisdiction, and to submit the rights of the government to litigation in any court, without some provision of law authorizing him to do so.

There is no analogy in the case before us to suits against officers of the customs or of the internal revenue to recover for illegal assessments or collections of taxes or duties, for they are suits against the officer for a tort or for money had and received, and when a judgment is rendered against him the government protects him by paying it, because the money was received for its use. But this is by virute of statute, and the mode of proceeding is pointed out and well defined, and the remedy is limited to cases where the mode is strictly pursued.

203*] *In the answer filed for the Comptroller in this case he says, or is made to say (for it is neither signed nor sworn to by him) that he "submits, on behalf of the United States, to the decision of the court the claims of the United States to priority of payment over the alleged claims of the creditors of said bank that are not disputed."

We have already said that the Comptroller has no power to subject the United States to such jurisdiction.

But he here seems only to submit the question of the government's claim to priority of payment, while the court not only decides against this priority, but renders a further decree requiring repayment of money had and received from the bank, and the payment of money which the United States is supposed to have assumed to pay in a contract with private parties not before the court. If the government is liable to the bank or its receiver or its creditors, for either of these claims, it would seem that it would be, in the first case, on an implied contract for money had and received; and in the second, on the express contract to pay as alleged. When such liability is denied, or payment is refused, the court of claims has jurisdiction, and no other court has. The United States cannot be subjected to litigation growing out of its relations to these banks in all the various courts in which their affairs may be the subject of judicial controversy.

But it is useless to pursue the matter further. The only substantial relief asked by the bill or granted by the decree, is against the United States. The manifest purpose of the proceeding was to subject the government to a tribunal which could rightfully exercise no jurisdiction in the premises. It was no party to the suit, nor did any party represent its interests who had authority to bind it.

The decree of the Circuit Court is reversed, with directions to that court to dismiss the bill.

NATHANIEL M. PAGE, Exr. of Samuel Miller, Deceased, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C. "*Miller* v. *U. S.*" 11 Wall. 268-331.)

Confederate citizen may sue out writ of error—seizure by serving notice—presumption of jurisdiction—when default warrants a decree—confiscation acts constitutional—in civil war, property may be confiscated—who are enemies.

In a proceeding under the acts of Congress of Aug. 6, 1861, and July 17, 1862, to confiscate shares of stock in corporations, the property of a confederate citizen, an inhabitant of the United States, the owner may sue out a writ of error to bring the case to this court.

The marshal's return to the warrant that he had seized the property, and that he then held it subject to the further order of the court, made the jurisdiction of the court over it complete.

A seizure of the stock "by serving a notice of said seizure personally upon the vice-president or president of a company," was a sufficient seizure.

The government may seize credits and corporation stocks of public enemies, in those states where no provision is made by state legislation for modes of seizure of such property.

In courts of limited jurisdiction, the presumption is that the court, having jurisdiction and having entered a judgment, did everything that was necessary to warrant the entry of the judgment.

In revenue cases, as in admiralty, default entered establishes facts averred in the libel or information, and warrants a decree of condemnation, if the information contains the necessary averments.

After a default in such cases, a trial by jury is unnecessary.

Said acts, authorizing confiscation, were a legitimate exercise of the war power, and are constitutional.

The right to confiscate exists in full force, when the war is domestic or civil.

In the case of a civil war, those are to be regarded and may be treated as enemies, who, though subjects or citizens of the lawful government, are residents of the territory under the power or control of the party resisting that government, and their property may lawfully be confiscated.

All the classes of persons described in the 5th and 6th sections of the act of 1862, were enemies within the laws and usages of war.

[No. 21.]

Argued Feb. 1, 2, 1870. Reargued Feb. 10, 1871. Decided Apr. 3, 1871.

IN ERROR to the Circuit Court of the United States for the Eastern District of Michigan.

The libel of information in this case was filed in the district court of the United States for the eastern district of Michigan, for the confiscation of certain real estate of the plaintiff in error. A decree having been entered in that court for the condemnation of said estate, the defendant sued out a writ of error to the circuit court, by which the said decree was affirmed; whereupon the defendant sued out this writ of error.

The case is stated in the opinion of the court.

Messrs. B. R. Curtis, **Wm. P. Wells,** and **Samuel T. Douglas,** for plaintiff in error:

1. There was no such seizure in this case as would give the court jurisdiction to proceed and condemn the property.

The return is as follows:

"I do further return that I seized said stock by serving a notice of said seizure personally upon M. L. Sykes, Jr., Vice President of the Michigan Southern & Northern Indiana Railroad, and President of the Detroit, Monroe, & Toledo Railroad. Charles Dickey, Marshal, etc."

This is a proceeding *in rem.* The acts of Congress, under which it is instituted, provide that property seized under these laws may be condemned in the district court, and that the proceedings shall be in conformity to admiralty or revenue cases, as nearly as may be. The libel in this case proceeds under both the acts, and alleges offenses under both, as grounds of forfeiture of the property. The district attorney in respect to the seizure, chose to conform to revenue cases, and endeavored, as is usual in revenue cases, to effect a seizure, before filing the libel. In these cases the preliminary seizure brings the *res* within reach of the process of court, if a good seizure is made. In the case at bar no seizure was made upon the warrant of arrest issued upon the filing of the libel, other than the previous seizure.

In admiralty or revenue proceedings *in rem,* seizure is made necessary to give the court jurisdiction.

The Ann, 9 Cranch, 289; *Taylor* v. *Carryl,* 20 How. 599, 15 L. ed. 1034; *The Washington,* 4 Blatchf. 101.

The acts of Congress expressly require seizure.

Act August, 1861, § 1; act July, 1862, § 5.

In proceedings *in rem,* in admiralty or revenue cases, the *res* must be actually or constructively within the possession of the court. Ben. Adm. Pr. § 434.

There must be an arrest of the *res.* Betts, Adm. Pr. 32; Adm. Rule 29 of Supreme Court.

Attachments *in rem* are served by actual levy upon the property. Dunl. Adm. Pr. 133, ch. IV. The Process.

The possession must be actual, open and visible.

See *Taylor* v. *Carryl, ubi supra,* and the other cases cited above; also *The Silver Spring,* 1 Spr. 551.

In two cases, Chief Justice Marshall has stated the rule as to notice in proceedings *in rem.* Where they are *in rem,* notice is served upon the thing itself.

The Mary, 9 Cranch, 144; *Mankin* v. *Chandler,* 2 Brock, 127; *Rose* v. *Himely,* 4 Cranch, 277.

The property consisted of stock in two corporations. No actual seizure of it could be made by the marshal.

See *Haley* v. *Reid,* 16 Ga. 437; *U. S.* v. *1756 Shares of Stock,* 5 Blatchf. 231.

In Michigan there is no law which authorizes the taking of stocks on mesne process. They may be taken on final process, but not in the way pursued in this case. 2 Comp. L. of Mich. 1213, 1214.

But if he had made a seizure upon the warrant, and there had been no valid seizure before the libel was filed, the court had no jurisdiction. *The Washington,* 4 Blatchf. 101.

There was no such hearing and proof in this case as are necessary to a valid decree.

The decree shows that the counsel for the government treated the case as one of default.

We say, then, no valid default was entered. Adm. Rule of Supreme Court.

The record does not show that the court pronounced a default, nor was the libel adjudged to be taken *pro confesso.*

If a valid default had been entered, there should have been a hearing, and the government should have proved its case. Adm. Rule 29; *U. S.* v. *The Lion,* 1 Spr. 399.

If a hearing was necessary, what should the government have proved?

It should have proved the seizure, and a seizure made previous to the filing of the libel. The return by the marshal, of a seizure, upon the warrant, is not sufficient.

The Washington, 4 Blatchf. 101; *The Silver Spring,* 1 Spr. 551.

It should have proved some offense under the acts of Congress.

As the proceedings related to a seizure on land, the case is one of common law jurisdiction, and there should have been a trial by jury.

Union Ins. Co. v. *U. S.* 6 Wall. 760, 18 L. ed. 879; *Armstrong's Foundry,* 6 Wall. 766, 18 L. ed. 882; *U. S.* v. *Hart,* 6 Wall. 770, 18 L. ed. 914.

The acts of Congress in question were enacted in the exercise of the sovereignty of the government over the whole people of the United States, and not in the exercise of its rights as a belligerent under the law of nations. Hence, the acts are not valid, unless they are in conformity with the Constitution.

The 5th and 6th Amendments of the Constitution of the United States, contain restrictions upon legislative power. So far as they are material to this case, they are in the 5th Amendment, that no person shall be held to answer for a capital or otherwise infamous offense, save on indictment or presentment by a grand jury; that no person shall be deprived of his property, save by due process of law; and in the 6th Amendment, that in all criminal prosecutions, the accused shall be entitled to a speedy and public trial by an impartial jury, in the state or district where the offense was committed.

The proceedings now before you had for their object, in point of fact, to deprive a citizen of his property, of all his property; and to deprive him of it by reason of a criminal offense, defined and punished by death, fine or imprisonment, by force of the same act of July 17, 1862.

This is necessarily true only in point of fact. It may be that this legislation was founded on other provisions of the Constitution. The powers contained in the Constitution, which I suppose will be relied on here, as the sources of authority for this legislation, are the powers to declare and prosecute war, to subdue insurrection, and to make rules concerning captures on land and water. They are what have been termed the "war powers" of the government.

These war powers are, by the Constitution itself, not expressly restricted. They are restricted from the very designation and nature of the powers themselves which are granted. A power to prosecute war, granted in that great instrument, is a power to prosecute it according to the laws of nations, not in violation of the laws of nations.

It was laid down by this court in the case of *Brown* v. *U. S.* 8 Cranch, 110, that it is competent for Congress to capture and to confiscate the whole or any part of the property of enemies, under the laws of nations. But this has nothing to do with criminals who are enemies. They are permanent inhabitants of the enemy's country.

When Congress comes to penal legislation, it is not dealing with inhabitants of the enemy's country as such, or their property, because they are such inhabitants. It is dealing with certain overt acts, which have been done against the sovereignty of the United States, amounting to offenses defined and punished in the laws of the United States. Then Congress does legislate under the restrictions which are contained in these 5th and 6th Amendments.

Then Congress cannot require that any person should answer for a capital or otherwise infamous offense, without an indictment; or that he can be prosecuted criminally, except before an impartial jury in the state and district where the offense was committed, or that he can be deprived of his property without due process of law.

This act of July 17, 1862, is "An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes." So much of this act as undertakes to punish treason and Rebellion, and to seize and confiscate the property of rebels the court has to do with in these cases.

The 2d section of this act creates offenses which were unknown to the law of the United States before its date. The offense of "giving aid and comfort to the existing Rebellion" (12 Stat. at L. 590), it makes an offense, and provides for its punishment by imprisonment. Thus far Congress has been legislating by virtue of its municipal authority to create penal laws. Then follow the provisions which carry into effect that part of the title of the act which I have read, "to seize and confiscate the property of rebels," not of enemies. Then the act proceeds to define what is meant by rebels, namely: they who have committed treason; they who have given aid and comfort to the Rebellion, they, who, being, according to the 7th section, engaged in the Rebellion at a certain date, shall not return to their allegiance within sixty days after a proclamation to be issued by the President.

It is not confined to enemies; it is applicable to those persons, and to all those persons, who have done certain overt acts which are described and made punishable by the law.

The 6th clause of the 5th section says:

"The property of any person who, owning property in any loyal state or territory of the United States, or in the District of Columbia, shall hereafter assist and give aid and comfort to such Rebellion," is to be forfeited.

Captain Semmes was an inhabitant of Maryland, and never ceased to be so. He was never an enemy, within the meaning of the laws of nations, as this court has applied that word, for he was never an inhabitant of the rebel states. He was a traitor and a pirate under the statute law of the United States, but not an enemy.

Here is this section which forfeits the property of any person, no matter where he resides, who owns property in the District of Columbia, or any one of the loyal states, upon the ground that he has committed a crime defined and punished by this law. Is such a forfeiture as that, a forfeiture under the laws of nations? It is a forfeiture under this municipal law, and under this only.

Now look, if your Honors please, at the 7th section, and these are the two which are in question in these cases:

"That if any person within any state or territory of the United States other than those named as aforesaid" (that is, other than the loyal states).

"After the passage of this act, being engaged in armed rebellion against the government of the United States, or aiding or abetting such Rebellion, shall not, within sixty days after public warning and proclamation duly given and made by the President of the United States, cease to aid, counsel and abet such Rebellion, and return to his allegiance to the United States," all his estate shall be forfeited. This, as I have said of the other provision, is directed against all persons of whatever State they may be inhabitants, and without any regard whatever to the question whether they are enemies within the laws of nations and the decisions of this court or not.

This, then, is a law which begins by punishing treason, which advances to the definition of a new offense, namely: giving aid and comfort to the Rebellion; which punishes that by fine or imprisonment or both, at the discretion of the court; and then it proceeds further and inflicts the forfeiture of all property of all persons who give aid or comfort to the Rebellion; and why is not this last just as much a punishment as the fine which is mentioned in the 2d section that defines the offenses?

This argument is greatly strengthened by what followed the enactment of this law by Congress.

In the Joint Resolution explanatory of "An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes," is this clause:

"Nor shall any punishment or proceedings under said act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life."

A "forfeiture" of the estate of the "offender." What have these terms to do with the appropriation of enemies' property under the laws of nations? They are strictly and exclusively applicable to punishment for crime.

There has been before this court at a former term, the case of *Armstrong's Foundry*, 6 Wall. 766, 18 L. ed. 882. That was a proceeding against particular property which had been placed in an illegal predicament with the consent of the owner. Before the final judgment of forfeiture was rendered in this court, Armstrong was pardoned. It was declared by this court that even in that case, the intention of Congress was to forfeit the property as a punishment for an offense committed by the owner, in devoting his property to such a use; and that, therefore, a pardon which condoned all offenses, and this, amongst others, relieved the property from the claim of the government.

How much stronger is the case now before the court, where the proceeding is not against an offending thing, but against the property of a person because he has committed a crime.

That this offense of giving aid and comfort to the Rebellion is punished by this law by a fine of $5,000, imprisonment for five years, inability or disqualification to hold any office of honor or trust under the United States, and forfeiture of all property; that this is an infamous offense within the meaning of the Constitution, will hardly be denied. That this is a criminal prosecution within the meaning of the Constitution, if it be not legislation exclusively directed against enemies' property within the scope of the war power of the government, as I have endeavored to explain it, also cannot be denied. Here is a charge of crime, and here is a forfeiture of all property by reason of his guilt of that crime, to be enforced by this proceeding.

It is equally clear that this is not due process of law, within the meaning of the Constitution.

In the heat of the Revolutionary War, acts of confiscation were passed; *ex post facto* laws were passed; bills of attainder were passed, etc. But it was the very excesses into which our ancestors had run during that heated time, which caused the framers of the Constitution of the United States to insert restrictions into it, that no *ex post facto* law should be passed; that no bill of attainder should be passed; that no man should be deprived of his property save by due process of law.

Messrs. **Hoar** and *Akerman, Attys. Gen.*, and **B. H. Bristow**, for defendants in error, and **Geo. F. Edmunds**, for the purchasers of the property:

As a preliminary question we submit, that the plaintiff in error is not entitled to bring up the record, or to any standing in this court. The statute providing for the seizure of the property, in the prosecution of the war, did not proceed against the property of any particular rebel or enemy, but against the property of any and all enemies.

The suit was *in rem* against the property, and not *in personam* against the owner.

In accordance with the course of procedure in admiralty and revenue cases, the supposed claimant of the property need not have been named.

It is believed that no instance can be found before these, of an appeal or a writ of error being brought even, much less sustained, in a cause *in rem*, by any person who was not a claimant in the court below, except under the English Act of 1797 (38 Geo. III. ch. 38, § 2), which was enacted to give persons interested a right of appeal in prize cases, where they had not appeared and become parties, a privilege which, without the statute, they did not possess.

All the analogies of the law are perfect in support of this result. See proceedings in equity upon bills taken *pro confesso*.

Owner of land cited as terre-tenant in ejectment, and not appearing. *Connor* v. *Peugh's Lessee*, 18 How. 394, 15 L. ed. 432; Palmer's H. of L. Pr. 140.

Persons in interest attempting to intervene. *Payne* v. *Niles*, 20 How. 219, 15 L. ed. 895.

While it is no doubt true, in respect to the conclusiveness of a judgment *in rem*, that all the world are parties, and have an opportunity to assert their rights and to appeal, the only method of such security is by appearing and making claim in the cause *dum fervet lis*.

And it is no excuse to say one did not have notice in fact, and so could not appear. The law does and must, conclusively, impute notice to all persons.

If the proceedings are not absolutely void, the judgment is conclusive; and if they are void, the remedy for persons not before the court as a party is, not by writ of error, but by suit for his property.

The information alleges, in substance, that Samuel Miller was a public enemy; a rebel citizen, residing in the state of Virginia; that he was the owner of the shares of railroad stock named in the libel; that he employed and used the same in aid of the enemy; that owning this stock, situated in a loyal state, he had assisted and given aid to the Rebellion against the government.

The information also alleged that the property of Miller, proceeded against, was part of the capital stock (particularly describing it) of two corporations, created under the laws of, and located and existing in, the state of Michigan, and that the property was within the jurisdiction of the court.

It further alleged the facts recited as causes of confiscation in section 6 of the act of August, 1861. 12 Stat. at L. 319.

It then proceeded further to allege that various causes of seizure and confiscation provided by the act of July 17, 1862 (12 Stat. at L. 590, 591); and the proclamation of July 25 (12 Stat. at L. 1266); and the seizure of the property by the marshal, under the direction of the President, and his holding it for confiscation and to pray a decree of confiscation and forfeiture to the United States, with directions for the disposition of the property and proceeds, and for process, monition, etc., all in strict substantial analogy to the practice in admiralty and revenue cases, as directed by the act.

The information is sufficient.

The property was within the district where it was seized and proceeded against. The cor-

porations existed in Michigan alone. The stock could be transferred there only, on the books of the corporation, and on surrender of the outstanding certificates.

United States v. *Leroy*, 5 Blatchf.

Even in the case of simple debts, for all purposes of appropriation to the use of creditors, etc., the situs of the property is the residence of the debtor. Garnishment, foreign attachment, and trustee process, in such cases, have existed in one form or another, almost as long as any branch of jurisprudence.

2 Conk. Adm. Pr. 138 *et seq.*

The act of Congress of July 17, 1862, made it the duty of the executive department of the government to seize for the use of the nation all the estate and property, money, stock, credits and effects of the persons enumerated as among the public enemies of the United States.

The very word, stocks, which defines his interest, is used.

Such incorporeal interests, in whatever form they may exist, are the proper subjects of confiscation, and for such purposes they are within the jurisdiction and power of the sovereign. If the real source of the interest or right to the performance of an obligation is within the territory of the sovereign, it may be cut off and destroyed.

Cooper v. *Telfair*, 4 Dall. 14; *Ware* v. *Hylton*, 3 Dall. 199, and authorities cited; *Smith* v. *Maryland*, 6 Cranch, 286.

The power of the legislative and war making department to confiscate the property of enemies on land, cannot be questioned.

Brown v. *The U. S.* 8 Cranch, 110; *Mrs. Alexander's Cotton*, 2 Wall. 404,17 L. ed. 915; *Ware* v. *Hylton*, 3 Dall. 199; *Smith* v. *Maryland*, cited *ante*.

And in such cases the same power is the sole judge of the exercise of the right, as to the extent, mode, and manner.

The act of 1862 puts this species of property by name in the category of enemies' property, if owned under the circumstances stated in the information (and declared in the prize cases to be a case of war), that is, by a public enemy; and it requires in such case that it shall be seized and condemned as enemies' property, and become the property of the United States. § 7.

The proceedings were in all respects regular, whether the seizure be regarded either as municipal or belligerent.

1. As a municipal seizure, it was just like a revenue or neutrality case, a proceeding *in rem* against the property which was before the court; and the property, not the claimant, was the subject of the suit.

The Palmyra, 12 Wheat. 1; *United States* v. *Louisiana Vengeance*, 3 Dall. 297; *The Sarah*, 8 Wheat. 391.

It was a civil case.

United States v. *Louisiana Vengeance, supra; United States* v. *The Betsey*, 4 Cranch, 443.

On the filing of the information, the court took control of the property by its officer, in the only way possible; gave notice to all persons to appear in the regular course, and upon default of claimants, decree confiscation and sale, upon evidence of the only fact the plaintiff in error would have had a right to dispute had he appeared, *i. e.*, that he was a public enemy, and adhered to the Confederate States for if he did not, in due and formal manner, claim the property as his, he could not have been heard at all.

The proceedings after condemnation, the party has no right to question, for, by the decree itself, all his right ceased absolutely.

Ingraham v. *Dawson*, 20 How. 495, 15 L. ed. 989.

According to settled principles and practice no trial by jury was requisite or legally possible in a case *in rem*, where all claimants made default and were in contumacy, or left the property derelict.

Conk. Tr. 526; Ben. 249; Man. Ex. Pr. 143 *et seq.*; Betts Pr. 38; *The Mary*, 9 Cranch. 126.

But if this be an admiralty cause, then writ of error will not lie.

The San Pedro, 2 Wheat. 132.

Constructive notice, according to the lawful practice of a court is, to all intents and purposes, just as effectual as actual notice. It must be that or nothing.

The only redress where there is any, in cases of hardship, is an appeal to the discretion of the court, to open the default, not by writ of error.

The Mary, 9 Cranch, 126.

Nor can this court, upon a writ of error, which must be founded upon the record, consider in any case whether there was too little or no evidence at all before the court below.

Parsons v. *Bedford*, 3 Pet. 443; *Minor* v. *Tillotson*, 2 How. 392; *New Orleans* v. *Gaines*, 22 How. 141, 16 L. ed. 295; *Suydam* v. *Williamson*, 20 How. 427, 15 L. ed. 978.

But if it be material to fix with precision the legal nature of these proceedings, which we do not perceive, it is easy to show that this was in all respects a belligerent seizure, *jure belli*, and that neither the provisions of the Constitution, nor the rules regulating municipal seizures, have any intrinsic application to the case.

Proceedings *in rem* to forfeit property are independent of criminal proceedings to punish persons. It is not necessary that the owner should have been previously convicted of a crime in order to forfeit his property by a suit *in rem*. The property may be treated as hostile, although the owner has not been guilty of treason. If he be an alien owing no allegiance, or a citizen whose opinions or wishes are not proved to be hostile and yet situated in the enemy's country or his property used in aid of the enemy, it may be forfeited.

2 Sprague, 140; *The Venus*, 8 Cranch. 253; *Jecker* v. *Montgomery*, 18 How. 114, 15 L. ed. 312; 2 Court Claims Rep. Nott. & H. 529; *The Prize Cases*, 2 Black, 635, 17 L. ed. 459; *Mrs. Alexander's Cotton*, 2 Wall. 404, 17 L. ed. 915; *The Peterhoff*, 5 Wall. 60, 18 L. ed. 571; *The Grey Jacket*, 5 Wall. 369, 18 L. ed. 653; *The William Bagaley*, 5 Wall. 405, 18 L. ed. 588.

And this is true, although the war be a civil war. In civil war, this belligerent right of forfeiture of enemies' property may be superadded to the exercise of the rights of sovereignty. The sovereign may exercise one or both of these rights at his option, and the character of the act will determine in which capacity it is performed.

Rose v. *Himely*, 4 Cranch, 272; *The Prize Cases*, 2 Black, 673, 17 L. ed. 478.

The intention of Congress in enacting this statute is to be found in the law itself, taken as a whole and with all its parts. Its purpose was to suppress insurrection and carry the then existing war to a successful termination; first, by prescribing punishment for treason—an act of sovereignty; second, by the seizure and confiscation of the property of rebels, enemies—a belligerent act. The property to be seized and condemned is to be proceeded against as enemies' property, a term known only in statutes declaring and for the enforcement of belligerent rights, and in courts enforcing such statutes.

This act of Congress must be so construed as not to make the legislature guilty of an absurdity. If Congress had intended that portion of the act commencing with the 5th section as a punishment for treason, it would have made the forfeiture of the property mentioned in the 5th and 6th sections follow the conviction, as did the forfeiture of the $10,000 and freedom of the slaves provided for in the 1st section of the act.

That all the property of an enemy found within the country during a state of war may be seized and condemned as enemies' property is a proposition so well established that no argument is necessary to prove it.

Brown v. *The United States*, 8 Cranch, 110; *Ware* v. *Hylton*, 3 Dall. 227.

This right exists as well in civil war as in public war. Sir Alexander Cockburn, Lord Chief Justice of England, in his charge in the case of Col. Nelson and Lieut. Brand, who stood indicted for the alleged murder of George William Gordon and Samuel Clark, Oct. 23, 1865, at Morant bay, during the negro Rebellion in the Island of Jamaica, says: "A rebel in arms stood in the position of a public enemy and, therefore, you might kill him or refuse him quarter and deal with him in all respects as a public enemy."

How far this right shall be exercised is a question for the political department of the government to determine. The mitigation of the rigid rule of international law, giving the sovereign full right to take possession of and confiscate the property of the enemy wherever found, which the humane policy of modern times has introduced, may affect the exercise of this right, but cannot impair the right itself.

It was, therefore, competent for Congress to treat the property of the domestic enemies of the government as though it were the property of foreign enemies.

One of the purposes of the confiscation provisions of this act of Congress, is the support of the army. Now, the power to support armies is one of the enumerated powers of Congress, and that body is also clothed with authority to make all laws necessary and proper for carrying such power into execution. The confiscation of enemies' property was not the only means adopted for the accomplishment of the end proposed; but that it was a proper means within the meaning of that word as used in the clause of the Constitution referred to, seems clear, according to the exposition given thereof in the case of *McCulloch* v. *Maryland*, 4 Wheat. 413.

Mr. Justice Strong delivered the opinion of the court:

This was a proceeding under the acts of Congress of August 6, 1861, and July 17, 1862, to confiscate shares of stock in two corporations created by the state of Michigan. The stock had been seized by the marshal of the district acting indirectly under the orders of the President of the United States. The marshal made return to the district attorney that he had seized it, with all dividends, interest, and moneys due thereon, specifying in his return the stock certificates by which it was represented, and describing the mode of seizure to have been serving a notice thereof personally upon the vice-president of one company, and upon the president of the other. An information was then filed in the district court in the nature of a proceeding *in rem*, against the stock, averring it to be the property of Samuel Miller, of Amherst county, Virginia, a rebel citizen and inhabitant of the United States. The information further averred that the said Miller was one of the persons described in the several clauses of the 5th section of the act of 1862, and also that within the states of Virginia and South Carolina, after the passage of the act, being engaged in armed Rebellion against the government of the United States, and being engaged in aiding and abetting such armed Rebellion, he did not, within sixty days after the proclamation (mentioned in the 6th section) had been made by the President, cease to *aid, countenance and abet said Rebel- [*293 lion, and did not and would not return to his allegiance to the United States. Upon the information thus filed a warrant and monition were issued, commanding the marshal to hold the stocks and property thus described, the same having been by him duly seized, until the further order of the court touching the same, and to give notice as prescribed, that all persons having any interest in said property, or having anything to say why the same should not be condemned as enemies' property and sold, according to the prayer of the libel, might appear before the court at a time designated therein and make their allegations in that behalf. To this writ or monition the marshal returned as follows: "I hereby certify and return that I have seized and now hold all the property described in the within writ" (the stocks aforesaid) "and now hold the same subject to the future order of said court, and have given notice to all persons interested therein, by publication, as required in the within writ." The record then shows that on the day designated in the monition, after default of all persons had been duly entered, and after reading the depositions which had been taken on behalf of the United States, the shares of stock were condemned as forfeited and a writ of *venditioni exponas* was ordered, under which they were sold. After this Miller applied by petition to the district court, praying that the decree of condemnation might be opened and set aside, but the prayer of the petition was denied. The case was then removed to the circuit court by writ of error, and the decree having been affirmed, the second has been brought into this court for review.

We notice at the outset an objection urged against the competency of the plaintiff in error to sue out the writ which brings the case here, on the ground that he was not a claimant in

the district court, only to say that it is set at rest by the decision made in *McVeigh* v. *United States*, a case decided at this term (*ante*, 80).

Assuming, then, that the case is properly in 294*] this court, *and that the plaintiff in error has a right to be heard, we proceed to notice the errors assigned.

The first is that there was no such seizure of the stocks as gave the court jurisdiction to condemn them as forfeited, and to order their sale.

This was a fatal error, if the fact was as claimed. In revenue and admiralty cases a seizure is undoubtedly necessary to confer upon the court jurisdiction over the thing when the proceeding is *in rem*. In most such cases the *res* is movable personal property, capable of actual manucaption. Unless taken into actual possession by an officer of the court, it might be eloigned before a decree of condemnation could be made, and thus the decree would be ineffectual. It might come into the possession of another court, and thus there might arise a conflict of jurisdiction and decision, if actual seizure and retention of possession were not necessary to confer jurisdiction over the subject. But how can it be maintained there was no sufficient seizure in this case? The record shows one. The marshal returned to the warrant that he had seized the property, and that he then held it subject to the further order of the court. Why is not this conclusive? Can a sheriff's or marshal's return to a writ be contradicted by a plaintiff in error? It is true the return did not describe the mode of seizure, but neither the writ nor the law required that more than the fact should be stated. The return met all the exigencies of the writ. It cannot be presumed, in the face of the record, that an illegal seizure was made, or that some act was done that did not amount to a seizure. But it is said the warrant with monition did not require the marshal to seize; that it only commanded him to hold the stock, the same having been by him duly seized, until the further order of the court. Whether this was not an order to seize, as well as to hold after seizure, we need not determine. Confessedly, the object of the writ was to bring the property under the control of the court and keep it there, as well as to give notice to the world. These objects would have been fully accomplished if its direction had been nothing more than to hold the property subject to 295*] *the order of the court, and to give notice. The marshal had already seized the stock, and it remained in his possession. An order to seize property already in his hands would have been superfluous. All that was needed was that, having the property, he should hold it subject to the order of the court. Thus held by its officer, the jurisdiction was complete. But the writ was larger. It commanded him to hold the property, it having been duly seized; and he returned a seizure. The act of Congress does not require that proceedings in confiscation shall conform precisely to those in admiralty or revenue cases, but only "as near as may be." They must be adapted to the peculiarities of the case, following proceedings in admiralty and revenue so nearly as may be, consistently with the objects Congress had in view. Yet even in admiralty it cannot be doubted, if a warrant with a monition should command a marshal to hold goods already in his possession until the further order of the court touching the same, and he should return that he had seized them and that he held them as required, the jurisdiction of the court over them would be complete. To hold otherwise would be to sacrifice the spirit to the letter of form; the substance to the shadow.

It is insisted, however, that inasmuch as the return to the warrant is silent respecting the mode of seizure, we may look to the seizure made by the marshal under the executive order before the information was filed. That was made by direction of the district attorney, acting under authority of the President, and the marshal, in reporting his action, returned that he seized the stock "by serving a notice of said seizure personally upon the vice-president of one company, and upon the president of the other." It is assumed that the judicial seizure made under the judicial warrant was made in the same way, or that it was the same seizure, and it is argued that the action of the marshal did not amount to a seizure effectual to bring the property within the jurisdiction of the court. The first observation we have to make in regard to this is, that the plaintiff in error has no right to make any such assumption. It is justified by *nothing in the record. [*296 True, a seizure under order of the President was necessary to warrant the institution of judicial proceedings for confiscation, and it may be, therefore, a proper inquiry whether what the marshal did under the executive order amounted to such a seizure. But the marshal's return to the judicial warrant, and his report to the district attorney, speak of distinct transactions, occurring at different times and under different directions. Waiving this, however, and assuming that the manner of seizure spoken of in the return to the warrant and monition was the same as that described in the report to the district attorney, we are of opinion that the seizure was good and effective; sufficient to give the court jurisdiction over the property.

The act of Congress of July 17, 1862, made it the duty of the President to cause the seizure of all the estate, property, money, stocks, credits, and effects of the persons described, and in order to secure the condemnation and sale of such property, after its seizure, directed judicial proceedings, *in rem*, to be instituted. It contemplated that every kind of property mentioned could be seized effectually in some mode. It had in view not only tangible property, but that which is in action. It named stocks and credits; but it gave no directions respecting the mode of seizure. It is, therefore, a fair conclusion that the mode was intended to be such as is adapted to the nature of the property directed to be seized, and in use in courts of revenue and admiralty. The modes of seizure must vary. Lands cannot be seized as movable chattels may. Actual manucaption cannot be taken of stocks and credits. But it does not follow from this that they are incapable of being seized, within the meaning of the act of Congress. Seizure may be either actual or constructive. It does not always involve taking into manual possession. Even in case of chattels movable, taking part of the goods in a house, under a fi. fa., in the name of the whole, is a good seizure of all. *Scott* v. *Scholey*, 8

East, 474. An assertion of control, with a present power and intent to exercise it, is suffi-
297*] cient. *We are told there is no statute in Michigan that authorizes the service of mesne process upon a corporation for the attachment of its stock. Be it so. That does not show that stocks cannot be seized or attached when Congress orders a seizure. Federal officers and Federal courts are not dependent upon state legislation for power to lay hold of property. Can it be that the government may seize credits and corporation stocks of public enemies in those states where provision is made by state legislation for modes of seizure of such property, but may not seize similar property of the same enemies in other states where there are no such statutes? There is, however, such a thing as seizure of corporation stocks in Michigan on final process, effected by service of a copy of the writ on an officer of the corporation, and similar modes of seizure are in use in most if not in all the states. Garnishment almost everywhere exists. What is that but substantial attachment? It arrests the property in the hands of the garnishee, interferes with the owner's or creditor's control over it, subjects it to the judgment of the court and, therefore, has the effect of a seizure. In all cases where the garnishee is a debtor, or where the garnishment is of stocks, it is effected by serving notice upon the debtor, or corporation. A corporation holds its stock, as a quasi trustee, for its stockholders. The service of an attachment, though it is but a notice, binds the debt or the stock in the hands of the garnishee, from the time of the service, and thenceforward it is potentially in "*gremio legis*." The statute declares that proceedings to confiscate shall conform as nearly as may be, to proceedings in admiralty or revenue cases. Now, it is legitimate in certain proceedings in courts of admiralty to attach credits and effects of such an intangible nature that they cannot be taken into actual possession by the marshal, and the mode of attachment is by notice, dependent upon no statutory enactment. *Manro* v. *Almeida*, 10 Wheat. 492, 493. In that case, reference was made approvingly to Clerke's Praxis, By Hall, tit. 32, p. 70, where it appears that it is consistent with
298*] *the practice of the admiralty, in cases where there is no property which the officer can attach by manucaption, to attach goods or credits in the hands of third persons, by means of the simple service of a notice. The language of this court was that, "as goods and credits, in the hands of a third person, wherever situated, may be attached by notice, there cannot be a reason assigned why the goods themselves, if accessible, should not be actually attached; and although it is very clear that the process of attaching by notice seems given as the alternative when the officer cannot have access to the goods themselves, yet all this may be confided to the discretion of the judge who orders the process." *Vide*, also, Conk. Adm. Pr. 478; *Smith* v. *Miln*, Abb. Adm. 373; and our Admiralty Rules, 2, and 37. These are, indeed proceedings to compel appearance, but they are, nevertheless, attachments or seizures, bring the subject seized within control of the court and, what is of primary importance, they show that, in admiralty practice, rights in action, things intangible, as stocks and credits, are attached by notice to the debtor or holder, without aid of any statute.

It was in this mode, known to the courts, and dependent on no statute, that the marshal seized the stock of the plaintiff in error. It is impossible for us to hold that his act was no sufficient seizure.

A single observation more upon this part of the case. The 8th and the 14th sections of the act of 1862 empowered the courts to make orders and decrees, to issue process, and do all other things necessary to fitly and efficiently carry out the purposes of the act, which were to seize and confiscate (*inter alia*) stocks and credits. Under this authority the court might have made an order, had it been necessary, prescribing as the mode of seizure precisely what the marshal did. And, if so, it would be difficult to maintain that, in proceeding to adjudicate upon the stocks, there was not a recognition of the marshal's action, as a valid seizure, equivalent to an antecedent order thus to seize. The decree expressly declared that the stocks had been seized.

*The second assignment of error is [*299 that there was no such hearing and proof in the case as was necessary to a valid decree of condemnation. Whether this assignment is well made must be determined by the record. That shows an information containing averments of all facts necessary to warrant a decree of condemnation. It shows a warrant and monition return of seizure and publication of notice, and a decree setting forth that the warrant of confiscation and monition having been duly made, and the default of all persons having been duly entered, it was thereupon, on motion of the district attorney, and on reading and filing the deposition taken on behalf of the United States, ordered, sentenced, and decreed by the court that the shares of stock standing in the name of Samuel Miller on the books of the companies, and belonging to him, which had been before seized by the marshal in this proceeding, be condemned as forfeited to the United States. Thus it appears a default was duly entered to a monition, founded on an information averring all necessary facts; that the decree was entered on monition, after default, and after reading depositions taken on behalf of the United States.

But it is insisted that the district court did not find that the stocks belonged to a person engaged in the Rebellion, or who had given aid or comfort thereto, which, it is said, are made necessary findings by the 7th section of the act, before a decree of condemnation can be entered.

This is not an objection to the jurisdiction of the court. We have already shown that that was complete. It is an objection to the regularity of proceeding, and it assumes that the record must show affirmatively there was no irregularity. It presumes, therefore, against the record. The general rule, however, is, that in courts of record all things are presumed to have been rightly done. Broome, Leg. Max. 428. In courts of limited jurisdiction, indeed, there is a presumption against jurisdiction, but when that appears they are entitled to the same presumptions in favor of their action as other courts are. *The district and circuit [*300 courts are of limited jurisdiction, but they are not inferior courts, and they are, therefore, entitled to the same presumptions in their

favor. Those presumptions are that the court, having jurisdiction, and having entered a judgment, did everything that was necessary to warrant its entry of the judgment. Undoubtedly the contrary may be shown in a court of error, but the burden of showing it is upon him who alleges error. The legal intendment is against him. This doctrine is abundantly sustained by the authorities. Thus, in *R. Co.* v. *Stimpson*, 14 Pet. 458, which was a patent case, Judge Story said: "It is a presumption of law that all public officers perform their official duties until the contrary is proved. And when," said he, "an act is to be done, or patent granted, upon evidence and proofs to be laid before a public officer, upon which he is to decide, the fact that he has done the act, or granted the patent, is prima facie evidence that the proofs have been regularly made and were satisfactory. It is not, then, necessary for the patent to contain any recitals that the prerequisites to the grant of it have been duly complied with, for the law makes the presumption." And in *Grignon* v. *Astor*, 2 How. 339, which related to a proceeding *in rem*, and where the order of sale did not set out the facts which, under the law, must have existed before a sale could be decreed, Mr. Justice Baldwin said: "The record of the county court shows that there was a petition representing some facts by the administrator, who prayed an order of sale; that the court took those facts which were alleged in the petition into consideration, and for these and divers other good reasons, ordered that he be empowered to sell. It did then appear to the court that there were facts and reasons before them that brought their power into action, and that it was exercised by granting the prayer of the petitioner, and the decree of the court does not specify the facts and reasons, or refer to the evidence on which they were made to appear to the judicial eye; they must have **301***] been, and the law presumes *that they were, such as to justify this action." So in *Erwin* v. *Lowry*, 7 How. 181, Mr. Justice Catron, in delivering the judgment of the court, said: "We hold that, wherever a judgment is given by a court having jurisdiction of the parties and of the subject-matter, the exercise of jurisdiction warrants the presumption in favor of a purchaser; that the facts, which were necessary to be proved to confer jurisdiction, were found."

It is not, however, necessary to invoke the maxim, "*Omnia presumunter rite acta esse*," in support of this record. It appears, affirmatively, that all the facts were found or established which, under the act of Congress, were essential to justify the judgment. It has been observed that the information set out that the stocks belonged to Samuel Miller, and that he was a person engaged in the Rebellion, who had given aid or comfort thereto; the monition was duly made, and that there was a default of all persons to appear and claim or show cause why the property should not be condemned as enemy's property. The default appears to have been duly entered. Were this, then, a proceeding according to the forms of a common-law action, the facts averred by the information would be considered as established or confessed, and everything found necessary for a judgment. The effect of a defualt to appear in an admiralty or revenue proceeding is ordinarily the same as in the other actions at law. It is a virtual confession. In Benedict's Admiralty, 2d ed. § 452, the practice in proceedings *in rem* is stated to be, if no one appears in response to the proclamation for all persons having anything to say why the property should not be condemned to come forward and make their allegations in that behalf, that, on motion of the libelant's proctor, the defaults are entered and a decree of condemnation and sale is made on a brief statement by the proctor of the cause of action. When the libelant's claim may not cover the whole value of the property, there is a subsequent hearing to ascertain the amount to which the libelant is entitled, but the decree of condemnation and sale is entered on the default alone. So in § 454 the same *author [**302** says: "In cases of seizure, when no one appears, the decree of condemnation is absolute, the only question being whether the property be forfeited or not. In such cases it is usual for the district attorney, on his motion for condemnation, to state briefly the substance of the libel and the cause of forfeiture." In *U. S.* v. *The Lion*, 1 Sprague, 399, Judge Sprague admitted that in some cases condemnation followed default of necessity without a hearing, though, in the case then before him, he held that some hearing was necessary, because the act of Congress under which the forfeiture was then sought (that of fishing vessels for violations of law in obtaining fishing bounties) provided that after default the court should proceed to hear and determine the cause according to law. The act under which these proceedings have been taken makes no such requisition; and even in *U. S.* v. *Lion*, Judge Sprague said, to what extent there must be a hearing must depend upon the circumstances of the case. The court, said he, will at least examine the allegations of the libel to see if they are sufficient in law, and the return of the marshal, and such affidavit or affidavits as the district attorney shall submit. He added that a wilful omission by the owners to answer might, of itself, satisfy the court that a forfeiture should be decreed. This, in a case where the statute required a hearing after default. In the present case, though governed by no such requirement, the court did examine the depositions, and then, on motion of the district attorney condemned the property. We have said the acts of 1861 and 1862 do not require any hearing after a default has been duly entered, as did the acts relative to forfeitures for violations of law respecting fishing bounties. It has been suggested, however, the act of 1789 directs that, in admiralty proceedings, there shall be a hearing after default. But there is no warrant for the suggestion. The act of 1789 contains no such provision. Neither the 19th section, nor any other part of the act, can be construed as making any such requirement. No change is made in the usual course of admiralty proceedings.

*There is no essential difference be- [***303** tween the forms of proceeding or the practice in revenue cases and those in admiralty, except where there are disputed facts. The former are described in Manning's Exchequer Practice, vol. 1, ch. 1, Information *in rem*. There it appears that, though generally there is one proclamation to call in claimants, then an appraisement.

and a second proclamation inviting bidders for more than the appraisement, many condemnations appear in the old records upon a single proclamation. Default in the first is a default of claimants; default to the second is a default of bidders. P. 149. Throughout the chapter, condemnation by default is treated as in accordance with the practice of tne courts in such cases. In *Atty. Gen.* v. *Lade*, Parker, Rev. Cas. 57, may be found an entire record of a revenue proceeding *in rem* to forfeit gold and silver coin seized for attempted exportation out of the realm contrary to acts of Parliament. The record, after reciting the information, seizure, etc., proceeds as follows: "Whereupon, proclamation being made for his said Majesty, as the custom is, that if anyone would inform the court here why the said several pieces of gold and silver coin of this realm, and also the said several pieces of foreign gold coin, should not, for the reasons aforesaid, remain forfeited, he might come and he should be heard, and no one appearing to do this, it is adjudged by the barons here that the said several pieces of gold and silver coin of this realm, and also the said several pieces of foreign gold coin, do, for the reasons aforesaid, remain forfeited." This judgment, on review, was held to be regular, after the court had ordered precedents to be searched. It thus appears that in revenue cases, as in admiralty, default entered establishes the facts averred in the libel or information as effectively as they can be established on hearing, and warrants a decree of condemnation if the information contains the necessary averments. The second assignment of error cannot, therefore, be sustained.

The third assignment is that as the proceed-
304*] ings related to *seizure on land the case was one of common-law jurisdiction, and there should have been a trial by jury; and we are referred to *Union Ins. Co.* v. *U. S.* 6 Wall. 759, 18 L. ed. 879; *Armstrong's Foundry*, 6 Wall. 766, 18 L. ed. 882, and other kindred cases. But in this cause there was a default. After the default there was no fact to be ascertained. The province of a jury in suits at common law is to decide issues of fact. When there are no such issues there can be nothing for a jury to try. This assignment is, therefore, without merit. None of the cases cited go further than to hold that issues of fact, on the demand of either party, must be tried by jury.

It remains to consider the objection urged on behalf of the plaintiff in error that the acts of Congress under which these proceedings to confiscate the stock have been taken are not warranted by the Constitution, and that they are in conflict with some of its provisions. The objection starts with the assumption that the purpose of the acts was to punish offenses against the sovereignty of the United States, and that they are merely statutes against crimes. If this were a correct assumption; if the act of 1861, and the 5th, 6th and 7th sections of the act of July 17, 1862, were municipal regulations only, there would be force in the objection that Congress has disregarded the restrictions of the 5th and 6th Amendments of the Constitution. Those restrictions, so far as material to the argument, are, that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury; that no person shall be deprived of his property without due process of law, and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. But if the assumption of the plaintiff in error is not well made; if the statutes were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States; if, on the contrary, they are an exercise of *the war powers of the government, it is [*305 clear they are not affected by the restrictions imposed by the 5th and 6th Amendments. This we understand to have been conceded in the argument. The question, therefore, is, whether the action of Congress was a legitimate exercise of the war power. The Constitution confers upon Congress, expressly, power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is, and always has been, an undoubted belligerent right. If there were any uncertainty respecting the existence of such a right, it would be set at rest by the express grant of power to make rules respecting captures on land or water. It is argued that though there are no express constitutional restrictions upon the power of Congress to declare and prosecute war, or to make rules respecting captures on land and water, there are restrictions implied in the nature of the powers themselves. Hence it is said the power to prosecute war is only a power to prosecute it according to the law of nations; and a power to make rules respecting captures is a power to make such rules only as are within the laws of nations. Whether this is so or not we do not care to inquire, for it is not necessary to the present case. It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now what is that right, and why is it allowed? It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to *appropri- [*306
ate the property. *The Venus*, 8 Cranch. 253. In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government,

while at the same time it furnishes to that government means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation.

It is also to be observed that when the acts of 1861 and 1862 were passed, there was a state of war existing between the United States and the rebellious portions of the country. Whether its beginning was on the 27th or the 30th of April, 1861, or whether it was not until the act of Congress of July 13th of that year, is unimportant to this case, for both acts were passed after the existence of war was alike an actual and recognized fact. *Prize Cases*, 2 Black, 635, 17 L. ed. 459. War existing, the United States were invested with belligerent rights in addition to the sovereign powers previously held. Congress had then full power to provide for the seizure and confiscation of any property which the enemy or adherents of the enemy could use for the purpose of maintaining the war against the government. It is true the war was not between two independent nations. But because a civil war, the government was not shorn of any of those rights that belong to belligerency. Mr. Wheaton, in his work on international law, § 296, asserts the doctrine to be that "the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as it respects neutral nations." It would be absurd 307*] to hold that, *while in a foreign war enemy's property may be captured and confiscated as a means of bringing the struggle to a successful completion, in a civil war of equal dimensions, requiring quite as urgently the employment of all means to weaken the belligerent in arms against the government, the right to confiscate the property that may strengthen such belligerent does not exist. There is no such distinction to be made. Every reason for the allowance of a right to confiscate in case of foreign wars exists in full force when the war is domestic or civil. It is, however, unnecessary to pursue this branch of the subject further. In *The Amy Warwick*, 2 Sprague, 122, and in the *Prize Cases*, 2 Black, 673, 17 L. ed. 478, it was decided that in the War of the Rebellion the United States sustained the double character of a belligerent and a sovereign, and had the rights of both. *Rose* v. *Himely*, 4 Cranch, 272; *Cheriot* v. *Foussat*, 3 Binn. 252; *Dobree* v. *Napier*, 3 Scott, 225; *The Santissima Trinidad*, 7 Wheat. 306; *U. S.* v. *Palmer*, 3 Wheat. 635.

We come then, directly to the question whether the act of 1861, and the 5th, 6th and 7th sections of the act of 1862, were an exercise of this war power, the power of confiscation, or whether they must be regarded as mere municipal regulations for the punishment of crime. The answer to this question must be found in the nature of the statutes and of the proceedings directed under them. In *Rose* v. *Himely*, above cited Chief Justice Marshall, in delivering the opinion of the court, said: "But admitting a sovereign, who is endeavoring to reduce his revolted subjects to obedience, to possess both sovereign and belligerent rights, and to be capable of acting in either character, the manner in which he acts must determine the character of the act. If, as a legislator, he publishes a law ordaining punishment for certain offenses, which law is to be applied by courts, the nature of the law and of the proceedings under it will decide whether it is an exercise of belligerent rights or exclusively of his sovereign power; and whether *the court, [*308 in applying this law to particular cases, acts as a prize court or as a court enforcing municipal regulations."

Apply this test to the present case.

It is hardly contended that the act of 1861 was enacted in virtue of the sovereign rights of the government. It defined no crime. It imposed no penalty. It declared nothing unlawful. It was aimed exclusively at the seizure and confiscation of property used, or intended to be used, to aid, abet or promote the Rebellion, then a war, or to maintain the war against the Government. It treated the property as the guilty subject. It cannot be maintained that there is no power to seize property actually employed in furthering a war against the government, or intended to be thus employed. It is the act of 1862, the constitutionality of which has been principally assailed. That act had several purposes, as indicated in its title. As described, it was "An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes." The first four sections provided for the punishment of treason, inciting or engaging in rebellion or insurrection, or giving aid and comfort thereto. They are aimed at individual offenders, and they were, undoubtedly, an exercise of the sovereign, not the belligerent rights of the government. But when we come to the 5th and the following sections we find another purpose avowed, not punishing treason and rebellion, as described in the title, but that other purpose, described in the title, as "seizing and confiscating the property of rebels." The language is, "That to insure the speedy termination of the present Rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same, and the proceeds thereof, for the support of the Army of the United States." Then follows a description of six classes of persons, those referred to as the persons whose property should be liable to seizure. The 6th section describes still another class. Now, the avowed purpose of all this was, not to *reach any criminal personally, but "to [*309 insure the speedy termination of the Rebellion" then present, which was a war which Congress had recognized as a war, and which this court has decided was then a war. The purpose avowed, then, was legitimate, such as Congress, in the situation of the country, might constitutionally entertain, and the provisions made to carry out the purpose, *viz.*, confiscation, were legitimate, unless applied to others than enemies. It is argued, however, that the enactments were for the confiscation of property of rebels, designated as such, and that the law of nations allows confiscation only of enemy's property. But the argument overlooks the fact that the Rebellion then existing was a war. And, if

so, those engaged in it were public enemies. The statute referred exclusively to the Rebellion then in progress. Whatever may be true in regard to a Rebellion which does not rise to the magnitude of a war, it must be that when it has became a recognized war those who are engaged in it are to be regarded as enemies. And they are not the less such because they are also rebels. They are equally well designated as rebels or enemies. Regarded as *descriptio personarum*, the words "rebels" and "enemies" in such a state of things, are synonymous. And, if this is true, it is evident the statute, in denominating the war rebellion, and the persons whose property it attempts to confiscate rebels, may, at least, have intended to speak of a war and of public enemies. Were this all that could be said it would be enough, for when a statute will bear two constructions, one of which would be within the constitutional power of Congress to enforce, and the other a transgression of the power, that must be adopted which is consistent with the Constitution. It is always a presumption that the legislature acts within the scope of its authority. But there is much more in this case. It is impossible to read the entire act without observing a clear distinction between the first four sections, which look to the punishment of individual crime, and which were, therefore, enacted in virtue of the sovereign power, and the subsequent sections, which have in view a state of public war, and which direct 310*] *the seizure of the property of those who were in fact enemies, for the support of the armies of the country. The 9th, 10th, and 11th sections are, in this view, significant. They declared that all slaves of persons engaged in rebellion against the government of the United States, or who should in any way give aid and comfort thereto, escaping within our lines, or captured from such persons, or deserted by them, should be deemed captives of war, and forever free; that escaping slaves of such owners should not be delivered up, and that no person engaged in the military or naval service should, under any pretense whatever, surrender slaves to claimants. The act then goes on to provide for the employment of persons of African descent in the suppression of the Rebellion. Can it be that all this was municipal legislation; that it had no reference to the war power of the government; that it was not an attempt to enforce belligerent rights? We do not think so. We are not to strain the construction of an act of Congress in order to hold it unconstitutional.

It has been argued, however, that the provisions of the act for confiscation are not confined in their operation to the property of enemies, but that they are applicable to the property of persons not enemies within the laws of nations. If by this is meant that they direct the seizure and confiscation of property not confiscable under the laws of war, we cannot yield it to our assent. It may be conceded that the laws of war do not justify the seizure and confiscation of any private property except that of enemies. But who are to be regarded as enemies in a domestic or civil war? In case of a foreign war all who are inhabitants of the enemy's country, with rare exceptions, are enemies whose property is subject to confiscation: and it seems to have been taken for granted in this case that only those who during the war were inhabitants of the Confederate States were liable to have their property confiscated. Such a proposition cannot be maintained. It is not true, even in case of a foreign war. It is ever a presumption that inhabitants of an enemy's territory are enemies, even though they are not participants in *the war, though they [*311 are subjects of neutral states, or even subjects or citizens of the government prosecuting the war against the state within which they reside. But even in foreign wars persons may be enemies who are not inhabitants of the enemy's territory. The law of nations nowhere declare the contrary. And it would be strange if they did, for those not inhabitants of a foreign state may be more potent and dangerous foes than if they were actually residents of that state. By uniting themselves to the cause of a foreign enemy they cast in their lot with his, and they cannot be permitted to claim exemptions which the subjects of the enemy do not possess. Depriving them of their property is a blow against the hostile power quite as effective and tending quite as directly to weaken the belligerent with whom they act, as would be confiscating the property of a non-combatant resident. Clearly, therefore, those must be considered as public enemies and amenable to the laws of war as such, who, though subjects of a state in amity with the United States, are in the service of a state at war with them, and this not because they are inhabitants of such a state, but because of their hostile acts in the war. Even under municipal law this doctrine is recognized. Thus in *Vaughan's Case*, 2 Salk. 635, Lord Holt laid down the doctrines: "If the states (Dutch) be in alliance, and the French at war with us, and certain Dutchmen turn rebels to the states, and fight under the command of the French King, they are enemies to us, for the French subjection makes them French subjects in respect of all nations but their own." So, "If an Englishman assist the French, and fight against the King of Spain, our ally, this is an adherence to the King's enemies."

Still less is it true that the laws of nations have defined who, in the case of a civil war, are to be regarded and may be treated as enemies. Clearly, however, those must be considered such who, though subjects or citizens of the lawful government, are residents of the territory under the *power or control of the [*312 party resisting that government. Thus much may be gathered from the *Prize Cases*. And why are not all who act with that party? Have they not voluntarily subjected themselves to that party; identified themselves with it? And is it not as important to take from them the sinews of war, their property, as it is to confiscate the property of rebel enemies resident within the rebel territory? It is hard to conceive of any reason for confiscating the property of one class that does not equally justify confiscating the property of the other. We have already said that no recognized usage of nations excludes from the category of enemies those who act with or aid or abet and give comfort to enemies, whether foreign or domestic, though they may not be residents of enemy's territory. It is not without weight, that when the Constitution was formed its

framers had fresh in view what had been done during the Revolutionary War. Similar statutes for the confiscation of property of domestic enemies, of those who adhered to the British government, though not residents of Great Britain, were enacted in many of the states, and they have been judicially determined to have been justified by the laws of war. They show what was then understood to be confiscable property, and who were public enemies. At least they show the general understanding that aiders and abettors of the public enemy were themselves enemies, and hence that their property might lawfully be confiscated. It was with these facts fresh in memory, and with a full knowledge that such legislation had been common, almost universal, that the Constitution was adopted. It did prohibit *ex post facto* laws. It did prohibit bills of attainder. They had also been passed by the states. But it imposed no restriction upon the power to prosecute war or confiscate enemy's property. It seems to be a fair inference from the omission that it was intended the government should have the power of carrying on war as it had been carried on during the Revolution and, therefore, should have the right to confiscate as enemy's property, not only the property of foreign enemies, but also that of domestic, and of the aiders, 313*] *abettors and comforters of a public enemy. The framers of the Constitution guarded against excesses that had existed during the Revolutionary struggle. It is incredible that if such confiscations had not been contemplated as possible and legitimate, they would not have been expressly prohibited, or at least restricted. We are, therefore, of opinion that neither the act of 1861 nor that of 1862 is invalid, because other property than that of public enemies is directed to be confiscated. We do not understand the acts, or either of them, to be applicable to any other than the property of enemies. All the classes of persons described in the 5th and 6th sections of the act of 1862 were enemies within the laws and usages of war.

It is further objected on behalf of the plaintiff in error, that under the statute of 1862 the property of all enemies was not made liable to confiscation. From this it is inferred that whether persons were within the law or not depended not on their being enemies, but on certain overt criminal acts described and defined by the law. The fact asserted, namely, that all enemies were not within the purview of the enactment we may admit, but we dissent from the inference. Plainly, it was competent for Congress to determine how far it would exert belligerent rights, and it is quite too large a deduction from the fact that the property only of certain classes of enemies was directed to be confiscated, that it was not intended to confiscate the property of enemies at all. If it be true that all the persons described in the 5th, 6th, and 7th sections were enemies, as we have endeavored to show they were, it cannot matter by what name they were called, or how they were described. The express declaration of the 7th section was that their property should be condemned "as enemies' property," and become the property of the United States, to be disposed of as the court should decree, the proceeds being paid into the Treasury for the purposes described, to wit, the support of the army. It was, therefore, as enemies' property, and not as that of offenders against municipal law, that the statute directed its confiscation.

Upon the whole, then, we are of opinion the confiscation *acts are not unconstitu- [*314 tional, and we discover no error in the proceedings in this case.

Decree affirmed.

Mr. Justice **Field**, dissenting.

I am unable to agree with the majority of the court in the judgment just rendered in this case, and will state, with as much brevity as possible, the grounds of my disagreement.

The case was brought for the forfeiture of personal property belonging to the appellant, and is founded upon what is termed the confiscation act of July 17th, 1862. There is, it is true, a count in the libel upon the act of August 6th, 1861, but no reliance has been placed upon it to support the forfeiture. The case has proceeded upon the theory that the stock, alleged to have been seized by the marshal, was in Michigan, and had been there since it was issued, a period anterior to the Rebellion and, of course, to the passage of the act in question, a position inconsistent with any claim that the property had been subsequently purchased to be used, or had been used, in aiding, abetting or promoting the Rebellion. No further attention will, therefore, be given to that act.

I shall direct my attention, in the first place, to the validity of the legislation embodied in the act of July 17th, 1862, and then, assuming, that legislation to be valid and in accordance with the Constitution, shall consider whether the proceedings in the case are in conformity with its requirements.

The authority for the legislation in question must be found in what are termed the war powers of the government; which, so far as they touch upon the present subjects of inquiry, are the power to declare war, to suppress insurrection, and to make rules concerning captures on land and water; or, in what is termed the municipal power of the government to legislate for the punishment of offenses against the United States.

It has been held, that when the late Rebellion assumed the proportions of a territorial civil war, the inhabitants of the *Confederate [*315 States, and the inhabitants of the loyal states, became reciprocally enemies to each other, and that the inhabitants of the Confederate States engaged in the Rebellion, or giving aid and comfort thereto, were at the same time amenable to the municipal law as rebels. The correctness of this determination is not disputed. The question is, not as to the right of the United States to adopt either course against the inhabitants of the Confederate States engaged in the Rebellion; that is, the right to treat them as public enemies, and to apply to them all the harsh measures justified by the rules of war; or the right to prosecute them in the ordinary modes of criminal procedure for the punishment of treason; but what course has Congress, by its legislation, authorized? For it is evident that legislation founded upon the war powers of the government, and directed against the public enemies of the United States, is subject to different considerations and limitations from those

applicable to legislation founded upon the municipal power of the government and directed against criminals. Legislation in the former case is subject to no limitations, except such as are imposed by the law of nations in the conduct of war. Legislation in the latter case is subject to all the limitations prescribed by the Constitution for the protection of the citizen against hasty and indiscriminate accusation, and which insure to him, when accused, a speedy and public trial by a jury of his peers.

The war powers of the government have no express limitation in the Constitution, and the only limitation to which their exercise is subject is the law of nations. That limitation necessarily exists. When the United States became an independent nation, they became, to use the language of Chancellor Kent, "subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law." 1 Kent, Com. 1. And it is in the light of that law that the war powers of the government must be considered. The power to prosecute war **316***] *granted by the Constitution, as is well said by counsel, is a power to prosecute war according to the law of nations, and not in violation of that law. The power to make rules concerning captures on land and water is a power to make such rules as Congress may prescribe, subject to the condition that they are within the law of nations. There is a limit to the means of destruction which the government, in the prosecution of war, may use, and there is a limit to the subjects of capture and confiscation, which government may authorize, imposed by the law of nations, and is no less binding upon Congress than if the limitation were written in the Constitution.[1] The plain reason of this is that the rules and limitations prescribed by that law were in the contemplation of the parties who framed and the people who adopted the Constitution.

Whatever any independent civilized nation may do in the prosecution of war, according to the law of nations, Congress, under the Constitution, may authorize to be done, and nothing more.

Now, in *Brown* v. *U. S.* 8 Cranch, 122, Mr. Chief Justice Marshall, in delivering the opinion of the court, said that it was conceded that "war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found," and added that "the mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the **317***] right itself. That remains *undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will." The question presented for consideration in that case was whether enemy's property, found on land at the commencement of hostilities with Great Britain in 1812, could be seized and condemned as a necessary consequence of the declaration of war; and the decision of the court was that it could not be condemned without an act of Congress authorizing its confiscation. The language of the eminent Chief Justice is, perhaps, subject to some qualification, if it was intended to state as a rule of public law that all property of the enemy, whether on land or water, was subject to confiscation. Mr. Wheaton, who is authority on all questions of public law, says that by the modern usage of nations, which has acquired the force of law, "private property on land is exempt from confiscation, with the exception of such as may become booty in special cases, when taken from enemies in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory," and that "this exemption extends even to the case of an absolute and unqualified conquest of the enemy's country." Lawrences' ed. Law of Nat. p. 596. And Mr. Chief Justice Marshall, in the subsequent case of *U. S.* v. *Percheman*, 7 Pet. 86, observed that it was unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country, and that "the modern usage of nations, which has become law, would be violated; that sense of justice and right, which is acknowledged and felt by the whole civilized world, would be outraged if private property should be generally confiscated, and private rights annulled."

But assuming the severe rule laid down by the Chief Justice to be the true rule, it applies only to the property of enemies, and by enemies is meant permanent inhabitants of the enemy's country. It is their property alone which is the subject of seizure and confiscation by authority of Congress, legislating under the war powers. Their property is *liable, not [***318** by reason of any hostile disposition manifested by them or hostile acts committed, or any violations of the laws of the United States, but solely from the fact that they are inhabitants of the hostile country and thus, in law, are enemies.

If we turn now to the act of July 17, 1862, we find that its provisions are not directed against enemies at all, but against persons who have committed certain overt acts of treason. It does not purport in any part of it to deal with enemies. It declares in its title that its object is "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." The other purposes relate principally to slaves, their employment or colonization, and the power of the President to proclaim amnesty and pardon. They have no bearing upon the questions under consideration, and need not be further noticed. The 1st section of the act prescribes the punishment for treason thereafter committed. It punishes it with death, or, in the discretion of the court, with imprisonment for not less than five years and a fine of not less than $10,000; and it provides that the slaves of the party adjudged guilty, if any he have,

1.—Thus it is forbidden by the law of nations to use poisoned weapons, or to poison wells, springs, waters, or any kind of food intended for the enemy. "Any state or general," says Halleck, "who should resort to such means would be regarded as an enemy to the human race, and excluded from civilized society." So, also, it is forbidden to encourage the assassination of an enemy or his generals or leaders, or to put to death prisoners of war, except in case of absolute necessity; or to make slaves of them or to sell them into slavery; or to take the lives of the aged, disabled and infirm, or to maltreat their persons. The United States are not freed from these prohibitions because they are not inserted in the Constitution. Halleck's Intr. Law, chaps. XVI. and XVIII.

shall be declared free. The 2d section provides for the punishment of the offense of inciting, setting on foot, or engaging in any rebellion or insurrection against the authority of the United States or the laws thereof, or engaging in or giving aid and comfort to the rebellion then existing. The 3d section declares that parties guilty of either of the offenses thus described shall be forever incapable and disqualified to hold any office under the United States. The 4th section provides that the act shall not affect the prosecution, conviction, or punishment of persons guilty of treason before the passage of the act, unless such persons are convicted under the act itself.

Then follow the clauses which provide for the seizure and confiscation of the property of certain classes of persons, who may thereafter be guilty of certain overt acts of treason. They contain no directions whatever for the seizure 319*] of the property, *of enemies, but only of persons who may thereafter violate the provisions of the act. Among the classes designated are included persons who may thereafter hold any agency under the Confederate States or under any state composing the Confederacy, and persons owning property in any loyal state or territory of the United States or District of Columbia, who shall thereafter assist and give aid and comfort to the rebellion; persons who may or may not be enemies in the sense in which the term is used in the law of nations; that is, permanent inhabitants of the enemy's country. So through all the provisions of the act, there is not a single clause which indicates, in the slightest degree, that it was against public enemies its provisions were directed. They are applicable to all persons who may do certain acts, whether they be enemies or not within the meaning of the law of nations.

The only place in the act where the word "enemies" is used, is in the clause which provides that if it be found by the courts, before which proceedings are instituted, that the property seized belonged to a person engaged in the rebellion or who had given aid or comfort thereto, it should be condemned as enemies' property; that is, should be condemned in the same manner as if it were enemies' property. This clause does not provide that the property shall be condemned if found to be enemies' property, but that, when condemned, it shall be with the like effect as though it were such property.

It would seem clear, therefore, that the provisions of the act were not passed in the exercise of the war powers of the government, but in the exercise of the municipal power of the government to legislate for the punishment of offenses against the United States. It is the property of persons guilty of certain acts, wherever they may reside, in loyal or disloyal states, which the statute directs to be seized and confiscated. It is also for acts committed after the passage of the statute, except in one particular, corrected by the Joint Resolution of the two Houses, that the forfeiture is to be declared. If it had been the intention of the statute to con- 320*] fiscate *the property of enemies, its prospective character would have been entirely unnecessary, for whenever public war exists the right to order the confiscation of enemies' property, according to Mr. Chief Justice Marshall, exists with Congress.

That the legislation in question was directed, not against enemies, but against persons who might be guilty of certain designated public offenses, and that the forfeiture ordered was intended as a punishment for the offenses, is made further evident by what followed the passage of the act of Congress. After the bill was sent to the President it was ascertained that he was of opinion that it was unconstitutional in some of its features, and that he intended to veto it. His objections were that the restriction of the Constitution concerning forfeitures not extending beyond the life of the offender had been disregarded. To meet this objection, which had been communicated to members of the House of Representatives, where the bill originated, a Joint Resolution explanatory of the act was passed by the House and sent to the Senate. That body, being informed of the objections of the President, concurred in the Joint Resolution. It was then sent to the President and was received by him before the expiration of the ten days allowed him for the consideration of the original bill. He returned the bill and Resolution together to the House, where they originated, with a message, in which he stated that, considering the act and the Resolution explanatory of the act, as being substantially one, he had approved and signed both. That Joint Resolution declares that the provisions of the third clause of the 5th section of the act shall be so construed as not to apply to any act or acts done prior to its passage, "nor shall any punishment or proceedings under said act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life."

The terms here used, "forfeiture" of the estate of the "offender," have no application to the confiscation of enemies' property under the law of nations. They are, as justly observed by counsel, strictly and exclusively applicable to punishment *for crime. It was to [*321 meet the constitutional requirement that the punishment by forfeiture should not extend beyond the life of the offender that the Joint Resolution was passed. The President said to Congress: The act is penal, and does not conform to the requirement of the Constitution in the extent of punishment which it authorizes, and I cannot, therefore, sign it. Congress accepts his interpretation, and by its Joint Resolution directs a construction of the act in accordance with his views. And this construction, thus directed, is decisive, as it appears to me, of the character of the act. Indeed, it is difficult to conceive of any reason for the limitation of the forfeiture of an estate to the life of the owner, if such forfeiture was intended to apply only to the property of public enemies. *Bigelow* v. *Forrest*, 9 Wall. 350, 19 L. ed. 700; and *McVeigh* v. *U. S. ante*, 80.

The inquiry, then, arises, whether proceedings *in rem* for the confiscation of the property of parties charged to be guilty of certain overt acts of treason, can be maintained without their previous conviction for the alleged offenses. Such proceedings, according to Mr. Chief Justice Marshall, may be had for the condemnation of enemies' property when authorized by Congress. The proceedings in such cases are merely to authenticate the fact upon which, under the law of nations, the confiscation follows. But

here the inquiry is, whether, upon the assumption that a party is guilty of a particular public offense, his property may be seized, and upon proof of his guilt, or its assumption, upon his failure to appear upon publication of citation, condemnation may be decreed. The inquiry is prompted from the supposed analogy of these cases to proceedings *in rem* for the confiscation of property for offenses against the revenue laws, or the laws for the suppression of the slave trade. But in these cases, and in all cases where proceedings *in rem* are authorized for a disregard of some municipal or public law, the offense constituting the ground of condemnation inheres, as it were, in the thing itself. The **322*]** thing is the instrument *of wrong, and is forfeited by reason of the unlawful use made of it, or the unlawful condition in which it is placed. And generally the thing, thus subject to seizure, itself furnishes the evidence for its own condemnation. Thus, goods found smuggled, not having been subjected to the inspection of the officers of the customs, or paid the duties levied by law, prove of themselves nearly all that is desired to establish the right of the government to demand their confiscation. A ship entering the mouth of a blockaded port furnishes, by its position, evidence of its intention to break the blockade, and the decree of condemnation follows. A ship captured whilst engaged in the slave trade furnishes, in the use to which it was subjected, the material fact to be established for its forfeiture. In all these cases the proceeding is against the offending thing. And it is true that in these cases criminal proceedings will also lie against the smuggler, or slave trader, if arrested, and that the proceedings *in rem* are wholly independent of and unaffected by the criminal proceedings against the person. But in the two cases the proof is entirely different. In the one case, there must be proof that the thing proceeded against was subjected to some unlawful use, or was found in some unlawful condition. In the other case the personal guilt of the party must be established, and when condemnation is founded upon such guilt, it must be preceded by due conviction of the offender, according to the forms prescribed by the Constitution. "Confiscations of property," says Mr. Justice Sprague in *The Amy Warwick*, 2 Sprague, 150, "not for any use that has been made of it, which go not against an offending thing, but are inflicted for the personal delinquency of the owner, are punitive, and punishment should be inflicted only upon due conviction of personal guilt."

If we examine the cases found in the reports, where proceedings *in rem* have been sustained, we shall find the distinction here stated constantly observed. Indeed, were this not so, and proceedings *in rem* for the confiscation of prop- **323*]** erty *could be sustained, without any reference to the uses to which the property is applied, or the condition in which it is found, but whilst, so to speak, it is innocent and passive, and removed at a distance from the owner and the sphere of his action, on the ground of the personal guilt of the owner, all the safeguards provided by the Constitution for the protection of the citizen against punishment, without previous trial and conviction, and after being confronted by the witnesses against him, would be broken down and swept away.

There is no difference in the relation between the owner and his property and the government, when the owner is guilty of treason and when he is guilty of any other public offense. The same reason which would sustain the authority of the government to confiscate the property of a traitor would justify the confiscation of his property when guilty of any other offense. And it would sound strange to modern ears to hear that proceedings *in rem* to confiscate the property of the burglar, the highwayman or the murderer, were authorized, not as a consequence of their conviction upon regular criminal proceedings, but without such conviction, upon *ex parte* proof of their guilt, or upon the assumption of their guilt from their failure to appear to a citation, published in the vicinage of the property, or posted upon the doors of the adjoining court-house, and which they may never have seen. It seems to me that the reasoning which upholds the proceedings in this case, works a complete revolution in our criminal jurisprudence, and establishes the doctrine that proceedings for the punishment of crime against the person of the offender may be disregarded, and proceedings for such punishment be taken against his property alone; or that proceedings may be taken at the same time both against the person and the property, and thus a double punishment for the same offense be inflicted.

For these reasons I am of opinion that the legislation upon which it is sought to uphold the judgment in this case, it not warranted by the Constitution.

I proceed to consider whether, if that legislation be valid *and constitutional, the [***324** proceedings in the case are in conformity with its requirements.

The act of Congress requires the seizure of the property, the forfeiture of which is sought, to be made under directions of the President. This seizure is preliminary to the commencement of proceedings for the condemnation of the property. "After the same shall have been seized," says the statute, such proceedings shall be instituted. This preliminary executive seizure is essential to authorize the filing of a libel of information, and in that sense it is essential to give the court jurisdiction to proceed; but it does not of itself vest in the court, jurisdiction over the property. The President could discharge the property from the seizure without the permission of the court or invoking its action. The mere fact that the marshal is employed as the agent in making the seizure does not alter the case. He does not then act as an officer of the court under its process. Any other person might be selected by the President as his agent. In cases under the revenue laws the seizure is often made by the collector or some officer other than the marshal, and the same thing might be done here. The preliminary seizure, if the property be movable, only determines the court in which judicial proceedings shall be instituted. To give the court control over the property something more is essential. The property must be brought into the custody of the court, and this can only be done under the process of the court. The very theory upon which all proceedings *in rem* are sustained is, that jurisdiction of the court is acquired by taking the *res* into its custody. It is the seizure under judicial process; judicial seiz-

ure, as distinguished from any preliminary seizure in any other way, which gives the jurisdiction, and nothing else ever has been held to confer jurisdiction in this class of cases.

Now, in the case before us, there was not, in my judgment, any preliminary seizure of the property made by order of the Executive or through his officers or agents, or any subsequent seizure under judicial process. The proceeding was instituted for the forfeiture of 200 shares 325*] of the common *stock of the Michigan Southern & Northern Indiana Railroad Company, and 343 shares of the Detroit, Monroe, & Toledo Railroad Company, and the pretense of seizure consisted in a notice given by the marshal, previous to the suit, to the vice president of the first company and the president of the second company that he had seized the stock in question. The marshal returned that he made the alleged seizure by giving notice in this way. Neither the president of one company nor the vice president of the other company were in possession of the stock; nor were they the agents of the owner; nor was any possession ever taken of the property by the marshal, unless such notice had the power of transmitting the possession to him. To constitute a valid seizure of property as a basis for a proceeding *in rem*, the party previously in possession must be dispossessed and unable any longer to exercise dominion over the property, and such dominion must be transferred to the officer making the seizure. No other seizure than this will sustain proceedings *in rem*, according to the established doctrine in admiralty and revenue cases, unless a different mode of seizure is specially prescribed by statute. No other mode would conserve the principle of notice to the party whose property was to be affected, which is essential to the validity of all judicial proceedings. "It is a principle of natural justice, of universal obligation," says Chief Justice Marshall, "that before the rights of an individual be bound by judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally or by publication; where they are *in rem*, notice is served upon the thing itself. This is necessary notice to all those who have any interest in the thing, and is reasonable because it is necessary and because it is the part of common prudence for all those who have any interest in it to guard that interest by persons who are in a situation to protect it." *The Mary*, 9 Cranch, 144.

The doctrine that notice to the owner is given 326*] by seizure *of the thing, rests upon the presumption that the owners of property retain possession of it themselves, or place it in the care and management of persons who will represent them and communicate to them any proceedings taken against their interest in relation to it. In this case this doctrine is entirely disregarded. The notice given to the president of one company and the vice president of the other might, with equal propriety, have been given to any other strangers to the owner. How the marshal could get possession of a thing which he did not touch nor handle nor control, by giving notice to two individuals in Detroit, themselves having no control or possession of the property, passes my comprehension. Shares or stock in companies can only be seized in virtue of statutory provisions, which prescribe a mode of seizure equivalent to actual taking of possession. No such provisions existed in the law of Michigan, in which state the proceedings were had. The Attorney General, in his instructions to the district attorney for carrying out the act, directed that stocks should be seized according to the methods prescribed by the state law. As no such methods were prescribed by the law of Michigan, or especially prescribed by the court, the case was one for which no provision was made.

After the libel was filed there was no new attempt to make any other seizure of the property than the one previously made. The process of the court directed the marshal to hold the stock which he had seized, referring, evidently, to the preliminary seizure. The marshal returned that he had seized and held the property, referring, as I understand it, to such preliminary seizure.

But further, the act of Congress declares that the proceedings for the condemnation of the property seized shall conform, as nearly as may be, to proceedings in admiralty or revenue cases. Here the proceedings are against property on land and they must, therefore, conform, as nearly as possible, to proceedings in revenue cases. Now, the act of 1799 prescribes the proceedings in revenue cases, and provides that after default "the court shall proceed to hear *and [*327 determine the cause according to law." 1 Stat. at L. p. 695, § 89. And in the case of *The U. S.* v. *The Lion*, 1 Sprague, 400, Mr. Justice Sprague, whose great learning justly adds weight to his opinions, gave a construction to this clause. A default had been properly entered, and it was contended by the district attorney that condemnation followed of necessity, upon default, without a hearing, but the learned judge, citing the clause mentioned, said: "This makes it imperative that there shall be some hearing before a decree of forfeiture, but to what extent must depend upon the circumstances of the case. The court will, at least, examine the allegations of the libel to see if they are sufficient in law, and the return of the marshal and such affidavit or affidavits as the district attorney shall submit. Where it appears that the owners have had full notice of the proceedings, and ample opportunity to intervene, and have voluntarily declined to do so, slight additional evidence will be sufficient. Indeed, a wilful omission by the owners to answer and thereby make disclosure as to material facts within their knowledge, might, of itself, satisfy the court that a forfeiture should be decreed. But the court will require the prosecutor to introduce full proof of the allegations in the libel whenever the circumstances shall make it reasonable." It will hardly be pretended that the circumstances in this case did not render it reasonable that such full proof should be had and yet no such proof was had. The only proof offered was a doubtful admission of the claimant, and consisted of the *ex parte* deposition of a single witness to a conversation which he alleged he had had with the claimant in 1863 in Virginia.

But this is not all. The act of Congress of 1862 further provides, in prescribing the proceedings to be taken, that "if" the property seized "shall be found to have belonged to a

person engaged in Rebellion, or who has given aid or comfort thereto, the same shall be condemned." Evidently some finding of the court is here contemplated upon presentations of proofs, and it appears to me, was intended as 328*] *authority for the subsequent decree. as much so as the verdict of a jury is authority for the subsequent judgment, and that without such finding the decree cannot stand. The record discloses that no such finding was made, and that no decree even was entered, as required by the 29th Admiralty Rule, that the libel be taken *pro confesso*, so as to justify the assumption that its allegations were true.

As the act is highly penal in its nature, it would seem that, according to well received rules, it should be strictly construed, and a rigid compliance with its provisions exacted. But the very opposite course in the construction of the act appears to have been adopted by the majority of the court.

I am of opinion that the judgment of the court below should be reversed. I am authorized to say that Mr. Justice **Clifford** concurs with me in this opinion.

Mr. Justice **Davis**, dissenting:

I concur in the views taken by the majority of the court in its opinion respecting the constitutionality of the acts of Congress under review, but I dissent from the disposition which is made of the case, believing that there are errors in the record, entitling the plaintiff in error to have the judgment of the court below reversed. This is a proceeding *in rem*, and by the course of procedure in admiralty, and revenue cases, to which it is assimilated, is conducted differently from suits at common law, or in equity, where there is actual service of process on the person. But all cases in court, proceed on the idea of notice to the party whose property is to be affected. This is a fundamental principle, underlying the whole structure of judicial proceedings, regardless of the form they may assume in the particular court in which they may be instituted. In courts of admiralty, and for hearing revenue cases, seizure of the thing is regarded as equivalent to personal service, on the ground that the person whose property is seized, has intrusted it to the care of some one who has the power and whose duty it is to represent him and assert his claim. *Mankin* v. *Chandler*, 2 Brock. 127; *Rose* v. *Himely*, 4 Cranch, 277; *The Mary*, 9 Cranch, 144.

329*] *It can be readily seen that in case tangible property which is capable of actual possession is seized, the interests of the owner will be protected by the person in whose custody it is placed. But it is different with intangible property, such as stocks in corporations, which, in their very nature, are incapable of seizure as other property. This species of property does not require to be left in charge of any person for its security and preservation, and it is evidenced by certificates which are, presumptively, in the possession of the owner of the stock, wherever he may be. How, then, can it be said that the mere service of notice on the officers of the corporations in which these stocks were held, either gave notice to the owner of the property, or brought the *res* within the control of the court? In no sense had they the control of the property, or were they the agents of the owner, or bound to appear and defend his interests. There certainly did not exist between them the legal relation which raises the presumption in other cases, that the custodian of the property seized will appear and defend the owner's interests. In point of fact, it may happen that the officers of the corporation are in direct hostility to the interests of the stockholders, and in this particular case it is fairly to be inferred, that the possible thing did actually occur. It is therefore, very clear that the manner in which these stocks purport to have been seized, did not satisfy the requisites of a revenue seizure, nor convey any notice to Miller, or to anyone sustaining a fiduciary relation to him, of what was done. Nor was his condition improved by the publication of notice, because he lived in an insurgent state, and any attempt to communicate to him the contents of the publication was forbidden, and would, therefore, have been illegal.

But, it may be asked, is there no way in which this species of property can be made the subject of legal process?

The answer is that it can only be done by statute, which shall point ont the mode of proceeding. In such a case the principle of notice is preserved, for the owner is advised that his property can be condemned, and the manner of its condemnation, and naturally, in this condition of things, if it *were possible, he [*330 would delegate to some one the authority to look after his interests. But stocks cannot be seized, in the absence of any statutory provision on the subject, and the law has failed to make such provision. It is a *casus omissus*, undoubtedly, but it is not the province of this court to supply the omission. This difficulty was felt by the Attorney General, because, in his instructions to the district attorneys, he directs that stocks shall be seized according to the methods prescribed by the state laws.

But in Michigan, there is no law which authorizes the taking of stocks on *mesne process*, and I cannot see how the fact, that they may be taken on final process in that state, tends to support the argument that the method pursued in this case to seize the property in the first instance was proper and legal.

But apart from this view of the subject, which, in my opinion, is fatal to the recovery in this case, there is an irregularity in the proceedings, which should reverse the judgment and send the case back for a new hearing.

There are two acts of Congress relating to the condemnation of enemies' property—one was passed in 1861, and the other in 1862. They differ materially in regard to the grounds on which condemnation can be placed. Besides, the act of 1861 divides the proceeds with the informer, which is not the case under the act of 1862. The libel sets forth every ground of condemnation under both acts, while the decree, in condemning the property, does not find any fact by reason of which it could be forfeited to the United States at all. This, in itself, is sufficient to reverse the decree. But as the decree divides the proceeds with the former, the court must necessarily have found the property confiscable under the act of 1861, and yet if the evidence in the case, consisting of an affidavit, made in New York, of one John M. Thatcher (who, in some way not disclosed in the record, was able to get down to Virginia in 1863, hunt up Miller, and have a private conversation with

him) tends to prove anything, it is that the property was confiscable under the act of 331*] 1862. As this is a direct proceeding *to reverse the judgment, these irregularities are grounds of error.

For these reasons, in my opinion, the decree in this case should be reversed.

UNITED STATES, *Plff.*, *v.* JAMES TYNEN.

(See S. C. 11 Wall. 88-95.)

When statute is repealed by subsequent statute on same subject—repeal of statute, effect of in this court.

*1. When there are two acts of Congress on the same subject, and the last embraces all the provisions of the first and also new provisions, and imposes different or additional penalties, the latter act operates without any repealing clause as a repeal of the first.

Accordingly, the 13th section of the act of Congress of 1813, "for the regulation of seamen on board the public and private vessels of the United States," which defines certain offenses against the naturalization laws, and prescribes their punishment, was held to be repealed by the act of Congress of 1870, "To Amend the Naturalization Laws, and to Punish Crimes against the Same, and for Other Purposes," which declared, not only that the commission of the several acts mentioned in the 13th section of the law of 1813 should constitute a felony, but also that a great number of other acts of fraudulent character in connection with the naturalization of aliens, should constitute a similar offense, and made the infliction of a larger punishment for each offense discretionary with the court.

2. By the repeal of an act without any reservation of its penalties, all criminal proceedings taken under it fail. There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence.

[No. 120.]

Submitted Feb. 17, 1871. Decided Apr. 10, 1871:

ON a certification of division in opinion between the judges of the Circuit Court of the United States for the District of California.

This case arose upon an indictment in the court below against Tynen, the defendant. The judges of that court being divided in opinion as to the sufficiency of the indictment, certified the case to this court.

The case is fully stated in the opinion of the court.

*Headnotes by Mr. Justice FIELD.

Mr. **Amos T. Akerman,** *Atty. Gen.*, for the United States.

(No counsel appeared in this court for the defendant.)

Mr. Justice **Field** delivered the opinion of the court:

The defendant was indicted under the 13th section of the act of Congress of March 3, 1813, entitled "An Act for the Regulation of Seamen on Board the Public and Private Vessels of the United States." The general object of the act, as expressed in its title, was carried out in the first eleven sections. They declared that it should not be lawful, after the termination of the war then existing with Great Britain, to employ on board of any public or private vessel of the United States any person except citizens of the United States, or persons of color, natives of the United States; and they require naturalized citizens thus employed to produce to the commanders of public vessels or collectors of customs, as the case might be, a certified copy of the act by which they were naturalized, setting forth the naturalization and the date thereof. They also contained various clauses to give effect to these requirements; but at the same time declared that the provisions of the act should not preclude the employment, as seamen, of the subjects or citizens of any foreign nations which should not have been prohibited by treaty or special convention with the United States, employment on board of her public or private vessels, of native citizens of the United States, who had not become citizens or subjects of such nation.

The 12th section declares that no person living within the United States after the act takes effect shall be admitted to become a citizen who shall not, for the continued term of five years next preceding his admission, have resided within the United States, without being at any time absent therefrom.

Then follows the 13th section, upon which the indictment is found. That section declares to be felony, "To falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged or counterfeited, any certificate or evidence of citizenship referred to in the act, or to pass, *utter or use as true, any false, [*90 forged or counterfeited certificate of citizenship, or to make, sell or dispose of any certificate of citizenship, to any other person from whom it was originally issued, and to whom it may of

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NOTE.—*Cases certified on division of circuit court; jurisdiction of U. S. Supreme Court in; on what division should be*—see note to Webster v. Cooper. 13 L. ed. U. S. 325.

Effect of repeal of statute on pending actions.

"The effect of a repealing statute is to obliterate the prior law as completely from the records as if it had never passed, and it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law." Van Inwagen v. Chicago, 61 Ill. 31; Ray v. Goodwin, 4 Moore & P. 341; Dwarris on Stat. 676; Thorne v. San Francisco, 4 Cal. 165; *Ex parte* McCardle, 7 Wall. 514, 19 L. ed. 264; Town of Belvidere v. Warren R. Co. 34 N. J. L. 193; Musgrove v. V. & N. R. Co. 50 Miss. 677.

Where a statute imposing a penalty is amended by increasing the penalty, and the second act contains a proviso that it shall not apply to prosecutions under the first except to enlarge the penalty, the latter act repealed the former, and the latter act is an *ex post facto* law and unconstitutional; and prosecutions pending under the first act were defeated by the second. Wilson v. Ohio & M. R. Co. 64 Ill. 542, 16 Am. Rep. 565.

The unconditional repeal of a penal statute abrogates all rights which may have arisen under it. No right can be said to have accrued under the statute, unless before its repeal such right was carried into judgment. Gregory v. German B'k of Denver, 3 Colorado, 332, 25 Am. Rep. 760; Gaul v. Brown, 53 Me. 496; Curtis v. Leavitt, 15 N. Y. 152; Nichols v. Squire, 5 Pick. 168; Bay City R. Co. v. Austin, 21 Mich. 391; Norris v. Crocker, 13 How. 429, 13 L. ed. 210.

Pending judicial proceedings based upon a statute cannot proceed after its repeal. If it appears, even in the court of last resort, that pending the appeal a statute which was necessary to support the judgment of the lower court has been repealed the judgment will be reversed. State v. Daley, 29 Conn. 272; Gilleland v. Schuyler, 9 Kan. 569; McMinn v. Bliss, 31 Cal. 122; Atwell v. Grant, 11 Md. 104; Keller v. State, 12 Md. 323; Price v. Nesbitt. 30 Md. 263; Mayor of Annapolis v. Maryland, 30 Md. 112; Wade v. St. Mary's School, 43 Md. 178; Hartung v. People, 22 N. Y. 95; Shepard v. State,

right belong;" and prescribed as punishment for the offense, imprisonment for a period of not less than three nor more than five years, or a fine in a sum not less than $500 nor more than $1,000, at the discretion of the court.

The indictment charges the defendant with the second of the offenses here designated; that he did, wilfully, falsely, and feloniously pass, utter, and use as true, a false, forged, and counterfeited certificate of citizenship purporting to have been issued by one of the district courts of California, and setting forth with particularity a compliance with the several requirements of the law for the naturalization of aliens.

The indictment has not alleged what use was made of the forged certificate by the defendant, or any purpose for which it was uttered; and the defendant demurred. The several grounds of demurrer stated may be reduced to substantially one:

That the indictment does not charge that the certificate or evidence of naturalization was forged to accomplish any purpose contemplated by the act of Congress under which the indictment was found, or for any other unlawful purpose, or with intent to injure the United States, or any state, person, corporation or association.

Upon this demurrer the question arose, whether the indictment charged any offense against the laws of the United States, and whether it was necessary for the indictment to aver that the certificate, or evidence of citizenship mentioned in it, was produced to the commander of a public vessel of the United States, or to a collector of the customs, as provided in previous sections of the act, when naturalized citizens were employed as seamen on board of the public or private vessels of the United States. Upon these questions the judges of the circuit court were opposed in opinion.

A like opposition of opinion occurred between the judges of the circuit court for the southern district of New York, in a similar case which came before this court at the December term of 1868, but as the opposition arose upon a motion to quash the indictment, the case was dismissed for want of jurisdiction. *U. S.* v. *Rosenburgh*, 7 Wall. 380, 19 L. ed. 263. In the present case the questions presented have ceased to be material and, consequently, it has become un-
92*] necessary to determine them, *for, since they arose in the circuit court, Congress has passed a statute amending the naturalization laws, and prescribing certain punishments for their violation, which has worked a repeal of the provisions of the 13th section of the act of 1813. 2 Stat. at L. 809.[1] That statute, which was approved on the 14th of July, 1870, declares not only that the commission of the several acts mentioned in the 13th section of the law of 1813 shall constitute a felony, but that also a great number of other acts of fraudulent character in connection with the naturalization of aliens, shall constitute a similar offense, and has made the infliction of a larger punishment for each offense discretionary with the court. The act of 1813 imposes as punishment, either imprisonment or fine, at the discretion of the court. The act of 1870 authorizes either of these punishments, or both, in the like discretion of the court. The act of 1813 allows the imprisonment to run between three and five years, and the fine to extend between $500 and $1,000. The act of 1870 fixes the imprisonment between one and five years, and the fine between $300 and $1,000.

There is no express repeal of the 13th section of the act of 1813 declared by the act of 1870, and it is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject the rule is give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act. *Davies* v. *Fairbairn*, 3 How. 636; *Bartlett* v. *King*. 12 Mass. 537; *Com.* v. *Cooley*, 10 Pick. 37; *Pierpont* v. *Crouch*, 10 Cal. 315; *Norris* v. *Crocker*, 13 How. 429; Sedgw. Stat. Law, 126.

Now, between the provisions of the act of 1813 and the act of 1870 there is a clear repugnancy. The first act makes *the punishment for [*93 the offenses designated, imprisonment or fine. It provides that the punishment shall be one or the other, and in so doing declares that it shall not be both. The second act allows both punishments in the discretion of the court; it thus permits what the first law prohibits.

Again; the act of 1813 provides that the im-

1—"An Act to Amend the Naturalization Laws and to Punish Crimes Against the Same, and for Other Purposes," Approved July 14, 1870, 16 Stat. at L. 254.

1 Tex. App. 522; Hubbard v. State, 2 Tex. App. 506; Montgomery v. State, 2 Tex. App. 618; U. S. v. The Peggy, 1 Cranch, 103, 2 L. ed. 49.

If a statute, making an act committed criminal, is repealed before conviction therefor, such act cannot be punished. Wall v. State, 18 Tex. 682; State v. O'Connor, 13 La. Ann. 486; State v. Brewer, 22 La. Ann. 273; Keller v. State, 12 Md. 323; Mayor of Annapolis v. Maryland, 30 Md. 112.

When a right has arisen under a contract, or a transaction in the nature of a contract authorized by statute, has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. Steamship Co. v. Joliffe, 2 Wall. 450, 17 L. ed. 805; Rice v. R. Co. 1 Black, 358, 17 L. ed. 147; Struebel v. Milwaukee, 13 Wis. 67; Prusseaux v. Welch, 2 West. L. M. 209; Sinking Fund Com'rs v. Northern B'k, 1 Met. 174; Creighton v. Pragg, 21 Cal. 115; *Ex parte* Graham, 13 Rich. Law, 277.

person has a vested right in a particular remedy. Repeal of statute may withdraw remedy. Musgrove v. V. & N. R. Co. 50 Miss. 677; McMinn v. Bliss, 31 Cal. 122.

Repeal of statutes imposing penalties, extinguish the penalties, if belonging to the public, or generally if to private individuals. Heald v. State, 36 Me. 62; Carlisle v. State, 42 Ala. 523; Town of Belvidere v. Warren, 34 N. J. L. 193; Rood v. C. M. & St. P. R. W. Co. 43 Wis. 146; Norris v. Crocker, 13 How. 437, 13 L. ed. 210; Seymour v. McCormick, 16 How. 480, 14 L. ed. 1024; Bay City, etc., R. Co. v. Austin, 21 Mich. 390; Fisher v. N. Y. C. & H. R. R. Co. 46 N. Y. 656; Welch v. Wadsworth, 30 Conn. 149; Wood v. Kennedy, 19 Ind. 68.

Repeal of a statute giving a court jurisdiction deprives it of the right to pronounce judgment in a proceeding previously pending. Todd v. Landry, 5 Mart. 459, 12 Am. Dec. 479.

Statute repealing all divorce laws of a state ousts court of jurisdiction in pending divorce action. Grant v. Grant, 12 S. C. 29, 32 Am. Rep. 506.

prisonment, when imposed as a punishment, shall not be less than three years, and may be extended to five. The act of 1870 allows the imprisonment to be fixed at one year, and from that period upwards to five years. In this, also, it permits what the first act forbids.

Again; the act of 1813 declares that the fine, when imposed, shall not be less than $500. The act of 1870 allows the fine to be as low as $300, thus authorizing what the first act declares shall not be done.

When repugnant provisions like these exist between two acts, the latter act is held, according to all the authorities, to operate as a repeal of the first act, for the latter act expresses the will of the government as to the manner in which the offenses shall be subsequently treated.

One of the earliest cases on this subject is that of *Rex* v. *Cator*, reported in 3 Burrows, 2026. There were two English statutes against enticing and seducing artificers in the manufactures of the kingdom into foreign service. The penalty under the first statute was, for the first offense, a fine of £100 and three months' imprisonment; for the second offense, the fine was discretionary and imprisonment for twelve months. Under the second statute the penalty was, for the first offense, a fine of £500 and twelve months' imprisonment; for the second offense the fine was £1,000 and two years' imprisonment. The latter act, said Lord Mansfield, seems to be a repeal of the former act; it was made to supply the deficiencies of the former. Accordingly, the defendant, who had been convicted under both statutes, was sentenced under the last. In *Rex* v. *Davis*, 1 Leach (C. C.) 271, it appeared that there were two stat- **94*]** utes *against killing deer in an inclosed park. The first statute made the offense a felony punishable with death. The last statute punished the first offense with a fine, and made the second offense a felony; and the twelve judges were unanimously of opinion that the last statute amounted to a repeal of so much of the first as related to the offense of felony.

There are numerous cases in the modern reports to the same effect. We will cite only one, which was decided in this court, that of *Norris* v. *Crocker*, 13 How. 429. In that case the defendants were sued in an action of debt to recover the penalty of $500 upon the 4th section of the act of Congress of February, 1793 (1 Stat. at L. 302), respecting fugitives from justice and persons escaping from the service of their masters. That section provided that any person who should, knowingly and willingly, obstruct or hinder the claimant, his agent or attorney, in seizing or arresting the fugitive from labor, or should rescue him from such claimant, agent or attorney when arrested by the authority given by the act, or should harbor or conceal him, after notice that he was a fugitive from labor, should forfeit and pay for each of these offenses the sum of $500, to be recovered by the claimant in an action of debt.

Pending the action brought under this section against the defendants, Congress, in 1850 (9 Stat. at L. 462) passed an act amendatory of and supplementary to the act of February, 1793, the 7th section of which embraces the offenses specified in the act of 1793, and creates new offenses, and affixes to each a different punishment from that named in the old act, prescribing a fine not exceeding £1,000, and imprisonment not exceeding six months upon indictment and conviction of the offender, and declaring that the offender shall also forfeit and pay, by way of civil damages, to the party injured, the sum of $1,000 for each fugitive lost, to be recovered by action of debt. The act of 1850 contained no clause repealing, in terms, the act of 1793, and the counsel of the government contended that it only added cumulative *rem- [***95** edies, and was intended to give greater facilities to the master of the slave in securing the fugitive, and could not be construed to have a retrospective operation and wipe out liabilities incurred under the old act, and thus deprive the master of rights of action in suits pending, that had accrued to him; and that the court would not favor repeals by implication. But the court held unanimously, Mr. Justice Catron delivering the opinion, that the last act was plainly repugnant to the first, observing also that, as a general rule, it was "Not open to controversy, that when a new statute covers the whole subject of an old one, adds offenses, and prescribes different penalties for those enumerated in the old law, that the former statute is repealed by implication, as the provisions of both cannot stand together."

By the repeal of the 13th section of the act of 1813 all criminal proceedings taken under it fell. There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the act repealed. In *Norris* v. *Crocker* the court said that, as the plaintiff's right to recover in that case depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject. As said by Mr. Justice Taney, in another case: "The repeal of the law imposing the penalty is of itself a remission." *Md.* v. *R. Co.* 3 How. 534. In the case at bar, when the 13th section of the act of 1813 was repealed, there was no offense remaining for the court to punish in virtue of that section.

It follows that in this case no answer can be returned to the questions certified to us, but that the case must be remanded to the court below, with directions to dismiss the indictment.

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*THE CITY OF NEW ALBANY, *Appt.*, [***96**

v.

STEVENSON BURKE, John Phelps Putnam, Heman Ely, and Heman Ely, as Executor of C. Arthur Ely, Deceased.

(See S. C. 11 Wall. 96-109.)

Agreement between city and railroad company —statute of limitations applied to an equity action.

An arrangement by which a city having subscribed to the stock of a railroad company, and is-

NOTE.—*Statute of Limitations as applicable to equity cases*—see notes, 6 L. ed. U. S. 287, 42 L. ed. U. S. 711.

sued its bonds in part payment, purchased back of the company a part of such bonds so issued and canceled, its stock subscription, is within the power of the contracting parties and valid.

The Indiana statutory limitation of six years in relation to suits at law, applied to an equity action.

[No. 115.]

Argued Mar. 24, 1871. Decided Apr. 10, 1871.

APPEAL from the Circuit Court of the United States for the District of Indiana.

The bill in this case was filed in the court below by the appellees, to compel the payment to them, as judgment creditors, of a certain sum alleged to be due their judgment debtors from the appellants. A decree having been entered in favor of the complainants, the respondent took an appeal to this court.

The case is further stated by the court.

Messrs. **T. A. Hendricks,** *M. C. Kerr, O. B. Hord, A. W. Hendricks,* and *George B. Houk,* for appellant:

Upon the facts disclosed in the answer, and established by the evidence, the city of New Albany, appellant, is not indebted to the railroad company.

The subscription, conceding for argument that it was valid, and all liability arising out of it, was canceled and determined by valid compromise made by competent authority, in good faith and on a good and adequate consideration.

The railroad company has largely relied on the subscription of the city, for the cash means to carry on its enterprise. The subscription was payable, not in money but in long bonds, and the necessary cash means could be obtained only by sale of the bonds. Negotiable bonds, to the amount of $200,000, had already been executed by the city to the company. Seven only of these had been sold, but active efforts were being made to negotiate the remainder in the city of New York. In the meantime, suits were commenced in the Floyd circuit court to enjoin the collection of the bond tax, upon the ground that the subscription was invalid.

Before sales of the bonds could be effected in New York, information of the pendency of these suits had been received there and the effect was to cast such doubt upon their validity that it was impossible to sell them there or elsewhere, at any price, or at least without so ruinous a sacrifice that a sale could not be thought of.

Failing to effect sales of the bonds, the railroad company borrowed money, to meet pressing exigencies, from the Ohio Insurance Company in New Albany, pledging all the city bonds as collateral security.

This borrowed money fell due. The insurance company was demanding payment and threatening to sell the collaterals. The suits to enjoin the levying of a bond tax were still pending, and it was evident that a determination of them could not be reached without protracted litigation. The determination that was afterwards reached, Nov. 10, 1857, was obtained only through the compromise.

The railroad company had no available means of payment and it was obvious that, unless some new arrangement could be made, the entire issue of city bonds would be sacrificed without accomplishing any substantial relief to the company or its creditors.

Under these circumstances, the directors of the railroad company determined to make a representation of the condition of the company to the city council, with a view to the compromise afterwards agreed upon. Aug. 7, 1857, the common council passed an ordinance, authorizing and directing the mayor to make the compromise. The terms were that the railroad company should cancel the subscription, and surrender all the bonds and coupons issued, except the seven bonds that had been sold, and should consent to the repeal of all ordinances of the council, except that one relating to the subscription. In consideration of which, the city should assume and pay the $36,000 borrowed money to the insurance company, and also pay the costs in the suit pending to enjoin the bond tax, and also all attorney's fees in those cases.

The board of directors of the railroad company, by resolution, accepted the terms of compromise expressed in the ordinance and authorized the president of the company to carry the arrangement into execution.

The bonds at the time of this compromise had no market value. The whole $193,000 of them, outstanding in the hands of the railroad company or its pledgees, would not probably have sold for enough to satisfy the $36,000 for which they were pledged, and could not have been more advantageously disposed of.

There is no conflict in the testimony on this point.

Two objections are taken to the compromise. One, that the subscription having been made on petition of citizens, the common council had no power to annul or compromise it; the other, that the cancelation or compromise of the subscription was, *per se*, a fraud upon creditors of the railroad company.

As to this first objection—want of power—the case of *Bell* v. *R. Co.* 4 Wall, 598, 18 L. ed. 338, is relied on.

An inference of want of power in an Indiana city from the absence of it in a county board of police of Mississippi, is not a *sequitur*.

"The Constitution of the state (Indiana) authorizes the legislature to create corporations (municipal) and imposes no limits as to the power to be conferred on them." *Aurora* v. *West*, 9 Ind. 85.

"They shall have control of the finances of the city, and of all property, real and personal, belonging thereto."

1 G. & H. 222, § 35; *Brinkmeyer* v. *Evansville*, 29 Ind. 181.

Neither of the cases cited, nor any other that we have met with, holds that a bona fide compromise that is really beneficial to the fund and to creditors, is beyond the power of the corporation, or is to be arbitrarily held fraudulent and void.

Upon the showing of bill, answer, exhibits and evidence, the complainants have slept so long upon the rights they assert, that their laches alone would bar any claim to equitable relief.

This suit was commenced Jan. 29, 1868, and no reason is given why it was so long deferred.

The compromise between the city and the railroad company was consummated Sep. 8, 1857.

This was more than ten years before the filing of the bill.

Messrs. **A. G. Porter** *&* *Harrison* and *S. Burke*, in person, for appellees:

The alleged compromise is utterly null and void, and constitutes no defense to the action.

It is clearly void, upon the principle settled by this court in the case of *Bell* v. *R. Co. supra.* The principle there settled is, that the officers of a municipal corporation, authorized by special statute and vote of the people to subscribe for stock in a railroad company, have no power to compromise such subscription and abandon the enterprise.

The compromise was made, pending the suit to foreclose the mortgage and recover judgment on the bonds.

To redeem the eighty bonds pledged, the company gave up, besides the eighty bonds pledged, one hundred thirteen bonds of $1,000 each, that were not pledged, and canceled the city subscription for $200,000 more, thus giving up $393,000 in bonds and subscriptions, payable upon demand in bonds, to prevent eighty bonds being sold.

These facts are undisputed, and we think clearly establish the charge of fraud in fact.

The railroad company, at the time of the compromise, was embarrassed and unable to pay its debts without calling in its capital stock. The bonds and subscription of the city constituted a large part of its unpaid capital stock and nearly, if not all, its available means to pay its debts.

That such a compromise, made under such circumstances, is void, is well settled by repeated reported adjudications in this country and in England.

The capital stock of a moneyed corporation is a trust fund irrevocably pledged to the creditors of the corporation. *Curran* v. *Ark.* 15 How. 304; *Ogilvie* v. *Ins. Co.* 22 How. 380, 16 L. ed. 349; 2 Redf. Railw. 634; 1 Redf. Railw. 168, and cases cited; Ang. & Ames, Corp. 559; 27 L. & E. 572; 39 L. & E. 576; 20 Conn. 178; *Adler* v. *Brick Mfg. Co.* 13 Wis. 57; 48 Pa. St. 29; 46 Pa. St. 48; 16 Conn. 593; *Mann* v. *Pentz*, 2 Sandf. Ch. 257; *Nathan* v. *Whitlock*, 9 Paige, 152.

Mr. Justice **Strong** delivered the opinion of the court:

The complainants in the court below are equitable owners of the judgment recovered on the 14th day of November, 1857, in the circuit court of Floyd county, Indiana, against the New Albany & Sandusky City Junction Railroad Company, an insolvent corporation. The judgment was obtained in a suit brought by certain trustees, to foreclose a mortgage given by the company to secure the payment of one hundred and ten bonds of $1,000 each, and such proceedings were had in the suit that there was not only a decree of foreclosure and an order to sell the mortgaged property, but a personal judgment against the company. The mortgaged premises were sold under the order, and the proceeds of sale having proved insufficient to satisfy the judgment, an execution was issued for the residue, which was returned "Unsatisfied." Nothing further was done until January 29, 1868, when Stevenson Burke having purchased the interests of several of the equitable owners of the judgment, this bill was filed by him and the other equitable owners, whose interests he had not acquired, against the railroad company, the city of New Albany and others. It averred the ownership of the judgment by complainants, the failure of the company to put any portion of its railroad into operation, or to lay any part of the track thereof, and its having become insolvent about the 30th day of April, 1857.

It charged further that the company, having expended all its means, abandoned all further efforts to build the road, and that its road-bed and right of way had been sold. It also charged that since the year 1858, it had not kept up its organization or elected any new officers. The bill then proceeds to charge that the city of New Albany was indebted to the company in the sum of $393,000 besides interest, growing out of a subscription to its capital stock, made on the 19th day of November, 1853, in part payment of which, two hundred bonds of $1,000 each had been delivered to the company, and that the other defendants were indebted in smaller sums in a similar manner. The bill further charged that none of these bonds except seven had been negotiated by the company; but that, on the contrary, one hundred and ninety-seven of them had been returned to the city in pursuance of an illegal compromise as alleged, and that the city subscription to the stock had been canceled. The complainants, therefore, charged that the city still remained a debtor to the company, and they prayed relief; that such indebtedness might be ascertained, and that so much thereof as was necessary to satisfy the judgment might be decreed to be thus applied.

*To this bill the city of New Albany has [*98 set up several defenses. The first of these is, that the circuit court had no jurisdiction of the case, inasmuch as it was a creditor's bill, founded upon a judgment of a state court of Indiana. A second defense urged is, that under the laws of Indiana, a judgment creditor's suit to subject assets of an insolvent corporation to the payment of his judgment, will not lie; but that the remedy, both by common law and by the statute, is sequestration, and the appointment of a receiver. The defect of necessary parties is also alleged.

The other defenses set up go to the merits. They are: First, that the complainants are concluded by a decree in a suit brought in 1863, in the Floyd county circuit court, in which they, the railroad company, and William Lindley, were parties; second, that, upon the facts disclosed in the pleadings, the city was indebted to the company when the bill was filed; that the adjustment by the city and the company was, at the time it was made (Sep., 1857) a compromise made in good faith, by which the city ceased to be indebted to the company, and that the adjustment was effective and valid as against all persons; and third, that if the complainants had rights against the city and might have impeached the validity of an arrangement by which the city recovered its bonds and obtained a cancelation of its subscription, they have slept so long upon these rights, that a court of equity will not afford them relief.

We proceed to consider the last mentioned two of these defenses; for if they are sufficient, it will be unnecessary to say anything of the others.

Assuming that the subscription made by the city to the capital stock of the company in 1853, though undoubtedly invalid at first, became valid by the ratification ordinance adopted March 7, 1855; that thereby the city came under obligation to give its bonds to the company in payment for the stock, so far as they had not already been given, and we come directly to the question: What was the effect of the arrangement made in August and September, 1857? Here the situation of the parties at the time is of importance to be considered.

The railroad company had undertaken to build a railroad from New Albany to Sandusky City, and it had commenced the work, relying mainly upon the bonds of the city to raise the money necessary. It had, however, been disappointed. Suits had been commenced for injunctions to restrain the collection of a tax for paying the interest, and the consequence was that the bonds could not be sold without a ruinous sacrifice, if sold at all. These suits were still pending. Meanwhile the company had borrowed $36,000, pledging the bonds to the amount of $80,000 as collateral security. The loan had fallen due, and the holders were demanding payment, and threatening to sell the collaterals. The company was utterly unable to redeem the pledge. Its available means were completely exhausted. It could neither go on with its work nor in any manner relieve itself. According to the weight of the evidence, the bonds pledged, together with all the others still held by the company, would not have sold for enough to have paid the $36,000 borrowed.

103*] *Turning now to the condition of the city, it had ratified its invalid subscription with an irrevocable engagement on the part of the company that not more than $250,000 should be called for until the railroad should be completed and put in running order at least to its junction with the Ohio & Mississippi Railroad, and then only for the purpose of furnishing the road with depots, rolling stock, etc. It had paid its bonds to the extent of $200,000 on the subscription, and it was liable to be called upon for $50,000 more. For the remainder it was liable only upon a contingency that has never happened, and that never can happen. The consideration for its subscription, it is true, had not failed, though the motive that induced it, namely: the construction of the railroad, no longer existed. The credit of the bonds which it had issued was gone, and had it issued the remaining $50,000, they could not have been sold for more than $8,000 or $10,000. It was in these circumstances that the company applied to the city, stating its own helplessness, and it was then that the arrangement was made by which the city assumed to pay the debt of $36,000 due by the company, and sundry other moneys, and in consideration thereof obtained from the company one hundred and ninety-three bonds, which had not been negotiated, and a cancelation of the stock subscription. Was this transaction valid?

The bonds were negotiable instruments, payable to bearer in not less than ten and not more than twenty years and, of course, passing from hand to hand by delivery. Had the whole subscription been paid, it must have been with similar bonds. And the manifest design of the subscription was to create bonds for sale in the market as the convenience or the necessities of the railroad company might require. There was no restriction in the contract upon the power of disposition, and none at law or in equity, unless it be that the company could not part with the bonds in fraud of its stockholders or its creditors. And it had the right, which all other debtors had at the time, to make preferences among its creditors—to pay one rather than another. It is not to be disputed that, situated as the company was at the time *when the contract of August and [*104 September, 1857, was made, with the debt of $36,000 pressing upon it, and with no other means of relief, it might have sold the entire lot of two hundred and forty-three bonds which it held, or was entitled to call for, at the best price that could have been obtained, and might have applied the entire proceeds, had they been needed, to pay that single debt. Of this neither the stockholders nor the other creditors could have complained. What more has been done now? No doubt such a course would have involved an equal sacrifice to the company, and would, in the end, have been more disastrous to the city. Time has revealed that the bonds were worth more than they could have been sold for, but we are to look at the circumstances as they were when the transaction took place, in considering what was its nature and whether it was legal. But if a sale by the company at the market price, and an application of the whole proceeds to the payment of the $36,000 debt, would have been unimpeachable, why is it less so because the city became the purchaser? Beyond doubt, the city might lawfully buy its own bonds. Had the company sold to a stranger, and then the city become a purchaser from the stranger, it will not be contended that any creditor of the company could complain. And it can make no difference whether the purchase was made directly or indirectly from the first holder of the bonds, assuming that there was no fraud. The transaction, or the arrangement of August and September, 1857, was, in substance, plainly nothing more than a purchase, by the city, of its own bonds, some of which had been issued and others of which it was under obligations to issue at the call of the vendor. The price paid was $36,000, besides some thousands more which the purchaser undertook to pay. Looking at it in the light of subsequent events, it was no doubt an advantageous purchase for the city and, if the uncontradicted evidence is to be believed, it was deemed at the time an advantageous sale or arrangement for the company. Certainly it did not place the company in any worse position than it must have held had it not been made.

*It is, however, contended by the com- [*105 plainants. that the arrangement was fraudulent, both in law and in fact, and that neither the common council of the city nor the directors of the railroad company had power to make it. In support of the proposition, that the transaction was *ultra vires*, we are referred to *Bell*

v *R. R. Co.* 4 Wall. 598, 18 L. ed. 338, but that case is very unlike the present. There a popular vote, under legislative sanction, had instructed the police board to subscribe a defined amount, leaving to them no discretion. The police board were agents to carry out the popular will, with limited powers. It was not, therefore, for them to subscribe a less amount, or make any other contract, than the one they had been directed to make; and this court well said that a municipal corporation, like the board of police, could not modify or alter the stock subscription voted by the people in the absence of power from the legislature. The decision, however, was placed upon other grounds. But in the present case the common council were free to exercise their own discretion. They were under no obligation to subscribe at all, and they might take as little or as much stock as they pleased, not exceeding $600,000. Besides, as we have seen, the arrangement assailed by the complainants was not a modification of the subscription previously made, or a bonus given for a release. It was rather a purchase of the city debt. We think it was not beyond the power of the contracting parties.

And we are not able to perceive that it was fraudulent, either in law or in fact. It may well be doubted whether the complainants can be heard in alleging fraud. It is clear the arrangement made is binding upon the railroad company, through which, as well as against which, they claim. They can, therefore, have no standing in court, unless the arrangement was absolutely null for want of power in the parties to make it, or unless it was fraudulent as against them and, therefore, voidable at their suit. We have already seen that it was not a nullity, and the bill does not charge 106*] *that it was fraudulent. It avers that the arrangement and compromise and attempted cancelation of the subscription were entirely null and void, but it does not allege that they were fraudulently made. In urging fraud now the complainants are setting up a case not made by the pleadings. But it is not necessary to place our decision on this ground. No doubt the subscribed capital stock of a corporation is a fund held by it in trust for its creditors, as is also all its other property, and had the railroad company released, without equivalent consideration, or given it away, its action would have been fraudulent, and might have been set aside by a court of equity. But certainly it was in the power of the directors to apply the subscription on bonds taken in payment to the extinguishment of debts and, if thus applied in good faith, all being obtained for it that it was worth, no one has been wronged. It is, therefore, a question of fact to be determined by the evidence, whether the bonds and the balance of the city's subscription were thus applied. Upon this subject we have already remarked at considerable length. We may add the evidence is convincing that the contract between the city and the company was made in the utmost good faith, with no intention to wrong creditors of the latter: that it was at the time considered advantageous to the company, and it is not proved that all was not paid for the bonds issued and to be issued that they could have been sold for in the market.

We will not pursue this branch of the case further. Were it even conceded that the arrangement of August and September, 1857, might have been set aside at the instance of the creditors of the company, the laches of the complainants is fatal to their bill. This suit was not brought until the 29th day of January, 1868. The contract assailed was consummated September 8, 1857. It was not made in secret. There was no attempt at concealment. On the contrary, the ordinance of the city was published at the time. The insolvency of the company, as well as its abandonment of its work on the railroad, was known. It is asserted in complainants' bill. Injunction suits were then pending against the city. *The re- [*107 turn of *nulla bona* to the complainants' execution against the railroad company was made on the 1st of December, 1858. Then their right, if any they had, to attack the compromise as fraudulent was perfect. Yet they remained inactive more than nine years, and it was not until after a speculator had purchased a large part of the judgment that this bill was brought. An attempt has been made to excuse this long delay by the testimony of one of the complainants, that he had never heard of the compromise of the city's subscription until a time which was subsequent to the commencement of the suit. But he does not say that he had not full possession of the means of detecting the fraudulent arrangement, if it was fraudulent, or that there had been any concealment; and the possession of such means of knowledge is, in equity, the same as knowledge itself. *Farnam* v. *Brooks*, 9 Pick. 212; 2 Story, Eq. 1521. Moreover, the other evidence in the case is irreconcilable with this statement of the witness. He had attorneys who knew of the compromise from the first. He himself went to New Albany, in the spring of 1858, for the purpose of making a thorough examination of the affairs of the company, and another witness thinks he was then informed of the arrangement. There is not the slightest evidence that any other one of the complainants was not fully apprised of what had been done from the time of the transaction, and certainly they all had the fullest means of knowledge. No excuse is, therefore, shown for their long delay, and it is difficult to see why they are not barred by the rule in equity analogous to the statute of limitations. Upon this subject it is unnecessary to cite authorities. They are to be found in numbers in the decisions of this court, as well as elsewhere. It is not to be questioned that a direct suit at law, founded upon alleged fraud in making the compromise, would have been barred by the Indiana statutory limitation of six years. It cannot be maintained that supine negligence and lapse of time are less efficient in a court of equity.

These views of the case render it unnecessary to consider *the other defenses set [*108 up against the complainants' right to recover.

The decree of the Circuit Court is reversed, and the cause remanded, with instructions to dismiss the complainants' bill as against the city of New Albany.

WESTERN TRANSPORTATION COMPANY,
Plff. in Err.,
v.
SAMUEL A. DOWNER.

(See S. C. 11 Wall. 129-135.)

"Dangers of lake navigation," shallowness of waters is included in—when loss not attributed to—burden of proof—presumption of negligence.

*1. The term "dangers of lake navigation" includes all the ordinary perils which attend navigation on the lakes and, among others, that which arises from shallowness of the waters, at the entrance of harbors formed from them.

2. When a defendant transportation company shows that a loss of goods which it had contracted to carry from one port to another, was occasioned by a danger of lake navigation, from losses by which it had exempted itself by its bill of lading, the plaintiff may show that the danger and consequent loss might have been avoided by the exercise of proper care and skill on the part of the defendant; in which case the defendant will be liable, notwithstanding the exemption in the bill of lading. The burden of establishing the absence of such care and skill on the part of the defendant, rests with the plaintiff.

A presumption of negligence, from the simple occurrence of an accident, seldom arises, except when the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases; or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible.

[No. 98.]

Submitted Mar. 2, 1871. Decided Apr. 10, 1871.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois. Suit was brought in the superior court of Chicago, by the defendant in error, to recover for damages to a certain quantity of coffee. Upon the petition of the defendant, the case was removed to the court below. Judgment having been given for the plaintiff in that court, the defendant sued out this writ of error.

The case is fully stated in the opinion of the court.

Messrs. **J. N. Jewett** and **George B. Hibbard,** for plaintiff in error:

The counsel for the defendant requested the judge to charge the jury that, if they believed from the evidence that the loss of the coffee was within one of the exceptions contained in the bill of lading, that is to say, if it was occasioned by a peril of navigation, of the lakes or rivers, then the burden of showing that the loss might have been avoided by the exercise of proper care and skill, was upon the plaintiff—it was for him to show that the loss was the result of negligence.

The court refused to so charge, and the defendant's counsel excepted.

This refusal was error. The whole doctrine is most clearly stated by this court in *Clark* v. *Barnell,* 12 How. 272; see, also, *Hunt* v. *The Cleveland,* Newb. 221; *The Neptune,* 6 Blatchf. 193; Am. Law. R. Jan. 1871, p. 212.

*Headnotes by Mr. Justice FIELD.

NOTE.—*From what liability a contract that a common carrier is not responsible for loss or damage will exonerate*—see note to New Jersey Steam Nav. Co. v. Merch's B'k, 12 L. ed. U. S. 465.

Liability of carrier by water for loss or damage of goods—see note to Moore v. Trans. Co. 16 L. ed. U. S. 674.

The court charged the jury, substantially, that it was the duty of the master to do one of three things: to "back" or to "put out to sea" or to "take a new course."

Certainly that was not a question of law. This part of the charge was plainly erroneous. *Greenleaf* v. *Birth,* 9 Pet. 292; *Blackburn* v. *Crawford,* 3 Wall. 175, 18 L. ed. 186.

Mr. **James T. Mitchell,** for defendant in error:

The weight of authority is in favor of the instruction complained of.

"If the acceptance of the goods was special, the burden of proof is still on the carrier to show, not only the cause of the loss was within the terms of the exception, but also that there was, on his part, no negligence or want of due care." 2 Greenl. Ev. § 219; *Whitesides* v. *Russell,* 8 Watts & S. 44.

So, also, in *Hays* v. *Kennedy,* 41 Penn. 378; Lowrie, Ch. J., says: "He must prove, not only an accident which the law admits as inevitable in its character, but also that he was guilty of no fault in falling into the danger, or in his efforts to extricate himself from it." *Graham* v. *Davis,* 4 Ohio St. 362.

This rule is well established, also, in other states.

Swindler v. *Hilliard,* 2 Rich. 286; *Baker* v. *Brinson,* 9 Rich. 201; *Berry* v. *Cooper,* 28 Ga. 543; *Turney* v. *Wilson,* 7 Yerg. 340; *Hill* v. *Sturgeon,* 28 Mo. 327.

The decision was expressly left to the jury. The language of the judge was: "It is for the jury to say whether he did his duty. I don't think he did, but the facts are submitted to you." In this there was no error. *Tracy* v. *Swartwout,* 10 Pet. 80; *Garrard* v. *Reynolds,* 4 How. 127.

Mr. Justice **Field** delivered the opinion of the court:

This was an action against the Western Transportation Company to recover damages sustained by the plaintiff from the loss of eighty-four bags of coffee, belonging to him, which the company had undertaken to transport from New York to Chicago. The company was a common carrier, and in the course of the transportation had shipped the coffee on board of the propeller Buffalo, one of its steamers on the lakes. The testimony shows that the steamer was seaworthy and properly equipped, and was under the command of a competent and experienced master; but on entering the harbor of Chicago in the evening, she touched the bottom, and not answering to her helm got aground, and during the night which followed, kept pounding, and thus caused the hold to fill with water. The result was that the coffee on board was so damaged as to be worthless.

The bill of lading, given to the plaintiff by the Transportation Company at New York, exempted the company from liability for losses on goods insured, and losses occasioned by the "dangers of navigation on the lakes and rivers." The defense made in the case was, that the loss of the coffee came within this last exception.

On the trial the plaintiff made out a prima facie case by producing the bill of lading, showing the receipt of the coffee by the company at New York, and the contract for its

transportation to Chicago, and by proving the arrival of the coffee at the latter place in the propeller Brooklyn in a ruined condition, and the consequent damages sustained. The company met this prima facie case by showing that the loss was occasioned by one of the dangers of lake navigation. The term, "dangers of lake navigation," include all the ordinary perils which attend navigation on the lakes, and among others, that which arises from shallowness of the waters at the entrance of harbors formed from them. The plaintiff then introduced testimony to show that this danger, and the consequent loss, might have been avoided by the exercise of proper care and skill on the part of the defendant. If the danger might have been thus avoided, it is plain that the loss should be attributed to the negligence and inattention of the company, and it should be held liable, notwithstanding the exception in the bill of lading. The burden of establishing such negligence and inattention rested with the 134*]*plaintiff, but the court refused an instruction to the jury to that effect, prayed by the defendant, and instructed them that it was the duty of the defendant to show that it had not been guilty of negligence. In this respect the court erred. In *Clark* v. *Barnwell*, 12 How. 272, the precise point was involved, and the decision of the court in that case is decisive of the question in this. And that decision rests on principle. A peril of navigation having been shown to exist, and to have occasioned the loss which is the subject of complaint, the defendant was prima facie relieved from liability, for the loss was thus brought within the exceptions of the bill of lading. There was no presumption, from the simple fact of a loss occurring in this way, that there was any negligence on the part of the company. A presumption of negligence from the simple occurrence of an accident seldom arises, except where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible. Thus, in *Scott* v. *Dock Co.* 3 Hurls. & C. 596, the plaintiff was injured by bags of sugar falling from a crane in which they were lowered to the ground from a warehouse by the defendant, and the court said: "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

So in *Curtis* v. *R. Co.* 18 N. Y. 543, the court of appeals of New York held that the mere fact that a passenger on a railroad car was injured by the train running off a switch, 135*]was not of itself, without proof of *the circumstances under which the accident occurred, presumptive evidence of negligence on the part of the company. The court said that carriers of passengers were not insurers, and that many injuries might occur to those they transported, for which they were not responsible; but as railroad companies were bound to keep their roads, carriages, and all apparatus employed in working them, free from any defect which the utmost knowledge, skill and vigilance could discover or prevent, if it appeared that an accident was caused by any deficiency in the road itself, the cars or any portion of the apparatus belonging to the company and used in connection with its business, a presumption of negligence on the part of those whose duty it was to see that everything was in order immediately arose, it being extremely unlikely that any defect should exist of so hidden a nature that no degree of skill or care could have seen or discovered it.

It is plain that the grounds stated in these cases, upon which a presumption of negligence arises when an accident has occurred, have no application to the case at bar. The grounding of the propeller and the consequent loss of the coffee may have been consistent with the highest care and skill of the master, or it may have resulted from his negligence and inattention. The accident itself, irrespective of the circumstances, furnished no ground for any presumption one way or the other. If, therefore, the establishment of the negligence of the defendant was material to the recovery, the burden of proof rested upon the plaintiff.

For the error in the refusal of the instruction prayed and in the instruction given, the judgment must be reversed, and the cause remanded for a new trial.

HENRY B. TYLER, *Plff. in Err.*,

v.

JOHN D. DEFREES.

(See S. C. 11 Wall. 331-356.)

Confiscation proceedings can be collaterally questioned, only for want of jurisdiction—powers of Congress are the same in civil war as in other wars— seizure gives jurisdiction.

Where confiscation proceedings do not come before this court on a writ of error, to correct any irregularities or mere errors of law, but collaterally as the foundation of the defendant's title, no error can be regarded here that does not go to the extent of showing a want of jurisdiction in the court which rendered the judgment condemning the property.

Congress to which is confided the power to make war, to suppress insurrection, to levy taxes, to make rules concerning captures on land and on sea, is not deprived of these powers when the necessity for their exercise is called out by domestic insurrection and internal civil war.

When the officer had seized the property for condemnation, and had made known that fact to the court, such seizure was sufficient to subject the land to the jurisdiction of the court.

[No. 24.]

Argued Mar. 29, 1870. Re-argued Feb. 13, 1871. Decided Apr. 10, 1871.

IN ERROR to the Supreme Court of the District of Columbia.

This was an action of ejectment brought in the court below, in which judgment was given for the defendant, upon a special verdict. The plaintiff thereupon sued out this writ of error.

sued its bonds in part payment, purchased back of the company a part of such bonds so issued and canceled, its stock subscription, is within the power of the contracting parties and valid.

The Indiana statutory limitation of six years in relation to suits at law, applied to an equity action.

[No. 115.]

Argued Mar. 24, 1871. Decided Apr. 10, 1871.

APPEAL from the Circuit Court of the United States for the District of Indiana.

The bill in this case was filed in the court below by the appellees, to compel the payment to them, as judgment creditors, of a certain sum alleged to be due their judgment debtors from the appellants. A decree having been entered in favor of the complainants, the respondent took an appeal to this court.

The case is further stated by the court.

Messrs. **T. A. Hendricks,** *M. C. Kerr, O. B. Hord, A. W. Hendricks,* and *George B. Houk,* for appellant:

Upon the facts disclosed in the answer, and established by the evidence, the city of New Albany, appellant, is not indebted to the railroad company.

The subscription, conceding for argument that it was valid, and all liability arising out of it, was canceled and determined by valid compromise made by competent authority, in good faith and on a good and adequate consideration.

The railroad company has largely relied on the subscription of the city, for the cash means to carry on its enterprise. The subscription was payable, not in money but in long bonds, and the necessary cash means could be obtained only by sale of the bonds. Negotiable bonds, to the amount of $200,000, had already been executed by the city to the company. Seven only of these had been sold, but active efforts were being made to negotiate the remainder in the city of New York. In the meantime, suits were commenced in the Floyd circuit court to enjoin the collection of the bond tax, upon the ground that the subscription was invalid.

Before sales of the bonds could be effected in New York, information of the pendency of these suits had been received there and the effect was to cast such doubt upon their validity that it was impossible to sell them there or elsewhere, at any price, or at least without so ruinous a sacrifice that a sale could not be thought of.

Failing to effect sales of the bonds, the railroad company borrowed money, to meet pressing exigencies, from the Ohio Insurance Company in New Albany, pledging all the city bonds as collateral security.

This borrowed money fell due. The insurance company was demanding payment and threatening to sell the collaterals. The suits to enjoin the levying of a bond tax were still pending, and it was evident that a determination of them could not be reached without protracted litigation. The determination that was afterwards reached, Nov. 10, 1857, was obtained only through the compromise.

The railroad company had no available means of payment and it was obvious that, unless some

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The same point was decided in *Armstrong's Foundry, supra.*

The district court was exercising special jurisdiction under the statute.

July 17, 1862, §§ 6, 7; 2 Bright, 1235, §§ 29, 30.

In such cases it is in the predicament of an inferior court, and all its proceedings are *coram non judice,* if the requirements of law be not observed in any respect.

Hollingsworth v. *Barbour,* 4 Pet. 466; *Williamson* v. *Berry,* 8 How. 536; 1 Sm. Lead. Cas. 832.

When *ex parte* proceedings are *in rem,* the statutory notice is necessary. 1 Sm. Lead. Cas. 836.

In *Boswell's Lessee* v. *Otis,* 9 How. 349, there was a violation of law in not having a jury trial, and the whole doctrine is therein fully discussed.

The decree of sale was passed July 29, 1863, prior to first Monday in August, on which last day the monition and attachment were returnable, so that the legal notice prescribed was ignored, and the decree rendered without either actual or constructive notice.

Messrs. **A. G. Riddle,** *S. L. Phillips,* and **L. Madison Day,** for defendant in error:

Both under the statute of July 17, 1862, and by the general law of proceedings *in rem,* the court has jurisdiction the moment of seizure, and institution of proceedings *in rem.*

The 5th section of the confiscation act declares: "To insure the speedy determination of the present Rebellion, it shall be the duty of the President to cause seizure of all the estate," etc.

And in the 7th section: "To secure the condemnation and sale of any such property after the same shall have been seized, so that it may be available for the purpose aforesaid, proceedings *in rem* shall be instituted in the name of the United States," etc.

But, independently of any statutory regulation in all proceedings *in rem,* a court of admiralty, whether as a prize or instance court, has jurisdiction and absolute control over the thing, as soon as seized and libeled. *Jennings* v. *Carson,* 4 Cranch, 23.

The district court does not derive its jurisdiction from any possession, actual or supposed, of its officers, but from the act and place of the seizure for the forfeiture; and if it at once acquires jurisdiction, it is not avoided by any subsequent irregularity.

The Bolina, 1 Gall. 81; 2 Pars. Mar. Law, 535.

In a case of seizure on land, it was held nothing more was necessary to give jurisdiction in cases of this nature, than that seizure should be made within the district.

Keene v. *United States,* 5 Cranch, 304.

A libel stating the fact of seizure on land, would give jurisdiction. *The Sarah,* 8 Wheat. 391.

In order to institute and perfect proceedings *in rem,* it is necessary that the thing should be actually and constructively within the reach of the court.

The Ann, 9 Cranch, 289; Conk. Adm. 253.

The acts of seizure by the marshal in this case were all that could be done.

17 Law Rep. 497; 1 Spr.; *The Josefa Segunda,* 10 Wheat. 312.

The decree or judgment of the court, which has jurisdiction of the person and subject-matter, is binding until reversed, and cannot be collaterally attacked. All the rights acquired at a judicial sale while the decree or judgment was in full force and which they authorized, will be protected. It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased, was made and authorized the sale. With the errors of the court he has no concern. These principles have so often received the sanction of this court, that it would not have been deemed necessary again to reaffirm them, had not the extent of the doctrine been questioned at the bar.

Mr. Justice Davis's opinion, *Gray* v. *Brignardello,* 1 Wall. 634, 17 L. ed. 697; see, also, *United States* v. *Nourse,* 9 Pet. 8; *Voorhees* v. *Bank of United States,* 10 Pet. 449; *Blaine* v. *The Charles Carter,* 4 Cranch, 328; *Elliott* v. *Piersol,* 1 Pet. 340; *United States* v. *Arredondo,* 6 Pet. 729; see, also, *Grignon* v. *Astor,* 2 How. 338; *Hylton* v. *Brown,* 1 Wash. (C. C.) 343.

Mr. Justice **Miller** delivered the opinion of the court:

In this action in ejectment, it was conceded that the plaintiff below had title to the lot in question, and should recover the possession, unless that title had been devested, by certain judicial proceedings had under the confiscation acts of Congress.

These proceedings are found by special proceedings of the jury on which the law of the case was submitted to the supreme court of this district *in banc,* who rendered a judgment in favor of defendants.

To this judgment, the plaintiff prosecutes the present writ of error, and *the question for our consideration is, whether the confiscation proceedings, as found in the special verdict, devested the title of plaintiff in the lot. [*344

These proceedings do not come before us on a writ of error to correct any irregularities or mere errors of law in the court which rendered the judgment, but they come before us collaterally as the foundation of the defendant's title.

According to the well-settled doctrine in such cases, no error can be regarded here, or could have been considered in the court below on the trial, that does not go to the extent of showing a want of jurisdiction in the court which rendered the judgment condemning the property. See, *Cooper* v. *Reynolds,* 10 Wall. 308, 19 L. ed. 931, and the numerous cases there cited.

Counsel for the plaintiff in error recognize this principle, but it is remarkable what a number of supposed errors in the proceedings are found by them to be jurisdictional. Almost every point that has been urged in the cases of *Garnet* v. *U. S. ante,* 79, and *Miller* v. *The Same, ante,* 135, on a writ of error directly to those confiscation proceedings, is here relied on as sufficient to defeat the jurisdiction. Looking to the errors alleged, it may safely be said that if half that has been so earnestly urged by counsel in these cases be well founded, the confiscation acts would be nugatory from the difficulty of putting them judicially in force, though their constitutionality were conceded.

Undoubtedly, by the individual, whose

property is thus seized and condemned for acts of hostility to his government, the course pursued would be scrutinized with an eye quick to detect errors, and it is not strange that this critical spirit should affect the argument here. When to this is added the belief, long inculcated, that the Federal government, however strong in a conflict with a foreign foe, lies manacled by the Constitution and helpless at the feet of a domestic enemy, we need not be surprised that both the power of Congress to pass such a law as the one in question, **345***] *and the capacities of the courts to enforce it, should meet with a stout denial.

But we do not believe that the Congress of the United States, to which is confided all the great powers essential to a perpetual union—the power to make war, to suppress insurrection, to levy taxes, to make rules concerning captures on land and on sea—is deprived of these powers when the necessity for their exercise is called out by domestic insurrection and internal civil war—when states, forgetting their constitutional obligations, make war aginst the nation, and confederate together for its destruction.

And we are further of opinion that where the constitutionality of the confiscation acts being established, we are called upon to sit in review on the judicial proceedings of the inferior courts in the enforcement of these statutes, that we are to be governed by the reasonable and sound rules applicable to analogous cases in the courts, and not by a system of procedure so captious, so narrow, so difficult to understand or to execute, as to amount to a nullification of the statute.

The framers of the act of July 17, 1862, appear to have anticipated much of what has been since urged in regard to the mode of proceeding in the execution of that statute. Seeing very clearly that the cases of seizure under the law would be mainly on land and would not, in that case, be cognizable as admiralty cases, and that being founded on the principle of confiscating enemy property, they were not strictly revenue cases; their attention was called to the proper mode of procedure in the enforcement of the law.

As the act was designed to introduce the principle of confiscating enemy property seized on land, like that seized on water, applying confiscation, however, to the property of a limited class of enemies, instead of to all enemies, it was conceived that the proceeding should be, in its essential features, analogous to those which the courts of admiralty were accustomed to use in property captured at sea. The same courts were to have jurisdiction, the same officers were to administer the law, and, **346***] as those courts were *already in possession of jurisdiction in revenue and admiralty cases, and as the analogies of those cases to the new jurisdiction conferred were supposed to present a mode of enforcing the law adapted to the latter in their main features, it was enacted that the proceedings under the statute should conform, as near as might be, to proceedings in admiralty or revenue cases; and, foreseeing also that in some respects they could not be strictly so conformed, the statute authorized the courts to make such orders, establish such forms of decrees and sale, and direct such deeds, when real estate shall be the subject of sale, as shall fitly and efficiently effect the purposes of the act.

Unquestionably, it was within the power of Congress to provide a full code of procedure for these cases, but it chose to give a direction on the subject which, adopting, as a general rule, a well-established system of administering the law of capture, looked to the fact that departures from that system might be necessary, and invested the courts with a discretion in that regard.

Five or six cases arising under this statute were argued before us at the last term, and, appreciating both the difficulty and the importance of some of the points raised in argument, they were all ordered to be argued again at this term, and have, under that order, been ably and fully re-argued. They have all been disposed of but this, and the court have not hesitated, where there was a substantial departure from the mode of proceeding directed by the statute, to reverse the decree of the courts below in the cases which were here on error to those proceedings. And when we have found the proceedings to be conformable to the course of procedure of revenue and admiralty cases, we have held the decrees to be valid. The cases thus decided, and especially the case of *Miller's Executors* v. *United States*, in effect, dispose of all the objections taken to the action of the court in this case, even if that action were here for review directly, instead of being presented collaterally in another suit.

But, as one point was much and earnestly pressed as peculiar to this case, and as conclusive against the validity of *the [**347** confiscation proceedings, that point will be further considered.

It is argued that there was no such judicial seizure of the land which was condemned and sold as to bring it within the jurisdiction of the court.

The record shows that the marshal of the District of Columbia, in which court the proceeding was had, and within the territorial jurisdiction of which court the land was situated, did seize the land under the instruction of the attorney of the United States for the district. No objection is made that this seizure was not full and complete. The order of the district attorney was directed to the marshal of the District of Columbia and described the property to be seized, and stated that the seizure was to be made for the purpose of instituting proceedings for its condemnation under the act of July 17, 1862. The marshal returned on this paper that he had seized the property and given notice to the tenants in possession, and he makes a part of this return the notice served on the occupants of the premises, in which he states that it is to be held subject to the order of the United States district court for the District of Columbia. After this the libel was duly filed in that court, and a monition was issued from it to the same marshal, ordering him to give due notice and to attach the property and to detain the same in his custody until the further order of the court in the premises. To this monition no return was made by the marshal except a certificate of publication of notice.

The proposition of the plaintiff's counsel is, that because no return of the marshal was made that he seized the property under this monition, the court had no jurisdiction of the case, and its subsequent condemnation and sale were void.

When we consider that it was the same officer and the same individual who had already seized the property, and had it in his control and possession, and that his statement to that effect was before the court, with the addition that he held it subject to the order of the court, that he was the only executive officer of 348*] the court who could make the *seizure, the point raised seems to be as narrow and unsubstantial as the second seizure would be useless.

The argument is based upon the analogy of revenue seizures, which are always of personal and moveable property, and which are always made in the first instance by some other officer or individual than the marshal, and which must be taken possession of by the marshal as the representative of the court. This is usually done under a process of the court for the purpose of bringing the property under its recognized control. And this is at once the reason, and suggests the limit of the two seizures in revenue cases so much relied on by counsel.

Now, suppose the property in this case had been personal property, how could the marshal make a seizure of that which was already in his manual possession? Whose possession would he displace? Could one hand represent the seizure under the monition and the other the seizure under the act of Congress? And can it be seriously contended that this must be done to give the court jurisdiction, when the officer of the court held the property already for condemnation or discharge as the court might order?

It may, however, be said that he should have made return of the writ, that he had seized and held the property under that. Such a return as to seizure would have been false, because he had seized it before and could make no second seizure, in fact, by taking it from his own possession. And he had already informed the court that he had detained the property subject to its order.

The proceeding inaugurated by the district attorney is designed to bring the property before the court. It can have no other purpose or end unless it is released by his order. The district attorney and the marshal are both officers of the court, and for that reason are selected to institute the proceeding by which the power of the court is called into exercise. When, therefore, the property is in the course of this proceeding seized by the marshal, and when with the filing of the libel all that has been done is brought before the court and it adopts and recognizes this seizure, the property 349*] *is held by him subject to the order of the court, and is under its control, and no second seizure by the same officer can be necessary.

In regard to real estate, the argument is still more forcible. The remarks of this court in *Cooper* v. *Reynolds*, already cited, are directly in point. Speaking of the various modes of acquiring jurisdiction, it was there said, that "While the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate, which being incapable of removal, and being within the territorial jurisdiction of the court, is, for all practical purposes, brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact in the court."

When, therefore, the officer, as in this case, had seized the property for condemnation, and had made known that fact to the court, it was quite certain that it would be within reach of its process when condemned for sale, and when it became necessary to put the purchaser in possession of it. No change of the title or possession could be made, pending the judicial proceedings, which would defeat the final decree. The seizure was, therefore, in our judgment, sufficient to subject the land to the jurisdiction of the court.

The judgment of the Supreme Court of the District of Columbia is, therefore, affirmed.

Mr. Justice **Davis**, concurring:

I concur in the judgment entered by the court in this case, though I have not been able to concur in all that is said by the court in its opinion.

Mr. Justice **Field**, dissenting:

I am compelled to dissent from the judgment of the court in this case.

*I agree with the majority, that as [*350 the decree of confiscation, under which the defendant asserts title to the demanded premises, comes before us collaterally, it cannot be attacked for mere errors or irregularities committed in the progress of the cause in which it was rendered. It can be only attacked for defects which go to the jurisdiction of the court, either over the subject-matter or the parties, or to render the particular decree. It is not strictly correct to say that, if the jurisdiction over the subject-matter and the parties exists in a particular case, any defect in the decree rendered can only be taken advantage of on appeal or by direct proceedings. That jurisdiction may exist and yet the decree may be so variant from that which the court was authorized to pronounce, as to be void on its face. If the law, for example, authorizes a pecuniary fine, the court cannot award imprisonment. If the law directs only damages to be assessed, the court cannot decree a specific performance. If the law declares that only a life estate shall be confiscated, the court cannot disregard its limitation and condemn the fee. The judgments in such cases would be void in whole or in part, notwithstanding complete jurisdiction was had over the subject and the parties in controversy. There are certain limitations to the action of courts even after they have acquired jurisdiction which they cannot transcend without opening their judgments to collateral attack. In other words, jurisdiction over the subject-matter and parties does not authorize a judgment in the case of any and every kind.

All reasonable presumptions are indulged in support of judgments when collaterally attacked. So large are these presumptions that

WESTERN TRANSPORTATION COMPANY,
Plff. in Err.,
v.
SAMUEL A. DOWNER.

(See S. C. 11 Wall. 129–135.)

"Dangers of lake navigation," shallowness of waters is included in—when loss not attributed to—burden of proof—presumption of negligence.

*1. The term "dangers of lake navigation" includes all the ordinary perils which attend navigation on the lakes and, among others, that which arises from shallowness of the waters, at the entrance of harbors formed from them.

2. When a defendant transportation company shows that a loss of goods which it had contracted to carry from one port to another, was occasioned by a danger of lake navigation, from losses by which it had exempted itself by its bill of lading, the plaintiff may show that the danger and consequent loss might have been avoided by the exercise of proper care and skill on the part of the defendant; in which case the defendant will be liable, notwithstanding the exemption in the bill of lading. The burden of establishing the absence of such care and skill on the part of the defendant, rests with the plaintiff.

A presumption of negligence, from the simple occurrence of an accident, seldom arises, except when the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases; or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible.

[No. 98.]

Submitted Mar. 2, 1871. Decided Apr. 10, 1871.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois. Suit was brought in the superior court of Chicago, by the defendant in error, to recover for damages to a certain quantity of coffee. Upon the petition of the defendant, the case was removed to the court below. Judgment having been given for the plaintiff in that court, the defendant sued out this writ of error.

The case is fully stated in the opinion of the court.

Messrs. **J. N. Jewett** and **George B. Hibbard**, for plaintiff in error:

The counsel for the defendant requested the judge to charge the jury that, if they believed from the evidence that the loss of the coffee was within one of the exceptions contained in the bill of lading, that is to say, if it was occasioned by a peril of navigation, of the lakes or rivers, then the burden of showing that the loss might have been avoided by the exercise of proper care and skill, was upon the plaintiff—it was for him to show that the loss was the result of negligence.

The court refused to so charge, and the defendant's counsel excepted.

This refusal was error. The whole doctrine is most clearly stated by this court in *Clark* v. *Barnell*, 12 How. 272; see, also, *Hunt* v. *The Cleveland*, Newb. 221; *The Neptune*, 6 Blatchf. 193; Am. Law. R. Jan. 1871, p. 212.

*Headnotes by Mr. Justice FIELD.

NOTE.—*From what liability a contract that a common carrier is not responsible for loss or damage will exonerate*—see note to New Jersey Steam Nav. Co. v. Merch's B'k. 12 L. ed. U. S. 485

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the cause according to law," a clause which has been judicially held, and in my opinion correctly held, to make it imperative upon the court that there shall be some hearing before a decree of forfeiture is rendered, and "the 354*] *court will require," says Mr. Justice Sprague, in such cases, "the prosecutor to introduce full proof of the allegations in the libel whenever the circumstances shall made it reasonable." *U. S.* v. *Lion*, 1 Sprague, 400.

If we consider the provision of the law of 1789, and the provision of the act of 1862, for a finding, it seems impossible to escape the conclusion that a finding upon hearing is an essential prerequisite to any decree of forfeiture in these confiscation cases. The authority to render the decree is in express terms made conditional upon a particular fact being found. If the fact designated be found, says the statute, the property shall be condemned, which is equivalent to declaring that if such fact be not found, no condemnation shall be decreed. As the record produced in the case, upon which the defendant relies, shows that no hearing was had and no finding was made, the decree of forfeiture rendered therein appears to me to be an act of judicial usurpation.

Third, as to the validity of the clauses of the act of 1862, providing for the seizure and confiscation of the property of rebels. This point I have already considered at length in the dissenting opinion in *Miller* v. *U. S.*, and I shall only add a few words. In that dissenting opinion I expressly stated that it had been held that when the late Rebellion assumed the proportions of a territorial civil war, the inhabitants of the Confederate States and the inhabitants of the loyal states became reciprocally enemies to each other, and that the inhabitants of the Confederate States engaged in the Rebellion, or giving aid and comfort thereto, were at the same time amenable to the municipal law as rebels, and that the correctness of this determination was not disputed; that the question was, not as to the right of Congress to adopt either of these courses, but what course had Congress, by its legislation, authorized. It is indisputable that whatever Congress may authorize to be done, by the law of nations, in the prosecution of war against an independent nation, it may authorize to be done when en- 355*] gaged in the prosecution *of a territorial civil war against the domestic enemies of the United States. I contend only that the limitations which the law of nations has imposed in the conduct of war between independent nations should apply and govern the United States in whatever war they may prosecute. I do not doubt, and have never doubted for a moment, that the United States possess all the power necessary to suppress all insurrections, however formidable, and to make their authority respected and obeyed throughout the limits of the Republic. But this recognition of the power of the government cannot be permitted to preclude a comparison of all legislation adopted to uphold its authority with the Constitution. And in so comparing the act of July 17, 1862, I am unable to find in that great instrument any sanction for the clauses in the act providing for the seizure and confiscation of the property of persons charged with particular criminal acts. I do not find it in the war powers of the government, for they sanction only the confiscation of the property of public enemies. I do not find it in the municipal power of the government to legislate for the punishment of crimes, for that is subject to limitations which secure to the accused a trial by a jury of his peers and the right to be confronted with the witnesses against him.

It is true, as already stated, that enemies participating in the Rebellion, or giving aid and comfort thereto, might have been treated as rebels and held amenable to the municipal law. Yet the terms "enemies" and "rebels" are not synonymous, even though the Rebellion attained the proportions of a territorial civil war. A permanent resident of the Confederacy was an enemy, although he may always have opposed the Rebellion and remained loyal in his feeling and action to the national government. His position as an enemy was determined by his residence, and had nothing to do with his personal disposition or conduct. But he was not a rebel, and could not have been prosecuted as such unless he was personally guilty of treasonable acts.

Congress well understood the distinction between enemies and rebels, and we are not justified in supposing that it intended *to [*356 disregard this distinction in its legislation, even were that practicable, as it was not.

My conclusion is that the judgment of the court below was erroneous, and should be reversed.

I am authorized to say that Mr. Justice **Clifford** concurs with me in this opinion.

JOHN H. HARRINGTON, Claimant of One Hundred Twenty-four Barrels of Distilled Spirits, *Plff. in Err.*,

v.

UNITED STATES,

and

JOSEPH A. BOYDEN, Claimant of One Hundred Fifty-four Barrels of Distilled Spirits, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C. *"The Distilled Spirits,"* 11 Wall. 356–369.)

Goods fraudulently removed from bonded warehouse are liable to forfeiture—repeal of statute by implication—knowledge of agent, effect of, on principal—confidential information of agent does not affect principal—goods mixed with others—effect of, on forfeiture.

*1. The acceptance by the collector of a false and fraudulent bond, given for the removal of distilled spirits from a bonded warehouse, will not prevent a forfeiture of such spirits under the 45th section of the internal revenue act of July 13, 1866, which forfeits "distilled spirits found elsewhere than in a bonded warehouse, not having been removed therefrom according to law."

2. The removal will be illegal, if effected by means of a false and fraudulent bond.

3. The 48th section of the internal revenue act of June 30, 1864, as amended by the act of 1866, which forfeits all goods, wares, merchandise, articles, or objects, if found in possession of any person in fraud of the internal revenue laws, etc., is applicable to distilled spirits, notwithstanding the forfeiture of spirits is provided for in a distinct series of sections relating thereto, in the same law or in the supplementary law.

4. All the sections can stand together; and where that is the case, one does not repeal or supersede

*Headnotes by Mr. Justice BRADLEY.

the other, as repeals by implication are not favored.

5. The rule that notice to the agent is notice to the principal, applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction and present to his mind at the time he is acting as such agent; provided it be of such a character as he may communicate to his principal, without breach of professional confidence.

6. Where distilled spirits, forfeited to the United States, are mixed with other distilled spirits belonging to the same person (ignorant of the forfeiture) they are not lost to the government by such mixture, either on principle of confusion of goods or transmutation of species, even though subsequently run through leaches for the purpose of rectification. The government will be entitled to its proportion of the result.

[Nos. 124, 125.]

Argued Mar. 28, 1871. Decided Apr. 10, 1877.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

Each of these cases arose upon an information filed in the district court of the United States for the district of Massachusetts, for the forfeiture of a certain quantity of distilled spirits. A decree having been entered for such forfeiture, the claimants sued out a writ of error to the circuit court, by which the decree was affirmed; whereupon, the claimants sued out a writ of error to this court.

The case is fully stated by the court.

Mr. **R. M. Morse, Jr.,** for plaintiffs in error:

The principal is not affected by the knowledge of the agent, unless the knowledge is acquired by the agent while in the employ of the principal, and in the course of the very transaction in which he is employed.

This doctrine was laid down in 1729, in *Fitzgerald* v. *Fauconberge*, Fitzg. 211.

In *Lowther* v. *Carlton*, 2 Atk. 242, Lord Ch. J. Hardwicke said: "If a counsel or attorney is employed to look over a title, and if by some other transaction, foreign to the business in hand, has notice, this shall not affect the purchaser."

The doctrine was reaffirmed by the same judge in *Warrick* v. *Warrick*, 3 Atk. 294, and in *Worsley* v. *Scarborough*, Ib. 392; by Lord Erskine, in *Hiern* v. *Mill*, 13 Ves. 120, and by Lord Eldon, in *Mountford* v. *Scott*, 3 Madd. 34.

In *Kennedy* v. *Green*, 3 Myl. & K. 699, Lord Brougham held that a client was not to be held cognizant of a fraud, although his solicitor was the contriver and actor in the same, because the solicitor's knowledge was not obtained in the course of his employment for that client.

See also *Wilde* v. *Gibson*, 1 H. of L. Cas. 605.

In the United States the weight of authority is in support of the same doctrine.

Bk. v. *Payne*, 25 Conn. 444; *Bk.* v. *Davis*, 2 Hill, 451; *N. Y. Cent. Ins. Co.* v. *Nat'l Prot. Ins. Co.* 20 Barb. 468; *Brown* v. *Montgomery*, 20 N. Y. 287; *Jackson* v. *Sharp*, 9 Johns. 163; *Hood* v. *Fahnestock*, 8 Watts, 489; *Bracken* v. *Miller*, 4 Watts & S. 111; *Winchester* v. *R. Co.* 4 Md. 231; *Ins. Co.* v. *Shriver*, 3 Md. Ch. 381; *Willis* v. *Vallette*, 4 Met. (Ky.) 186; *Keenan* v. *Ins. Co.* 12 Ia. 126; *Bierce* v. *Red Bluff Hotel Co.* 31 Cal. 160.

In England, however, it has been held that, when one transaction is clearly followed by and connected with another, or when it is clear that a previous transaction is present to the mind of the agent when engaged in another transaction, there is no ground for the distinction by which the rule, that notice to the agent is notice to the principal, had been restricted to the same transaction.

Hargreaves v. *Rothwell*, 1 Keen, 158; *Lenehan* v. *McCabe*, 2 Ir. Eq. 342; *Fuller* v. *Bennett*, 2 Hare, 394; *Dresser* v. *Norwood*, 17 C. B. (N. S.) 466.

But this relaxation of the rule has not generally obtained in the United States.

Whether a person had knowledge of certain facts is purely a question of fact, to be determined by a jury under proper instructions, and it should not be laid down as a conclusive presumption of law that he had, because his agent, before he became his agent, had it.

But even if the court should adopt the modification of the rule as stated in *Hargreaves* v. *Rothwell*, and *Dresser* v. *Norwood*, and approved by the learned judge in the circuit court, yet instruction of the learned district judge was clearly wrong, as he failed to give the qualification which is held in those cases to be essential to affect the principal with the prior knowledge of his agent, to wit: that it must appear that the previous transaction is present to the mind of the agent when engaged in another transaction, or that one transaction is clearly followed by and connected with another, so that that fact may be necessarily inferred.

The fourth instruction prayed for applies to the case of both claimants.

The prayer was as follows: "That if a portion of the spirits proved in this case not to have paid a tax, had passed through the rectifiers in which there were other spirits, and so become mixed with them, no portion of the spirits when rectified would be liable to forfeiture."

Both the prayer for instructions, and the instruction of the presiding judge in the district court, assumed that the spirits were mixed with other spirits in the rectifiers, so that they could not be distinguished.

The presiding judge in the district court laid down two rules to the jury:

1. That if the spirits were mixed with other spirits, with knowledge of the fraud committed, for the purpose of destroying their identity, and were so mixed that they could not be distinguished and identified, then the entire quantity was forfeited to the United States.

2. That if the mixture was innocently made, the government was entitled to a fair proportion of the mixture.

Both of these rules, it is submitted, were incorrect.

There is no more odious system of penalties than the forfeiture of property, even when the express terms of the statute compel it; and yet here it is proposed to go beyond the language of the statute and forfeit property which has in no way offended against the law.

There is absolutely nothing in the charge to instruct the jury at all, on the basis on which they were to estimate the fair proportion to which the government was entitled. They were left to estimate in such way as seemed proper to them. And it is submitted, that even assuming the correctness of the general proposition of the court, there was still a want of definiteness and exactness in the instruction.

The doctrine of confusion of goods, as stated either in the civil or the common law, has no application in a proceeding for forfeiture under a criminal statute.

"Penal statutes are to be construed strictly, and cases within the like mischief are not to be drawn within a clause inclosing a prohibition or a forfeiture, unless the words clearly comprehend the case."

Story, J., in *The Harriet*, 1 Story, 255; E. F. Smith, on Stat. and Const. Law, 723–725; see also, Dwar. Stat. 635–637, and the following cases there cited:

Warne v. *Varley*, 6 T. R. 443; *R.* v. *Handy*, 6 T. R. 286; *Martin* v. *Ford*, 5 T. R. 101.

The difficulty with the argument for the government on this point is that it seeks to extend the provisions of the statute to other goods than those in terms described. It alleges that certain spirits, describing them in their information, have not paid the tax, and are liable to forfeiture. The evidence offered in support of this charge is, that the spirits seized are not the same as those described in the information. It then seeks to condemn the spirits seized, not because they are liable to forfeiture, by the terms of the act, but because some of their original ingredients, where identity is lost, were so liable. The case may be within the mischief of the statute, but is clearly not covered by the terms, at least not by the terms of the section under which this information is drawn.

The statute authorizes the government, in case of the nonpayment of the taxes, either to proceed against them for forfeiture, or to sell them for nonpayment of the taxes, and apply the proceeds of the sale to the payment of the taxes.

When goods are liable to forfeiture under a statute giving no other remedy to the government, the title of the government vests where the offense subjecting them to forfeiture is committed.

But whether they are liable to forfeiture or not, at the option of the government, no title can vest until that option has been exercised. In this case it was not done until after the information was filed. Therefore, at the time the mixture was made, the government had no title to any part of the spirits. The claimants mixed different spirits, all of which belonged to them, and there is no room for the application of the doctrine of confusion, which assumes that at the time of the mixture, part of the ingredients belonged to one person and part to another.

If the title of the government vested when the offense was committed, the government may assess a tax on its own property and distraint it.

See *Caldwell* v. *U. S.* 8 How. 366.

Messrs. Amos T. Akerman, Atty. Gen., **C. H. Hill**, *Asst. Atty. Gen.*, and **B. H. Bristow**, *Solicitor Gen*, for defendant in error:

The instructions with regard to the intermixture of the seized spirits with others were sufficiently favorable to the claimants. The law on this subject, as stated by Chancellor Kent, is as follows:

"With respect to the state of a confusion of goods, where those of two persons are so intermixed that they can no longer be distinguished, each of them has an equal interest in the subject as tenants in common, if the intermixture was by consent. But if it was wilfully made, without mutual consent, then the civil law gave the whole to him who made the intermixtures, and compelled him to make satisfaction in damages to the other party for what he had lost. The common law gave the entire property, without any account, to him whose property was originally invaded and its distinct character destroyed."

2 Kent, Com. (6th ed.) 364; *Willard* v. *Rice*, 11 Met. 493; see *U. S.* v. *Fifty-six Barrels of Whisky*, 4 Int. Rev. Rec. 106, 108.

The character of the property was not changed.

See *Cushing* v. *Breed*, 14 Allen, 376.

This is, undoubtedly, in one sense, a penal statute, but it is not a statute which, therefore, is to be strictly construed—a point too often decided to be now open in this court.

Taylor v. *U. S.* 3 How. 197, 210; *Cliquot's Champagne*, 3 Wall. 114, 18 L. ed. 116; *Fennerstein's Champagne*, 3 Wall. 145, 18 L. ed. 121; *U. S.* v. *Hodson*, 10 Wall. 395, 19 L. ed. 937.

In mercantile transactions, and in other cases of the purchase and sale of personal property, the knowledge of the agent is knowledge of the principal.

Sm. Merc. L. 175, 176; *Dresser* v. *Norwood*, 17 C. B. N. S. 481.

See, likewise, authorities cited by Mr. Justice Clifford, 10 Int. Rev. Rec. 165.

Those cases which deny that a principal can be held responsible for knowledge of his agent, are mostly cases of the relations of solicitor and client, and refer to matters of titles to real estate. The question involved therein seems to have been: how far knowledge in the agent, of facts which would charge him with a trust in favor of third parties, can bind an innocent party.

Lowther v. *Carlton*, 2 Atk. 242; *Warrick* v. *Warrick*, 3 Atk. 294; *Mountford* v. *Scott*, 3 Madd. 34; *Hood* v. *Fahnestock*, 8 Watts, 489; *Bracken* v. *Miller*, 4 Watts & S. 111.

And the doctrine formerly prevalent in England has been greatly qualified by recent cases.

Hargreaves v. *Rothwell*, 1 Keen, 158; *Fuller* v. *Benett*, 2 Hare, 394.

The case would seem to fall within the principle of *Hern* v. *Nichols*, 1 Salk. 289.

Mr. Justice **Bradley** delivered the opinion of the court:

These are writs of error to the circuit court for the district of Massachusetts. The cases arose as follows: the collector of internal revenue in Boston in April, 1867, seized 278 barrels of distilled spirits, as being forfeited by removal from a bonded warehouse, without paying the tax due thereon. The plaintiff in error, Harrington, claimed 124 barrels, and Boyden, 154 barrels. Upon the trial of the cases, the jury found against 50 barrels claimed by Harrington and against all the barrels claimed by Boyden. It appeared in evidence that in April, 1867, a large quantity of spirits was withdrawn from the United States bonded warehouses in Boston, upon the pretense of an intent to transport the same to Eastport, for exportation thence.

False and fraudulent bonds were given therefor, and the spirits were never attempted to be transported to Eastport, but were removed for consumption and sale in Boston and vicinity.

property is thus seized and condemned for acts of hostility to his government, the course pursued would be scrutinized with an eye quick to detect errors, and it is not strange that this critical spirit should affect the argument here. When to this is added the belief, long inculcated, that the Federal government, however strong in a conflict with a foreign foe, lies manacled by the Constitution and helpless at the feet of a domestic enemy, we need not be surprised that both the power of Congress to pass such a law as the one in question, **345***] *and the capacities of the courts to enforce it, should meet with a stout denial.

But we do not believe that the Congress of the United States, to which is confided all the great powers essential to a perpetual union—the power to make war, to suppress insurrection, to levy taxes, to make rules concerning captures on land and on sea—is deprived of these powers when the necessity for their exercise is called out by domestic insurrection and internal civil war—when states, forgetting their constitutional obligations, make war aginst the nation, and confederate together for its destruction.

And we are further of opinion that where the constitutionality of the confiscation acts being established, we are called upon to sit in review on the judicial proceedings of the inferior courts in the enforcement of these statutes, that we are to be governed by the reasonable and sound rules applicable to analogous cases in the courts, and not by a system of procedure so captious, so narrow, so difficult to understand or to execute, as to amount to a nullification of the statute.

The framers of the act of July 17, 1862, appear to have anticipated much of what has been since urged in regard to the mode of proceeding in the execution of that statute. Seeing very clearly that the cases of seizure under the law would be mainly on land and would not, in that case, be cognizable as admiralty cases, and that being founded on the principle of confiscating enemy property, they were not strictly revenue cases; their attention was called to the proper mode of procedure in the enforcement of the law.

As the act was designed to introduce the principle of confiscating enemy property seized on land, like that seized on water, applying confiscation, however, to the property of a limited class of enemies, instead of to all enemies, it was conceived that the proceeding should be, in its essential features, analogous to those which the courts of admiralty were accustomed to use in property captured at sea. The same courts were to have jurisdiction, the same officers were to administer the law, and, **346***] as those courts were *already in possession of jurisdiction in revenue and admiralty cases, and as the analogies of those cases to the new jurisdiction conferred were supposed to present a mode of enforcing the law adapted to the latter in their main features, it was enacted that the proceedings under the statute should conform, as near as might be, to proceedings in admiralty or revenue cases; and, foreseeing also that in some respects they could not be strictly so conformed, the statute authorized the courts to make such orders, establish such forms of decrees and sale, and

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at least by some form of written assignment, placing the shares within the power of the pledgee.

Here nothing of the kind was done. The only act or writing appertaining to the transaction, was the execution of the power of attorney by Culver, not to the bank, or to any agent of the bank, as such; but to one Thomas S. Stanfield, as his—Culver's—own agent, and attorney in fact. This was but a private transaction between himself and his own agent.

There is only one condition upon which a bank may purchase or hold its own shares; and that is, where it is necessary to do so in order to prevent loss on a debt previously contracted in good faith. In such case the available capital of the bank being, to that extent, already lost and imperiled, the bank, for the protection of its own shareholders, may take the stock in payment.

In this case the bank by by-law and by the form of certificate adopted, made its stock certificates as nearly of the character of negotiable paper as it was practicable to make them. The certificates show that the stock was transferable on the books of the bank, but that it was transferable only on the surrender of the certificates.

The appellees were fully justified in acting on the hypothesis that Culver had previously acquired the shares, for the certificates expressly certified that he owned them. And it was not even necessary for the protection of their rights that they should give notice to the bank, for by its own rules Culver could not transfer in the absence of the certificates, and these were in their own possession.

The precise point we are now submitting came under judgment in the court of appeals of New York, in *The N. Y. & N. H. R. Co.* v. *Schuyler*, 34 N. Y. 30.

The same question was considered in the supreme court of Connecticut, in the case of *The Bridgeport Bk.* v. *N. Y. & N. H. R. Co.* 30 Conn. 270.

If that 15th by-law could have the meaning imputed to it, it is still subject to the objections taken to the first plea founded on section 35 of the act of 1864. If that section prohibits all loans or discounts by a national bank, on the security of its own shares, it is no more competent to create the lien by by-law than by particular agreement.

A by-law creating a lien must, in fact, rest on agreement. It is founded on consent of existing stockholders, and by which subsequent ones are bound. It is the thing itself, and not any particular mode of doing it, that is prohibited.

Mr. Justice **Davis** delivered the opinion of the court:

The defendants in error commenced this suit in the court below, to obtain pecuniary satisfaction for the refusal of the National Bank of South Bend to permit the transfer of certain 371*] shares of stock *on its books to them, on the ground that the law imposed the duty on the corporation to allow the transfer, and raised an implied promise in their favor, that the duty should be performed. The case stated by the declaration is this: On the 8th day of July, 1865, the bank issued two certificates of stock to Charles V. Culver, which declared that he was entitled to 150 shares in the capital stock of the institution, and that these shares were transferable on the books of the bank, in person or by attorney, only on the surrender of the certificate. This limitation on the power of transfer was in conformity with the terms of a by-law on the subject. On the 29th of January, 1866, Lanier and Handy purchased 138 shares of this stock from Culver for value, and obtained from him the stock certificates regularly assigned, with the usual powers of attorney to transfer the stock, of which transaction the Bank was notified on the 31st day of the same month of January. This purchase was not followed up by an immediate request for the transfer of the stock, but in the month of January, 1868, this request was regularly made and refused. The bank, in justification of its conduct, interposes three pleas in bar, which set up two distinct defenses. The first and third pleas justify the refusal on the ground that, at the time the stock was taken by Culver, he had pledged it as a security for such deposits as the bank might, from time to time, make with the house of Culver, Penn & Co., of New York, of which he was a member; and that to make the pledge more effectual by power of attorney regularly executed, he authorized his attorney in fact to sell and transfer the stock, in case the bank conceived it to be necessary, and apply the proceeds to liquidate any balance due the bank from Culver, Penn & Co.; and that fifty shares had actually been sold, in pursuance of this agreement, and the proceeds applied before Culver assigned the stock certificates to the defendants in error; and the remaining shares had been sold before the bank had notice that they were assigned. The second plea asserts the right of the bank independently of this special agreement to hold the stock in question until Culver had discharged his liabilities to it, by virtue of the provisions of the act of Congress, under which it was organized, and which were incorporated into a by-law of the institution.

It is unnecessary to decide whether the first and third pleas would answer the declaration, if the transaction pleaded were lawful, because the directors of the bank were forbidden by law from dealing with Culver in the manner they did. At the time this proceeding took place the currency act of 1863 had been superseded by the act of June 3, 1864, which expressly repealed the former act. See § 52, 13 Stat. at L. p. 118. It is, therefore, by the provisions of the latter act that the conduct of banking associations must be governed, whether they were organized before or after it became a law. And in looking into this act, see § 35, 13 Stat. at L. p. 110, we find these associations expressly prohibited from making any loan or discount on the security of the shares of their own capital stock. And so marked is the policy of Congress on this subject, that it does not allow a bank to become the purchaser or holder of its shares at all, unless absolutely necessary to prevent loss on a debt previously contracted in good faith, and not then for a longer period than six months. It is easy to see, that if the power were given to a bank to

they generally answer as an explanation for the absence of all matters in the record, which are required to be taken before the judgment can be lawfully entered. As the presumptions are indulged to supply the absence of averments of the particular facts presumed, they cease to be received when the contrary of the particular supposed facts appears. Thus, when a record of a judgment, rendered in an action at law **351*]** upon an issue joined between *the parties, is produced, in which no verdict of a jury or finding of the court appears, upon the existence of which alone the judgment could be entered, it will be presumed that such verdict or finding was had. But, on the other hand, if it affirmatively appear in the record that no such proceeding was had, the judgment may be attacked as having been rendered without authority. It is of no avail, then, to invoke the doctrine that a judgment cannot be collaterally assailed. The doctrine does not apply to a case of this kind, for the record itself establishes the invalidity of the judgment produced.

The objections which I make to the decree, upon which the defendant asserts title, go to the jurisdiction of the court over the property condemned, to its jurisdiction to enter the decree rendered, and to the validity of the act of July 17th, 1862. Similar objections were taken by me in a dissenting opinion to the decree in the case of *Miller* v. *U. S. ante*, 135, recently decided, but the importance I attach to them justifies their further elucidation.

First, as to the jurisdiction of the court over the property. The executive seizure of the property required by the act of Congress is preliminary to the commencement of judicial proceedings for its forfeiture. "After the same shall have been seized" says the statute, "proceedings shall be instituted." Now, when the executive seizure in this case was made, what was the condition of the property before judicial proceedings were taken? Was it in the custody of the court? Clearly not. As yet the court had nothing to do with it—no more than, before suit, it has to do with a vessel seized by the collector for a violation of the revenue laws, or brought into port by a prize crew for an attempted breach of blockade. The fact that the marshal was employed as the agent of the President in making the seizure, did not change the position of the property. The President might have selected any other person as his agent with the same result. He might, at this stage, have released the property from seizure upon his own volition, without interfering with the authority of or coming in collision with the court. **352*]** As yet *no relations were established between the court and the property seized. Whatever the marshal, in making the preliminary seizure, may have said to the occupants of the premises seized, or whatever notice he may have given to them, whether it was that he held the property subject to the directions of the President, or to the order of the district court or district attorney, in nowise affected the condition of the property, or created any relation between it and the court. The existence of any such relation did not depend upon the declaration of that officer, who as yet was not acting under any judicial process.

The next proceeding was the filing of the libel of information; but that did not change the relation between the court and the property. The libel was the foundation for the issue of the process of the court to bring the property within its custody; but, of itself, without such process, it worked no change in the condition of things. When was it ever pretended that the mere filing of a libel, without the issue of process, brought person or thing into the custody of the court? When the libel was filed process was ordered, and process was issued, commanding the marshal to attach the property and detain the same in his custody. By attachment under this judicial process, had it been made, the court would have acquired jurisdiction over the property, for it is by seizure under judicial process, and that alone, that the court takes the *res* into its custody. But the process thus issued was never served, and the jurisdiction of the court over the property rested upon the preliminary seizure alone. And yet we are told by the majority of the court that the objection that this preliminary seizure was insufficient to give the requisite jurisdiction, and that a new seizure, under judicial process, was necessary, is a very narrow and unsubstantial objection. I answer, that no objection is narrow or unsubstantial which goes to the jurisdiction of the court to forfeit the property of a citizen upon *ex parte* proceedings, without a hearing, for alleged public offenses of which he is assumed to be guilty, because he did not appear to a citation, which the law prohibited from being communicated *to [**353** him. This court has repeatedly dismissed writs of error because tested by a wrong officer, or made returnable on a day other than the first day of the term, or because they did not embrace all the parties to the record; and when it has been urged that the objections taken to them were extremely narrow and unsubstantial, the answer has been that nothing could be treated as narrow and unsubstantial, and for that reason disregarded, which was prescribed by law as the mode of exercising the appellate jurisdiction of the court. So here, nothing can justly be considered as either narrow or unsubstantial which is required by law to give jurisdiction to a court to enforce penal statutes, in the absence of the alleged offenders against their provisions.

Second, as to the jurisdiction of the court to render the decree in the confiscation case. The act of Congress, as already stated, is highly penal in its consequences, and by all established canons of interpretation should be strictly construed. Kent, Com. 376. Its every requirement should be rigidly exacted. What, then, are its requirements? It declares that the proceedings instituted for the condemnation of the property seized shall conform as nearly as may be to proceedings in admiralty or revenue cases, and if the property shall be found to have belonged to a person engaged in the rebellion, or who has given aid and comfort thereto, the same shall be condemned.

As the proceedings in the case upon which the defendant relies related to land, they should have conformed, according to those provisions, as nearly as practicable to proceedings in revenue cases. Now, the statute of 1789 prescribes the proceedings in these cases, and declares that after default is made in one of them, "the court shall proceed to hear and determine

the cause according to law," a clause which has been judicially held, and in my opinion correctly held, to make it imperative upon the court that there shall be some hearing before a decree of forfeiture is rendered, and "the 354*] *court will require," says Mr. Justice Sprague, in such cases, "the prosecutor to introduce full proof of the allegations in the libel whenever the circumstances shall made it reasonable." *U. S.* v. *Lion*, 1 Sprague, 400.

If we consider the provision of the law of 1789, and the provision of the act of 1862, for a finding, it seems impossible to escape the conclusion that a finding upon hearing is an essential prerequisite to any decree of forfeiture in these confiscation cases. The authority to render the decree is in express terms made conditional upon a particular fact being found. If the fact designated be found, says the statute, the property shall be condemned, which is equivalent to declaring that if such fact be not found, no condemnation shall be decreed. As the record produced in the case, upon which the defendant relies, shows that no hearing was had and no finding was made, the decree of forfeiture rendered therein appears to me to be an act of judicial usurpation.

Third, as to the validity of the clauses of the act of 1862, providing for the seizure and confiscation of the property of rebels. This point I have already considered at length in the dissenting opinion in *Miller* v. *U. S.*, and I shall only add a few words. In that dissenting opinion I expressly stated that it had been held that when the late Rebellion assumed the proportions of a territorial civil war, the inhabitants of the Confederate States and the inhabitants of the loyal states became reciprocally enemies to each other, and that the inhabitants of the Confederate States engaged in the Rebellion, or giving aid and comfort thereto, were at the same time amenable to the municipal law as rebels, and that the correctness of this determination was not disputed; that the question was, not as to the right of Congress to adopt either of these courses, but what course had Congress, by its legislation, authorized. It is indisputable that whatever Congress may authorize to be done, by the law of nations, in the prosecution of war against an independent nation, it may authorize to be done when en- 355*] gaged in the prosecution *of a territorial civil war against the domestic enemies of the United States. I contend only that the limitations which the law of nations has imposed in the conduct of war between independent nations should apply and govern the United States in whatever war they may prosecute. I do not doubt, and have never doubted for a moment, that the United States possess all the power necessary to suppress all insurrections, however formidable, and to make their authority respected and obeyed throughout the limits of the Republic. But this recognition of the power of the government cannot be permitted to preclude a comparison of all legislation adopted to uphold its authority with the Constitution. And in so comparing the act of July 17, 1862, I am unable to find in that great instrument any sanction for the clauses in the act providing for the seizure and confiscation of the property of persons charged with particular criminal acts. I do not find it in the war powers of the government, for they sanction only the confiscation of the property of public enemies. I do not find it in the municipal power of the government to legislate for the punishment of crimes, for that is subject to limitations which secure to the accused a trial by a jury of his peers and the right to be confronted with the witnesses against him.

It is true, as already stated, that enemies participating in the Rebellion, or giving aid and comfort thereto, might have been treated as rebels and held amenable to the municipal law. Yet the terms "enemies" and "rebels" are not synonymous, even though the Rebellion attained the proportions of a territorial civil war. A permanent resident of the Confederacy was an enemy, although he may always have opposed the Rebellion and remained loyal in his feeling and action to the national government. His position as an enemy was determined by his residence, and had nothing to do with his personal disposition or conduct. But he was not a rebel, and could not have been prosecuted as such unless he was personally guilty of treasonable acts.

Congress well understood the distinction between enemies and rebels, and we are not justified in supposing that it intended *to [*356 disregard this distinction in its legislation, even were that practicable, as it was not.

My conclusion is that the judgment of the court below was erroneous, and should be reversed.

I am authorized to say that Mr. Justice **Clifford** concurs with me in this opinion.

JOHN H. HARRINGTON, Claimant of One Hundred Twenty-four Barrels of Distilled Spirits, *Plff. in Err.*,

v.

UNITED STATES,

and

JOSEPH A. BOYDEN, Claimant of One Hundred Fifty-four Barrels of Distilled Spirits, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C. *"The Distilled Spirits,"* 11 Wall. 356–369.)

Goods fraudulently removed from bonded warehouse are liable to forfeiture—repeal of statute by implication—knowledge of agent, effect of, on principal—confidential information of agent does not affect principal—goods mixed with others—effect of, on forfeiture.

*1. The acceptance by the collector of a false and fraudulent bond, given for the removal of distilled spirits from a bonded warehouse, will not prevent a forfeiture of such spirits under the 45th section of the internal revenue act of July 13, 1866, which forfeits "distilled spirits found elsewhere than in a bonded warehouse, not having been removed therefrom according to law."

2. The removal will be illegal, if effected by means of a false and fraudulent bond.

3. The 48th section of the internal revenue act of June 30, 1864, as amended by the act of 1866, which forfeits all goods, wares, merchandise, articles, or objects, if found in possession of any person in fraud of the internal revenue laws, etc., is applicable to distilled spirits, notwithstanding the forfeiture of spirits is provided for in a distinct series of sections relating thereto, in the same law or in the supplementary law.

4. All the sections can stand together; and where that is the case, one does not repeal or supersede

*Headnotes by Mr. Justice BRADLEY.

the other, as repeals by implication are not favored.

5. The rule that notice to the agent is notice to the principal, applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction and present to his mind at the time he is acting as such agent; provided it be of such a character as he may communicate to his principal, without breach of professional confidence.

6. Where distilled spirits, forfeited to the United States, are mixed with other distilled spirits belonging to the same person (ignorant of the forfeiture) they are not lost to the government by such mixture, either on principle of confusion of goods or transmutation of species, even though subsequently run through leaches for the purpose of rectification. The government will be entitled to its proportion of the result.

[Nos. 124, 125.]

Argued Mar. 28, 1871. Decided Apr. 10, 1877.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

Each of these cases arose upon an information filed in the district court of the United States for the district of Massachusetts, for the forfeiture of a certain quantity of distilled spirits. A decree having been entered for such forfeiture, the claimants sued out a writ of error to the circuit court, by which the decree was affirmed; whereupon, the claimants sued out a writ of error to this court.

The case is fully stated by the court.

Mr. **R. M. Morse, Jr.,** for plaintiffs in error:

The principal is not affected by the knowledge of the agent, unless the knowledge is acquired by the agent while in the employ of the principal, and in the course of the very transaction in which he is employed.

This doctrine was laid down in 1729, in *Fitzgerald* v. *Fauconberge*, Fitzg. 211.

In *Lowther* v. *Carlton*, 2 Atk. 242, Lord Ch. J. Hardwicke said: "If a counsel or attorney is employed to look over a title, and if by some other transaction, foreign to the business in hand, has notice, this shall not affect the purchaser."

The doctrine was reaffirmed by the same judge in *Warrick* v. *Warrick*, 3 Atk. 294, and in *Worsley* v. *Scarborough*, Ib. 392; by Lord Erskine, in *Hiern* v. *Mill*, 13 Ves. 120, and by Lord Eldon, in *Mountford* v. *Scott*, 3 Madd. 34.

In *Kennedy* v. *Green*, 3 Myl. & K. 699, Lord Brougham held that a client was not to be held cognizant of a fraud, although his solicitor was the contriver and actor in the same, because the solicitor's knowledge was not obtained in the course of his employment for that client.

See also *Wilde* v. *Gibson*, 1 H. of L. Cas. 605.

In the United States the weight of authority is in support of the same doctrine.

Bk. v. *Payne*, 25 Conn. 444; *Bk.* v. *Davis*, 2 Hill, 451; *N. Y. Cent. Ins. Co.* v. *Nat'l Prot. Ins. Co.* 20 Barb. 468; *Brown* v. *Montgomery*, 20 N. Y. 287; *Jackson* v. *Sharp*, 9 Johns. 163; *Hood* v. *Fahnestock*, 8 Watts, 489; *Bracken* v. *Miller*, 4 Watts & S. 111; *Winchester* v. *R. Co.* 4 Md. 231; *Ins. Co.* v. *Shriver*, 3 Md. Ch. 381; *Willis* v. *Vallette*, 4 Met. (Ky.) 186; *Keenan* v. *Ins. Co.* 12 Ia. 126; *Bierce* v. *Red Bluff Hotel Co.* 31 Cal. 160.

In England, however, it has been held that, when one transaction is clearly followed by and connected with another, or when it is clear that a previous transaction is present to the mind of the agent when engaged in another transaction, there is no ground for the distinction by which the rule, that notice to the agent is notice to the principal, had been restricted to the same transaction.

Hargreaves v. *Rothwell*, 1 Keen, 158; *Lenehan* v. *McCabe*, 2 Ir. Eq. 342; *Fuller* v. *Bennett*, 2 Hare, 394; *Dresser* v. *Norwood*, 17 C. B. (N. S.) 466.

But this relaxation of the rule has not generally obtained in the United States.

Whether a person had knowledge of certain facts is purely a question of fact, to be determined by a jury under proper instructions, and it should not be laid down as a conclusive presumption of law that he had, because his agent, before he became his agent, had it.

But even if the court should adopt the modification of the rule as stated in *Hargreaves* v. *Rothwell*, and *Dresser* v. *Norwood*, and approved by the learned judge in the circuit court, yet instruction of the learned district judge was clearly wrong, as he failed to give the qualification which is held in those cases to be essential to affect the principal with the prior knowledge of his agent, to wit: that it must appear that the previous transaction is present to the mind of the agent when engaged in another transaction, or that one transaction is clearly followed by and connected with another, so that that fact may be necessarily inferred.

The fourth instruction prayed for applies to the case of both claimants.

The prayer was as follows: "That if a portion of the spirits proved in this case not to have paid a tax, had passed through the rectifiers in which there were other spirits, and so become mixed with them, no portion of the spirits when rectified would be liable to forfeiture."

Both the prayer for instructions, and the instruction of the presiding judge in the district court, assumed that the spirits were mixed with other spirits in the rectifiers, so that they could not be distinguished.

The presiding judge in the district court laid down two rules to the jury:

1. That if the spirits were mixed with other spirits, with knowledge of the fraud committed, for the purpose of destroying their identity, and were so mixed that they could not be distinguished and identified, then the entire quantity was forfeited to the United States.

2. That if the mixture was innocently made, the government was entitled to a fair proportion of the mixture.

Both of these rules, it is submitted, were incorrect.

There is no more odious system of penalties than the forfeiture of property, even when the express terms of the statute compel it; and yet here it is proposed to go beyond the language of the statute and forfeit property which has in no way offended against the law.

There is absolutely nothing in the charge to instruct the jury at all, on the basis on which they were to estimate the fair proportion to which the government was entitled. They were left to estimate in such way as seemed proper to them. And it is submitted, that even assuming the correctness of the general proposition of the court, there was still a want of definiteness and exactness in the instruction.

The doctrine of confusion of goods, as stated either in the civil or the common law, has no application in a proceeding for forfeiture under a criminal statute.

"Penal statutes are to be construed strictly, and cases within the like mischief are not to be drawn within a clause inclosing a prohibition or a forfeiture, unless the words clearly comprehend the case."

Story, J., in *The Harriet*, 1 Story, 255; E. F. Smith, on Stat. and Const. Law, 723-725; see also, Dwar. Stat. 635-637, and the following cases there cited:

Warne v. *Varley*, 6 T. R. 443; *R.* v. *Handy*, 6 T. R. 286; *Martin* v. *Ford*, 5 T. R. 101.

The difficulty with the argument for the government on this point is that it seeks to extend the provisions of the statute to other goods than those in terms described. It alleges that certain spirits, describing them in their information, have not paid the tax, and are liable to forfeiture. The evidence offered in support of this charge is, that the spirits seized are not the same as those described in the information. It then seeks to condemn the spirits seized, not because they are liable to forfeiture, by the terms of the act, but because some of their original ingredients, where identity is lost, were so liable. The case may be within the mischief of the statute, but is clearly not covered by the terms, at least not by the terms of the section under which this information is drawn.

The statute authorizes the government, in case of the nonpayment of the taxes, either to proceed against them for forfeiture, or to sell them for nonpayment of the taxes, and apply the proceeds of the sale to the payment of the taxes.

When goods are liable to forfeiture under a statute giving no other remedy to the government, the title of the government vests where the offense subjecting them to forfeiture is committed.

But whether they are liable to forfeiture or not, at the option of the government, no title can vest until that option has been exercised. In this case it was not done until after the information was filed. Therefore, at the time the mixture was made, the government had no title to any part of the spirits. The claimants mixed different spirits, all of which belonged to them, and there is no room for the application of the doctrine of confusion, which assumes that at the time of the mixture, part of the ingredients belonged to one person and part to another.

If the title of the government vested when the offense was committed, the government may assess a tax on its own property and distraint it.

See *Caldwell* v. *U. S.* 8 How. 366.

Messrs. Amos T. Akerman, Atty. Gen., **C. H. Hill**, *Asst. Atty. Gen.*, and **B. H. Bristow**, *Solicitor Gen*, for defendant in error:

The instructions with regard to the intermixture of the seized spirits with others were sufficiently favorable to the claimants. The law on this subject, as stated by Chancellor Kent, is as follows:

"With respect to the state of a confusion of goods, where those of two persons are so intermixed that they can no longer be distinguished, each of them has an equal interest in the subject as tenants in common, if the intermixture was by consent. But if it was wilfully made, without mutual consent, then the civil law gave the whole to him who made the intermixtures, and compelled him to make satisfaction in damages to the other party for what he had lost. The common law gave the entire property, without any account, to him whose property was originally invaded and its distinct character destroyed."

2 Kent, Com. (6th ed.) 364; *Willard* v. *Rice*, 11 Met. 493; see *U. S.* v. *Fifty-six Barrels of Whisky*, 4 Int. Rev. Rec. 106, 108.

The character of the property was not changed.

See *Cushing* v. *Breed*, 14 Allen, 376.

This is, undoubtedly, in one sense, a penal statute, but it is not a statute which, therefore, is to be strictly construed—a point too often decided to be now open in this court.

Taylor v. *U. S.* 3 How. 197, 210; *Cliquot's Champagne*, 3 Wall. 114, 18 L. ed. 116; *Fennerstein's Champagne*, 3 Wall. 145, 18 L. ed. 121; *U. S.* v. *Hodson*, 10 Wall. 395, 19 L. ed. 937.

In mercantile transactions, and in other cases of the purchase and sale of personal property, the knowledge of the agent is knowledge of the principal.

Sm. Merc. L. 175, 176; *Dresser* v. *Norwood*, 17 C. B. N. S. 481.

See, likewise, authorities cited by Mr. Justice Clifford, 10 Int. Rev. Rec. 165.

Those cases which deny that a principal can be held responsible for knowledge of his agent, are mostly cases of the relations of solicitor and client, and refer to matters of titles to real estate. The question involved therein seems to have been: how far knowledge in the agent, of facts which would charge him with a trust in favor of third parties, can bind an innocent party.

Lowther v. *Carlton*, 2 Atk. 242; *Warrick* v. *Warrick*, 3 Atk. 294; *Mountford* v. *Scott*, 3 Madd. 34; *Hood* v. *Fahnestock*, 8 Watts, 489; *Bracken* v. *Miller*, 4 Watts & S. 111.

And the doctrine formerly prevalent in England has been greatly qualified by recent cases.

Hargreaves v. *Rothwell*, 1 Keen, 158; *Fuller* v. *Benett*, 2 Hare, 394.

The case would seem to fall within the principle of *Hern* v. *Nichols*, 1 Salk. 289.

Mr. Justice **Bradley** delivered the opinion of the court:

These are writs of error to the circuit court for the district of Massachusetts. The cases arose as follows: the collector of internal revenue in Boston in April, 1867, seized 278 barrels of distilled spirits, as being forfeited by removal from a bonded warehouse, without paying the tax due thereon. The plaintiff in error, Harrington, claimed 124 barrels, and Boyden, 154 barrels. Upon the trial of the cases, the jury found against 50 barrels claimed by Harrington and against all the barrels claimed by Boyden. It appeared in evidence that in April, 1867, a large quantity of spirits was withdrawn from the United States bonded warehouses in Boston, upon the pretense of an intent to transport the same to Eastport, for exportation thence.

False and fraudulent bonds were given therefor, and the spirits were never attempted to be transported to Eastport, but were removed for consumption and sale in Boston and vicinity.

359*] and the *taxes were not paid. The Government contended that the spirits seized were parcel of this lot, and that the claimants were parties to or cognizant of this fraud. The claimants contended that part of the spirits in controversy were not a portion of the spirits fraudulently withdrawn, but were from different and distinct lots, and that the spirits claimed by Harrington had been rectified in leaches in which various lots were mixed, including, possibly, some of the lot fraudulently withdrawn, which it was impossible to identify. They further claim that the spirits were bought in open market, without knowledge of the fraud, and that such of the fraudulent lot as Harrington had bought, he had bought through Boyden as his agent. Evidence was given on both sides, tending to prove these several points.

The claimants insist, in the first place, that no recovery can be had under the information on the conceded facts of the case. The information contained three counts relied on; one on section 45 of the act of July 13, 1866, and two on section 48 of the act of June 30, 1864, as amended by act of July 13, 1866. The first-named section declares that "all distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law not having been paid, shall be forfeited." The first count charges that the spirits in question were thus found. It is insisted that they were removed according to law.

We do not think that a removal procured by a false and fraudulent bond, though accepted by the collector, was a removal according to law, and we fail to perceive how the spirits which were thus withdrawn from the bonded warehouse can be exempted from the operation of this section.

The other section, on which the second and third counts were framed, declares that "all goods, wares, merchandise, articles, or objects, on which taxes are imposed by the provisions of law, which shall be found in the possession or custody, or within the control of any person or persons in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized, etc., and shall be forfeited to the United States." It is insisted that this section does not apply to distilled spirits, inasmuch as they are provided for in a different part of the act by a distinct series of sections.

An examination of the act of 1864 will show that the first fifty-two sections are of a gen-
365*] eral character, intended to *apply to all taxes imposed by the act, and that the 48th section is especially of that character, and applies to distilled spirits as well as all other articles. By the act of 1866, this section was amended in a manner not material to the question at issue. When thus amended it still stood as it did before, having the same office and the same general application. The addition in the act of 1866 of several new sections relating to the removal of distilled spirits from a bonded warehouse, and imposing penalties and forfeitures for giving fraudulent bonds for that purpose, or for illegally removing the spirits, does not deprive the 48th section of the act of 1864 of its general application. There is nothing incongruous or repugnant between it and the new sections. Both can stand, and an information may be founded on both or either, whenever the facts will admit. It is a very common thing for cumulative remedies to be thus provided. The act of 1868, which revises the entire revenue law relating to spirits and tobacco, furnishes a striking instance of this. After providing for a large number of specific forfeitures, or forfeitures for specific breaches of the law, it follows up the subject by sections of the most general nature, so framed as not to admit of any possible escape or evasion, and which necessarily include most of the cases before specifically provided for. Statutes *in pari materia*, like the acts of 1864 and 1866, are to be construed together, and repeals by implication are not favored if the acts can reasonably stand together.

The other points made by the claimants relate to the charge given by the court to the jury. Passing over the first and second instructions prayed for, which are not insisted on, and are not tenable if they were, the third and fourth demand attention. The substance of the third instruction prayed for was: that if the spirits were removed from the warehouse according to the forms of law, and the claimants bought them without knowledge of the fraud, they were not liable to forfeiture. The court charged in accordance with this prayer with this qualification, that if Boyden bought the spirits as agent for Harrington, and was *cognizant of the fraud, Harrington [*366 would be bound by his knowledge. The claimants insist that this is not law.

The question how far a purchaser is affected with notice of prior liens, trusts, or frauds, by the knowledge of his agent who effects the purchase, is one that has been much mooted in England and this country. That he is bound and affected by such knowledge or notice as his agent obtains in negotiating the particular transaction, is everywhere conceded. But Lord Hardwicke thought that the rule could not be extended so far as to affect the principal by knowledge of the agent acquired previously in a different transaction. *Warrick* v. *Warrick*, 3 Atk. 290. Supposing it to be clear that the agent still retained the knowledge so formerly acquired, it was certainly making a very nice and thin distinction. Lord Eldon did not approve of it. In *Mountford* v. *Scott*, 1 Turn. & R. 274, he says: "It may fall to be considered whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say, that if an attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening; it must in all cases depend upon the circumstances." The distinction taken by Lord Hardwicke has since been entirely overruled by the Court of Exchequer Chamber in the case of *Dresser* v. *Norwood*, 17 Com. B. N. S. 466. So that in England the doctrine now seems to be established, that if the agent, at the time of effecting a purchase, has knowledge of any prior lien, trust or fraud, affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquire the knowledge when he effects the purchase, no question can arise as to his having it

at that time; if he acquired it previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend on the lapse of time and other circumstances. Knowledge communicated to the principal himself he is bound to recollect, but he is not bound 367*] by knowledge communicated to his*agent unless it is present to the agent's mind at the time of effecting the purchase. Clear and satisfactory proof that it was so present seems to be the only restriction required by the English rule as now understood. With the qualification that the agent is at liberty to communicate his knowledge to his principal, it appears to us to be a sound view of the subject. The general rule that a principal is bound by the knowledge of his agent is based on the principle of law, that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty. When it is not the agent's duty to communicate such knowledge, when it would be unlawful for him to do so, as, for example, when it has been acquired confidentially as attorney for a former client in a prior transaction, the reason of the rule ceases, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by his agent's secret and confidential information. This often happened in the case of large estates in England, where men of great professional eminence were frequently consulted. They thus became possessed, in a confidential manner, of secret trusts or other defects of title, which they could not honorably, if they could legally, communicate to subsequent clients. This difficulty presented itself to Lord Hardwicke's mind, and undoubtedly lay at the bottom of the distinction which he established. Had he confined it to such cases, it would have been entirely unexceptionable.

The general tendency of decisions in this country has been to adopt the distinction of Lord Hardwicke, but it has several times been held, in consonance with Lord Eldon's suggestion, that if the agent acquired his information so recently as to make it incredible that he should have forgotten it, his principal will be bound. This is really an abandonment of the principle on which the distinction is founded. Story, Ag., § 140; *Hovey* v. *Blanchard*, 13 N. H. 145; *Patten* v. *Ins. Co.* 40 N. H. 145; 368*] **Hart* v. *Bank*, 33 Vt. 252. The case last cited adopts the rule established by the case of *Dresser* v. *Norwood*. Other cases, as that of *Bank of the U. S.* v. *Davis*, 2 Hill, 452; *N. Y. Cent. Ins. Co.* v. *Protection Ins. Co.* 20 Barb. 468, adhere to the more rigid view. See cases collected in note to American edition of 17 Com. B. Rep. (N. S.), 482, and Mr. Justice Clifford's opinion in the circuit court in the present case.

On the whole, however, we think that the rule as finally settled by the English courts, with the qualification above mentioned, is the true one, and is deduced from the best consideration of the reasons on which it is founded. Applying it to the case in hand, we think that the charge was substantially correct. The fair construction of the charge is, that if the jury believed that Boyden, the agent, was cognizant of the fraud at the time of the purchase, Harrington, the principal, was bound by this knowledge. The precise words were "that if Boyden bought the spirits as agent for Harrington, and Boyden was cognizant of the fraud, Harrington would be bound by his knowledge." The plain and natural sense of these words, and that in which the jury would understand them, we think, is that they refer to Boyden's knowledge at the time of making the purchase. Thus construed, the charge is strictly in accordance with the law as above explained. There was no pretense that Boyden acquired his knowledge in a fiduciary character.

This result is arrived at independent of the question whether an innocent purchaser without notice can, in any case, claim precedence of the title of the United States arising by forfeiture. It has frequently been held that he cannot do so in cases of statutory forfeitures ensuing from acts done or omitted. *U. S.* v. *Grundy*, 3 Cranch, 338; *U. S.* v. *1960 Bags of Coffee*, 8 Cranch, 398; *Fontaine* v. *Phœnix Ins. Co.* 11 Johns. 293; *Kennedy* v. *Strong*, 14 Johns. 128; *The St. Jago de Cuba*, 9 Wheat. 416; *The Florenzo*, 1 Blatchf. & H. 60. But as this point was not argued or raised, we do not put the case upon it.

The fourth instruction prayed for was: that if a portion of the spirits fraudulently removed had passed through the rectifiers in which there were other spirits, and so become mixed therewith, no portion of the spirits, when rectified, would be liable to the forfeiture.

The court refused to give this instruction, but instead thereof charged, in substance, that, in the case supposed, if the different lots so mixed belonged to the claimants, the government would be entitled to the forfeiture of a fair proportion of the rectified spirits, although the mixture were innocently made. If done purposely and fraudulently, in order to destroy the identity of the spirits unlawfully removed from the bonded warehouse, the court charged that then the whole mixture would be forfeited.

We see no error in the fourth instruction given. It needs *no learned examination [*369 of the doctrine of confusion or mixture of goods to make it apparent that if certain spirits belonging to the government by forfeiture are voluntarily mixed with other spirits belonging to the same party and passed through the process of rectification in leaches, he cannot thereby deprive the government of its property; and if the government only claims its fair proportion of the rectified spirits, he certainly cannot complain of injustice. The only result of applying the doctrine of confusion of goods would be to forfeit the entire mixture. And it cannot be claimed that the process of rectification in leaches effects such a transmutation of species as to destroy the identity of the liquor. If, after the mixture and before the rectification, a certain proportion of the spirits belongs to the United States, they will not lose that proportion by the spirits being passed through the leaches for the purpose of rectification.

The judgment of the Circuit Court must be affirmed.

THE FIRST NATIONAL BANK OF SOUTH BEND, *Plff. in Err.*, *v.* CHARLES LANIER and Parker Handy.

(See S. C. 11 Wall. 369-378.)

National banks cannot loan on their own stock —deposit is a loan—contract pledging stock of national bank to it, illegal—laws of 1863 and 1864—bank, when liable to action for refusing to transfer its stocks on its books.

By the currency act of June 3, 1864, national banks are expressly prohibited from making any loan or discount on the security of the shares of their own capital stock.

A deposit is nothing but a loan of money, and is within both the letter and spirit of the provision, whether interest be obtained or not.

A contract, pledging the stock of a national bank to it as security for loans, is illegal.

Congress evidently intended, by leaving out of the Law of 1864 the 36th section of the act of 1863, to relieve the holders of bank shares from the restrictions imposed by that section.

When certificates of bank stock are transferable on the books of the bank on their surrender, a bank which refuses to make such transfer to a purchaser on request, is liable to an action for damages.

[No. 88.]

Argued Feb. 27, 1871. Decided Apr. 10, 1871.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

The history and facts of the case are fully stated in the opinion of the court.

Messrs. **McDonald** and **Roache**, for plaintiff in error:

It has been objected to this defense, that there could be no valid pledge, inasmuch as the certificates of stock, which it is claimed are the highest evidence of title to the stock, were not taken possession of by the pledgee. In general, possession of the thing pledged, by the party to whom it is pledged, is necessary to constitute a valid pledge; but this rule is answered whenever the pledgee has such possession as the nature of the property will permit. But the certificates do not constitute the property; they are only muniments of title.

Cunningham v. *Ins. Co.* 4 Ala. 652.

The shares of stock constitute the property; these might be pledged, and the possession, so far as such property is capable of being possessed, remains in the pledger. Ang. & Ames, Corp. § 580.

This results from the nature of the property being as it is, intangible personal property possessing more the elements of a chose in action than of a chattel. Ang. & Ames, Corp. § 560.

On the other hand, certificates of stock are simply the muniments and evidences of the holder's title to a given number of shares in the property and franchises of a corporation of which he is a member.

Bk. v. *N. Y. & N. H. R. Co.* 13 N. Y. 627.

The issuance of the certificates was not at all essential to constitute the holder an owner of the stock, and a transfer may take place without the surrender of the outstanding certificate. Ang. & Ames, Corp. § 565.

The objection, therefore, that no valid pledge could exist as there was no actual possession of the thing pledged, is untenable.

It is further insisted, that if the stock was pledged, Culver, still holding the certificates, had the power to transfer the stock by the assignment of the certificates to a bona fide holder, and that such holder would take the stock free of any claim of the bank by reason of such pledge. This would be giving the certificates a legal character they clearly do not possess. This would impress upon them the highest rights of commercial paper. In the case of *The Mechanics' Bk.* v. *N. Y. & N. H. R. Co.*, above cited, the court says: "Certificates of stock are not security for money in any respect, much less are they negotiable securities." As muniments of title they may, undoubtedly, be assigned or pledged, but the bona fide assignee or pledgee will take them, subject to all the equities that existed against the assignee. See *Cunningham* v. *Ins. Co.* 4 Ala. 652.

Again; it is contended that the contract under which the bank claimed a lien on the stock was void, on account of the 35th section of the act of Congress of June 8, 1864.

The object of the prohibition was to compel stockholders to become borrowers on the same terms as other general customers; and inasmuch as the inhibition is limited to loans and discounts, which must be held to mean those made in the ordinary course of dealing, it cannot, we think, with any fairness, be extended to such securities as might be taken for deposits in such commercial centers as the bank might find it necessary to make for the purposes of trade and exchange, and which is clearly the character of the transaction set out in the pleas under consideration.

The 15th section of the by-laws is as follows: "The stock of this bank shall be assignable only on the books of this bank, subject to the restrictions and provisions of the act of February 25, 1863. The 36th section of said act provided that the capital stock of such banks should be assignable on the books of the association, in such manner as its by-laws should prescribe; but no shareholder in any association formed under said act, should have power to sell or transfer any share held in his own right, so long as he should be liable, as principal debtor, surety or otherwise, to the association, for any debt due and unpaid, etc. The repeal of that section by the act of June 3, 1864, could not operate to affect the by-law, unless the right to impose such restrictions was taken away by the subsequent act; but so far from that being the case, the 12th section of the act of 1864 expressly confers upon such associations the right, either by laws or in their articles of association, to prescribe the manner in which stock shall be transferable on their books.

Messrs. **T. A. Hendricks**, *O. B. Hord*, and *A. W. Hendricks*, for defendants in error:

The record shows that there was no valid pledge of the stock.

"Delivery accompanies a pledge and is essential to its validity."

4 Kent, Com. 138 (marg.); Story, Bail. §§ 287, 288; *Ward* v. *Sumner*, 5 Pick. 59; *Barlow* v. *Paxton*, 5 Johns. 258; *Wilson* v. *Little*, 2 N. Y. 443.

In case of the corporation shares, we think the delivery should be by handing over the certificates, as the most apt and tangible representative of that species of chose in action; or by investing the pledgee with the legal title by transfer on the books, as in *Wilson* v. *Little*, or

at least by some form of written assignment, placing the shares within the power of the pledgee.

Here nothing of the kind was done. The only act or writing appertaining to the transaction, was the execution of the power of attorney by Culver, not to the bank, or to any agent of the bank, as such; but to one Thomas S. Stanfield, as his—Culver's—own agent, and attorney in fact. This was but a private transaction between himself and his own agent.

There is only one condition upon which a bank may purchase or hold its own shares; and that is, where it is necessary to do so in order to prevent loss on a debt previously contracted in good faith. In such case the available capital of the bank being, to that extent, already lost and imperiled, the bank, for the protection of its own shareholders, may take the stock in payment.

In this case the bank by by-law and by the form of certificate adopted, made its stock certificates as nearly of the character of negotiable paper as it was practicable to make them. The certificates show that the stock was transferable on the books of the bank, but that it was transferable only on the surrender of the certificates.

The appellees were fully justified in acting on the hypothesis that Culver had previously acquired the shares, for the certificates expressly certified that he owned them. And it was not even necessary for the protection of their rights that they should give notice to the bank, for by its own rules Culver could not transfer in the absence of the certificates, and these were in their own possession.

The precise point we are now submitting came under judgment in the court of appeals of New York, in *The N. Y. & N. H. R. Co.* v. *Schuyler*, 34 N. Y. 30.

The same question was considered in the supreme court of Connecticut, in the case of *The Bridgeport Bk.* v. *N. Y. & N. H. R. Co.* 30 Conn. 270.

If that 15th by-law could have the meaning imputed to it, it is still subject to the objections taken to the first plea founded on section 35 of the act of 1864. If that section prohibits all loans or discounts by a national bank, on the security of its own shares, it is no more competent to create the lien by by-law than by particular agreement.

A by-law creating a lien must, in fact, rest on agreement. It is founded on consent of existing stockholders, and by which subsequent ones are bound. It is the thing itself, and not any particular mode of doing it, that is prohibited.

Mr. Justice **Davis** delivered the opinion of the court:

The defendants in error commenced this suit in the court below, to obtain pecuniary satisfaction for the refusal of the National Bank of South Bend to permit the transfer of certain 371*] shares of stock *on its books to them, on the ground that the law imposed the duty on the corporation to allow the transfer, and raised an implied promise in their favor, that the duty should be performed. The case stated by the declaration is this: On the 8th day of July, 1865, the bank issued two certificates of stock to Charles V. Culver, which declared that he was entitled to 150 shares in the capital stock of the institution, and that these shares were transferable on the books of the bank, in person or by attorney, only on the surrender of the certificate. This limitation on the power of transfer was in conformity with the terms of a by-law on the subject. On the 29th of January, 1866, Lanier and Handy purchased 138 shares of this stock from Culver for value, and obtained from him the stock certificates regularly assigned, with the usual powers of attorney to transfer the stock, of which transaction the Bank was notified on the 31st day of the same month of January. This purchase was not followed up by an immediate request for the transfer of the stock, but in the month of January, 1868, this request was regularly made and refused. The bank, in justification of its conduct, interposes three pleas in bar, which set up two distinct defenses. The first and third pleas justify the refusal on the ground that, at the time the stock was taken by Culver, he had pledged it as a security for such deposits as the bank might, from time to time, make with the house of Culver, Penn & Co., of New York, of which he was a member; and that to make the pledge more effectual by power of attorney regularly executed, he authorized his attorney in fact to sell and transfer the stock, in case the bank conceived it to be necessary, and apply the proceeds to liquidate any balance due the bank from Culver, Penn & Co.; and that fifty shares had actually been sold, in pursuance of this agreement, and the proceeds applied before Culver assigned the stock certificates to the defendants in error; and the remaining shares had been sold before the bank had notice that they were assigned. The second plea asserts the right of the bank independently of this special agreement to hold the stock in question until Culver had discharged his liabilities to it, by virtue of the provisions of the act of Congress, under which it was organized, and which were incorporated into a by-law of the institution.

It is unnecessary to decide whether the first and third pleas would answer the declaration, if the transaction pleaded were lawful, because the directors of the bank were forbidden by law from dealing with Culver in the manner they did. At the time this proceeding took place the currency act of 1863 had been superseded by the act of June 3, 1864, which expressly repealed the former act. See § 52, 13 Stat. at L. p. 118. It is, therefore, by the provisions of the latter act that the conduct of banking associations must be governed, whether they were organized before or after it became a law. And in looking into this act, see § 35, 13 Stat. at L. p. 110, we find these associations expressly prohibited from making any loan or discount on the security of the shares of their own capital stock. And so marked is the policy of Congress on this subject, that it does not allow a bank to become the purchaser or holder of its shares at all, unless absolutely necessary to prevent loss on a debt previously contracted in good faith, and not then for a longer period than six months. It is easy to see, that if the power were given to a bank to

loan money on the security of its shares, it would imply also a power to become the owner of those shares, and this Congress intended to guard against.

These institutions were created to subserve public purposes, and not the mere private interests of their stockholders. And in no better way could this object be attained than by placing shareholders, in their pecuniary deal-
375*] ings *with the bank, on the same footing with other customers. Besides, how could the capital of the bank be kept available for active use, if the shareholder, who had pledged his stock for borrowed money, should be unable to meet his obligation? To the extent of the debt the capital would be withdrawn, and it is hardly possible that this could be the case for any length of time, were the debt secured outside of the shares of the bank. But it is unnecessary to seek for the reason of this prohibition, as the provision concerning it is explicit, and free from ambiguity.

Although the section in question forbids loans or discounts by a bank on the security of its own shares of stock, it is argued that this inhibition does not extend to the case of deposits made by one bank with another. But a deposit is nothing but a loan of money, and is within both the letter and spirit of the provision. It is well known that country banks keep on deposit in New York, with bankers and merchants, a considerable amount of money for their own convenience, for which they receive more or less of interest. But whether interest be obtained or not, these deposits are, equally with paper discounted over the counter of the bank, loans of money, and the reason of the rule is equally applicable to them.

The banker is accountable for the deposits he receives as a debtor, and the individual borrower of money from the bank sustains no other relation to it. In both cases money is borrowed, to be returned in a greater or less period of time, according to the contract of the parties. Without pursuing the subject further, it is clear that the contract between the South Bend Bank and Culver was illegal and cannot, therefore, be pleaded in avoidance of any duty imposed on the bank. It would seem, from the date of the certificates issued to Culver, that as soon as he took the stock he pledged it, and the bank is, therefore, without the excuse of endeavoring to secure a pre-existing debt contracted in good faith. The contract in its inception was in violation of law, and the bank cannot complain if it is made to suffer in consequence of it.

376*] *The defense interposed by the second plea is equally unavailing to the plaintiffs in error. This plea assumes that the bank had a lien upon the stock of Culver for his indebtedness to it, without any special agreement on the subject, by virtue of the provisions of the 36th section of the currency act of 1863, restricting a shareholder from transferring his stock as long as he owes the bank, which remained in operation, although the section was repealed by the act of 1864, by means of a by-law adopted when the section was in force, declaring that the stock of the bank shall be transferable only on the books of the bank, subject to the provisions and restrictions of the act of Congress aforesaid.

If it be conceded that the by-law intended to embrace the restrictions contained in the 36th section, it is hard to see what good it accomplished, because, as long as this section was in force, it was the law of the corporation, known to all men, and did not need the aid of a by-law to render it operative. And if it be contended that a bank may, through the agency of a by-law, retain a particular section that has been repealed, it is difficult to see why it may not, by the same means, retain all the remaining sections of the repealed statute that are applicable to its business, and thus antagonize itself to the whole policy of Congress on the subject. But of necessity a by-law cannot operate in this way, nor is there any reason to suppose it was intended that this one should have such an effect. In the absence of any action taken by the bank on the subject since the new law went into operation, the fair inference is that this by-law is used as an after-thought to serve the purposes of this suit. Congress evidently intended, by leaving out of the law of 1864, the 36th section of the act of 1863, to relieve the holders of bank shares from the restrictions imposed by that section. The policy on the subject was changed, and the directors of banking associations were, in effect, notified that thereafter they must deal with their shareholders as they dealt with other people. As the restrictions fell, so did that part of the by-law relating to the subject fall with them.

It remains to be seen whether, on the case stated, Lanier *and Handy can recover [*377 of the bank for a breach of corporate duty, notwithstanding the specific shares had already been transferred to other persons through the power of attorney which Culver gave when he attempted to pledge his stock as security for the deposits to be made with his New York house. And, in considering this question, we are relieved of any necessity of deciding between conflicting equities, for this suit does not seek to disturb the title of the adverse purchasers to the specific stock. It leaves them in possession of the property, and undertakes to subject the bank to damages for refusing to transfer the stock to the defendants in error. And, as we view this controversy, it makes no difference whether the transfers were actually made to other parties before or after the bank received notice of the assignment of the stock certificates by Culver to Lanier and Handy.

The power to transfer their stock is one of the most valuable franchises conferred by Congress on banking associations. Without this power, it can readily be seen that the value of the stock would be greatly lessened and, obviously, whatever contributes to make the shares of the stock a safe mode of investment and easily convertible, tends to enhance their value. It is no less the interest of the shareholder, than the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage.

It is in obedience to this requirement, that stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the

large cities of the country, and are sold in open market the same as other securities. Although neither in form or character negotiable paper, they approximate to it as nearly as practicable. If we assume that the certificates in question are not different from those in general use by corporations, and the assumption is a safe one, it is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can 378*]*buv with safety. He is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know, that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates.

In this state of case Lanier and Handy made their purchase of Culver. They bought for value, without knowledge of any adverse claim, in full faith that the bank would observe its engagements, and pursued in all respects the directions given in the certificates. They were not told to give notice to the bank of their purchase, nor was there any necessity for notice, because, by the rules of the bank, Culver could not transfer the stock in the absence of the certificates, and these they had in their possession. It is therefore clear, in making their purchase of Culver, that they had a right to rely on the certificates as securing to them the stock which they represented. And it is equally clear that the bank, in allowing this stock to be transferred to other parties while the certificates were outstanding in the hands of bona fide holders, was guilty of a breach of corporate duty, and as its conduct operated to the injury of Lanier and Handy, an action will lie in their behalf to obtain satisfaction for the injury.

These views dispose of this case, and they are sustained by recent decisions in the court of appeals of New York and the supreme court of Connecticut, and, as we are advised, they also are supported by the supreme court of New Jersey in a case not yet reported. *Bridgeport Bank* v. *N. Y. & N. H. R. Co.* 30 Conn. 270; *Same* v. *Schuyler*, 34 N. Y. 30.

The judgment of the Circuit Court is affirmed.

SAMUEL E. RANKIN, *Plff. in Err.*,

v.

THE STATE OF TENNESSEE.

(See S. C. 11 Wall. 380-382.)

Judgment of reversal, when not final judgment.

A judgment of reversal, where the case must go back and be tried upon its merits, is not a final judgment of which this court can take jurisdiction.

NOTE.—*What is final decree or judgment of state or other court from which appeal lies*—see notes, 5 L. ed. U. S. 302; 17 C. C. A. 238; 28 C. C. A. 482; 32 C. C. A. 475.

[No. 109.]

Argued Mar. 21, 1871. Decided Apr. 10, 1871.

IN ERROR to the Supreme Court of the State of Tennessee.

This case arose in the circuit court of Jefferson county, Tennessee, upon an indictment for murder against the plaintiff in error. The defendant having been acquitted in that court, the case was taken by writ of error, to the supreme court of the state, by which the judgment below was reversed, and the cause remanded for a new trial; whereupon the defendant sued out this writ of error.

The case is fully stated by the court.

Mr. **H. Maynard**, for plaintiff in error:

(No counsel appeared in this court for defendant in error.)

Mr. Justice **Bradley** delivered the opinion of the court:

This is a writ of error to the supreme court of Tennessee. The case below was an indictment found in the state circuit court of Jefferson county, in August term, 1865, against Samuel E. Rankin, the plaintiff in error, and ten other persons named in the indictment, charging them with the murder of one John Thornhill, on the 1st of June preceding. The defendant, in August term, 1866, pleaded that on the day mentioned in the indictment, he was in the military service of the United States in the military district of East Tennessee, being first lieutenant of Company B of the 9th Tennessee Cavalry, and bound to obey all lawful orders of his superiors, "then and there existing and being an insurrection and civil war in said military district;" and that, on the 5th day of October thereafter, he was arraigned *and put on [*381 trial at Chattanooga, before a general court-martial, for the same identical crime with which he was charged by the indictment, and was acquitted thereof; and he set forth the record and proceedings of the court-martial. To this plea the attorney general filed a replication, denying the existence of the record and the continuance of the war, and alleging fraud in the procurement of the trial by court-martial. The defendant demurred, and the court sustained the demurrer. The attorney general then filed a new replication, the case was tried, and the defendant was acquitted. Writ of error being brought, the state supreme court reversed the decree of acquittal, on the ground that the defendant's plea was insufficient, and remanded the case to the circuit court for trial. The effect of this judgment was to overrule the defendant's plea, and to require him to plead over to the indictment.

The difficulty with the case, as brought before us, is that the judgment is not a final one in the case. This court, under the 25th section of the judiciary act, can only take cognizance of final judgments of the state courts. And although the court has been liberal in its construction of the statute as to what judgments are final, yet the judgment in this case cannot be deemed such by any reasonable stretch of construction. It is a rule in criminal law *in favorem vitæ*, in capital cases, that when a special plea in bar is found against the prisoner, either upon issue tried by a jury, or upon a point of law decided by the court, he shall not be concluded or *convicted thereon, [*382

but shall have judgment of *respondeat ouster*, and may plead over to the felony the general issue, not guilty. 4 Bl. Com. 338. And this is the effect of the judgment of reversal rendered by the supreme court of Tennessee in this case; so that in no sense can that judgment be deemed a final one. The case must go back and be tried upon its merits, and final judgment must be rendered before this court can take jurisdiction. If after that it should be brought here for review, we can then examine the defendant's plea and decide upon its sufficiency.

The writ of error must be dismissed.

ALEXANDER T. STEWART, Francis Warden, and George Fox, as A. T. Stewart & Co., *Plffs. in Err.*,

v.

S. BLOOM, S. KAHN, A. Levy, and A. Adler, as Bloom, Kahn, & Co.

(See S. C. "*Stewart* v. *Kahn*," 11 Wall. 493-507.)

Construction of act of Congress in regard to limitation of actions, as affected by the war—such act applies to state and Federal courts, and is constitutional.

The act of Congress of 1864, in regard to the limitations of actions, means that the time which elapsed, both before and after the passage of the act, during which the plaintiff could not prosecute his suit by reason of the civil war, is to be deducted from the time the cause of action accrued.

The act of 1864 applies not only to cases in the Federal courts, but also to cases in the courts of the states.

The act is warranted by the Constitution of the United States, and is valid.

[No. 81.]

Submitted Feb. 6, 1871. Decided Apr. 10, 1871.

IN ERROR to the Supreme Court of the State of Louisiana.

The petition in this case was filed in the fourth district court of New Orleans by the plaintiffs in error, to recover upon a promissory note. Judgment having been given for the defendants, the plaintiffs took an appeal to the supreme court of the state, by which the said judgment was affirmed; whereupon the plaintiffs sued out this writ of error.

The case is fully stated by the court.

Mr. **S. M. Johnson,** for plaintiffs in error:

This case comes here on a writ of error to to supreme court of Louisiana, and in obedience to the authority of the 2d section of the act of Congress of February 5, 1867. The section of the act referred to is amendatory of the 25th section of what is known as the judiciary act of 1789. These two sections should be carefully considered; for the act of 1867 enlarges the sphere of review of this court.

By the 25th section, it will be seen that the court was restricted to "an examination and correction of such errors only as might appear on the face of the record." The obvious intent and purpose of the grant of power to this court, by this section was, in general terms, to enable the Supreme Court of the United States, in specified cases, to reverse the decisions of the highest courts of the state.

One of the grounds set up in the act of 1867 (the same in the act of 1789), to authorize a review by this court of the decision of the highest court of any state, is stated by the act itself, thus:

"Where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity."

This case is brought here to correct the error of the supreme court of Louisiana, which affirmed the validity of the statute of prescription of that state, pleaded by the defendants in bar of the plaintiff's right to recover, which statute, we maintain, is repugnant to the Constitution and laws of the United States.

We have, in the final decision of the state court, a distinct affirmation of the validity of prescription during the whole war.

That law had been suspended or made inoperative by reason of the war, which confessedly did shut out the plaintiffs from all access to the courts of Louisiana. It follows that the defendant set up in bar a suspended and invalid law.

From April 15 and August 16, 1861, the dates of President Lincoln's proclamations of nonintercourse with Louisiana, all judicial proceedings and all statutes of that state involving the execution of any laws affecting citizens of the United States, became void. To all legal intents and purposes, war existed between the United States and Louisiana.

The act of 1864 was not necessary to secure to these plaintiffs exemption from the operation of the act of Louisiana invoked by the defendants.

War, in the judgment of this court, we doubt not, will be held to operate *ipso facto* as the suspension of all laws of the state which affect the rights of loyal citizens of the United States, whether at the time in or out of the state of Louisiana. The act of 1864 simply declared such suspension, without invalidating the force of general principles, which are to be deduced from the condition of public affairs referred to.

Mr. **E. T. Merrick,** for defendants in error:

On motion to dismiss.

There is nothing of record to show that any question respecting the Statute of Limitations of the United States of June 11, 1864, was raised or relied upon before the supreme court of Louisiana, as a ground of recovery.

See *Medberry* v. *Ohio*, 24 How. 413, 16 L. ed. 739.

The act of Feb. 5, 1867 (2d section), must be construed with 25th section of the judiciary act of 1789; and there is nothing in either which contemplates that a writ of error can be maintained for any other matter or thing than that shown by the record. It was not the intention of Congress to create any new mode of trying cases in error.

On the merits, if motion to dismiss should be overruled.

There is no grant of power in the Constitution of the United States to Congress to prescribe rules of property or practice for the government of the several states. *Quoad* the matters not intrusted to the government of the United States, the state courts are considered as courts of another sovereignty. *Ableman* v. *Booth*, 21 How. 516, 16 L. ed. 173. As Congress cannot

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NOTE.—*Suspension of statute of limitations during war*—see note to Hanger v. Abbott, 18 L. ed. U. S. 939.

create the state courts, as it cannot establish the ordinary rules of property, obligations and contracts, nor, in general, denounce penalties for crimes and offenses in the several States, it cannot prescribe rules of proceeding for such state courts.

On the other hand, there is no inhibition in the Constitution of the United States upon the individual states, to pass statutes of limitation, even where such statutes of limitation bar the judgments of sister states. See, *McElmoyle v. Cohen*, 13 Pet. 328.

It, therefore, necessarily appears that Congress never intended by the act of June 11, 1864 (13 Stat. at L. 123), to legislate for the several states.

The mere reading of the act shows that Congress was legislating for the courts and officers of the United States, over which it has jurisdiction. It suspended the statute of limitations, in the cases given, both as to crimes and civil actions. Could a state bring a writ of error to this court, to reverse a judgment of its own courts, which should hold that a criminal offense or penal action was barred by the statute of limitations, notwithstanding the impossibility of summoning or arresting the offender, for the cause assigned in the statute?

The statute of Louisiana, enforced in this case, has been on the statute book for forty-five years, and receives a like interpretation for citizens and strangers. It has been interpreted in former times as subject to exceptions, it is true, but the interpretation, whatever, it has been, has received a uniform application.

Smith v. *Stewart*, 21 La. Ann. 67; *Jaquet* v. *Webb*, 22 La. Ann. 111.

The plaintiffs in error (conceding their citizenship) had their choice of tribunals, either those of the state or the nation. They selected the former, as most advantageous to them, and lost.

Statutes of limitation and prescription are considered as mere directions to the forum, what kind of actions to hear, and what are to be dismissed. A claim barred in one state or country may be enforced in another state or country, where the laws as to the times of limitation are different.

McCluny v. *Silliman*, 3 Pet. 270; *McElmoyle* v. *Cohen*, *supra*; *Townsend* v. *Jemison*, 9 How. 407; *Patterson* v. *Gaines*, 6 How. 550.

The Louisiana Code of Practice has it: "The forms, the effects and the prescription of actions, are governed by the law of the place where they are brought; but contracts are governed by the law of the place where they are entered into." C. P. art. 13.

Taylor v. *Joor*, 7 La. Ann. 272. "Questions of prescription affect the remedy, and must be determined by the law of the forum."

Newman v. *Goza*, 2 La. Ann. 646; *Union Cotton Mfg. Co.* v. *Lobdell*, 7 Mart. N. S. 108; Story, Confl. L. Nos. 576, 577, and authorities there cited.

Mr. Justice **Swayne** delivered the opinion of the court:

This is a writ of error to the supreme court of the state of Louisiana. The record discloses the following case: On the 16th of April, 1866, the plaintiffs in error, citizens and residents of the state of New York, brought suit against the defendants in error in the fourth district court of New Orleans, upon a promissory note made at New York on the 10th day of August, 1860, by the defendants, under their firm name of Bloom, Kahn, & Co., to the plaintiffs, by their firm name of A. T. Stewart & Co., for the sum of $3,226.24, payable at the office of A. Levy & Co., in the city of New Orleans, with the current rate of exchange on New York, *seven months from date. [*501 The plaintiffs, by their petition, claimed also to recover a few dollars for the balance of an account. The note was duly protested at maturity for non-payment. On the 28th of the same month of April the defendant, Levy, filed his answer, wherein he alleged that he knew nothing of the correctness of the note, or account, and demanded full proof. He also pleaded the statutory prescription of that state, of five years, as a bar to the action. The other defendants, Bloom, Kahn, & Adler, answered subsequently. They denied all the allegations of the petition, and also set up the defense of prescription.

A statute of the state provides that when "new facts" are alleged in the answer, "neither replication nor rejoinder shall be admitted." The facts are "considered as denied by the plaintiff." Code, art. 329.

Kahn was examined upon interrogatories, and answered that the defendants' firm was constituted as alleged in the plaintiffs' petition, and that their place of business at the date of the note was Clinton, Louisiana. Another witness testified that he had known the defendant, Levy, since the year 1854 or 1855; that Levy had resided in New Orleans since that time, and was there during the period of the Rebellion. At the trial the plaintiffs submitted this testimony, and the note and protest, to the court. It does not appear that any evidence was offered touching the account. The court gave judgment for the defendants. Upon what ground it was given is not disclosed in the record.

The plaintiffs appealed to the supreme court of the state. In that court they insisted that the act of Congress of June 11, 1864, entitled "An Act in Relation to the Limitation of Actions in Certain Cases," interrupted the running of the prescription, and entitled them to recover. The supreme court affirmed the judgment of the district court. The record shows they held that "more than five years having elapsed after the maturity of the note before the citations were served *on the de- [*502 fendants, the plea of prescription must be sustained." It is clear that the judgment was given solely upon this ground. The case would have been more satisfactorily presented if a bill of exceptions had been taken at the proper time, and the material facts in that way placed upon the record. But enough is shown to develop clearly the action of the supreme court of the state, and the point we are called upon to review. There is no controversy as to the facts. Under the circumstances, a refusal on our part to exercise the jurisdiction invoked would involve a sacrifice of substance to form, and unwarrantably defeat the ends of justice.

Our attention has been called to the second section of the act of Congress of February 5, 1867, amending the judiciary act of 1789; 14 Stat. 385. That section is to a great extent a

transcript of the 25th section of the prior act. There are several alterations of phraseology which are not material. A change of language in a revised statute will not change the law from what it was before, unless it be apparent that such was the intention of the legislature. *Theriat* v. *Hart*, 2 Hill, 381, note; *Douglas* v. *Howland*, 24 Wend. 47. But at the close of the 2d section there is a substantial addition and omission. The addition in nowise concerns this case, and need not be remarked upon. The omission is of these words in the 25th section of the original act: "But no other error shall be regarded as a ground of reversal in any such case, as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute." 1 Stat. at L. 185.

It is a rule of law that where a revising statute, or one enacted for another, omits provisions contained in the original act, the parts omitted cannot be kept in force by construction, but are annulled. *Ellis* v. *Paige*, 1 Pick. 43; *Bartlet* v. *King*, 12 Mass. 537; *Nichols* v. *Squire*. 5 Pick. 168.

503*] *Whether the 25th section of the original act is superseded by the 2d section of the amendatory act, is a point not necessary in this case to be determined; for, conceding the negative, the question before us is within the omitted category, is presented by the record, and is the only one we are called upon to consider. It is alike within the section in question of the original and of the amendatory act. In either view there is no jurisdictional difficulty.

In *Hanger* v. *Abbott*, 6 Wall. 532, 18 L. ed. 939, this court held that the time during which the courts in the states lately in rebellion were closed to the citizens of the loyal states is, in suits since brought, to be deducted from the time prescribed by the statutes of limitations of those states respectively, although the statutes themselves contain no such exception and this independently of the act of Congress of 1864. In the case of *The Protector*, 9 Wall. 687, 19 L. ed. 812, the same rule was applied to the acts of Congress of 1798 and 1803, fixing the time within which appeals shall be taken from the inferior Federal tribunals to this court. The case before us was decided prior to the decision of this court in *Hanger* v. *Abbott*, with which it is in direct conflict. But apart from the act of 1864, it would present no ground of Federal jurisdiction. *Hanger* v. *Abbott* came into this court under the 22d section of the judiciary act of 1789, or if that section is superseded, under the 2d section of the amendatory act of 1867. Its determination, therefore, depends necessarily upon the construction and effect to be given to the act of 1864.

The note upon which the suit is founded matured upon the 13th of March, 1861. The prescription of five years expired on the 13th of March, 1866. This action was commenced on the 16th of April, 1866, one month and three days after the period of limitation had elapsed.

The act of 1864 consists of a single section

other states of the Union. This Proclamation was authorized by the 5th section of the Act of July 13, 1861. The authority of the United States was excluded from the entire state of Louisiana from the date of the first Proclamation down to the month of May, 1862, when the city of New Orleans and a small strip of adjacent territory lying along the Mississippi river below that city was reclaimed from the dominion of the rebels by the military forces of the United States. Even then no court there, state or Federal, was open to the plaintiffs. Levy was there, but the other defendants were elsewhere in the state, whither the arms of the United States had not penetrated. But, without pursuing the subject further, here was a period of more than a year to be deducted, according to the act of Congress, from the time necessary, under the state law, to create a bar, and this defeated the prescription relied upon by the defendants.

But it has been insisted that the act of 1864 was intended to be administered only in the 506*] Federal courts, and that it *has no application to cases pending in the courts of the states.

The language is general. There is nothing in it which requires or will warrant so narrow a construction. It lays down a rule as to the subject, and has no reference to the tribunals by which it is to be applied. A different interpretation would defeat, to a large extent, the object of its enactment. All those who could not sue in the courts of the United States, including the loyal men who were driven out by the insurrection and returned after it ceased, and those of the same class who remained at home during the war, would be deprived of its benefits. The judicial anomaly would be presented of one rule of property in the Federal courts, and another and a different one in the courts of the state; and debts could be recovered in the former which would be barred in the latter. This would be contrary to the uniform spirit of the national jurisprudence from the adoption of the judiciary act of 1789 down to the present time.

The act thus construed, it is argued, is unwarranted by the Constitution of the United States and, therefore, void.

The Constitution gives to Congress the power to declare war; to grant letters of marque and reprisal; to make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

The President is the Commander-in-Chief of the army and navy, and of the militia of the several states, when called into the service of the United States, and it is made his duty to take care that the laws are faithfully executed. Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures to be taken in carrying on war and to suppress insurrection, are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution.

507*] *In the latter case the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrections. It is a beneficent exercise of this authority. It only applies coercively the principle of the law of nations, which ought to work the same results in the courts of all the rebellious states, without the intervention of this enactment. *Hanger* v. *Abbott, supra.* It promotes justice and honesty, and has nothing penal or in the nature of confiscation in its character. It would be a strange result if those in rebellion, by protracting the conflict, could thus rid themselves of their debts, and Congress, which had the power to wage war and suppress the insurrection, had no power to remedy such an evil, which is one of its consequences. What is clearly implied in a written instrument, is as effectual as what is expressed. *U. S.* v. *Babbit, supra.* The war power and the treaty making power, each carries with it authority to acquire territory. *American Ins. Co.* v. *Canter*, 1 Pet. 511. Louisiana, Florida and Alaska were acquired under the latter, and California under both. The act is within the canons of construction laid down by Chief Justice Marshall. *McCulloch* v. *Md.* 4 Wheat. 316.

This objection to the statute is untenable.

The judgment of the Supreme Court of the state is reversed. The cause will be remanded to that court, with directions to overrule the plea of prescription, and to proceed in the case in conformity to law.

THE SUSQUEHANNA & WYOMING VALLEY RAILROAD & COAL COMPANY, *Appt.*,

v.

R. M. BLATCHFORD and J. B. Newman, Trustees.

(See S. C. 11 Wall. 172-178.)

Jurisdiction as to parties—executors and trustees—defect, how taken advantage of—demurrer—plea in abatement.

*1. In controversies between citizens of different states, where the jurisdiction of the courts of the United States depends upon the citizenship of the parties, if there are several co-plaintiffs, each plaintiff must be competent to sue, and if there are several co-defendants, each defendant must be liable to be sued in those courts, or the jurisdiction cannot be entertained.

2. Executors and trustees, suing for others' benefit, form no exception to this rule. If they are personally qualified by their citizenship to bring suits in the courts of the United States, the jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified; and if they are not personally qualified by their citizenship, the courts of the United States will not entertain jurisdiction, although the parties whom they represent may be qualified.

3. The cases of Browne v. Strode, 5 Cranch, 303, and McNutt v. Bland, 2 How. 10, commented upon and explained.

4. When the citizenship of the parties is averred

*Headnotes by Mr. Justice FIELD.

NOTE.—*Jurisdiction of U. S. circuit court dependent on residence of parties; proper place of suit*—see note to Roberts v. Lewis, 36 L. ed. U. S. 579.

in a bill of complaint, and it does appear that some of the plaintiffs are disqualified by their citizenship from maintaining the suit, the defect may be taken advantage of by demurrer, or without demurrer, on motion at any stage of the proceedings.

5. A plea in abatement is required only when the citizenship averred is such as to support the jurisdiction of the court, and the defendant desires to controvert the averment.

[No. 97.]

Argued Mar. 2, 1871. Decided Apr. 17, 1871.

APPEAL from the Circuit Court of the United States for the Western District of Pennsylvania.

The bill in this case was filed in the court below, by the defendants in error, for the foreclosure of a certain mortgage. A decree having been entered in said court in favor of the complainants, the respondents took an appeal to this court.

The case is sufficiently stated in the opinion of the court.

Messrs. **E. L. Hodges** and *Isaac J. Post*, for appellant:

To sustain the jurisdiction of the Federal court, each plaintiff must be qualified to sue, and each defendant must be liable to be sued by them, under the provisions of the 11th section of the judiciary act.

Strawbridge v. *Curtiss*, 3 Cranch, 267; *Ward* v. *Arredondo*, 1 Paine, 410; *Conolly* v. *Taylor*, 2 Pet. 556.

Executors and administrators, trustees and corporations, qualified by citizenship, may sue in the Federal courts, although they for whose benefit the suits are brought may be disqualified.

Chappedelaine v. *Dechenaux*, 4 Cranch, 306; *Clarke* v. *Matthewson*, 12 Pet. 171; *Osborn* v. *Bk. of U. S.* 9 Wheat. 856; *R. R. Co.* v. *Letson*, 2 How. 497; *Irvine* v. *Lowry*, 14 Pet. 298; *Bonnafee* v. *Williams*, 3 How. 574.

The jurisdiction depends exclusively upon the citizenship of the parties to the suit appearing on the record.

A supposed analogy between the trust relations of the present plaintiffs, and those of the plaintiffs in certain cases heretofore decided in this court, founded upon official bonds, affords the only explanation of the judgment rendered in the court below on this demurrer. Those cases are three, *viz.:* *Browne* v. *Strode*, 5 Cranch, 303; *McNutt* v. *Bland*, 2 How. 10; *Huff* v. *Hutchinson*, 14 How. 586.

These are all suits upon bonds given under state laws, to an officer having no interest in the subject-matter, for the benefit of whom it may concern.

Mr. **Theodore Cuyler**, for appellees:

The jurisdiction of the court, when it is founded upon the citizenship of the parties, rests upon that of the real and not of the nominal parties to the suit.

"The courts of the United States have jurisdiction in a case between the citizens of the same state, if the plaintiffs are only nominal plaintiffs, for the use of an alien." *Browne* v. *Strode*, 5 Cranch, 303.

"By a law of the state of Mississippi, sheriffs are required to give bonds to the governor for the faithful performance of their duty. The fact that the governor and the party sued are citizens of the same state will not oust the jurisdiction of the circuit courts of the United States, provided the party for whose use the suit is brought, is a citizen of another state." *McNutt* v. *Bland*, 2 How. 10.

"The court will not suffer its jurisdiction in an equity cause to be ousted by the circumstances of the joinder or non-joinder of merely formal parties, who are not entitled to sue or liable to be sued in the United States courts." *Wormley* v. *Wormley*, 8 Wheat. 422.

"The substantial parties, plaintiffs, those for whose benefit the decree is sought, are aliens, and the court has original jurisdiction between them and all the defendants.

Conolly v. *Taylor*, 2 Pet. 556; see, also, *Irvine* v. *Lowry*, 14 Pet. 293.

Mr. Justice **Field** delivered the opinion of the court:

The 11th section of the judiciary act of 1789 vests in the circuit courts original jurisdiction of suits of a civil nature, at law and in equity, when the matter involved exceeds, exclusive of costs, the sum or value of $500, in three classes of cases: 1, when the United States are plaintiffs or petitioners; 2, when an alien is a party; and, 3, when the suit is between a citizen of the state where the suit is brought, and a citizen of another state.

In the last two classes the designation of the party, plaintiff or defendant, is in the singular number, but the designation is intended to embrace all the persons who are on one side, however numerous, so that each distinct interest must be represented by persons, all of whom are entitled to sue or are liable to be sued in the Federal courts. *Strawbridge* v. *Curtis*, 3 Cranch, 267. In other words, if there are several co-plaintiffs, the intention of the act is that each plaintiff must be competent to sue, *and, if there are several co-defendants, [*175 each defendant must be liable to be sued, or the jurisdiction cannot be entertained. Executors and trustees suing for others' benefit form no exception to this rule. If they are personally qualified by their citizenship to bring suit in the Federal courts, the jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified. This has been repeatedly adjudged. It was so adjudged as early as 1808, in *Chappedelaine* v. *Dechenaux*, 4 Cranch, 307, where the complainants, though citizens of France, brought suit, one as residuary legatee and the other as administrator *de bonis non* of a testator, who had been a citizen of Georgia, against the defendant, who was a citizen of that state. Counsel, on opening the question of jurisdiction, was stopped by the court, Mr. Chief Justice Marshall observing that the impression of the court was that the case was clearly within the jurisdiction of the courts of the United States; that the plaintiffs were aliens; and, although they sued as trustees, they were entitled to sue in the circuit court. This ruling was followed in *Childress* v. *Emory*, 8 Wheat. 669; and in *Osborn* v. *The Bank of the United States*, 9 Wheat. 738, the Chief Justice laid it down as a universal rule that, in controversies between citizens of different states, the jurisdiction of the Federal courts depended not upon the relative situation of the parties concerned in interest, but upon the relative situation of the parties named in the record.

These authorities are conclusive of the present case. The defendant is a corporation created under the laws of Pennsylvania. One of the plaintiffs, Blatchford, describes himself in the bill as a citizen of the state of New York, and the plaintiff, Newman, describes himself as a citizen of Pennsylvania, and they both describe themselves as trustees, who sue solely for the use of Henry Beckett, an alien and a subject of the Queen of Great Britain, and of Joseph Loyd, a citizen of New Jersey. The demurrer of the defendant raises the objection that the plain-176*]tiff, Newman, is a citizen of the *same state with the defendant, and that the court has, in consequence, no jurisdiction in the case. If there were no other parties, the suit clearly would not lie, for the 11th section of the judiciary act only authorizes a suit between citizens of different states, not between citizens of the same state. And the objection, according to the construction we give to that section and to the authorities cited, is equally available when a disqualified party is joined with others who are qualified.

The cases of *Browne* v. *Strode*, 5 Cranch, 303, and *McNutt* v. *Bland*, 2 How. 10, upon which the plaintiffs rely, do not aid them. In the first case the action was on a bond given by an executor for the faithful execution of his testator's will, in conformity with the statute of Virginia, which required all such bonds to be made payable to the justices of the peace of the county where administration was granted, but allowed suits to be brought upon them at the instance of any party aggrieved. The object of the action was to recover of the defendant, a citizen of Virginia, a debt due by the testator to a British subject, and was brought in the name of the justices of the peace of the county, who were also citizens of that state. It was held that the circuit court had jurisdiction.

In *McNutt* v. *Bland* the action was on a bond given by a sheriff of a county in Mississippi. By the law of that state sheriffs were required to execute bonds to the governor of the state and his successors, conditioned for the faithful performance of the duties of their office, which bond could be prosecuted at any time by any party injured until the whole amount of the penalty was recovered. The action in the case cited was brought in the name of the governor for the use of citizens of New York, against the defendants, who were citizens of Mississippi. Upon demurrer it was held by this court that the circuit court had jurisdiction.

"In this case," said the court, "there is a controversy and suit between citizens of New York and Mississippi; there is neither between 177*] the governor and the defendants. As* the instrument of the state law to afford a remedy against the sheriff and his sureties, his name is on the bond and to the suit upon it, but in no just view of the Constitution or law can he be considered as a litigant; both look to things, not names; to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them in virtue of some positive law." The court then cites the case of *Browne* v. *Strode*, and states the principle on which it was decided, to be, "that where the real and only controversy is between citizens of different states, or an alien or a citizen, and the plaintiff is by some positive law compelled to use the name of a public officer who has not, nor ever had any interest in or control over it, the courts of the United States will not consider any others as parties to the suit, than the persons between whom the litigation before them exists."

There is no analogy between these cases and the case at bar. The nominal plaintiffs in those cases were not trustees, and held nothing for the use or benefit of the real parties in interest. They could not, as is said in *McNutt* v. *Bland*, prevent the institution or prosecution of the actions or exercise any control over them. The justices of the peace in the one case, and the governor in the other, were the mere conduits through whom the law afforded a remedy to the parties aggrieved.

In the case at bar the plaintiffs are the real prosecutors of the suit. They are parties to the mortgage contract negotiating its terms and stipulations, and to them the usual rights and powers of mortgagees are reserved, and to them the usual obligations of mortgagors are made. The right to use different remedies is expressly provided upon default in the payments stipulated, and the adoption of either rests at the option of the plaintiffs. So long as they do not refuse to discharge the trusts reposed in them, other parties are not authorized to institute or prosecute any proceedings for the enforcement of the mortgage, or to exercise any control over them.

The case is not one where a plea in abatement was required *to raise the question of [*178 citizenship. Here the citizenship of the parties is averred in the bill of complaint, and the consequent defect in the jurisdiction of the court is apparent, and a defect of this character thus disclosed may be reached on demurrer or taken advantage of without demurrer, on motion, at any stage of the proceedings. A plea in abatement is required only where the citizenship averred is such as to support the jurisdiction of the court and the defendant desires to controvert the averment. The question of citizenship constitutes no part of the issue upon the merits.

It follows, from the views expressed, that the decree of the court below must be reversed, and that the cause must be remanded, with directions to the court to dismiss the bill for want of jurisdiction of parties; and it is so ordered.

DUNLOP, MONCURE & CO. and The Legal Representatives of Louise D. Minor, Deceased, *Plffs. in Err.*,

v.

JAMES E. ZUNTS.

(See S. C. *"Moncure v. Zunts,"* 11 Wall. 416–423.)

Practice in Louisiana—sale of land in that state set aside for want of proper notice.

The act of May 26, 1824, established in Louisiana the practice of the state courts as the practice of the Federal courts, and limited the power of the Federal courts in that state over their own rules of practice.

The act of 1824 has not been repealed or modified by the 7th section of the act of March 2, 1867.

A sale of land in Louisiana which the marshal had advertised only in the newspapers selected by the clerk of the House of Representatives, should be set aside for want of advertisement in the parish where the land lay.

[No. 127.]

Argued Mar. 31, Apr. 3, 4, 1871. Decided Apr. 17, 1871.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The history and facts of the case are fully stated by the court.

Messrs. **C. Robinson** and **P. Phillips,** for plaintiffs in error:

The mode of proceeding on writs of execution issued on judgments of courts of the state of Louisiana, having been adopted by rule in the circuit court of the United States, held in that state, was the proper rule to govern the marshal of that court. *Collier* v. *Stanbrough,* 6 How. 21.

It is nowise affected or impaired by section 7 of the act of Congress of Mar. 2, 1867, making appropriations for sundry civil expenses of the government for the year ending June 30, 1868, and for other purposes (14 Stat. at L. 466); the other purposes of the act, besides making appropriations, being connected with the expenses of the government; and the advertisements provided for in § 7 being confined to those, the accounts for which are to be "adjusted by the proper accounting officers" of the government, and the money for which is to be paid out of money appropriated by Congress. This is yet more manifest from the act of Mar. 28, 1867, §§ 2, 3, 15 Stat. at L. 7, 8.

In 1835, it was held that the officer was bound to advertise the real estate "in both the English and French languages, for the space of 30 days before the sale;" that the law requires "property situated in the place where this was, when seized by the sheriff, to be advertised both in the English and French languages."

McDonough v. *Gravier,* 9 La. 544.

The Rev. Stat. is that in certain parishes, one of which is Ascension, advertisements "shall be published both in the English and French languages." R. S. pp. 4, 5, of ed. 1856.

Messrs. D. G. Campbell, J. A. Campbell, and **T. J. Durant,** for defendants in error:

English is the language of the Constitution, the laws and the tribunals of the United States. It is and always has been the legal language of Louisiana. The act of Congress of Feb. 20, 1811 (2 Stat. at L. 641), "To enable the People of the Territory of Orleans to Form a Constitution and State Government," declares, in § 3, "that, after the admission of the said territory of Orleans as a state into the Union, the laws which such state may pass shall be promulgated, and its records of every description shall be preserved, and its judicial and legislative written proceedings conducted in the language in which the laws and the judicial and legislative written proceedings of the United States are now published and conducted."

The 15th paragraph of the 6th article of the Constitution of Louisiana, adopted under this authorization, and with which the state was admitted into the Union, made at New Orleans, Jan. 22, 1812, declared that "all laws that may be passed by the legislature of the state of Louisiana, and the judicial and legislative written proceedings of the same, shall be promulgated, preserved, and conducted in the language in which the Constitution of the United States is written."

The Constitution of Louisiana, made at New Orleans, Mar. 7, 1868, under which the state was re-admitted, in article 109, declares "that no law shall require judicial process to be issued in any other than the English language."

The first advertisement of the sale of the property under the fi. fa. was made Mar. 30, 1868, so that at that time no law, state or Federal, required an advertisement in French.

The facts were that the United States marshal advertised the property in newspapers published in the city of New Orleans, which had been designated by the clerk of the House of Representatives, under the act of Congress of Mar. 2, 1867 (see 14 Stat. at L. 466 and 467), and which had by that officer been duly notified, as the law requires, to the judge of the United States court in Louisiana.

The act of 1867 referred to, makes it the duty of the clerk of the House of Representatives to select in certain states, among which is Louisiana, one or more newspapers, in which, or in some one or more of which so selected, all such advertisements as may be ordered for publication in said district, by any United States court or judge thereof, or by any officer of such courts, or by any executive officer of the United States, shall be published.

Mr. Justice **Miller** delivered the opinion of the court:

Margaret R. Deas obtained a judgment in the circuit court of the United States for the district of Louisiana, against Caroline D. Moncure and others, heirs of Henry Doyal, and under an execution issued on this judgment, certain real estate was sold lying in the parish of Ascension, of which Zunts, the present defendant in error, became the purchaser. The laws of Louisiana authorize a proceeding by a purchaser at judicial sale, somewhat in the nature of a bill of peace, to quiet and confirm the title acquired by the sale. This proceeding is called a monition, and is instituted in the same court in which the original judgment was rendered, by a publication warning all persons interested to come forward and show cause, if any they can, why the title acquired by the sale should not be confirmed.

In response to this monition issued by Zunts, the present plaintiffs in error appeared in court and opposed the confirmation on several grounds, which attacked the validity of the sale for want of conformity in the marshal's proceedings to the laws of Louisiana. The issues raised by this opposition were tried by a jury, and several bills of exception were taken, which present the points relied on by plaintiffs in error, to reverse the judgment of the circuit court confirming the sale.

The most important of these relate to the advertisement of the sale, and to them we shall limit our observations.

The Code of Procedure of Louisiana originally provided that such sales should be published in the English and French languages in a newspaper of the parish where the seizure was made. Subsequently the law was altered so as to dispense with the publication in French, unless the defendant should request it. But from this amendment, the parish of Ascension and some other parishes were exempt. So there is no question but that the law of Louisiana, in regard to land sold under executory process in

the parish of Ascension, required a publication in a newspaper of that parish, in both French and English, as a preliminary to the sale. In the case in consideration, no publication was made in the parish of Ascension, though there was a newspaper published there, in both the English and French languages, and the only notice given of the sale was an advertisement in the English language, in a newspaper of New Orleans.

There seems to be no reason to doubt, if the original judgment in this case had been rendered in a state court of Louisiana, and the proceeding we are now considering had been there tried, that the sale could not have been sustained. And the real question that we are to decide is: whether the departure of the marshal from the requirements of the Louisiana Code, in making the sale under executory process of the Federal court, is sufficient in this case to invalidate the sale.

421*] *The act of Congress of May 26, 1824, declares that "the mode of proceedings in civil cases in the courts of the United States that now are, or hereafter may be, established in the state of Louisiana, shall be conformable to the laws directing the mode of practice in the district courts of said state," and, though there is a provision authorizing the judges of those courts to make alterations necessary to conform the practice to the organization of the Federal courts, this authority is quite limited. This statute, then, in establishing the practice of the state courts as the practice of the Federal courts, however the state laws may modify that practice, and in limiting the power of the Federal courts in that state over their own rules of practice, is a departure from the otherwise uniform action of Congress on that subject. The mode of procedure in the courts of Louisiana, conforming very nearly to those of the civil law, and both the Code of Procedure and the Civil Code of that state differing so widely from the system of common law adopted in all the other states, was the reason of this special purpose of Congress to require the Federal courts in that state to conform to the usages of the local law. This has been frequently noticed in this court.

It is said, however, that the act of 1824 has been repealed or modified by the 7th section of the act of March 2, 1867. 14 Stat. at L. 466.

This is an act making appropriations for sundry civil expenses of the government for the year 1868. Among these expenses were the publication of advertisements of the departments, and other matters in the District of Columbia, and the laws concerning the Army and Navy in the United States Army and Navy Journal.

The 7th section of this act authorizes the clerk of the House of Representatives to name one or more newspapers published in each of the eleven states which had been in insurrection, naming them in which the treaties of the laws of the United States shall be published, and in some one or more of which "all such advertisements as may be ordered for publication in said districts by any United States courts or judge thereof, or any officer of such courts, or of any executive officer of the United States, shall be published, the compensation provided and other terms of publication shall be fixed by said clerk, at a rate not exceeding $2 per page for the publication of treaties and laws, and not exceeding $1 per square of eight lines for the publication of advertisements, the accounts for which shall be adjusted by the proper accounting officers, and paid in the manner now allowed by law in like cases." The law further provides that the clerk of the House shall notify the heads of departments, and each judge of the United States courts, of the paper selected, and that thereafter it shall be the duty of such executive officers to furnish to such selected paper only an authentic copy of the publications to be made as aforesaid.

The strict grammatical construction of this section limits its application to such advertisements and publications as must be adjusted by the proper accounting officers, and paid in the manner now allowed by law in like cases. That this means accounting officers of the Federal Treasury and payments by or on behalf of the United States, we cannot doubt. Such language would hardly be used in reference to costs of court, to be paid by private parties, in a litigation between themselves. Nor would any legislative body use the phrase "acounting officers" in reference to the clerk *or [*422 marshal in taxing the costs of advertisements in the regular course of their duties. It is a phrase well known as referring to the auditors and comptrollers of the Treasury, who pass upon all claims against the government before they can be paid out of the public Treasury. The cases then to which the section by its term applies are such publications as the Federal government is concerned in, and for which it may have to pay.

This view is confirmed by the manifest purposes of the act. These are: First, to require that the clerk of the House of Representatives should select, in the states lately in insurrection, the newspapers in which such publication should be made as the United States required, instead of the heads of the departments, and other officers who had heretofore exercised that discretion; second, that he should also fix the scale of prices, within a limit prescribed by the act which the government should be charged for such publications.

Nor is this view affected by the fact that judges of courts and other officers of the court, meaning marshals and clerks, are among those required to make publications in the papers so selected; for in the proceedings of these courts in revenue seizures, confiscations, cotton cases, forfeitures and the like, many notices are required to be published and are published by these officers, for which the United States pays, and which, before the marshal can get the allowance for it, must be passed upon by the accounting officers of the Treasury.

Whether we look, then, to the language of this 7th section, or to the manifest purpose and object of the act, we are constrained to limit its application to such publications as the Federal government may make on her own account, and for which payment is to be made out of the Federal Treasury.

If the language of the section were much more favorable than it is to the construction contended for by the defendant in error, we should pause long before concluding that Congress had reversed in this instance its uniform

policy of conforming the modes of proceeding in the Federal courts to those of the states, and had repealed *pro tanto* the act of 1824, 423*] *which laid down that as the law for Louisiana, with an express limitation in the power of the court to modify it; and that it had invaded the rule long received as an axiom, that the descent, alienation and transfer of real estate was governed rightfully by the law of the state wherein it lay. We are quite satisfied that Congress had no such intent in passing the act of 1867.

The effort to support the course of the marshal, by showing that he acted under a rule of the court, is hardly worth consideration. The mere circumstance that for a few months that officer, acting under the construction of the act of 1867, which we have just shown to be erroneous, had advertised only in the newspapers selected by the clerk of the House of Representatives, did not constitute a rule of the court.

We are of opinion that the sale should have been set aside for want of the advertisement in the parish where the land lay.

The judgment of the Circuit Court affirming the sale is, therefore, reversed, and the case remanded, with directions to proceed in conformity to this opinion.

MOSES A. MEADER *et al., Appts.,*
v.
CHARLES E. NORTON.

(See S. C. 11 Wall. 442–458.)

Power of commissioners to settle Mexican land claims—equity jurisdiction over land patents for fraud or mistake—innocent purchasers—laches and statute of limitations, no defense, until fraud is discovered.

By the act authorizing commissioners to settle Mexican land claims in California, nothing more was contemplated than the separation of the lands which were owned by individuals from the public domain.

Courts of equity have full jurisdiction to relieve against fraud or mistake, and that power extends to cases where one man has procured the patent which belonged to another, at the time the patent was issued.

Persons are not innocent purchasers, who had notice of the adverse title at the time of purchase.

Defenses of laches and the statute of limitations cannot prevail where the relief sought is grounded on a charge of secret fraud, and it appears that the suit was commenced within a reasonable time after the evidence of the fraud was discovered.

[No. 110.]

Argued Mar. 21, 1871. Decided Apr. 17, 1871.

APPEAL from the Circuit Court of the United States for the District of California.

The petition in this case was filed in the court below, for the cancelation of a certain grant of land on the ground of fraud, and for a decree establishing the alleged rights of the petitioner in the said land. A decree having been entered in favor of the petitioner, the respondents took an appeal to this court.

Messrs. Black & Lamon, P. Phillips, and **W. G. M. Davis,** for appellants:

The court had no jurisdiction over the subject-matter of the bill. The Federal courts have no inherent jurisdiction of land titles set up by those who claim under the Mexican government. When the contest involves an examination of the Mexican grants and concessions, and necessitates the finding by the state of such titles so set up at the time when California was acquired, such powers only over such subjects were possessed by the courts, as were conferred by special acts of Congress.

The finding of the board of Land Commissioners is as conclusive as the decree of any court of competent jurisdiction.

The decree unsettles and changes the decree of the board.

The controversy involved precisely the same matters of law and fact which were submitted to the board by the act of Congress.

Landes v. *Brant,* 10 How. 348; *LeBois* v. *Bramell,* 4 How. 449; *Strother* v. *Lucas,* 6 Pet. 763; *Gamache* v. *Piquignot,* 16 How. 451.

The decision of the commissioners not only concludes the United States, but is equally conclusive as to all those whose claims needed to be confirmed by the board. The failure to litigate the question as to the existence of a grant by Mexico, in the forum provided by law, deprives a claimant of all right to moot such a claim anywhere.

The jurisdiction given to the commission was exclusive. The act of Mar. 3, 1851, § 13, provides a remedy for the adjudication of conflicting claims.

Chouteau v. *Eckhart,* 2 How. 344.

If the court could take jurisdiction of the matter litigated and decided by the commissioners, on the ground of fraud committed by Bolcoff in procuring his claim to be recognized, the United States alone could promote such questions.

Sampeyreac v. *U. S.* 7 Pet. 222.

The complainants cannot base a title upon a fraud. As the Castros were barred by failure to present their claim, they cannot use Bolcoff's fraud to escape the bar. The bar cannot be removed except by Congress, and then the purchasers from Bolcoff would be protected.

The matters now set up by the complainants were before the commissioners, and were passed upon by them, as the bill admits and the record shows.

The evidence does not establish fraud on the part of Bolcoff.

Fraud alleged by complaint must be proved, not inferred.

U. S. v. *Arredondo,* 6 Pet. 691.

The court treated the case as one resting on newly discovered evidence.

The court could not take cognizance of the case upon such ground.

The case stated in the bill is one where a court of equity should refuse relief against the purchasers from Bolcoff, because of the laches of the Castros. This the court should have done, irrespective of the statute of limitations of California.

The omission to demur or insist on the bar of the statute in the answer, does not prevent the court from applying the statute.

1 Baldwin, 394; *Maxwell* v. *Kennedy,* 8 How. 210; Ad. Eq. 168.

The purchases, made in good faith, relying on the action of the commissioners and the issuance of the patent, should have been sustained.

Ad. Eq. 510.

Mr. **William M. Stewart,** for appellee, presented the opinion of court below as his argument, from which is the following:

From this examination of the documents, it is difficult to resist the conclusion that they are all false and were fabricated by Bolcoff, or some one at his instigation, to defraud the sisters of their property and secure the title to himself.

By the false and fabricated documents, and the suppression or destruction of the grant to the sisters, a confirmation of the claim under the alleged grant to Bolcoff has been obtained, and the legal title secured to his children; when, in truth and fact, the real title was in the three sisters, and should have been adjudged to them. Under these circumstances, upon obvious principles of justice, the patentees and all persons holding under them, with notice of the claim of the sisters, should be decreed to surrender up the title. The right of the complainant to a decree of this character rests upon the established doctrine, that whenever property is acquired by fraud, or under such circumstances as to render it inequitable for the holder of the legal title to retain it, a court of chancery will convert him into a trustee of the true owner.

1 Spence, Eq. Jur. 4; *Hardy* v. *Harbin*, U. S. C. C. for Cal., June term for 1865.

This is not the case of the confirmation and patent upon an independent grant, having no relations to the proceedings of the sisters, but upon a grant alleged to have been given by agreement to Bolcoff, as a substitute for the one decreed to the sisters. The case proceeds upon the ground that the confirmees obtained by fraud or confirmation in their name, the rights granted to the sisters, and by reason of the confirmation have secured the possession of the legal title to the premises. It is the possession of this legal title which prevents the complainant from maintaining ejectment for the premises, and drives him into a court of chancery for relief.

In this state, the statute of limitations, as we have had occasion to observe, differs essentially from the English statute, and from statutes of limitation in most of the other states. Those statutes, in terms, apply only to particular legal remedies; and courts of equity there are said to be bound by them only in cases of concurrent jurisdiction, and in other cases to act only by analogy to the statutes, and not in obedience to them. But in this state the statute applies as well to equitable as to legal remedies. It is directed to the subject-matter, and not the form of the proceeding, or the forum in which it is prosecuted.

Lord v. *Morris*, 18 Cal. 486; *Hardy* v. *Harbis*, U. S. C. C. Cal. June term, 1865.

There would seem, therefore, to be as good reason for requiring parties claiming the bar of the statute to suits in equity in this state when the objection is not raised by demurrer, to plead such statute or insist upon it in the answer, as there is for a similar rule when the bar of the statute is invoked in actions at law. In some cases such is the rule now, as in suits to have an account of rents and profits of land. See. *Prince* v. *Heylin*, 1 Atk. 493.

And were it necessary, we should not hesitate to hold that the rule in this state applies to all cases in equity; but it is not necessary now to go so far. For even where it was not essential, by the old rules, to plead the statute or to refer to it in terms; yet, to claim any benefit from it, the pleador was required to state facts sufficient to bring the case within its operation, and then to insist that, by reason of those facts, the remedy of the complainant was barred. This has not been done by the defendants in this case; their claim, made in argument, only that the relief is barred, will not answer.

2 Madd. Ch. 309; *Van Hook* v. *Whitlock*, 7 Paige, 381.

The presentation or non-presentation by the sisters of their claim under the grant of the board of Land Commissioners, has nothing to do with the equitable relations between them and third parties. The Supreme Court of the United States has frequently determined, to quote its own language, that the government had no interest in the contests between persons claiming *ex post facto* the grant.

Castro v. *Hendricks*, 23 How. 442, 16 L. ed. 577.

The supreme court of California, while holding that the legal title was vested in the confirmee, has, in repeated instances, declared that equities between him and third parties remained unaffected.

See, *Hardy* v. *Harbin*, where this subject is considered at length.

See, also, *Estrada* v. *Murphy*, 19 Cal. 272; and the recent decision in *Salmon* v. *Symons*, 30 Cal. 306.

If, in this case, after the sisters had obtained their grant, Bolcoff had fabricated a deed from them of the property, and presented the claim in his own name and obtained a confirmation and patent, no question could be made against their right to demand the transfer to them of the legal title. He could not be heard to say that they would have lost the property by non-presentation, and that, therefore, he should be left alone in his fraudulent acquisition. His mouth would be stopped by his fraud. Nor, indeed, could it be in truth affirmed by anyone, that the property would have ultimately been lost to the sisters, and that relief might not have been afforded them by appropriate legislation. As observed in the *Hardy Case*, the finder of personal property might, with equal propriety, justify its detention on the ground that the true owner would never have found it.

Now, the case supposed is, in all its essential features, the case at bar; the only difference being the presentation of a fabricated grant from the governor, instead of a fabricated deed of the sisters, with a representation that the grant was issued to Bolcoff by agreement with the sisters, as a substitute for the one decreed to them, and in fact issued to them. It would be a reproach to the administration of justice, if a court of equity could afford no remedy to the injured parties.

Mr. Justice **Clifford** delivered the opinion of the court:

Claims to lands in California by virtue of any right or title derived from the former government were required to be presented to the land commissioners, and authority was vested in the commissioners to decide upon the valid-

ity of such claims and to certify their decisions, with the reasons for the same, to the district attorney for the district.

Applicants for such confirmations were required to present their claims to the commis- 452*] sioners when sitting as a *board, but the act of Congress made no provision for notice to any adverse claimant, and the proceedings before the commissioners were wholly *ex parte* unless opposed by the district attorney.

Power to review such decisions was vested in the district court, on petition of the claimant in case of rejection, or of the district attorney in case of confirmation. 9 Stat. at L. 633.

Specific regulations were enacted as to the form of such petitions, and the provision was that the district court should proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as might be taken by the order of the said court, and that the court, on application of the party against whom judgment was rendered, should grant an appeal to the Supreme Court of the United States.

On the 5th of May, 1852, a petition signed by the attorneys of Francisco Bolcoff and Juan Bolcoff was filed with the Land Commissioners, setting up title to the rancho El Refugio, as grantees of their father, José Bolcoff, and asking for a confirmation of their claim under the act of Congress passed to settle such private claims to lands in that state. They represented that the tract was granted to their father during Mexican rule by the governor of that department under the colonization laws ordained by the supreme government.

Pursuant to the requirements of the act of Congress they filed with their petition their documentary evidences of title, consisting of the following documents: (1) A paper bearing date on the 7th of April, 1841, purporting to be a grant of the rancho El Refugio to José Bolcoff by Juan B. Alvarado, governor of the department at the date of the supposed grant. (2) The certificate of Governor Alvarado, dated the 28th of July, 1841, stating that the grant made on the 8th of April, 1839, in favor of José Bolcoff, was approved on the 22d of May, 1841, by the Departmental Assembly. (3) 453*] A document dated the 26th *of July, 1842, purporting to be a record of juridical possession of the tract given to the supposed grantee by the proper Mexican authorities. (4) The diseño or sketch of the tract described in the petition addressed to the governor by the original donee.

Proof of the handwriting of the persons whose names purport to be signed to the documents was introduced by the petitioners, and as no question was made as to the authenticity of the documents, they were received as genuine and treated as such in the hearing, and the commissioners entered a decree in favor of the petitioners, confirming the claim.

Both parties concede that an appeal was taken on behalf of the United States to the district court, but it was never prosecuted to effect and was subsequently dismissed.

Patents may be issued for all claims confirmed by the commissioners where no appeal was taken, the claimant complying with the conditions specified in the 13th section of the act providing for the adjudication of such claims; that is, he must present to the General Land Office an authentic certificate of such confirmation and a plat or survey of the land duly certified and approved by the surveyor-general. Such an application was accordingly made by the confirmees to the Commissioner of the General Land Office, and he, on the 4th of February, 1860, issued a patent in due form to the persons in whose favor the decree was entered, and to whom the certificate of confirmation was granted. Title to the land is claimed by the appellants under that patent.

Attention will now be called to the evidences of title under which the appellee claims in this case. On the 13th of February, 1839, three orphans, daughters of Joaquin Castro, a deceased Mexican citizen, to wit, Maria Candida, Maria Jacinta and Maria de los Angeles, presented their petition to Juan B. Alvarado, Governor of California, asking for a grant of the rancho El Refugio. Reference of the petition was made to the administrator of the adjoining mission, and he having reported, on the 16th of March, 1839, *that the land [*454 could be granted, as the land was not necessary to the mission, the governor, on the same day, made a provisional grant of the same to the petitioners and referred the espediente to the prefect of the district, as was the usual course in respect to such applications. Immediate attention was given to the subject by that officer, and on the twentieth of the same month he reported to the governor that the land was vacant, and recommended that the grant should be issued to the petitioners.

Evidently the several documents constituting the complete espediente show a full compliance with all the requirements of the colonization laws, and it is quite clear that the case was so understood by the governor, as on the 8th of April, in the same year, he issued the concession in which the petitioners are declared to be the owners in fee of the land. Specific boundaries are given to the tract granted and the directions in the same document are that the espediente be reserved for the consideration of the Departmental Assembly and their due approval of the same. Due report of the proceedings was made to that tribunal, and the record shows that on the 22d of May, 1840, they formally approved of the grant.

Satisfactory proof was introduced that Maria Candida intermarried with José Bolcoff, and that Maria de los Angeles intermarried with Joseph L. Majors. Prior to the marriage of Maria de los Angeles, the three sisters lived together as members of the family of José Bolcoff, the husband of the elder, and Maria Jacinta continued to reside in his family on the premises until 1850, when she became a nun and entered a convent.

By the record it appears that Joseph L. Majors, on the 30th of April, 1852, presented a petition to the commissioners claiming title in right of his wife to one third of the rancho El Refugio, setting up the concession made by the governor, to his wife and her two sisters, and asked that the claim might be confirmed. In support of his claim he introduced the several documents referred to as tending to show that the concession to the three sisters was a valid *grant of the rancho; but the commis- [*455 sioners, on the 30th of January, 1855, rejected

the claim, evidently proceeding upon the ground that the documents introduced by the other claimants were genuine.

Apart from that consideration the commissioners were, doubtless, much influenced by the testimony of the governor, who was examined as a witness by the successful claimants. He admitted that he granted the rancho in the first place to the three sisters, but he stated that he made the grant at the request of Maria Candida, the wife of José Bolcoff, and that he subsequently re-granted the land to her husband at her request and upon her representation that an arrangement to that effect between her husband and the husband of her other married sister had been made. His statement was that he granted the new title to José Bolcoff because the parties agreed upon it, although he admitted that neither of the other two grantees ever came before him or made any such request. Subsequent investigations led to the discovery that the documents, or most of the documents, introduced in support of the claim of José Bolcoff, were forged and fraudulent, which induced the appellee, claiming title under the three sisters, to commence the present suit.

Confirmed as the claim of José Bolcoff was at the same time that the claim of the three sisters was rejected, they did not appeal nor would they have been benefited if they had, as the claim was confirmed to the other claimants, and they were not parties in that litigation and could not appeal from the decree. Had all the facts and circumstances been known, the unsuccessful claimant might, perhaps, have presented a petition to the district judge and have procured an injunction restraining the confirmees of the claim "from suing out a patent for the same until title thereto" had been "finally decided," but it is a sufficient answer to any such suggestion that the patent was issued before the alleged forgeries were discovered.

Remediless as the appeal was at law, he instituted the present suit in the circuit court. His theory is, as shown in the bill of complaint, 456*] that the grant was, in fact, made to *the three sisters, and that their names were erased and the name of the successful claimant inserted in the same, and that the commissioners were induced by false swearing, forgery and fraud, to confirm the claim to the grantees of the party guilty of all those offenses, as the means of his success and of the defeat of the claim of the three sisters, to whom the rancho really belonged.

All such charges are denied in the answer, but they are fully proved by the documents exhibited in the case and by such facts and circumstances as leave no doubt in the mind of the court that the charges are true. Even the governor admits, in his deposition taken in this case, that the espediente, including the concession, was prepared in the name of the three sisters, but he states that when the titulo was prepared the wife of José Bolcoff came before him, and that upon her representation that her sisters were to receive an interest in another rancho. the title papers were made out in the name of her husband.

Such a theory is highly improbable, but the much better answer to it is that it is clearly and satisfactorily disproved. Beyond all doubt the entire espediente, except the titulo, was in the name of the three sisters, and the formal concession, which was also in their name, directed that the ultimate title should be issued to them and be recorded in the proper book; and discoveries made since the patent was issued show that the grant was entered in the *Toma de Razon* and in Jimeno's Index.

Much weight is due to those documents as evidences of title, even when they are not introduced in the particular case before the court. They were not produced before the commissioners, and it may be doubted whether they would have benefited the case of the three sisters if they had been, as their names are erased in the entry and the name of José Bolcoff written in their place, and as no suspicion of forgery or fraud existed at that time it may be doubted whether the production of the documents would have changed the result. Conjectures in that behalf, however, are of no avail, as it now appears that all or nearly all of the title papers introduced *to support that title were [*457 forged and fraudulent, showing, to the entire satisfaction of the court, that the equity of the case was in the three sisters.

Further argument upon that topic is unnecessary, as the proofs are persuasive, convincing and decisive. Detailed reference to them is given in the opinion delivered by the circuit court, and to that the parties can recur if they desire to examine the documents or the statements of the witnesses as exhibited in the depositions sent up in the record.

Suppose that is so, still it is insisted by the appellants that the decree should be reversed because the decree of the commissioners, as they contend, was final and conclusive between the original claimants. Unquestionably, it is a general rule that when jurisdiction is delegated to a tribunal over a subject-matter, and its exercise is confided to their discretion, the decision of the matter, in the absence of fraud, is, in general, valid and conclusive. Even fraud will not in every case open the judgment or decree to review where the proceeding is not a direct one, but it is not important to enter much into that field of inquiry, as the 15th section of the act under which the commissioners were appointed provides that the final decrees rendered by the commissioners or by the district or Supreme Court of the United States, or any patent to be issued under the act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons. 9 Stat. at L. 634.

Nothing more is contemplated by the proceedings under that act than the separation of the lands which were owned by individuals from the public domain. *U. S.* v. *Morillo*, 1 Wall. 709, 17 L. ed. 627; *Beard* v. *Federy*, 3 Wall. 493, 18 L. ed. 93; *U. S.* v. *Sanchez*, Hoffm. L. Cas. 133; *Martin* v. *U. S.* Hoffm. L. Cas. 146; *U. S.* v. *Ortega*, Hoffm. L. Cas. 135.

Argument is not necessary to show that a patent in a suit at law is conclusive evidence of title against the United States and all others claiming under the United States by a junior title. Until the patent issues the fee is in the government, *but when it is- [*458 sues the legal title passes to the patentee. Persons claiming to hold the land against the

patent cannot have relied in a suit at law, but courts of equity have full jurisdiction to relieve against fraud or mistake, and that power plainly extends to cases where one man has procured the patent which belonged to another at the time the patent was issued. *Bagnell* v. *Broderick*, 13 Pet. 436; *Patterson* v. *Winn*, 11 Wheat. 380.

Where one party has acquired the legal right to property to which another has the better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title. *Stark* v. *Starrs*, 6 Wall. 419, 18 L. ed. 930.

Objection was taken in the court below that some of the respondents were innocent purchasers, but that objection cannot have any weight at this time, as all the appellants before the court had notice of the title of the appellee, as clearly appears by the report of the master. None of those who purchased without notice are embraced in the decree.

Laches and the statute of limitations are set up in argument, but such defenses cannot prevail where the relief sought is grounded on a charge of secret fraud, and it appears that the suit was commenced within a reasonable time after the evidence of the fraud was discovered.

Decree affirmed.

UNITED STATES, *Plff. in Err.*,

v.

GIDEON B. WRIGHT, *et al.*

(See S. C. 11 Wall. 648-650.)

Discretion in officer—court or jury cannot revise.

The instruction by the judge who tried the case was erroneous, which referred to the jury a matter which, under the law, rested wholly in the discretion of the Postmaster-General.

By the act of March 3, 1863, Congress constituted him the sole judge to determine, not only whether the exigencies in the case had arisen, but, if they had, the manner and extent of the allowance to postmasters under that act; and it is not competent for court or jury to revise his decision.

[No. 121.]

Argued Mar. 28, 1871. Decided Apr. 17, 1871.

IN ERROR to the Circuit Court of the United States for the Middle District of Tennessee.

Suit was brought in the court below by the plaintiff in error, upon the official bond of a postmaster. Judgment having been given in favor of the plaintiff for only a small part of the amount claimed, the said plaintiff sued out this writ of error.

The case is sufficiently stated by the court.

Messrs. Amos T. Akerman, Atty-Gen., and **B. H. Bristow**, *Solicitor Gen.*, for plaintiff in error.

No counsel appeared in this court for the defendants in error.

Mr. Justice **Davis** delivered the opinion of the court:

This is a suit on the official bond of the postmaster at Gallatin, Tennessee, and a disposition of the case depends on the construction to be given to the 5th section of the act of March 3, 1863, 12 Stat. at L. p. 702, which declares that "whenever, by reason of the presence of a military or naval force near any postoffice, unusual business accrues thereat, the Postmaster-General is hereby required to make a special order, allowing proportionately reasonable compensation to the postmaster and for clerical services." It appeared in evidence at the trial, that the Postmaster-General had refused to allow the defendant, Wright, the claim for clerk hire, preferred by him under the provisions of this section, and the inquiry arose, whether the decision was final. The learned judge who tried the cause held that the action of the department was not conclusive on the subject, and instructed the jury to allow the postmaster a fair compensation for clerical assistance, if in their opinion, the state of things existed calling for the allowance.

This instruction was clearly erroneous, for it referred to the jury a matter which, under the law, rested wholly in the discretion of the Postmaster-General. The act of March 3d, 1863, which embraces the section upon whose construction the disposition of the case depended, effected great changes in the administration of the Postoffice Department, but it did not take from the Postmaster-General the right to control and regulate the allowances to Postmasters and the expenses of their offices, which was conferred by the 9th section of the act of July 5, 1836. Indeed, it would seem that the general *power granted by that section [*650 was sufficient to meet the exigencies provided for by the 5th section of the act of March 3, 1863, but be this as it may, the latter section did nothing more than to require the Postmaster-General, in case the business of a particular postoffice was considerably increased on account of the location of the national forces in its vicinity, to compensate the postmaster for the extra labor performed and the additional expenses incurred.

The section did not go further and prescribe rules to govern the action of the Postmaster-General, nor did it seek to interfere with the judicial discretion of that officer. Congress constituted him the sole judge to determine not only whether the exigencies in the case had arisen but, if they had, the manner and extent of the allowance, and it is not competent for court or jury to revise his decision, nor is it re-examinable anywhere else, as there is no provision in the law to that effect. It may be safely laid down as a general rule, says Story, Judge, "that where a particular authority is confided to a public officer to be exercised by him in his discretion, upon an examination of facts, of which he is made the appropriate judge, his decision upon these facts is, in the absence of any controlling provisions, absolutely conclusive as to the existence of those facts." *Allen* v. *Blunt*, 3 Story, 745.

The judgment of the Circuit Court is reversed, and a venire de novo awarded.

SETH H. MANN and Mary H. Mann, *Appts.*,

v.

THE ROCK ISLAND BANK.

(See S. C. 11 Wall. 650-652.)

Fraudulent purchase of real estate by cashier in his wife's name, with funds of bank.

Where the cashier of a bank, purchased real estate, the title of which was taken to his wife, with

money of the bank, the real estate will be decreed to be sold, at the suit of the bank, to pay to it the money.

[No. 113.]

Argued Mar. 28, 1871. Decided Apr. 17, 1871.

APPEAL from the Circuit Court of the United States for the District of Wisconsin.

The bill in this case was filed in the district court of the United States for the district of Wisconsin, by the appellee, to compel the subjection of certain real estate held in the name of Mary H. Mann, to the payment of a certain claim against Seth H. Mann, her husband. The case having been transferred to the circuit court, was there tried. A decree having been entered in favor of the complainant, the respondents took appeal to this court.

The case is sufficiently stated by the court.

Messrs. Wirt, Dexter, and **Thomas Wilson,** for appellants.

No counsel appeared in this case for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

In this case the Rock Island Bank charges by bill in chancery, that Seth H. Mann, who was then cashier of the bank, but had ceased to be so several years previous to the filing of the bill, had defrauded the bank of $20,000, and that the money itself, or the property in which it had been invested, had been converted into certain real estate, the legal title of which then stood in the name of Mary H. Mann, wife of Seth; and the bill prays for a decree against Mann, for the $20,000 with interest, and against him and his wife, and that the real estate may be subjected to the payment of the debt.

The defendants answered, testimony was taken and a decree rendered that Mann was liable for the money, and that the real estate should be sold to pay it. This decree was carried into effect by a sale of the property, and about four years afterwards, the defendants prayed an appeal to this court.

No counsel appears for the Rock Island Bank. We have, therefore, been compelled to make a 652*] minute and careful *analysis of the whole record.

It turns in every point upon simple questions of fact. There is not a doubtful question of law involved in the entire record. That this court should be compelled to undergo the labor of finding the truth in such a mass of testimony, a duty much more appropriate to a master or to some other tribunal than this, and which in common-law cases is peculiarly the province of the jury, is itself a hindrance and obstruction to public justice by the delay which it interposes to the hearing of other cases. We do not feel that this burden should be further increased, and the time of this court, due to other parties and to more important interests, be consumed in writing and delivering opinions which, if they attempt to go into examination of the facts to justify the decision of the court, will be equally tedious and useless.

In this case, a full and minute history of both branches of the controversy is given in the bill, and in the answers of the defendants. Much testimony is also taken by deposition.

It appears to us that Seth Mann, as cashier and agent of the Rock Island Bank, made a contract with a bank of Georgia, in which he had some interest, by which $110,000 of the circulation of the Georgia Bank was to be used by the Rock Island Bank, and protected by it, and returned ultimately to the Georgia Bank; that, under pretext of a private and personal arrangement of his own, he received $20,000 of this money, which he put in circulation on his own account, and received the avails of it in real estate, the transaction being conducted in other people's names; that this money struck from the same plate, and having on it marks and figures used to distinguish the $90,000 actually received by the Rock Island Bank, was redeemed by it over its counter as the $90,000 was, while Mann got the benefit of its original issue, and has never accounted for it to anyone.

It seems pretty clear to us, that for many years prior to his connection with the Rock Island Bank, Mann had been hiding what little means he had in his wife's name; and that while the cashier of the bank, he used Mr. Osborne's name in the same manner, and when his son became of age, he was used for the same purpose. In this way, by a transfer from Osborne to his wife of shares in the Rock Island Bank, and by purchase with those shares of the Oakland Bank in her name, and by the voluntary conveyance by the son of fourteen acres of the land in question to the wife, and the conversion of the Oakland Bank stock, bonds, etc., into other real estate, and into improvements on it, the $20,000, of which Mann had defrauded the Rock Island Bank, became real estate held in the name of his wife.

As the decree of the Circuit Court is based upon this view of the case, it is affirmed.

SETH DEWING and Ephraim Graham, *Plffs. in Err.,*
v.
DAVID SEARS, JR., *et al.*
and
SAME *v.* SAME.

(See S. C. 11 Wall. 379, 380.)

Judgment on contract payable in gold, should be entered for gold.

A judgment on a contract for the payment or delivery of a specified weight of pure gold, in coined money, should have been entered for coined dollars and parts of dollars, instead of treasury notes equivalent in market value to the value in coined money of the stipulated weight of pure gold.

[Nos. 137, 138.]

Argued April 6, 1871. Decided May 1, 1871.

IN ERROR to the Supreme Court of the State of Massachusetts.

Suit was brought in the superior court for the county of Norfolk, commonwealth of Massachusetts, by the defendants in error, for money alleged to be due upon a contract of lease for the yearly rent of four ounces, two pennyweights, and twelve grains of pure gold in coined money. Judgment was given for the defendants, but subsequently, by order of the supreme judicial court of the commonwealth,

NOTE.—*Obligations payable in gold and silver or in specie*—see note, 19 L. ed. U. S. 141.
Form of judgment on obligation to pay in coin—see note, 29 L. R. A. 593.

to which the said plaintiff took an appeal, the said superior court entered judgment for an amount in treasury notes, equal in market value to the amount of coined gold reserved as rent in the lease, whereupon the defendants sued out this writ of error.

Messrs. Edwin M. Bigelow and **C. Cushing,** for plaintiffs in error.

No counsel appeared in this court for defendants in error.

380*] *Mr. Justice **Strong** delivered the opinion of the court:

The contract in these cases was for the payment or delivery of a specified weight of pure gold, solvable in coined money. They are, therefore, governed by the decisions heretofore made by this court in *Bronson* v. *Rodes*, and *Butler* v. *Horwitz*, 7 Wall. 229 and 258, 19 L. ed. 141, 149. It follows that the judgments entered in the superior court were erroneous. They should have been entered for coined dollars and parts of dollars, instead of Treasury notes, equivalent in market value to the value in coined money in the stipulated weight of pure gold.

The judgment in each case is reversed, and the cause is remanded, with instructions to enter judgment in accordance with the foregoing opinion.

THE SECOND NATIONAL BANK OF LEAVENWORTH *et al., Plffs. in Err.*,

v.

F. R. HUNT, Assignee of W. T. Keller and Mary K. Gladding, as Partners, Bankrupts.

(See S. C. 11 Wall. 391-395.)

Court, in charge to jury, cannot assume facts which are controverted—chattel mortgage not filed is void, as to creditors.

Courts cannot assume, in their instructions to juries, that material facts upon which the parties rely are established, unless they are admitted or the evidence respecting them is not controverted.

A court cannot assume to be valid an instrument, which the testimony tended to establish was fraudulent and void, as against creditors.

A chattel mortgage which was never deposited in the office of the register of deeds of the county where the property was situated or the mortgagors resided, as required by the state statute, is void as against creditors.

[No. 140.]

Submitted April 11, 1871. Decided May 1, 1871.

IN ERROR to the Circuit Court of the United States for the District of Kansas.

Suit was brought in the court below, by the defendant in error, to recover the value of certain property. Judgment having been for the plaintiff in that court, the defendants sued out this writ of error.

The case is fully stated by the court.

Messrs. **Thos. Ewing, Jr.,** and *Sherry & Helm*, for plaintiffs in error.

Messrs. **E. Stillings** and **E. B. Wheat,** for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

This was an action brought by the assignee in bankruptcy of Keller and Gladding, to recover of the Second National Bank of Leavenworth the value of certain property, alleged to have been transferred by it to them in fraud of the provisions of the bankrupt act.

On the trial, evidence was introduced on the part of the plaintiff, tending to show that the bankrupts had made a conveyance of their property to the defendants when they were insolvent, and that the defendants had reasonable grounds for believing that the bankrupts were in this condition at the time; that the transfer was not made in the ordinary course of business; and that on the first day of August, 1866, they executed a chattel mortgage on portions of their property to the cashier of the bank, to secure the payment of two notes, each for $4,000 belonging to that institution. Whereupon evidence upon the part of the defendants was given, tending to show that the bankrupts, in conversations preliminary to the execution of the chattel mortgage, for the purpose of securing their existing indebtedness to the bank, as well as to obtain future advances, promised its president to deliver to the bank, whenever it should desire, the entire stock of goods which they might have at the time on hand; that in February, 1867, in pursuance of this agreement, they delivered a portion of their stock, amounting in value to $2,542, and in July following they turned over the balance to the bank.

Evidence was also given, tending to show that the bankrupts continued to sell the goods included in the mortgage, and all other goods at their store, with the consent of the defendants until the transfer in July, 1867, and that this was contemplated by the parties when the mortgage was made.

The defendants thereupon prayed the court to instruct the jury that, if they "believe from the evidence that the conveyance from Keller and Gladding, in July, 1867, was made in pursuance of the original agreement between them and the bank, they are to regard the sale or transfer as valid, and not (as made) in contemplation of evading the provisions of the bankrupt law." The court refused to give the instruction, and the defendants excepted. The correctness of this refusal is a question presented for our consideration.

The question *is one easily answered. [***394** It would have been error to have given the instruction requested; for it assumes that there was an original valid agreement between the parties, that the plaintiffs should deliver to the bank the entire stock of goods when desired.

In the first place, the record does not disclose that any such agreement was established; it only discloses that the evidence introduced tended to show that, in conversations preliminary to the execution of the mortgage, the bankrupts made a promise to the president of the bank to that effect.

Courts cannot assume, in their instructions to juries, that material facts upon which the parties rely are established, unless they are admitted, or the evidence respecting them is not controverted. The courts would otherwise encroach upon the appropriate and exclusive providence of juries.

In the second place, the supposed agreement, if established, was void as against other cred-

NOTE.—*Necessity of filing chattel mortgages*—see note, 26 L. ed. U. S. 160.

itors of the bankrupts. It did not create any lien upon the property, nor entitle the bank to any preference over other creditors in the event of the debtors being afterwards proceeded against under the bankrupt act. The subsequent sale, even if made in pursuance of the agreement, did not take effect by relation at its date. Transfers of personal property, situated as in this case, only take effect as against creditors from the delivery of the property to the purchaser.

The stipulation in the chattel mortgage, providing that in case of default in the payment of the notes or interest, it should be lawful for the cashier of the bank to take possession of the property and sell the same, does not aid the defendants for two reasons, both equally conclusive. 1. The mortgage was never deposited in the office of the register of deeds of the county where the property was situated or the mortgagors resided and was, therefore, void as against creditors under the statute of Kansas. 2. The mortgagors remained in possession of the goods notwithstanding the mortgage, and by its terms; and the testimony tended to show that they continued to sell the goods, with the assent of the defendants, until the transfer in 395*] July, 1867. The *court could not assume the instrument to be valid in the face of this testimony, for if the facts were found by the jury which the testimony tended to establish, the mortgage was fraudulent and void as against creditors.

In any view of the case the instruction prayed was properly refused.

Judgment affirmed.

UNITED STATES, *Appt.*,
v.
THE STEAMER MONTELLO, Her Boats, Tackle, Apparel, and Furniture, Stephen M. Booth and Charles W. Slayton, Claimants.

(See S. C. *"The Montello"* 11 Wall. 411-416.)

River, when not navigable water of United States—not when navigable only in one state—acts of Congress requiring license of vessels do not apply to such river—employment of vessel in foreign commerce does not make such acts applicable.

*1. A river is a navigable water of the United States, when it forms by itself, or by its connection with other waters, a continued highway over which commerce is or may be carried on with the other states or foreign countries, in the customary modes in which such commerce is conducted by water.

2. If a river is not of itself a highway for commerce with other states or foreign countries, or does not form such highways by its connection with other waters, and is only navigable between different places within the state, then it is not a navigable water of the United States, but only a navigable water of the state.

3. The acts of Congress, providing for the enrollment and license of vessels, only apply to vessels employed upon the navigable waters of the United States.

*Headnotes by Mr. Justice FIELD.

NOTE.—*To what places jurisdiction of admiralty is confined*—see note, 16 L. ed. U. S. 110.
What waters are navigable—see note, 42 L. R. A. 305.

4. Congress has not prescribed any regulations governing commerce between the states, except so far as it is conducted in vessels on the navigable waters of the United States.

[No. 103.]

Submitted March 7, 1871. Decided May 1, 1871.

APPEAL from the Circuit Court of the United States for the District of Wisconsin.

The libel of information in this case was filed in the district court of the United States for the district of Wisconsin. A decree of dismissal having been entered by that court, the complainants took an appeal to the circuit court, by which the said decree was affirmed; whereupon the said complainants took a further appeal to this court.

The case is sufficiently stated by the court.

Mr. **Amos T. Akerman,** *Atty.-Gen.*, for appellant.

No counsel appeared in this court for appellees.

Mr. Justice **Field** delivered the opinion of the court:

This case was heard on the libel of information filed by the United States against the steamer Montello, and the exception taken to it by the claimant. The object of the proceeding was to recover two penalties alleged to have been forfeited to the United States; one by the neglect of the owners or captain of the vessel to procure her enrollment and license, while she was engaged in navigating Fox river, in the state of Wisconsin, between Oshkosh and Portage City, and in transporting passengers and merchandise between those places; and the other, by their failure to put upon the boilers of the steamer an additional safety valve prescribed by the board of supervising inspectors, and to provide a good and reliable water gauge for the boilers.

For the first penalty claimed, the libel alleges in substance that the owners of the vessel, which was propelled in whole or part by steam, and was of twenty tons burden and upwards, on the 1st of October, 1867, transported in her, passengers and merchandise on the bays, rivers, and other navigable waters of the United States; and that in carrying passengers, they navigated Fox river in Wisconsin, between the ports of Oshkosh and Portage City; and that, prior to that period, they were engaged in transporting between those places merchandise, consisting of the products of Wisconsin, which were destined for use and consumption in other states of the Union and in foreign countries, and also in transporting merchandise consisting of the products of other states, brought from those states to Wisconsin, and destined to different places within her limits, without having the steamer enrolled or licensed, as required by the act of Congress of July 7, 1838, and the amendatory act of August 30, 1852.

For the second penalty claimed, the libel alleges *that an additional safety-valve, [*413 of such dimensions and arrangement as had been prescribed by the board of supervising inspectors, had not been placed on the boilers of the steamer as required by law, and that a

good and reliable water-gauge had not been provided for the boilers.

The exception of the claimants to the libel was, that the court had no jurisdiction of the matters contained in the article, on the ground that they were not matters of admiralty and maritime jurisdiction, in this: that the steamer Montello was employed wholly on the inland waters of the state of Wisconsin, at the time of the seizure and previously; and was not engaged in the coasting trade, nor in foreign commerce, or in commerce between the states.

The district court sustained the exception and dismissed the libel. The circuit court affirmed the decision, and the United States brought the case here on appeal.

The libel does not impart any information as to the character of Fox river, or its connection with other waters, and it is only from the general allegation of the libel that the vessel transported passengers and merchandise upon the navigable waters of the United States, preceding the allegation as to the transportation on Fox river, that we are justified in inferring that the libel intended to state that Fox river was a navigable water of the United States.

We are supposed to know judicially the principal features of the geography of our country and, as a part of it, what streams are public navigable waters of the United States. Since this case was presented we have examined, with some care, such geographies and histories of Wisconsin as we could obtain from the library of Congress, to ascertain, if possible, the real character of Fox river, and to render 415*] the *fiction of the law, as to our supposed knowledge of the navigable streams in that state, a reality in this case; but from such examination we are still in doubt whether Fox river has any such connection with other waters as to form with them a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water. It can only be deemed a navigable water of the United States when it forms, by itself or by its connection with other waters, such a highway. If it form such a highway, the case presented is directly within the ruling made in the case of the steamer *Daniel Ball*, decided at the present term. 10 Wall. 557, 19 L. ed. 999. If, however, the river is not of itself a highway for commerce with other states or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the state, then it is not a navigable water of the United States, but only a navigable water of the state, and the acts of Congress, to which reference is made in the libel, for the enrollment and license of vessels, have no application. Those acts only require such enrollment and license for vessels employed upon the navigable waters of the United States.

The fact that the steamer, in so far as she was employed in transporting the products of Wisconsin, which were destined for use and consumption in other states and foreign countries, and in transporting the products of other states brought to Wisconsin and destined to different places within her limits, was engaged in commerce between the states, does not affect the question under consideration, for Congress has not prescribed any regulations governing such commerce, except so far as it is conducted in vessels on the navigable waters of the United States.

As the decree must be reversed, and the cause remanded to the court below for further proceedings, the parties will be able to present, by new allegations and evidence, the *precise character of Fox river as a [*416 navigable stream, and not leave the matter to be inferred by construction from an imperfect pleading.

Decree reversed, and cause remanded for further proceedings.

THE CITY OF ST. LOUIS, *Plff in Err.*, *v.* THE WIGGINS FERRY CO.

(See S. C. 11 Wall. 423-432.)

Corporation, a citizen of the state which created it—ferry-boats of Illinois company not taxable by city of St. Louis.

In the jurisprudence of the United States, a corporation is regarded as, in effect, a citizen of the state which created it.

Ferry-boats belonging to an Illinois company employed in running across the Mississippi river between the Illinois shore and St. Louis, which were laid up on the Illinois shore when not in use, are not taxable by the city of St. Louis.

[No. 134.]

Argued April 6, 1871. Decided May 1, 1871.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

The history and facts of the case are fully stated by the court.

Mr. **J. M. Krum**, for plaintiff in error:

Personal property does not, necessarily, follow the domicil of the owner, nor does liability to taxation depend upon his residence merely, but upon the local situation, the situs of the property. It is subjected to taxation in consideration of the protection which it receives from the laws of the place where it is found, and where the owner or his agent or manager of it is resident.

Findley v. *Philadelphia*, 32 Pa. 381; *Mills* v. *Thornton*, 26 Ills. 300; *R. R. Co.* v. *Morgan Co.* 14 Ill. 163; *Hoyt* v. *Com'rs Taxes*, 23 N. Y. 224; *Life Assurance Society* v. *Com. Taxes*, 28 Barb. 318; *St. Joseph* v. *R. R. Co.* 39 Mo. 476.

To determine the situs of this property, it is necessary to consider its character; how and where it was used; by whom managed and used; where the owners and managers kept their principal office; and where and how the earnings of this property were disbursed, etc.

That the boats in question were such as, under the laws of the United States, were required to be enrolled, does not admit of a doubt.

Enrollment must be made at the port nearest to the place where the owner resides, or where the acting or managing owner usually resides, etc.

Waring v. *Clarke*, 5 How. 465; *Hays* v. *Steamship Co.* 17 How. 598, 15 L. ed. 255.

It is not claimed that the enrollment of these ferry-boats at the port of St. Louis is conclu-

NOTE.—*Citizenship of corporations*—see notes, 27 L. ed. U. S. 87; 6 C. C. A. 37; 14 L. R. A. 585.

sive as to the situs of the property. The enrollment simply indicates the domicil or home port of the vessels, and it is a circumstance to be considered in connection with the other facts in the case, in determining the question at issue.

As these ferry-boats were used as a ferry in carrying passengers, etc., across the Mississippi river, to and from the city of St. Louis, the managers of the boats all the time residing in said city, and there received and disbursed the earnings of the ferry-boats, keeping their office there, and the ferry company itself keeping its principal office in said city, the boats already having been enrolled at the last-named port, these facts lead irresistibly to the conclusion that the property in question was situate within the city of St. Louis, at the time the taxes sued for were levied.

The place of residence of a corporation may be wherever its corporate business is carried on. Ang. & Ames, Corp. §§ 103-109; *R. Co.* v. *Letson*, 2 How. 497; *Blackstone Mfg. Co.* v. *Inhabitants*, 13 Gray, 488; *Cromwell* v. *Ins. Co.* 2 Rich. 512.

In *Farnsworth* v. *Terre Haute & Alton R. Co.* 29 Mo. 75, the supreme court of Missouri held that a foreign corporation which takes up its residence and establishes its principal office here becomes amenable to the laws and process of the state, like an individual resident, etc. Rev. Stat. Mo. 1855, p. 376.

The very question now before this court was adjudicated in the case of *St. Louis* v. *Wiggins Ferry Co.* 40 Mo. 580.

The facts in that case are precisely the same as in this.

Judge Holmes, in giving the opinion of the court, says: "There can be little doubt that the effect of the statutes of this state is such as to make this corporation, though chartered abroad, a resident of this state, not only for the purposes of suing and being sued by ordinary process, or by attachment, but for all the purposes of ownership of personal property, and of taxation, if the same be actually situated within the city limits."

This decision should have been followed by the court below in this case.

Messrs. Lewis & Bogg, M. Blair, and **F. A. Dick**, for defendant in error:

The defendant is a citizen and resident of the state of Illinois, and actually resides within that state, and there holds and uses the property sought to be subjected to taxation.

The Wiggins Ferry Company is sued, in this case, as a citizen of the state of Illinois.

Such a corporation actually and permanently resides within the state by whose law it is created.

See the case of *The Germania Fire Ins. Co.* v. *Francis*, *ante*, 77, 1870; *R. Co.* v. *Letson*, 2 How. 497, 558; *Drawbridge Co.* v. *Shepherd*, 20 How. 227, 233, 15 L. ed. 896, 899.

In *Marshall* v. *R. Co.* 16 How. 314, 327, Grier, J., for the court, says:

It is urged that a corporation cannot be a citizen; but such objection is a mere sophism. Necessarily, in legal view, the corporation is a person, and it and not its members give it local habitation and status of citizenship, in the only state where they, through it, can assemble. P. 328.

Bank of Augusta v. *Earle*, 13 Pet. 538, says of the corporation:

"It must dwell in the place of its creation, and cannot migrate to another sovereignty."

See, also, *R. Co.* v. *Wheeler*, 1 Black, 286, 296, 17 L. ed. 130, 133.

Whenever a boat was not running, or became disabled, or was to be repaired, she was within the jurisdiction and boundary of the state of Illinois, there taken by the defendant's agents, and there in actual possession of the defendant. Under such a state of facts, there is no room for a constructive presence in St. Louis, or a constructive possession of the boats by the general or financial officers of the company. The possession of the money collected by the company for ferriage or freight in the hands of its treasurer, is not possession of the boats. The point of departure on each trip of the boats was from the port where she was laid up and at rest, and to that port must and did each boat return, and when so returned, and not until then, was such trip at an end.

The home port of a vessel is that at or near which the owner, when owned by one person, usually resides; and this is not changed by her enrollment at another port, especially when the first-named port is not a port of enrollment. See *Hill* v. *The Golden Gate*, Newb. 308; *Hays* v. *Steamship Co.* 17 How. 596, 15 L. ed. 254; *The General Smith*, 4 Wheat. 438; *The Nestor*, 1 Sumn. 75; *The Chusan*, 2 Story, 456.

In the late case of *The Lulu*, 1 Abb. U. S. 191, decided by Mr. Chief Justice Chase in 1868, at Baltimore, he recognized the same rule of law, saying (p. 193): "It is clear that, under the American decisions, Baltimore, being in another state than that in which the vessel was owned and enrolled, must be regarded as a foreign port."

3 Kent, 133, in the text, says, in speaking of the liability of an owner for repairs: "The ownership in relation to this subject is not determined by the register."

The United States statutes on the subject of registering vessels, also imply the same meaning.

Act of Sept. 1, 1789, 1 Stat. at L. 55, §§ 2, 4; act, 1792, 1 Stat. at L. 287.

Section 3 says: "The port to which such vessel shall belong at the time of her registry, which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such ship, usually resides."

Mr. Justice Clifford says, in *Blanchard* v. *The Martha Washington*, 1 Cliff, 463-467: "Regulations to the same effect are prescribed by the act of Feb. 18, 1793, for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries" (1 Stat. at L. 305); and this case speaks of the collector of the home port, which by law is defined to be the port at or nearest to which the owner, if there be but one, usually resides. 1 Stat. at L. 467.

Mr. Justice **Swayne** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of Missouri.

The plaintiff in error instituted five suits in the St. Louis circuit court for the recovery of taxes alleged to be due from the ferry company

to the city. Upon the petition of the company they were removed into the circuit court of the United States for that district. In that court, by the consent of the parties, the causes were consolidated and thereafter proceeded to trial as one case. The counsel upon both sides entered into a written stipulation waiving a jury, and the cause was submitted to the court, pursuant to the act of Congress of March 3d, 1865. The court found the facts specially, and the finding is a part of the record. Judgment was given for the defendant. The city excepted and has brought the case here for review.

The bill of exceptions was unnecessary. The facts having been specially found by the court, they are before us for examination as if they were embodied in the special verdict of a jury. The question presented for our consideration, as prescribed by the statute, is, whether they are sufficient to support the judgment. The bill of exceptions gives them no effect which they would not have had without it, and raises no question which would not have been as well presented if it had not been taken.

The controversy relates to taxes imposed by the city upon the ferry-boats of the defendants, 429*] used in conveying freight *and passengers across the Mississippi river between the city of St. Louis and the opposite Illinois shore. The company was required to pay a specific sum for a license, and a tax was imposed upon its wharf boat, attached to the city landing. Both were duly paid. Payment of the taxes upon the ferry-boats was refused, and the several suits, consolidated into the one before us, were instituted by the city to recover the amount claimed to be due.

In the jurisprudence of the United States a corporation is regarded as in effect a citizen of the state which created it. It has no faculty to emigrate. It can exercise its franchises extra-territorially only so far as may be permitted by the policy or comity of other sovereignities. By the consent, express or implied, of the local government, it may transact there any business not *ultra vires*, and, "like a natural person, may have a special or constructive residence, so as to be charged with taxes and duties or be subjected to a special jurisdiction." *Glaize* v. *S. C. R. Co.* 1 Strob. 72; *Cromwell* v. *Charleston Ins. Co.* 2 Rich. 512. It is for the local sovereign to prescribe the terms and conditions upon which its presence by its agents and the conducting of its affairs shall be permitted. *Bank* v. *Earle*, 13 Pet. 588; *Lafayette Ins. Co.* v. *French*, 18 How. 405, 15 L. ed. 451.

It has been said that the power of taxation for the purposes of the commonwealth is a part of all governmental sovereignty and is inseparable from it. It is for the legislature to decide what persons and property shall be reached by the exercise of this function, and in what proportions and by what processes and instrumentalities taxes shall be assessed and collected. The authority extends over all persons and property within the sphere of its territorial jurisdiction. When called into activity there can be no limit to the degree of its exercise except what is found in the wisdom of the law-making power and the operation of those conservative principles which lie at the foundation of all free government. *McCulloch* v. *Md.* 4 Wheat. 428; *Prov. Bank* v. *Billings*, 4 Pet. 563.

*Where there is jurisdiction neither [*430 as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a state should enact that the citizens or property of another state or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action.

In the eye of the law personal property, for most purposes, has no locality. *Mobilia sequuntur personam; immobilia situm. Mobilia non habent sequelam.* In a qualified sense it accompanies the owner wherever he goes, and he may deal with it and dispose of it according to the law of his domicil. If he die intestate, that law, wheresoever the property may be situate, governs its disposal, and fixes the rights and shares of the several distributees. Story, Confl. L. § 379; Broom, Max. 501, 502; *Re Ewin*, 1 Cromp. & J. 156. But this doctrine is not allowed to stand in the way of the taxing power in the locality where the property has its actual situs, and the requisite legislative jurisdiction exists. Such property is, undoubtedly, liable to taxation there in all respects as if the proprietor were a resident of the same locality. *Int. Life Assur. Co.* v. *Comrs. of Taxes*, 28 Barb. 318; *People* v. *Comrs.* 23 N. Y. 228; Story, Confl. L. 550. The personal property of a resident, at the place of his residence, is liable to taxation, although he has no intention to become domiciled there. *Findley* v. *Phila.* 32 Pa. 381. Whether the personal property of a resident of one state situate in another can be taxed in the former, is a question which in this case we are not called upon to decide. *Wilson* v. *Mayor of N. Y.* 4 E. D. Smith, 678; *Hoyt* v. *Comrs. supra.*

Upon looking into the enactments under which the taxes in question were assessed, it is obvious that their purpose *was not to [*431 tax the property through the proprietor, but to tax the things themselves by reason of their being "within the city." The point for us to decide, therefore, is, whether they are covered by the legal provisions under which the taxes were imposed. If the taxing officer acted without authority the taxes were invalid, and the city is not entitled to recover in this action.

The boats were enrolled at the city of St. Louis, but that throws no light upon the subject of our inquiry. The act of 1789, § 2, 1 Stat. at L. 55, and the act of 1792, § 3, 1 Stat. at L. 287, require every vessel to be registered in the district to which she belongs, and the 4th section of the former act, and the 3d section of the latter, declares that her home port shall be that at or near which her owner resides. The solution of the question, where her home port is, when it arises, depends wholly upon the locality of her owner's residence, and not upon the place of her enrollment. 3 Kent, Com. 133, 170; *Hill* v. *The Golden Gate*, Newb. 308; *Superior*, Newb. 181; *Jordan* v. *Young*, 37 Me. 27, 29.

The company has an office in Illinois. Its minor officers such as engineers and pilots, lived in Illinois, where its real estate, including a warehouse, was situated. The company had

also an office in St. Louis. Its president and vice-president and other principal officers lived in the city, and there the ordinary business meetings of the directors were held, and the corporate seal was kept. The court found that the boats, "when not in actual use, were laid up by the Illinois shore, and were forbidden, by a general ordinance of the city of St. Louis regulating ferries and ferry-boats, to remain at the St. Louis wharf or landing longer than ten minutes at a time." A tax was paid upon the boats in Illinois. Their relation to the city was merely that of contact there, as one of the termini of their transit across the river in the prosecution of their business. The time of such contact was limited by the city ordinance. Ten minutes was the maximum of the stay they were permitted to make at any one time. The owner was in the eye of the law a citizen of 432*] *that state, and from the inherent law of its nature could not emigrate or become a citizen elsewhere. As the boats were laid up on the Illinois shore when not in use, and the pilots and engineers who ran them lived there, that locality, under the circumstances, must be taken to be their home port. They did not so abide within the city as to become incorporated with and form part of its personal property. *Hays* v. *Pacific S. S. Co.* 17 How. 599, 15 L. ed. 255; *New Albany* v. *Meekin*, 3 Ind. 481. Hence they were beyond the jurisdiction of the authorities by which the taxes were assessed, and the validity of the taxes cannot be maintained. *R. Co.* v. *Jackson*, 7 Wall. 262, 19 L. ed. 88. In our opinion, the facts found are sufficient to support the judgment.

It has been insisted ably and learnedly by the counsel for the defendant in error, that the taxes in question are taxes upon the tonnage of vessels engaged in interstate commerce, and are prohibited by the Constitution of the United States. No argument as to this aspect of the case has been submitted by the counsel upon the other side. We have not found it necessary to consider the subject, and we express no opinion upon it.

The judgment of the Circuit Court is affirmed.

UNITED STATES, *Plff. in Err.*,
v.
SETH HOWELL.

(See S. C. 11 Wall. 432-438.)

Indictment for passing counterfeit Treasury notes—construction of act.

The words "false, forged, and counterfeit," in the 6th section of the act of Feb. 25, 1862, imply, when applied to a Treasury note, that it purports to be such a valid instrument, but is not genuine or valid.

Said 6th section is not void for repugnancy.

Under said section, one can be legally convicted for passing a forged or counterfeit note, purporting to be a United States Treasury note issued under authority of said act.

[No. 219.]

Submitted Apr. 5, 1871. Decided May 1, 1871.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the District of California.

The history and facts of the case are stated by the court.

The questions certified to this court were as follows:

First. Whether the second count in said indictment, in manner and form as therein stated, is in itself repugnant.

Second. Whether the 6th section of the said act of Congress, entitled "An Act to Authorize the Issue of United States Notes, and for the Redemption or Funding thereof, and for Funding the Floating Debt of the United States," approved Feb. 25, 1862, is repugnant; and whether any person could, under said act, be legally convicted of and punished for any offense whatever, other than that of altering, and causing and procuring to be altered, and willingly aiding and assisting in altering a note, bond, coupon, or other security issued under authority of said act.

Third. Whether the 4th paragraph or clause of said 6th section of the act aforesaid, which is in the words following, to wit: "Or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the United States from any foreign place with intent to pass, utter, publish, or sell, or shall have or keep in possession or conceal, with intent to utter, publish, or sell, any such false, forged, counterfeited, or altered note, bond, coupon, or other security with intent to defraud." etc., is repugnant.

Fourth. Whether the defendant could, under said 4th paragraph or clause of said section, be legally convicted of and punished for uttering or passing a forged or counterfeit note, purporting to be a United States Treasury note, issued under authority of said act.

Fifth. Whether the defendant could, under said 4th paragraph or clause of said 6th section, be legally convicted of and punished for any offense whatever, other than passing, uttering, publishing, or selling, etc., an "altered note, bond, coupon, or other security," etc.

Mr. **B. H. Bristow,** *Solicitor Gen.*, for plaintiff:

Forgery is defined to be "the false making of an instrument, which purports, on the face of it, to be good and valid for the purposes for which it was created, with a design to defraud any person or persons."

Jones & Palmer's Case, 1 Leach (C. C.) 366.

According to this definition, the phrase, "if any person shall forge a note issued under authority of this act," may with propriety be read, "if any person shall falsely make a note which purports, on its face, to be a note issued under authority of this act."

Starkie, in his Crim. Prac. 113, says: "Many statutes describing the offense of forgery use the word 'one,' and if any person shall forge any will, or bond (22 Geo. II. chap. 25), or writing obligatory," etc.; and, therefore, it may be averred in the indictment that the defendant forged the will (*Rex* v. *Birch*, Leach, 79 East P. C. 980), bond, or writing obligatory.

Dunnet's Case, East (P. C.) 985.

This form of expression is sanctioned by long usage. It is employed in the following, among other enactments:

Act of Mar. 2, 1803, § 1, in reference to uttering or publishing "any false sea-letter, Mediterranean passport, or certificate of registry."

ever remote, to establish the probability or improbability of the fact in controversy." *Trull v. True*, 33 Me. 367.

The general rule is clearly laid down by Mr. Starkie, in his work on Evidence, § 18. "Presumptions are founded upon the course of trade, the course of the past, the customs of a particular trade or of a particular class of people, and even the course of conducting business in the concerns of a private individual, to prove a particular act done in the usual routine of business."

Messrs. **W. H. Peckham** and *L. Allis*, for defendants in error:

The testimony of each witness on the subject must, from necessity, be based mainly on hearsay; for though each might be able to state from personal knowledge how the fact was as to his own business, he could not state how it was with respect to the business and transactions of other houses throughout the period designated, except by conjecture or from what had been told him by others supposed to have knowledge of such business and transactions.

If any witness could possibly give such testimony from personal knowledge, still it would be too remote and speculative to furnish any reliable indication of how much defendants in error had on hand at the time of the fire. *Ins. Co.* v. *Phillip*, 13 Wend. 81.

Mr. Justice **Davis** delivered the opinion of the court:

On the 24th day of October, 1866, the Home Insurance Company insured for a period of one year against loss or damage by fire, the stock of groceries and other merchandise owned by the defendants in error, and which were contained in the store occupied by them in the city of St. Paul. On the 22d day of February, 1867, the store and its contents were destroyed by fire, and this suit is brought to recover the damages occasioned by the burning of the stock of goods. At the trial, the main question in issue was the extent of the loss. As the books were mostly destroyed, and the defendant had introduced evidence tending to show that those which were not burned were unreliable, and afforded no data from which the value of the goods on hand at the date of the fire could be ascertained, or the extent of loss determined, the case rested chiefly on the testimony of the plaintiffs. They swore that their sales, during the year preceding the fire, were about $120,000, and that the goods on hand at the time of the fire were worth, at their cost value, $65,000.

The defendant insisted, on the basis of the sale, that the loss was greatly overstated, and as one means of proving it, offered to show by witnesses in St. Paul, engaged in the same business with the plaintiffs, and whose annual sales were equally as large, that grocery merchants in that city for the past six years have not carried nor had on hand at any time, more than one fifth of their annual aggregate sales, and that this was the case on the day the fire occurred. In other words, they wish to show by the general course of trade in that branch of business in St. Paul, that the plaintiffs' loss could not have exceeded $24,000, if their sales during the year amounted to only $120,000.

The court refused to allow the evidence to go to the jury, and the correctness of this ruling presents the only point in the case which it is necessary to consider.

Although we agree with Lord Ellenborough, "that the rules of evidence must expand according to the exigencies of society" (*Pritt* v. *Fairclough*, 3 Camp. 306), yet is is not necessary to introduce any innovation upon these rules in order to hold that this evidence should have been admitted. It is true there are no reported cases on the subject, but on principle its admissibility can be sustained.

It is well settled that if the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury. It would be a narrow rule and not conducive to the ends of justice, to exclude it on the ground that it did not afford full proof of the nonexistence of the disputed fact. Besides, presumptive evidence proceeds on the theory that the jury can infer the existence of a fact from another fact that is proved, and most usually accompanies it. *Hart* v. *Newland*, 3 Hawks, 122. Many of the affairs of human life are determined in courts of justice in this way, and experience has proved that juries, under the direction of a wise judge, do not often err in the reasoning which leads them to a proper conclusion on such evidence. *And if they should happen to [*441 reach a wrong conclusion, the court has in its own hands the mode and measure of redress. In the nature of things, the officers of the insurance company were unable, by any direct proof, to contradict the testimony of the plaintiffs as to the value of the goods destroyed. If the loss were an honest one, it was their duty to pay it; but if they had good reason to believe it to be exaggerated, it was equally their duty to refuse to pay it. As they had no direct evidence to produce, bearing on the subject, they offered to prove a fact which, uncontradicted and unexplained, would lead the jury to the conclusion that the plaintiffs had overvalued the property destroyed by fire. It was neither opinion nor hearsay which they tendered to the court, nor was it a usage of trade they wanted to prove; but a matter of fact concerning the business in which the plaintiffs had been employed, which would render it extremely improbable that they had sustained the loss they claimed to have suffered. The plaintiffs testified when the fire occurred, the stock in their store was worth over $60,000, and yet their sales during the year were only double that amount. The defendants said this could not be so, because the merchants of St. Paul, engaged in a like business and to the same extent, did not at that time, nor at any other time during the preceding six years, have on hand on the average more than one fifth of their annual aggregate sales.

If this state of case could be proved by the united testimony of this class of merchants, it would establish a fact connected with this kind of business, to wit: the uniform relation between the stock on hand and the annual sales, from which the existence of another fact could be reasonably inferred, which is, that the business of the plaintiffs rested on the same basis and was governed by the same rule of uniformity. Indeed, so strong would be this inference, that in the absence of any attempt to explain or contradict the evidence, the jury

by mentally supplying the ellipsis which is in general use in conversation or in writing in similar cases. We speak, for instance, of "false diamonds." According to the criticism we are considering this phrase has no meaning, because if the stones spoken of are diamonds they cannot be false, and if they are false they cannot be diamonds. But anyone understands the meaning to be false stones which purport to be diamonds, or false similitude of diamonds. So we speak of a bank note. Now, if the paper spoken of is a forgery it is not a bank note, which means an obligation of some bank to pay money. But here also the mind supplies the ellipsis which good usage allows, and understands that what is meant is a forged paper in the similitude of a banknote, or which on its face appears to be such a note. And in a similar manner we speak of a forged will. If the argument 437*] *of defendant's counsel is sound there can be no such thing as a forged will, receipt, note, or bond, because if forged they are void and, therefore, not notes, wills, bonds, etc. In fact the phrase "void will" or "void note," is, according to this argument, a solecism, because the instrument cannot be at once the will or note of the party, and be void.

The use of the words "false, forged, and counterfeit," in the statute, implies, therefore, when applied to any of the obligations of government mentioned, that it purports to be such an instrument, but is not genuine or valid. And so are the authorities. See, 2 Russell, Crimes, 801; East, Pleas, Crown, 950.

It is conceded that if the statute had, in describing the offenses, called the instrument uttered a note, purporting to be issued under the authority of the statute, the difficulty would have been removed. In the case of *Rex* v. *Birch*, 2 East, P. C. 980, the indictment charged them "with publishing as true, a false, forged, and counterfeited paper writing, purporting to be the last will of Sir Andrew Chadwick." It was objected that the indictment was bad, because "it should have been said that they forged a certain will," which was the language of the statute, and not a paper writing purporting to be a will. "But," says Mr. East, who in his Pleas of the Crown, 950, makes a full report of the case, "a variety of precedents were found, so that the judges held it to be good." But, it is apparent, from the exception taken, and from the language of East and of Russell, that the usual mode of charging the offense was to say that the prisoner had forged the will or other paper, and that either form is good.

The case of *U. S.* v. *Cantril*, 4 Cranch, 167, is relied on as holding an opposite doctrine to that we have here presented. That case was submitted without argument, and the report says that the opinion of the court was that the judgment should be arrested for the reasons assigned in the record. These reasons are that the indictment was repugnant, because it 438*] *charged the prisoners with having published as true "a certain false, forged, and counterfeited paper, purporting to be a bankbill of the United States for ten dollars, signed by Thomas Willing, president, and G. Simpson, cashier." And because the statute relating to the charge set forth in the indictment is inconsistent, repugnant, and void. In this statement, the words "signed" and "purporting" are italicized, and the court may have held the indictment bad because the former word was used, thus sustaining the objection made in *Rex* v. *Birch*. Or it may have held that the language of the indictment amounted to an averment, that the bill charged to be forged was signed in fact by the president and cashier of the bank, in which case it could not have been a forgery. Or it may possibly have thought that under the peculiar language of that statute, which differs materially from the one under consideration, they were bound to hold it void for repugnancy. However that may be, we do not consider the case, as it is reported, an authority for holding the statute void which we are called on to construe.

To the first and third questions, and the first branch of the second, we answer, No.

To the fourth and fifth, and the second branch of the second, we answer, Yes.

THE HOME INSURANCE COMPANY, *Plff. in Err.*,
v.
CHARLES WEIDE *et al.*

(See S. C. 11 Wall. 438-442.)

Evidence to establish a fact must go to the jury —evidence of amount of loss in action against insurance company.

If evidence offered on a trial conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury.

Testimony of a class of merchant of a place, as to the uniform relation between the stock on hand and the annual sales in their business, is proper, on the question of the amount of loss by fire to a stock of similar goods, in an action to recover the insurance.

[No. 135.]

Argued Apr. 6, 1871. Decided May 1, 1871.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

Suit was brought in this case in the district court of Ramsey county, Minnesota, by the defendants in error, to recover insurance upon certain goods lost by fire. Upon the petition of the defendant, the case was removed to the United States circuit court, by which judgment was given for the plaintiffs; whereupon the defendant sued out this writ of error.

The case is fully stated by the court.

Messrs. Morris Lamprey and **E. A. Storrs**, for plaintiff in error:

The courts have said that "Evidence, to be admissible, need not afford full proof of the fact which it is offered to establish, but it is sufficient if it conduces in any reasonable degree to prove that fact." *Belden* v. *Lamb*, 17 Conn. 441.

Again: "Where there is a spark of evidence of a fact, it ought not to be excluded from the jury." *Fitzwater* v. *Stout*, 16 Pa. 22.

Again: "Testimony cannot be excluded as irrelevant which would have a tendency, how-

ever remote, to establish the probability or improbability of the fact in controversy." *Trull v. True*, 33 Me. 367.

The general rule is clearly laid down by Mr. Starkie, in his work on Evidence, § 18. "Presumptions are founded upon the course of trade, the course of the past, the customs of a particular trade or of a particular class of people, and even the course of conducting business in the concerns of a private individual, to prove a particular act done in the usual routine of business."

Messrs. **W. H. Peckham** and *L. Allis*, for defendants in error:

The testimony of each witness on the subject must, from necessity, be based mainly on hearsay; for though each might be able to state from personal knowledge how the fact was as to his own business, he could not state how it was with respect to the business and transactions of other houses throughout the period designated, except by conjecture or from what had been told him by others supposed to have knowledge of such business and transactions.

If any witness could possibly give such testimony from personal knowledge, still it would be too remote and speculative to furnish any reliable indication of how much defendants in error had on hand at the time of the fire. *Ins. Co. v. Phillip*, 13 Wend. 81.

Mr. Justice **Davis** delivered the opinion of the court:

On the 24th day of October, 1866, the Home Insurance Company insured for a period of one year against loss or damage by fire, the stock of groceries and other merchandise owned by the defendants in error, and which were contained in the store occupied by them in the city of St. Paul. On the 22d day of February, 1867, the store and its contents were destroyed by fire, and this suit is brought to recover the damages occasioned by the burning of the stock of goods. At the trial, the main question in issue was the extent of the loss. As the books were mostly destroyed, and the defendant had introduced evidence tending to show that those which were not burned were unreliable, and afforded no data from which the value of the goods on hand at the date of the fire could be ascertained, or the extent of loss determined, the case rested chiefly on the testimony of the plaintiffs. They swore that their sales, during the year preceding the fire, were about $120,000, and that the goods on hand at the time of the fire were worth, at their cost value, $65,000.

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be valid, which is hardly denied by the defendants, the prior ones must be equally good. *Seymour* v. *R. Co.* 25 Barb. 284.

The cases cited upon the other side, from the English reports which appear to support a stricter rule, are decisions at common law, or decisions based upon the application of some of the stockholders, seeking to prevent injurious actions by the company.

But it is perfectly established in chancery that the courts administering the equities of parties will compel the company and those claiming under it, to respect the engagements into which it may have entered towards third persons, when they cannot be adequately reinstated in their former position; and the company will not be permitted to set up irregularities or even want of power, as a justification for their refusal to comply with these promises in good faith.

Eastern Co. R. Co. v. *Hawkes*, 5 H. of L. Cas. 331, 375; *Fay* v. *Noble*, 12 Cush. 1; *Cary* v. *R. Co.* 29 Barb. 35; *R. Co.* v. *Bastian*, 15 Md. 494; *Warner* v. *Chappel*, 32 Barb. 309; *Akin* v. *Blanchard*, 32 Barb. 527; *Bissell* v. *R. Co.* 22 N. Y. 258; *Parish* v. *Wheeler*, 22 N. Y. 506; *Wilson* v. *R. Co.* 34 Beav. 187.

Railroad bonds have assumed the character of negotiable paper, and that character has been sanctioned by the decision of this court.

Knox Co. v. *Aspinwall*, 21 How. 539, 16 L. ed. 208; *Moran* v. *Miami Co.* 2 Black, 722, 17 L. ed. 342; *Mercer Co.* v. *Hackett*, 1 Wall. 83, 17 L. ed. 548; *Bissell* v. *Jeffersonville*, 24 How. 287, 16 L. ed. 664; *Meyer* v. *Muscatine*, 1 Wall. 385, 17 L. ed. 564; *White* v. *R. R. Co.* 21 How. 578, 16 L. ed. 223; *Gelpcke* v. *Dubuque*, 1 Wall. 175, 17 L. ed. 520; *Murray* v. *Lardner*, 2 Wall. 110, 17 L. ed. 857; *Bronson* v. *R. Co.* 2 Wall. 283, 17 L. ed. 725; *Thompson* v. *Lee Co.* 3 Wall. 327, 18 L. ed. 177.

All that the public need to know is, that a company has been invested with the power to construct a railroad, and that it, necessarily, has the right to do everything conducive to that object.

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Even if a question could be raised as to the power to mortgage, the defendants are not entitled to make it. They are purchasers of the franchises and property of the company by virtue of an execution sale, and have simply such title at the time of such sale.

Gordon v. *Preston*, 1 Watts, 387; *Lane* v. *Baughman*, 17 Ohio St. 647; *Wright* v. *Bundy*, 11 Ind. 398; *Dolphin* v. *Aylward*, L. R.; 4 H. of L. Cas. 486, 499, 502.

At the sale of the road the defendants had the benefit of the mortgages by an abatement of the price or amount bid and paid as the purchase money. Hence the defendants were able to buy fifty miles of railroad costing over $40,000 per mile, at $28,000; or say $560 per mile, subject to the mortgages. They have no right to complain of the amount of the mortgage debt. *Bronson* v. *La Crosse & M. R. Co.* 2 Wall. 311, 17 L. ed. 731.

When a committee or trustees of a body of stockholders are parties, it is sufficient; all the stockholders are not necessary parties. *R. Co.* v. *Howard*, 7 Wall. 415, 19 L. ed. 122.

The defendants had not only constructive, but actual notice of the existence of the several deeds of trust, and the issuance of the corresponding bonds. In the first place, the deeds of trust were duly recorded, and by the registration laws of Texas, this constituted constructive or legal notice; and as a railroad in Texas is legally treated as an entirety, a record in the county where the principal office is kept, is good to the whole world.

The general principle that those in possession of the trust property, with the knowledge of the trust who acquire it by means not recognized in the trust deed, become thereby constructive trustees, is too well settled to require much discussion.

Cases before cited: *Michoud* v. *Girod*, 4 How. 503; 2 Spence, Eq. Jur. 298; *Van Epps* v. *Van Epps*, 9 Paige, 238; *R. Co.* v. *Howard*, 7 Wall. 409, 19 L. ed. 120; 16 Ves. 249; 2 Swift, Dig. 114, side page.

If a purchaser has notice of the trust deed at the time of purchase, he becomes a trustee. 2 Swift, Dig. 115, side page.

Whether the possessor is made chargeable with the trust or not, depends entirely upon his knowledge, without reference to the purity or honesty of his motives. *Adair* v. *Shaw*, 1 Sch. & L. 243; 3 Mason, 316; *Oliver* v. *Piatt*, 3 How. 401.

Every advantage gained by a trustee belongs to the *cestui que trust*. *Holridge* v. *Gillespie*, 2 Johns, Ch. 30; *Morrison* v. *Caldwell*, 5 Mon. 435.

The Real and Personal Estate Association and the Junction company were created by means of the facilities which had been placed in the power of these directors by the original corporation, and cannot be used as a cover for their treachery. In the language of Judge Davies, in the case of *The Coal Co.* v. *Sherman*, 30 Barb. 553: "They were its creators; they breathed into it life and gave it all it had, and owned the whole of it at its creation . . . and, therefore, what they knew, their creatures knew."

Phillips v. *Winslow*, 18 B. Mon. 431; *Lane* v. *Baughman*, 17 Ohio St. 642; *Abbott* v. *Rubber Co.* 33 Barb. 593; *R. Co.* v. *Winans*, 17 How. 30, 15 L. ed. 27; *Canal Bridge* v. *Gordon*, 1 Pick. 297; *Pulsford* v. *Richards*, 17 Beav. 87; *R. Co.* v. *Hudson*, 16 Beav. 485.

"Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the rights of the creditors to pursue it," etc., into the hands of all purchasers with notice; an account may be compelled, etc. *Howard* v. *R. Co.* 7 Wall. 409, 19 L. ed. 120.

A satisfactory answer, perhaps, to the views taken by the defendants is, that the cases in which the mortgagee is not bound to render account of the income before the foreclosure suit, are those of a simple mortgage covering the property and not specifying particularly the income as being itself actually mortgaged, while in the present case there is a specific mortgage of the tolls, income and profits, whenever the said company shall be in default of making payment.

The authority to pledge the future earnings

And when, subsequently (Dec. 19, 1857) the legislature empowered railroad corporations to make mortgages, they imposed restrictions on the exercise of the power, and made special provisions for the consequences of its exercise.

II. The corporate acts by which each of these deeds was brought into existence, were all done in the city of New York and, consequently, are wholly void.

III. No such execution of the deeds is proved as was sufficient to pass the legal title and create the trusts; and the legal title is not before the court.

IV. The decree of foreclosure was erroneous.

1. Because there had been no reference to a master, to ascertain what parties holding bonds would come in and make themselves parties to the suit; and only the bonds held by parties so coming in, and those held by the complainants in the bill, can be included in the decree of foreclosure nisi. All others are excluded from the benefit of the decree. And although the complainants in such a bill may have made proof at the hearing, of some bonds, so as to entitle them, in the opinion of the court, to a decretal order of reference, yet, it is settled, on sound reason and by the highest authority, that the complainants themselves, in such a bill, must go before the master and prove their claims.

Owens v. *Dickenson*, Cr. & Phil. 48; *Field* v. *Titmuss*, 2 E. L. & E. 89; 1 Sim. (N. S.) 218; *Whitaker* v. *Wright*, 2 Hare, 310.

It would be difficult to find a case which demanded, more imperatively than this, the application of this rule of procedure.

It is demonstrable that a large amount of these bonds found by the court to be outstanding, must have been issued in known and direct violation of the express provisions of two of the mortgages.

The second mortgage was to take the place of the first, and not a single bond could be issued under it, without canceling a like amount issued under the first mortgage. Yet the court included in the decree of foreclosure, £49,600 issued under the first mortgage, and £41,664 of unpaid coupons, and the whole $750,000 included in the second mortgage, and unpaid coupons $675,000.

Again; the third mortgage was designed in part to extinguish the second, and provides for the issue of $35,000 for each of the fifty-two miles of road between Galveston and Henderson, equal $1,820,000, less $750,000, equals $1,070,000; and there could be no further issue, save to cancel a like amount of bonds issued under the second mortgage.

Yet, the decree finds that none of the second mortgage bonds were extinguished, and that $1,900,000, issued under the third mortgage, are now outstanding.

Every taker and holder of these bonds was bound to take notice of this express limitation of authority to issue bonds, and was required to ascertain, at his peril, whether the authority to issue was exhausted.

Marsh v. *Fulton Co.* 10 Wall. 676, 19 L. ed. 1040, at present term; *Floyd's Acceptances*, 7 Wall. 676, 19 L. ed. 173; *Bk.* v. *Winchester*, 8 Allen, 109; *Benoit* v. *Conway*, 10 Allen, 528; *Stagg* v. *Elliott*, 12 Scott (N. S.) 373.

V. These complainants cannot maintain this bill to foreclose the three mortgages.

The casual fact that each of them happens to hold bonds said to be issued under each of the three mortgages is not material. If no other persons than themselves were in any way interested, one bill to foreclose three distinct mortgages, each of which is open to inquiry as to its validity, as to the sum secured by it, as to the account to be taken preliminary to a foreclosure, and as to the terms to be allowed to the mortgagor in the decree nisi, would be unprecedented and attended with many difficulties.

But this is a suit by four complainants, in behalf of themselves and all others having a common interest with them.

No one has a common interest with them who does not hold bonds issued under each of the three mortgages, and of the same proportionate amounts as the complainants; and there is no evidence and no reason even, to conjecture that anyone does.

There is no community of interest between those who hold bonds under the several successive mortgages.

Each encumbrancer under the second mortgage has a direct interest to show the first to be invalid, and to reduce the amount secured by it; and so with the third mortgage, in reference to the first and second.

Messrs. **James Grant** and **W. G. Hale**, for Cowdrey *et al.*:

While the corporation cannot abandon the state of its origin, and become permanently domiciled elsewhere, it may maintain an office and agents abroad, and make contracts and incur liabilities anywhere, even to the extent of being sued and bringing suit.

Bk. of Augusta v. *Earle*, 13 Pet. 521; *Bard* v. *Poole*, 12 N. Y. 495; *McCall* v. *Byram Mfg. Co.* 6 Conn. 428; *Arms* v. *Conant*, 36 Vt. 744; *R. R. Co.* v. *McPherson*, 35 Mo. 13; *Wright* v. *Bundy*, 11 Ind. 404; *Cary* v. *R. Co.* 29 Barb. 50; *McCluer* v. *R. Co.* 13 Gray, 128; *Kennebec Co.* v. *Augusta Ins. Co.* 6 Gray, 208; *N. Y. Floating Derrick Co.* v. *N. J. Oil Co.* 3 Duer, 648; Ang. & Ames, Corp. §§ 104, 274, 275.

As its directors are mere agents, they may hold meetings and act in other states so as to bind the company.

It is not the duty of holders of bonds, negotiable in their character and put afloat by the officers of a railroad company, to look into the regularity of every preliminary step. They are entitled to assume that everything has been done which the law or charter of the company requires.

Zabriskie v. *R. Co.* 23 How. 381, 16 L. ed. 488; *Bissell* v. *R. Co.* 22 N. Y. 258; *Allegheny* v. *McClurkan*, 14 Pa. 83; *Argenti* v. *San Francisco*, 16 Cal. 255.

By the 5th section of the act of 1857 (Pas. Dig. 810) the right of a railroad corporation in Texas to impose a lien on its franchises, was distinctly recognized, and that thereby the liens previously granted were confirmed by legislative authority. And it will be seen, by reference to the recital in the third mortgage and in the second mortgage, that each subsequent mortgage recognizes the preceding, and that there is no conflict whatever between them; so that if the eight per cent mortgage

be valid, which is hardly denied by the defendants, the prior ones must be equally good. *Seymour* v. *R. Co.* 25 Barb. 284.

The cases cited upon the other side, from the English reports which appear to support a stricter rule, are decisions at common law, or decisions based upon the application of some of the stockholders, seeking to prevent injurious actions by the company.

But it is perfectly established in chancery that the courts administering the equities of parties will compel the company and those claiming under it, to respect the engagements into which it may have entered towards third persons, when they cannot be adequately reinstated in their former position; and the company will not be permitted to set up irregularities or even want of power, as a justification for their refusal to comply with these promises in good faith.

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All that the public need to know is, that a company has been invested with the power to construct a railroad, and that it, necessarily, has the right to do everything conducive to that object.

Cases cited above: *Le Conteulx* v. *Buffalo*, 7 Barb. 249; *Leazure* v. *Hillegas*, 7 S. & R. 320; *Bk. of Ky.* v. *Schuylkill*, 1 Parson (Pa.) Sel. Cas. 235; *Dana* v. *Bk.* 5 W. & S. 243.

Even if a question could be raised as to the power to mortgage, the defendants are not entitled to make it. They are purchasers of the franchises and property of the company by virtue of an execution sale, and have simply such title at the time of such sale.

Gordon v. *Preston*, 1 Watts, 387; *Lane* v. *Baughman*, 17 Ohio St. 647; *Wright* v. *Bundy*, 11 Ind. 398; *Dolphin* v. *Aylward*, L. R.; 4 H. of L. Cas. 486, 499, 502.

At the sale of the road the defendants had the benefit of the mortgages by an abatement of the price or amount bid and paid as the purchase money. Hence the defendants were able to buy fifty miles of railroad costing over $40,000 per mile, at $28.000; or say $560 per mile, subject to the mortgages. They have no right to complain of the amount of the mortgage debt. *Bronson* v. *La Crosse & M. R. Co.* 2 Wall. 311, 17 L. ed. 731.

When a committee or trustees of a body of stockholders are parties, it is sufficient; all the stockholders are not necessary parties. *R. Co.* v. *Howard*, 7 Wall. 415, 19 L. ed. 122.

The defendants had not only constructive, but actual notice of the existence of the several deeds of trust, and the issuance of the corresponding bonds. In the first place, the deeds of trust were duly recorded, and by the registration laws of Texas, this constituted constructive or legal notice; and as a railroad in Texas is legally treated as an entirety, a record in the county where the principal office is kept, is good to the whole world.

The general principle that those in possession of the trust property, with the knowledge of the trust who acquire it by means not recognized in the trust deed, become thereby constructive trustees, is too well settled to require much discussion.

Cases before cited: *Michoud* v. *Girod*, 4 How. 503; 2 Spence, Eq. Jur. 298; *Van Epps* v. *Van Epps*, 9 Paige, 238; *R. Co.* v. *Howard*, 7 Wall. 409, 19 L. ed. 120; 16 Ves. 249; 2 Swift, Dig. 114, side page.

If a purchaser has notice of the trust deed at the time of purchase, he becomes a trustee. 2 Swift, Dig. 115, side page.

Whether the possessor is made chargeable with the trust or not, depends entirely upon his knowledge, without reference to the purity or honesty of his motives. *Adair* v. *Shaw*, 1 Sch. & L. 243; 3 Mason, 316; *Oliver* v. *Piatt*, 3 How. 401.

Every advantage gained by a trustee belongs to the *cestui que trust*. *Holridge* v. *Gillespie*, 2 Johns, Ch. 30; *Morrison* v. *Caldwell*, 5 Mon. 435.

The Real and Personal Estate Association and the Junction company were created by means of the facilities which had been placed in the power of these directors by the original corporation, and cannot be used as a cover for their treachery. In the language of Judge Davies, in the case of *The Coal Co.* v. *Sherman*, 30 Barb. 553: "They were its creators; they breathed into it life and gave it all it had, and owned the whole of it at its creation . . . and, therefore, what they knew, their creatures knew."

Phillips v. *Winslow*, 18 B. Mon. 431; *Lane* v. *Baughman*, 17 Ohio St. 642; *Abbott* v. *Rubber Co.* 33 Barb. 593; *R. Co.* v. *Winans*, 17 How. 30, 15 L. ed. 27; *Canal Bridge* v. *Gordon*, 1 Pick. 297; *Pulsford* v. *Richards*, 17 Beav. 87; *R. Co.* v. *Hudson*, 16 Beav. 485.

"Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the rights of the creditors to pursue it," etc., into the hands of all purchasers with notice; an account may be compelled, etc. *Howard* v. *R. Co.* 7 Wall. 409, 19 L. ed. 120.

A satisfactory answer, perhaps, to the views taken by the defendants is, that the cases in which the mortgagee is not bound to render account of the income before the foreclosure suit, are those of a simple mortgage covering the property and not specifying particularly the income as being itself actually mortgaged, while in the present case there is a specific mortgage of the tolls, income and profits, whenever the said company shall be in default of making payment.

The authority to pledge the future earnings

of a railroad not yet brought into existence, is recognized in many decisions, among which may be cited: *Jessup* v. *Bridge*, 11 Ia. 572; *State* v. *North Central R. Co.* 44 Md. 131; *Parkhurst* v. *R. Co.* 19 Md. 472; *Seymour* v. *R. Co.* 25 Barb. 284, 310; *Willink* v. *Can. Co.* 3 H. W. Green, Ch. (N. J.) 401; *Mitchell* v. *Winslow*, 2 Story, 630.

A person who comes into possession of trust property wrongfully, and especially by using means which his fiduciary relations have placed in his power, cannot absorb the revenues of that property and convert them to his own use, without accountability. The authorities previously cited illustrate this elementary principle; but we refer in addition, also, to the case of *Fowler* v. *Merrill*, 11 How. 375, and especially to the case of *Jortin* v. *R. Co.* 6 De Gex, M. & G. 270; 2 Smale & G. ch. 48, 31 Eng. L. & E. 320.

Mr. Justice **Bradley** delivered the opinion of the court:

This was a bill filed by N. A. Cowdrey, Edwin and George Parsons, Frederick P. James, and Isaac Sherman, citizens of New York, against the Galveston, Houston, & Henderson Railroad Company, the successor company of the same name, the Galveston & Houston Junction Railroad Company, and George B. Nicholson and fourteen other persons, all citizens of Texas (except Thomas W. Pierce, who was a citizen of Massachusetts) for the foreclosure and sale of the railroad of said company, with all its appurtenances and all the property of said company, to pay in due order the several outstanding bonds issued under the first, second, and third mortgages of said company, and to call the defendants to account for the tolls, income, and profits of the said railroad whilst in their possession. The bill was filed on the 12th February, 1867, on behalf not only of the complainants, who allege themselves to be large holders of said bonds, but of all other holders thereof, who might come in and contribute to the costs and expenses of the suit.

It appears from the pleas and proofs, that the Galveston, Houston, & Henderson Railroad Company was chartered by the act of the legislature of Texas, on the 7th of February, 1853, for the purpose of constructing and operating a railway from the city of Galveston to the city of Houston and thence to Henderson, with such branches as they might deem expedient; with power, among other things, to take land by condemnation, and to acquire by purchase, donation, or in payment of stock such real estate as the directors should think desirable to aid in **461*]** the construction *or maintenance of said road; such alienation or mortgage to be signed in the name of the president, and to be countersigned by the treasurer; also with power to borrow money on their bonds or notes, at such rates as the directors should deem expedient, and generally to do and perform all such acts as might be necessary and proper for or incident to the fulfilment of their obligations, and for the maintenance of their rights. By virtue of supplements to the charter and general laws of the state, the company became entitled to grants of the public lands of the state, to the amount of sections per mile, by virtue of which they subsequently acquired land certificates for 512,000 acres of land.

The company was duly organized under its charter, and commenced operations for constructing its road.

On the 1st of December, 1863, the company made its first issue of bonds, namely: fifteen hundred bonds, each for £100 payable in London at the expiration of ten years, with interest at the rate of six per cent per annum. To secure these bonds, the company executed a deed of trust or mortgage to trustees, upon its railroad constructed and to be constructed from Galveston to Houston, and its privileges, rights, and real estate, owned or thereafter to be owned by the company, in connection with its said railroad, and all tolls, issues, or profits, whenever default should be made in payment of the bonds, and all the franchises of the company, all of the depots, stations, and buildings and lands occupied or to be occupied therefor. The terms of the deed were, that it should be held in trust for the bond holders; that so long as no default was made by the company in payment of principal or interest, the property should remain in the company's possession; but if it should be in default for the space of three months in payment of either, and on *request in writing by any holder of the [***462** bonds, the trustees might take actual possession of the railroad and all the property mortgaged, take the receipts thereof, and on due notice sell the same to pay the interest due, after paying the expenses of management, and all costs and charges incidental to the trust.

On the first day of June, 1855, a second issue of bonds was made by the said company, to the amount of $750,000, payable in ten years, with interest at ten per cent per annum, convertible after three years into stock of the company, and secured by second mortgage of similar import to the first, except that it conveyed, in addition to what was conveyed by the first mortgage, all the lands which shall or may belong to said company, by virtue of any act of the legislature of the state of Texas, in connection with said road from Galveston to Houston.

On the 8th of October, 1857, a third issue of bonds was made, to the amount of $2,625,000, in $100 bonds, payable in 1879, with interest at eight per cent per annum; and these bonds were secured by a third mortgage on the same property as the second mortgage, except as it purports to cover the railroad from Galveston, for the full distance of seventy-five miles.

The bill states that these bonds were issued to raise money to construct, equip, and supply the railroad; and that the company, by the aid thereof, did complete its road from Galveston to Houston, a distance of 52 miles. It further states that the company, after the issue thereof, took up and canceled about £100,000 of the first issue, leaving outstanding only about £50,000, of which the complainants held £32,600, with a large amount of coupons thereon for unpaid interest; that only about $700,000 of the second issue are outstanding besides the coupons thereon, of which the complainants held $250,000, besides a large amount of unpaid coupons; and that about $2,000,000 of the third issue were outstanding, of which the complainants held a large amount.

During the examination, the complainants produced and scheduled the bonds of the several 464*] classes held by them to *the amounts nearly corresponding with these allegations; the amount of the third issue so produced being $21,800, besides coupons. They were examined as to the manner in which they obtained possession thereof, and proved that they had purchased them of various parties and at various prices, from 30 to 70 per cent on the par value. It further appears by the pleadings and the evidence that, on the 21st day of May, 1859, the company executed to Phillip C. Tucker, as trustee for Robert Pulsford, a fourth deed of trust, to secure the payment of £9,600 previously loaned to the company by Pulsford, on a number of bonds of the third issue, together with other securities, delivered to him to hold as collateral security, and £10,000 advanced at the time of the execution of the deed. This deed covered the same property which was covered by the other trust deeds. It was besides agreed, in a separate article, that Pulsford should have a special lien on a lot of railroad iron, which was pledged to him, and which was to be used for completing the track of the railroad between Galveston City and Virginia Point, a distance of about five miles.

The bill does not advert to this deed, but Pulsford and his trustees, on their petition for that purpose, were permitted to intervene as defendants, and filed an answer and a crossbill, claiming a first lien on a portion of the road laid with the aforesaid rails. It appears, from vouchers produced on the examination, that over $30,000 had been paid to Pulsford on his claim.

It further appears by the pleadings and evidence that on the 6th day of March, 1860, the road-bed, track, franchises, chartered rights, and privileges of the Galveston, Houston, & Henderson Railroad Company and the rolling stock thereof, consisting of two locomotives, fourteen platform cars, one passenger car, etc., were sold by the sheriff of Galveston county, under executions issued on a large number of judgments which had been recovered against the company, amounting in all to nearly $120,000. The purchaser was Benjamin F. Terry, and the property was bid off for $28,000. Terry and his associates, immediately after the purchase, organized themselves into a new company and claimed, by virtue of the sheriff's sale and the laws of Texas, to be invested with all the chartered rights and privileges, including the corporate franchises of the Galveston, Houston, & Henderson Railroad Company, and organized as such, and they and their successors constitute the present company acting under that name, but are sometimes designated as the successor company. This new organization took possession of the railroad and all its works and property, and commenced to operate it. 466*] *The last directors of the old company were interested in this purchase, and continued in the new company.

It further appears that Terry and his associates formed themselves into a voluntary company called the Real and Personal Estate Association, for the purpose of raising money to pay some of the pressing claims against the railroad company, which were regarded as assumed by the new company, and for the further purpose of procuring real estate for depots, rolling stock, machinery, and tools, needed for the use of the railroad company; and that in this way they laid out a large sum of money, over $150,000, and leased the property thus acquired to the new railroad company. The rents reserved are stated in the answer of the defendants.

It further appears that, in order to build a short railroad at the city of Houston, to connect the railroad of the defendants with the Texas Central Railroad, the same persons procured a charter from the legislature, on the 8th of April, 1861, by which they were incorporated as the Galveston & Houston Junction Railroad Company; and were, as such, authorized to construct and operate a railroad to connect the Galveston, Houston, & Henderson Railroad with the Texas Central Railroad. This road was constructed accordingly, and was less than two miles in length, with a bridge over the Buffalo bayou. *The cost of the road is stated [*467 to have been about $51,000. The company also purchased about $12,000 worth of cars from the Houston, Trinity, & Tyler Railroad Company. These cars were leased to the Galveston, Houston, & Henderson Railroad Company, at $600 per month.

About the 1st of May, 1865, the Real and Personal Estate Association sold and transferred all its rolling stock, tools, and machinery, to the Galveston & Houston Junction Railroad; so that, when the bill in this case was filed, the latter company claimed to be the owner of all the rolling stock, tools, and machinery in use on the Galveston road, except the old stock that was in existence in March, 1860; the whole being rented to the Galveston company for rents which are charged by the complainants to be exorbitant, and intended to absorb all the earnings of the Galveston railroad. It is undoubtedly true, as appears from the evidence, that by means of rents paid by the Galveston company to the real estate association for real estate, depot grounds, etc., and for rolling stock, tools, and machinery, and of similar rents paid to the junction company, and of the proportion of the gross receipts retained by said company, the Galveston company received but a very small portion of the earnings of the work for its share.

It is admitted by the defendants that the stockholders of the new Galveston railroad company, the stockholders of the junction railroad company, and the members of the Real and Personal Estate Association are identically the same persons, and that their several interests are proportionally the same in each concern. It is evident, therefore, that the bargains made by the Galveston railroad company were bargains made with themselves, and were just exactly what they were pleased to make them; and the evident design manifested was: to make them on such terms that the Galveston railroad company should get but a very small share of the proceeds. The complainants charge that all this was a fraud; that the tools and income of the railroad were mortgaged to them as well as the roadbed itself, and that the individual defendants are bound to account for them.

*It is admitted by the defendants that [*468

these outside companies were formed because they apprehended difficulty from the creditors of the old company. They did not deem it safe to purchase new property, either real estate or rolling stock, or to construct a connecting road at Houston, in the name of the Galveston railroad company. The mortgages held by the trustees of the complainants and other claims were clouds hanging over the title of the railroad and, therefore, they were unwilling to invest their money in the company's name, or to invest it with the title to any new property acquired. They urged these circumstances in justification of their course, although they insist that the rents and the division of receipts were fair and right. The defendants, however, do not satisfy themselves by defending their own position; they assail the title of the complainants, and the correctness of the decree in several important particulars which we shall proceed to examine; promising, however, that upon the filing of the bill and reading divers affidavits, the court below appointed a receiver, and a successor since appointed who have, during the pendency of the suit, carried on the operations of the railroad, and received all the emoluments thereof, for the benefit of the parties entitled thereto.

The first objection made by the defendants **474***] to the decree *is that the mortgages under which the complainants claim are not valid for want of capacity in the railroad company to make them. It is admitted that the charter authorizes the company to mortgage certain real estate, which it was authorized to acquire for the purpose of aiding in the construction or maintenance of the road. But they insist that this power applies to outside real estate procured as ancillary to the main design of building the road, and does not apply to the right of way and track of the railroad. But we think it is general, and applies to any real estate which the company might acquire in any way. This construction is aided by the other powers conferred by the charter, as that of borrowing money on bond or note, and of doing all acts necessary and proper for or incident to the fulfilment of their obligations. And it is expressly declared that all conveyances and contracts executed in writing, signed by the president and countersigned by the treasurer, or any other officer duly authorized by the directors, under seal of the company, and in pursuance of a vote of the directors, shall be valid and binding. If it were necessary to look into the charter for express power to borrow money and mortgage its property to secure the payment thereof, we think the power is found therein.

But the defendants contend that if the power to mortgage mere real and personal estate be conceded, still there is no power to mortgage, or in any way to assign the railroad as such, or the franchise of operating it and taking tolls, or any other franchise, much less that of exercising corporate powers; and hence the decree is erroneous in authorizing a sale of these rights and franchises under the mortgages.

Without examining how far the operative effect of a mortgage executed by a railroad company upon its road, works and franchises may extend, *per se*, without statutory aid, it is sufficient to say that, in our opinion, the legislature of Texas has validated the mortgages, and given them the effect which, by their terms, they were intended to have. By the act of December 19, 1857 (Pasch. Dig. § 4912), it is expressly provided that:

*"The roadbed, track, franchise, and [**475** chartered rights and privileges of any railroad company in this state shall be subject to the payment of the debts and legal liabilities of said company, and may be sold in satisfaction of the same, but . . . shall be deemed an entire thing, and must be sold as such; and in case of the sale of the same, whether by virtue of an execution, order of sale, deed of trust, or any other power, the purchaser or purchasers at such sale and their associates shall be entitled to have and exercise all the powers, privileges, and franchises granted to said company by its charter, or by virtue of the general laws of this state; and the said purchaser or purchasers and their associates shall be deemed and taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges, and benefits thereof, in the same manner and to the same extent as if they were the original corporators of said company."

The following § 4913 enacts that:

"Whenever a sale of the roadbed, track, franchise and chartered rights and privileges of any railroad company is made by virtue of any deed of trust or power, the same shall be made at the time and place mentioned in the deed of trust or power, and in accordance with the provisions of the same, as to notice and in other respects; and if the same be not specified, such sale shall be made as hereinafter provided for sales under execution or order of sale."

The following § 4914 gives the like effect to sales under execution issued upon a judgment. Indeed, it is by virtue of the latter section that the defendants claim to be the present owners of the road and its franchises. This law is not prospective, but general, in its operation. It is a remedial law for the benefit of creditors, and should be liberally construed. It should especially be applied to a case in which, by the very terms of the trust deed, all the franchises and rights of the company are expressly embraced therein. It cannot be claimed, as is done by the defendants, that a sale under one mortgage or judgment, by virtue of this law, nullifies and destroys all prior mortgages. Such a doctrine would work the greatest injustice, and would open *the door to the grossest [**476** frauds. A sale under a junior security must be subordinate to one that is prior and paramount. Successive sales of the same franchises can no more be deemed incompatible than successive sales of the same property; and we all know that a sale of land under a judgment does not, in the slightest manner, affect a prior mortgage. A subsequent sale of the same land may be made by virtue of the latter.

It is next objected that the mortgages were not properly executed, because the meetings of the directors by which the mortgages were authorized to be executed were held in the city of New York. It is not denied that the mortgages were executed in good faith under the corporate seal, and signed by the president and countersigned by the treasurer of the company,

tenants, which do not affect the question here. The rails put down on the Company's road became a part of the road. The road itself was included in the mortgages of the complainants. Pulsford, by allowing his property to go into or become part of the road, consented to its being covered by the mortgages in question. He acquired no lien which can displace them. In certain states a lien is created by statute in favor of mechanics, called the mechanic's lien, by which a person furnishing materials or work on a building acquires a lien on the property to secure the payment of his claim. But this kind of lien did not exist in Texas in favor of those who supplied materials or money for constructing railroads. We have no hesitation in saying that Pulsford's claim to priority cannot be maintained.

Some other minor points have been made by the defendants which it is not necessary for us to examine in detail. *Our conclusion is that the decree, so far as it is in favor of the complainants, must be affirmed.*

The complainants have also appealed from the decree because it fails to award them the tolls, income and profits of the railroad during the time it was operated by the present defendants, and to make the defendants accountable therefor. The complainants claim that nearly all the rolling stock and property, including **483***] the junction railroad, claimed *by the defendants as their property, were really produced by the earnings of the railroad fraudulently appropriated to themselves by the defendants. This claim raises the question whether a mortgage of the tolls and income makes the mortgagor or his assignees accountable therefor before demand made by the mortgagee. In this case it does not appear that the complainants or their trustees made any demand for the tolls and income until they filed the present bill. The bill itself does not contain any allegation of such a demand. Now, what is the language of the deeds of trust? They convey, it is true, with the other premises, the tolls, income, issues, and profits, whenever the company shall be in default of payment; but a subsequent clause provides that in case the company shall at any time for the space of three months be in default in respect to the payment of either interest or principal of said bonds when due and demanded, on request in writing of any of the holders of the bonds, the trustees shall take possession of the railroad and other property, and through the agency of the persons they may appoint, shall collect and receive the tolls, incomes and profits of the railroad and mortgaged property for the purpose of the security before declared, and may sell the road upon giving due notice, etc. It seems to us that the latter clause defines and points out the manner in which the pledge of the tolls and income is to be practically carried into effect. At all events, until a regular demand was made for the payment of the tolls and income we do not think, under the language of the deed, that the defendants were bound to account therefor. If this be so, it matters not what bargains the defendants made between themselves as to the disposition of said tolls and income.

We are, therefore, of opinion, that this part of the decree ought also to be affirmed. The result is that the entire decree of the Circuit Court is affirmed.

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*ROBERT FORSYTH, *Plff. in Err.*, [*484
v.
ROBERT K. WOODS, Assignee of the Estate of Edward P. Tesson and Edward M. Tesson, Son & Company.

(See S. C. 11 Wall. 484-488.)

Individual promise of partners, when does not create firm liability—surety on bond, when promise to indemnify, not valid—breach of trust by administrator.

A promise by the individual partners, made in their individual names, respecting a matter that has no connection with the firm business, does not create a liability of the firm as such.

The law will not enforce a promise to indemnify a surety on an administration bond, for doing an act planned and intended to enable his principal in the administration bond to commit a gross breach of trust.

To permit a mercantile firm, of which the administrator is a partner, to take the assets of the decedent's estate, into its possession, and to share in the disposition of them, is a gross breach of trust by the administrator.

[No. 143.]

Argued Apr. 13, 1871. Decided May 1, 1871.

IN ERROR to the Circuit court of the United States for the District of Missouri.

Suit was brought in the district court of the United States for the eastern district of Missouri, by the defendant in error, as assignee of a bankrupt partnership, upon an account and a promissory note. The plea of the defendant was demurred to, and judgment thereupon given for the plaintiff. Upon appeal to the circuit court the said judgment was affirmed; whereupon the said defendant sued out this writ of error.

The case is fully stated in the opinion of the court.

Messrs. Thomas T. Gantt, J. M. Carlisle, and **J. D. McPherson,** for plaintiff in error:

The defendant having assumed a liability for and at the express request of the bankrupts, and the defendant having had to pay the money in discharge of this liability, the money so paid was, in contemplation of law, paid for them and at their request.

The rule on this subject was thus stated by Lord Campbell, Ch. J., in *Batard* v. *Hawes*, 2 E. & B. 296:

"To support the action for money paid, it is necessary that there should be a request from the defendant, either expressed or implied by law. Where one party enters into a legal liability for, and at the request of another, a request to pay the money is implied by law, from the fact of entering into the engagement."

If money has been paid by the plaintiff, in discharge of a liability which he has taken upon himself at the defendant's instance or by his authority, the laws will imply that it was paid at his request. Chit. Cont., 10th ed., 660.

NOTE.—*Application of partnership assets to debts; rights of individual and partnership creditors therein*—see note to U. S. v. Hack, 8 L. ed. U. S. 941.

covered; and the rights of all are protected by the opportunity given to all to contest the claim of any. We consider the bill as properly conceived, and the objection as untenable.

In connection with this objection it is proper to notice an objection to the original decree: that it undertook to declare and find the amount of bonds outstanding and due under each mortgage before the bonds had been regularly produced and proved. That decree, of course, is not to be regarded as final and conclusive on this point. The remarks of Vice Chancellor Wigram, in *Whitaker* v. *Wright*, 2 Hare, 310, are germane to this subject: "With respect to the form of a decree in a creditor's suit," says he, "the court does not treat the decree as conclusive of the debt. It is clear that it is not so treated for all purposes, for any other creditor may challenge the debt, and it is equally clear that in practice the executor himself is allowed to impeach it. If, in a case where the plaintiff sues in behalf of himself and all other creditors, and the defendants, who represent the estate, do not admit assets, it is objected at the hearing that the debt is not well proved, the court tries the question only whether there is sufficient proof upon which to found a decree; and however clearly the debt may be proved in the cause, the decree decides nothing more than that the debt is sufficiently proved to entitle the plain-**480***] tiff to go into the master's office, *and a new case may be made in the master's office, and new evidence may be there tendered." See, Story, Eq. Jur. § 549, note. In this case, it is true, no reference to a master was made in the first decree for taking the proof of the various bonds that might be produced; but the final decree directed that, to ascertain the proportion and amount of the several series of bonds and coupons outstanding, all holders thereof claiming participation in the distribution of proceeds of any sale of the property should present their bonds and coupons to the court, to be deposited in some bank to be designated, there to remain subject to further order and to such directions as the court may make to ascertain their genuineness, and to classify them. This has not yet been done, all proceedings being stayed by the appeal. But the action of the court, as far as it has gone, is substantially correct. It only remains to complete the proceeding in accordance with the proper practice applicable to the case.

On the part of Robert Pulsford it is objected that the decree does not give him a priority on that portion of the road which was laid with his iron. He contends that he is entitled to this, first, because when the mortgages of the complainants were executed it was not in existence, and could not have been conveyed thereby, and can only be embraced therein on a principle of equitable estoppel, which is rebutted when it comes in conflict with a superior equity; secondly, because his capital applied to the road conserved it, and rendered it capable of being operated, which it would not have been otherwise; hence, on the principle adopted by the civil and maritime laws of awarding priority to the last creditor who furnished necessary repairs and supplies to a vessel, he is entitled to priority. The counsel for Pulsford has furnished us with a very ingenious and learned argument on these points, but we cannot yield to their force.

As to the first point, without attempting to review the many authorities on the subject, it is sufficient to state that, in our judgment, the first, second, and third deeds of trust, *or mortgages, given by the Galveston [***481** railroad company to the trustees, estops the company, and all persons claiming under it and in privity with it, from asserting that those deeds do not cover all the property and rights which they profess to cover. Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad, which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures, and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases. To hold otherwise would render it necessary for a railroad company to borrow money in small parcels as sections of the road were completed, and trust deeds could safely be given thereon. The practice of the country and its necessities are in coincidence with the rule. The precise case arose in New Jersey thirty years ago. The Morris Canal Company mortgaged its canal, appurtenances, and chartered rights to secure a loan. When the mortgage was given, one section of the canal, that between Newark and Jersey City, although authorized, was not constructed. It was constructed afterwards. Two other mortgages were given upon that part of the canal, one of which was held by the state of Indiana. A bill of foreclosure was filed on the first mortgage, and after argument by very able counsel, Chancellor Pennington held that the first mortgage took priority. The objection was raised that the company did not own any of the land on which the contested portion was constructed when the mortgage was given. "Can it be possible," said he, "that if on the line of the route at any place it should turn out that a deed was obtained for a piece of land since the execution of the mortgage, that such part of the canal is not embraced within it?" 3 Green, Ch. 402. Mr. Pulsford, as holder of the fourth mortgage, is *an assignee of the railroad company, [***482** claiming under it, with full notice of the other mortgages. He is in privity with the company, and is bound by the estoppel.

As to the other point, giving priority to the last creditor for aiding to conserve the thing, all that is necessary to say is that the rule referred to has never been introduced into our laws except in maritime cases, which stand on a particular reason. We do not understand that it is a part of the general law of Texas. By an act of the Congress of Texas, passed 20th January, 1840, the common law was made the rule of decision, where not inconsistent with the Constitution and acts of Congress. By the common law it is an inflexible rule, that whatever is affixed to the freehold becomes a part of the realty, except certain fixtures erected by

tenants, which do not affect the question here. The rails put down on the Company's road became a part of the road. The road itself was included in the mortgages of the complainants. Pulsford, by allowing his property to go into or become part of the road, consented to its being covered by the mortgages in question. He acquired no lien which can displace them. In certain states a lien is created by statute in favor of mechanics, called the mechanic's lien, by which a person furnishing materials or work on a building acquires a lien on the property to secure the payment of his claim. But this kind of lien did not exist in Texas in favor of those who supplied materials or money for constructing railroads. We have no hesitation in saying that Pulsford's claim to priority cannot be maintained.

Some other minor points have been made by the defendants which it is not necessary for us to examine in detail. *Our conclusion is that the decree, so far as it is in favor of the complainants, must be affirmed.*

The complainants have also appealed from the decree because it fails to award them the tolls, income and profits of the railroad during the time it was operated by the present defendants, and to make the defendants accountable therefor. The complainants claim that nearly all the rolling stock and property, including 483*] the junction railroad, claimed *by the defendants as their property, were really produced by the earnings of the railroad fraudulently appropriated to themselves by the defendants. This claim raises the question whether a mortgage of the tolls and income makes the mortgagor or his assignees accountable therefor before demand made by the mortgagee. In this case it does not appear that the complainants or their trustees made any demand for the tolls and income until they filed the present bill. The bill itself does not contain any allegation of such a demand. Now, what is the language of the deeds of trust? They convey, it is true, with the other premises, the tolls, income, issues, and profits, whenever the company shall be in default of payment; but a subsequent clause provides that in case the company shall at any time for the space of three months be in default in respect to the payment of either interest or principal of said bonds when due and demanded, on request in writing of any of the holders of the bonds, the trustees shall take possession of the railroad and other property, and through the agency of the persons they may appoint, shall collect and receive the tolls, incomes and profits of the railroad and mortgaged property for the purpose of the security before declared, and may sell the road upon giving due notice, etc. It seems to us that the latter clause defines and points out the manner in which the pledge of the tolls and income is to be practically carried into effect. At all events, until a regular demand was made for the payment of the tolls and income we do not think, under the language of the deed, that the defendants were bound to account therefor. If this be so, it matters not what bargains the defendants made between themselves as to the disposition of said tolls and income.

We are, therefore, of opinion, that this part of the decree ought also to be affirmed. The result is that the entire decree of the Circuit Court is affirmed.

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*ROBERT FORSYTH, *Plff. in Err.*, [*484

v.

ROBERT K. WOODS, Assignee of the Estate of Edward P. Tesson and Edward M. Tesson, Son & Company.

(See S. C. 11 Wall. 484–488.)

Individual promise of partners, when does not create firm liability—surety on bond, when promise to indemnify, not valid—breach of trust by administrator.

A promise by the individual partners, made in their individual names, respecting a matter that has no connection with the firm business, does not create a liability of the firm as such.

The law will not enforce a promise to indemnify a surety on an administration bond, for doing an act planned and intended to enable his principal in the administration bond to commit a gross breach of trust.

To permit a mercantile firm, of which the administrator is a partner, to take the assets of the decedent's estate, into its possession, and to share in the disposition of them, is a gross breach of trust by the administrator.

[No. 143.]

Argued Apr. 13, 1871. Decided May 1, 1871.

IN ERROR to the Circuit court of the United States for the District of Missouri.

Suit was brought in the district court of the United States for the eastern district of Missouri, by the defendant in error, as assignee of a bankrupt partnership, upon an account and a promissory note. The plea of the defendant was demurred to, and judgment thereupon given for the plaintiff. Upon appeal to the circuit court the said judgment was affirmed; whereupon the said defendant sued out this writ of error.

The case is fully stated in the opinion of the court.

Messrs. Thomas T. Gantt, J. M. Carlisle, and **J. D. McPherson,** for plaintiff in error:

The defendant having assumed a liability for and at the express request of the bankrupts, and the defendant having had to pay the money in discharge of this liability, the money so paid was, in contemplation of law, paid for them and at their request.

The rule on this subject was thus stated by Lord Campbell, Ch. J., in *Batard* v. *Hawes*, 2 E. & B. 296:

"To support the action for money paid, it is necessary that there should be a request from the defendant, either expressed or implied by law. Where one party enters into a legal liability for, and at the request of another, a request to pay the money is implied by law, from the fact of entering into the engagement."

If money has been paid by the plaintiff, in discharge of a liability which he has taken upon himself at the defendant's instance or by his authority, the laws will imply that it was paid at his request. Chit. Cont., 10th ed., 660.

NOTE.—*Application of partnership assets to debts; rights of individual and partnership creditors therein*—see note to U. S. v. Hack, 8 L. ed. U. S. 941.

The liability of the bankrupt occurs before bankruptcy, *viz.*, at the time when the defendant became surety for the partner.

On this point the case of *Batard* v. *Hawes*, 2 E. & B. 296, is express. That of *Appleton* v. *Bascom*, 3 Met. 170, is equally so.

The right in action of indebitatus assumpsit to set off money paid, being plain, the question here is only as to the effect of the bankrupt act upon the case.

The provisions of that act, applicable to the case, are two only:

The 20th section of the act restricts the right of set-off to demands in their nature provable, under the act.

This, being a demand for money paid, is provable under the general description of a debt and is, moreover, expressly made provable by the 19th section of the act, which provides that if payment be made after bankruptcy, by reason of any contingent liability existing at the time of the bankruptcy, such payment may be proved at any time before final dividend.

Each one of the demands set up in the plea, is for money paid at the joint request of the two, and only members composing the firm and for their joint use and benefit; and it is further shown that the emoluments were to go to the firm as a matter of partnership business.

It is argued that the only ground of considering the liability joint, is the accidental circumstance of the two principals on the bond being partners.

That is not our case. Their joint liability depends on the fact that the request was joint, and the act done was for their joint use and benefit.

This is not undertaking to answer for the default of another nor undertaking to answer for any default; but a contract directly between the plaintiff and defendant; a request from one directly to the other to pay money; and the payment of money in pursuance of that request. The statute of frauds has no application to such a case.

Mr. **S. S. Boyd,** for defendant in error:

In order to exemplify the matter, we will take the case of the E. P. Tesson bond by itself, as the facts in relation to both bonds, so far as they affect the question at issue, are identical; and whether Forsyth was surety for each of the partners separately, or for only one of them, is of no importance.

So far as E. P. Tesson is concerned, he is individually liable as principal in the bond given by Forsyth as surety. If E. M. Tesson has incurred any liability at all, it can only be on one or the other of two grounds, very different from that which fixes the liability of E. P. Tesson. It must be either on his implied promise that he would be jointly responsible with Forsyth for the acts of E. P. Tesson, thus making him a cosurety with defendant; or on the ground that he became a guarantor to Forsyth against any loss occasioned by the conduct of E. P. Tesson; the liability of E. P. Tesson being fixed by a sealed instrument, and that of E. M. Tesson resting wholly in parol. Can liabilities arising under such different circumstances and depending upon such distinctly diverse grounds, be converted into a joint liability, simply by showing that the parties incurring them happen to be partners in business? If they are jointly liable, it can only be because they are partners; for otherwise, there is no unity or connection between them. E. P. Tesson is, in any event, liable as principal for the whole; E. M. Tesson is only contingently liable on the default of E. P. Tesson, and then only as cosurety or guarantor. But we contend that the record clearly shows that E. M. Tesson incurred no liability of any kind whatever, on account of the E. P. Tesson bond. Even had he made a special promise to answer for the default of E. P. Tesson, such promise falls within the statute of frauds, and no liability attaches to him therefrom.

A verbal promise on the part of the firm to answer for the default of another person, or to save a person harmless from loss by reason of the conduct of another person, which promise, whether made with or without consideration, is clearly within the statute of frauds, as above cited, and in terms declared to give no right of action, but to be null and void. The fact that the party making default happens to be a member of the firm making the promise, cannot, of course, affect the question.

Admitting, for the sake of the argument, that the defendant has a claim of some kind against the partnership, for the defalcation of E. P. Tesson; yet, it is not provable against the partnership estate, for the reason that it not only was not due, but it had no existence at the time of the adjudication of bankruptcy, to wit, December 23, 1867; for the liability of Forsyth did not become absolute until May 6, 1868, when E. P. Tesson made default.

Mr. Justice **Strong** delivered the opinion of the court:

The plea to which the plaintiff has demurred, avers a joint request made by the individuals who compose the firm of E. P. Tesson & Co., to the defendant, soliciting him to become a surety of one of these individuals in an administration bond. It also avers a joint representation made to him by them, that they intended to make the administration a matter of partnership business, to take in the possession of the partnership business all the assets of the intestate and to share, as partners, the gains and losses resulting from the administration; so that, in signing the bond, he would in effect become a surety of the firm, and not merely a surety of the partner to whom the grant of letters of administration might be made. The plea further avers that, moved by the joint request and relying upon the joint representations aforesaid, the defendant did become a surety in the administration bond, and that *af- [*485 terwards (the partnership having taken possession of all the assets of the deceased intestate and having become bankrupt) he was compelled to pay to the legal representatives and next of kin of such intestate, a large sum of money, in consequence of the default of the administrators. It is still further averred that, under similar circumstances, after like request and representations, the defendant became surety in an administration bond of the other partner, to whom administration of another estate was committed by the probate court, and that he was compelled to pay money for that administrator's default. Whether these facts show a legal liability of the

infringement, asserts that the reissued patent was obtained by fraud; that it was a device to cover matter not invented or claimed by John Allender, and denies that the machines made by defendants have anything in them covered by the patent of plaintiff.

After replication and testimony, a final decree was rendered, according to the prayer of the bill.

1. We are satisfied that the agreements set up in the bill are the valid contracts of the defendant. Though the plaintiff was unable to produce any resolution or order in writing by the trustees or board of directors of the defendant corporation, and though the seal used was the private seal of one of its officers, instead of the corporate seal, neither of these is essential to the validity of the contract. We entertain no doubt that Rindge, the agent and one of the directors and treasurer of the Eureka company, was authorized to execute the agreement, and if any doubt existed on that point, the report and payment for five hundred machines, the first month's use of the patent under that agreement, would remove the doubt. If it did not, it would very clearly amount to a ratification.

2. The defendant company furnished a sample of the machine they were making. That machine is before us. We do not understand that it is seriously contended that this machine does not contain some part of the invention covered by the reissue of the Allender patent. The effort of defendant is to show that it is not covered by the original patent to Allender. This latter point will be noticed presently. After making the agreement in this case, an agreement made on due deliberation, the defendant being engaged in the business of making the machines before it took the license—an agreement manifestly intended to adjust conflicting rights—and after furnishing one of the machines as a sample of what it proposed to do under that agreement; and after having made and sold five hundred of them, there arises a very strong presumption that the de-
492*] nial that anything *in those machines is covered by plaintiff's patent is made to support an unwillingness to pay the royalty which it had agreed to pay. And we are not at all satisfied that, in equity, it can be permitted to set up this defense, while it makes no attempt, by cross bill or even in the answer, to show that the agreements were obtained by fraud, surprise, or imposition.

But if this could be permitted, the testimony does not repel the presumption arising from the making of that contract, and the defendant's action under it, that the machines made by it do contain matter covered by the reissued patent of plaintiff.

3. If the defendant means, by the very vague answer to the bill, to set up and to rely on a fraud by which the commissioner was misled and deceived and induced to reissue the patent, and that the plaintiff or its assignors were the guilty parties, that question cannot be raised in this collateral proceeding, and can only be considered in some direct suit to impeach and set aside the patent. *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 19 L. ed. 566.

But if it is meant merely to say that, in point of fact, the reissue embraces matter which was no part of Allender's original invention, then there is no evidence in the record by which we can determine that question, for neither the original patent to Allender, nor any part of it, nor any of the reissues of that patent, except the last, which is the one claimed to be wrongfully reissued, is in the record.

4. Some attempt is made to assail the novelty of Allender's invention, but as no notice was given of any such attempt, or of the witnesses or other evidence by which that charge was to be supported, it cannot be considered in this case.

On the whole case we concur with the Circuit Court, and its judgment is affirmed.

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*UNITED STATES, *Plff. in Err.*, [*508
v.
JOHN F. WILEY *et al.*

(See S. C. 11 Wall. 508-514.)

War suspends statute of limitations in favor of the citizen and the United States—act of June 11, 1864—time before the passage of the act, to be counted.

The effect of the war was, to suspend the running of the statute of limitations during its continuance, in suits between the inhabitants of the loyal states and the inhabitants of those in rebellion.

The running of the statute is thus suspended, not only in favor of the citizen, but also in favor of the United States.

The general rule, as above stated, was not changed by the act of Congress of June 11, 1864.

The statute requires all the time to be deducted during which the suit could not be prosecuted by reason of the war, whether such time was before or after its passage.

[No. 133.]

Argued Apr. 6, 1871. Decided May 1, 1871.

IN ERROR to the Circuit Court of the United States for the District of West Virginia.

Suit was brought in the court below, against the defendants in error, upon a marshal's bond. Judgment having been entered in favor of the defendants, the plaintiffs sued out this writ of error.

The case is fully stated by the court.

Messrs. Amos T. Akerman, Atty. Gen., **C. H. Hill**, *Asst. Atty. Gen.*, **B. H. Bristow**, *Solicitor Gen.*, and *T. H. Talbot*, for plaintiff in error:

This case would seem to be one fully covered by former decisions of this court, to the effect that the time during which the courts in the lately rebellious states were closed to the opposing belligerents, is to be excluded from the computation of time fixed by the statute of limitations, within which suits must be brought. There would seem to be no reason, if the statute of limitations runs against the United States at all, why this exclusion should not be made in respect of suits brought by them, as well as suits brought by their citizens.

Statute of June 11, 1864, § 1, 13 Stat. at L. 123; *Hanger* v. *Abbott*, 6 Wall. 532, 18 L. ed. 939; *The Protector*, 9 Wall. 687, 19 L. ed. 812.

Messrs A. L. Merriman, Conway Robinson, and **Tazewell Taylor**, for defendants in error:

NOTE.—*Suspension of statute of limitations during war*—see note to Hanger v. Abbott, 18 L. ed. U. S. 939.

Mr. **Jas. B. Robb,** for appellant:

"A promise for which there is no consideration cannot be enforced at law."

"The rule was intended to protect parties from mistake, inadvertence, or fraud."

1 Pars. Cont. 427, 428.

A consideration must be proved where the contract is in writing, as much as if the contract were oral only.

1 Pars. Cont. 429.

An exception is made in favor of contracts under seal; but the indenture relied upon not being sealed with the official or corporate seal of the Eureka company is to be treated as a parol contract.

Gen. Stat. of Mass. ch. 13, § 7, cl. 15.

The consideration must have some real value.

1 Pars. Cont. 436.

The only consideration to support the defendant's promise, is a grant of a right to use, in the manufacture of wringing machines for sale, such parts of the invention of John Allender, secured by the reissued patent, as are represented in defendant's machine, and no other.

It did not contain any part of the invention. Nothing passed by the grant, and there was no consideration for the promise.

Messrs. **Charles Levi Woodbury** and *M. E. Ingalls,* for appellee:

1. A corporation may adopt any seal it chooses, for the time being, as well as an individual.

Perk. 1, § 32; *Mill Dam Foundry* v. *Hovey,* 21 Pick. 428; *Porter* v. *R. Co.* 37 Me. 349; *Bank* v. *Rut. R. Co.* 30 Vt. 159.

2. Where a corporation makes a contract through an agent, who puts a seal to it, it becomes its contract, although it has not its common seal.

See cases cited above.

3. A corporation may appoint an agent by mere vote, or by any corporate act whatever.

Ang. & Ames, Corp. 313; *Bank* v. *Patterson,* 7 Cranch, 305.

4. Such appointment may be inferred or implied from his being held out as such agent by the officers of the corporation, or from the recognition of his acts as agent by the directors or by the corporation.

2 Kent, Com. 288; Story, Ag. 652; *Bank.* v. *Dandridge,* 12 Wheat. 64; *Randall* v. *Van Vechten,* 19 Johns. 60; *Bank* v. *Guttschlick,* 14 Pet. 29.

5. It is not necessary that authority from a corporation to its agent to contract in its behalf, should be given at an assembly of the directors; but their assent may be obtained separately.

Bank v. *R. Co.* 30 Vt. 159.

6. Knowledge and concurrence of stockholders in all that is done is sufficient authority to its agents.

Miller v. *R. Co.* 36 Vt. 475.

7. A corporation becomes bound for the unauthorized acts of its agent by a subsequent ratification, the same as a natural person.

See, cases before cited, and *Turnpike* v. *Collins,* 8 Mass. 299; *Gordon* v. *Preston,* 1 Watts, 385; *Curtis* v. *Leavitt,* 15 N. Y. 49; *Hoyt* v. *Thompson,* 19 N. Y. 207.

8. This ratification may be inferred from the silence of the corporation upon receiving notice, through its proper officers, of the acts of one assuming to act as its agent.

Gordon v. *Preston,* 1 Watts, 385; *Curtis* v. *Leavitt,* 15 N. Y. 49; *Hoyt* v. *Thompson,* 19 N. Y. 207; *Frothingham* v. *Haley,* 3 Mass. 70; *Shaw* v. *Nudd,* 8 Pick. 9; *Thayer* v. *White,* 12 Met. 343.

9. Notice to an agent in the transactions for which he is employed, is notice to the principal. This rule applies equally to a corporation, as to a natural person.

Ang. & Ames, Corp. § 305, and cases there cited.

10. The directors of a corporation are its authorized agents, and notice to them in their official capacity is notice to the corporation.

Ang. & Ames, Corp. § 306; *Burrill* v. *Bk.* 2 Met. 163; *Sargent* v. *Webster,* 13 Met. 497; *Bk.* v. *Lewis,* 22 Pick, 32; *Bk.* v. *Davis,* 2 Hill. 451.

Mr. Justice **Miller** delivered the opinion of the court:

The appellee was the owner of a reissued patent for an improved washing and wringing machine, the original of which had been issued to John Allender. There had been several surrenders and reissues of this patent, the last of which is on the 22d July, 1865. The appellant being engaged in the manufacture of clothes wringing machines under other patents, entered into a written covenant, as the bill of the appellee charges, with the appellant, for the privilege of using their patent, and the bill makes exhibits of two written agreements on this subject.

The first of these agreements licenses the Eureka company to use the patent of the Bailey company during the existence of the patent and of any renewal thereof, for which the Eureka company is to pay a royalty of fifty cents for every machine manufactured by it in which the patent is used. To secure the performance of this, and to prevent any misunderstanding, the Eureka company furnished a sample of the machines, and agreed that its books should at all times be open to the examination of the complainants, and that it would make monthly reports and payments; and it covenanted that it would not directly or indirectly infringe the reissued patent of complainants, or violate the conditions of their agreement.

The second covenant was made to arrange the prices at which the machines made by the parties should be sold, so as to prevent injurious competition.

The bill charges that these covenants were the result of protracted negotiations, in which the original patent, the reissues and the character of the invention were well considered, and that they were a fair adjustment of the interests of the parties.

It is then alleged that, in the first month, five hundred machines were made under the contract and paid for by defendants, but that it continued to make and sell the machines, and refused to account or pay for them. It then prays for a discovery of the number made, and for an account and decree for the sum due, and for an injunction against the use of the patent, until the sum found due shall be paid.

The answer denies the agreement, denies the

infringement, asserts that the reissued patent was obtained by fraud; that it was a device to cover matter not invented or claimed by John Allender, and denies that the machines made by defendants have anything in them covered by the patent of plaintiff.

After replication and testimony, a final decree was rendered, according to the prayer of the bill.

1. We are satisfied that the agreements set up in the bill are the valid contracts of the defendant. Though the plaintiff was unable to produce any resolution or order in writing by the trustees or board of directors of the defendant corporation, and though the seal used was the private seal of one of its officers, instead of the corporate seal, neither of these is essential to the validity of the contract. We entertain no doubt that Rindge, the agent and one of the directors and treasurer of the Eureka company, was authorized to execute the agreement, and if any doubt existed on that point, the report and payment for five hundred machines, the first month's use of the patent under that agreement, would remove the doubt. If it did not, it would very clearly amount to a ratification.

2. The defendant company furnished a sample of the machine they were making. That machine is before us. We do not understand that it is seriously contended that this machine does not contain some part of the invention covered by the reissue of the Allender patent. The effort of defendant is to show that it is not covered by the original patent to Allender. This latter point will be noticed presently. After making the agreement in this case, an agreement made on due deliberation, the defendant being engaged in the business of making the machines before it took the license—an agreement manifestly intended to adjust conflicting rights—and after furnishing one of the machines as a sample of what it proposed to do under that agreement; and after having made and sold five hundred of them, there arises a very strong presumption that the de-492*] nial that anything *in those machines is covered by plaintiff's patent is made to support an unwillingness to pay the royalty which it had agreed to pay. And we are not at all satisfied that, in equity, it can be permitted to set up this defense, while it makes no attempt, by cross bill or even in the answer, to show that the agreements were obtained by fraud, surprise, or imposition.

But if this could be permitted, the testimony does not repel the presumption arising from the making of that contract, and the defendant's action under it, that the machines made by it do contain matter covered by the reissued patent of plaintiff.

3. If the defendant means, by the very vague answer to the bill, to set up and to rely on a fraud by which the commissioner was misled and deceived and induced to reissue the patent, and that the plaintiff or its assignors were the guilty parties, that question cannot be raised in this collateral proceeding, and can only be considered in some direct suit to impeach and set aside the patent. *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 19 L. ed. 566.

But if it is meant merely to say that, in point of fact, the reissue embraces matter which was no part of Allender's original invention, then there is no evidence in the record by which we can determine that question, for neither the original patent to Allender, nor any part of it, nor any of the reissues of that patent, except the last, which is the one claimed to be wrongfully reissued, is in the record.

4. Some attempt is made to assail the novelty of Allender's invention, but as no notice was given of any such attempt, or of the witnesses or other evidence by which that charge was to be supported, it cannot be considered in this case.

On the whole case we concur with the Circuit Court, and its judgment is affirmed.

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*UNITED STATES, *Plff. in Err.*, [*508
v.
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(See S. C. 11 Wall. 508-514.)

War suspends statute of limitations in favor of the citizen and the United States—act of June 11, 1864—time before the passage of the act, to be counted.

The effect of the war was, to suspend the running of the statute of limitations during its continuance, in suits between the inhabitants of the loyal states and the inhabitants of those in rebellion.

The running of the statute is thus suspended, not only in favor of the citizen, but also in favor of the United States.

The general rule, as above stated, was not changed by the act of Congress of June 11, 1864.

The statute requires all the time to be deducted during which the suit could not be prosecuted by reason of the war, whether such time was before or after its passage.

[No. 133.]

Argued Apr. 6, 1871. Decided May 1, 1871.

IN ERROR to the Circuit Court of the United States for the District of West Virginia.

Suit was brought in the court below, against the defendants in error, upon a marshal's bond. Judgment having been entered in favor of the defendants, the plaintiffs sued out this writ of error.

The case is fully stated by the court.

Messrs. Amos T. Akerman, Atty. Gen., **C. H. Hill**, *Asst. Atty. Gen.*, **B. H. Bristow**, *Solicitor Gen.*, and *T. H. Talbot*, for plaintiff in error:

This case would seem to be one fully covered by former decisions of this court, to the effect that the time during which the courts in the lately rebellious states were closed to the opposing belligerents, is to be excluded from the computation of time fixed by the statute of limitations, within which suits must be brought. There would seem to be no reason, if the statute of limitations runs against the United States at all, why this exclusion should not be made in respect of suits brought by them, as well as suits brought by their citizens.

Statute of June 11, 1864, § 1, 13 Stat. at L. 123; *Hanger* v. *Abbott*, 6 Wall. 532, 18 L. ed. 939; *The Protector*, 9 Wall. 687, 19 L. ed. 812.

Messrs A. L. Merriman, Conway Robinson, and **Tazewell Taylor**, for defendants in error:

NOTE.—*Suspension of statute of limitations during war*—see note to Hanger v. Abbott, 18 L. ed. U. S. 939.

June 11, 1864 (§ 1, 13 Stat. at L. 123; 2 Brightly, Dig. 298), Congress passed the following act:

"Wherever, during the existence of the present Rebellion, any action (civil or criminal) shall accrue against any person who, by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of such action or the arrest of such person; or, whenever after such action (civil or criminal) shall have accrued, such person cannot, by reason of such resistance of the laws or such interruption of judicial proceedings, be arrested or served with process for the commencement of the action, the time during which such person shall so be beyond the reach of legal process, shall not be deemed or taken as any part of the time limited by law for the commencement of such action."

Congress had previously, July 11, 1862 (12 Stat. at L. 538; Brightly, Dig. 362), enacted that the time fixed for limitation of suits against sureties of postmasters, by the 3d section of act of Congress, Mar. 3, 1825 (2 years), shall not be considered as running in any state declared to be in a state of insurrection during the time the insurrection shall continue. And in the 16th section of act of July 27, 1868, 15 U. S. Stat. at L. 197, which repealed the limitation of 2 years in suits against sureties of postmasters, it was carefully provided that nothing therein contained should repeal any of the provisions of the act of July 11, 1862, aforesaid.

The above, it is believed, is a collection of all the statutes of limitation affecting offered bonds, to which should, perhaps, be added the act of Mar. 2, 1867, 14 Stat. at L. 545, relating to appeal and writs of error; as to which see *The Protector*, 9 Wall. 688, 19 L. ed. 812.

The suit might have been commenced prior to the war.

The suit was not brought for 3 years and 8 months after May 25, 1865, when, by the case agreed, there was no longer any interruption to the regular proceeding of the courts of Virginia.

It will not be denied, I presume, that the act limiting suits on the bonds of marshals, which are payable to the United States of America, applies to all suits brought on such bonds, whether for the use of the United States, or for the use of any individual injured by default of the marshal. The terms of the law are general, "all suits;" and while it is held that the sovereign power is not bound by general words in a statute, but only when intended expressly or by necessary implication, no question of this character can be raised on a statute applying exclusively to statutory bonds payable to the United States and suable only in the name of the United States. If it does not apply to the United States, the only obligee in the bond mentioned in the act, the statute is nugatory and of no effect whatever.

What, then, is the effect of the act of the 11th of June, 1864? Unless it be held that the statute is retrospective in its operations, this statute does not prevent the bar of the statute, for, if prospective only, its effect will be to stop the running of the statute from June 11, 1864, to 25th May, 1865, a period less than a year, which would leave more than six years in which the statute would be held to run.

Now, statutes of limitation are never held to be retrospective; for to make them so, would be impairing vested rights or the obligation of contracts.

Ang. Lim. 14, § 22, and cases therein cited; *Gospel Society* v. *Wheeler*, 2 Gall. 105; *Calder* v. *Bull*, 3 Dall. 386; *Dash* v. *Van Kleeck*, 7 Johns. 477; *Ogden* v. *Saunders*, 12 Wheat. 349; *Jackson* v. *Lamphire*, 3 Pet. 280; *Postmaster-Gen.* v. *Rice*, Gilp. 554.

In this last case it was held that the act of Mar. 3, 1825 limiting suits against sureties of deputy-postmasters, did not apply to bonds executed before the passage of the act.

This act of June 11, 1864, cannot be said to be an enabling statute; the obvious design and intent was to declare that the statute of limitations should not, in the cases mentioned, be computed in any part of this time limited by law for the commencement of an action, or, which in effect, is the same, to add to the period limited by law, the exact time which that statute declared should not be computed.

In its provisions it differs materially from the act of Mar. 2, 1867, referred to in the case of *The Protector, supra.*

It is submitted that the acts of July 11, 1862, 12 Stat. at L. 538; July 27, 1861, and June 11, 1864, all cited at large, are statutes declaratory of the principle that legislation was necessary to prevent the running of the statute of limitations against the United States during the late Civil War.

The expressions are obviously prospective, and can only mean, that if, after the passage of the act, any person cannot be arrested, then the time during which process is obstructed shall be deducted, in computing the time within which the action may be or might have been brought.

If Congress had said plainly that so much of the time of the Rebellion, or Civil War, as elapsed after the passage of the act aforesaid, shall not be computed, and had said no more in express terms, is it not fully equivalent to saying that the residue of the period of the war shall be computed in applying the act of limitations? Is not this a case, if there ever was or can be one, for the application of the old rule of construction, "*Expressio unius est exclusio alterius?*"

The act is an express provision by law to protect the United States in its future suits against the operation of its own statute of limitation, during the remaining period of the war after its passage, and affirming the principle that it did run on against the government, at least excludes any and all other relief and protection, against the running of the statute during the war, than that provided by itself and for itself, the sovereign by that act. It had the power to make a more liberal provision of time for itself; but not deeming it expedient or necessary it is not for the courts to supply what was wanting in legislation to cover the exigencies of this case upon any supposed equity of the statute to prevent a defeat of this action upon this plea.

If Congress had not thought proper to create specially against the United States the bar of the statute of limitations, no time would have

been run against the United States, so that outside of the special statute, there being no bar, there can be nothing referable to equity to be invoked in its behalf.

It is submitted that the recent decisions of the court, *viz.*, *Hanger* v. *Abbott*, 6 Wall. 532, 18 L. ed. 939, and *The Protector*, *supra*, and other like cases decided this term and not yet reported, have no application to the case at bar.

All of those cases were cases between individual subjects or citizens of opposing belligerents.

Justice Clifford, in *Hanger* v. *Abbott*, states that the right to sue was suspended by the acts of the government, for which all the citizens are responsible, but this only refers to the right of the citizen, not to the right of the government.

Mr. Justice **Strong** delivered the opinion of the court:

Whether the act of April 10, 1806, which prescribes a limitation to suits upon marshals' bonds, is applicable to suits brought by the United States, is a question which we do not propose now to answer, for, if it is, we are still of the opinion that the defendants' plea of the statute was an insufficient bar.

The cause of action arose in 1860, and the present suit was brought on the 15th of February, 1869. But it is stipulated between the parties that from the 24th day of May, 1861, to the 24th day of May, 1865, the defendants were 513*] *actual residents of the state of Virginia, and that during the whole of that period, by reason of resistance to the execution of the laws of the United States, and the interruption of the ordinary course of judicial proceedings in said state of Virginia, the defendants could not be served with process for the commencement of the action. We know, judicially, that during the four years in which the process could not be served there existed a state of war, and that the inability to effect service was caused by that. The question, therefore, is whether the time during which the war existed, and during which it was impossible to serve process for commencement of suit, is to be deducted from the time which elapsed between 1860 and February 15th, 1869.

In *Hanger* v. *Abbott*, 6 Wall. 532, 18 L. ed. 939, it was decided that the effect of the war was to suspend the running of the statutes of limitation during its continuance, in suits between the inhabitants of the loyal states and the inhabitants of those in rebellion. The same doctrine was repeated, in substance, in *The Protector*, 9 Wall. 687, 19 L. ed. 812. It would answer no good purpose to go behind the decisions and review the reasons upon which they are founded. We are still of opinion that they rest upon sound principle. But it is said those decisions only rule that the war suspended the statutes' running against claims by one citizen upon another, and that they do not relate to claims of the government against its own citizens resident in rebellious states. This may be conceded, but the same reasons which justify the application of the rule to one class of cases require its application to the other. True, the right of a citizen to sue during the continuance of the war was suspended, while the right of the government remained unimpaired. But it is the loss of the ability to sue rather than the loss of the right that stops the running of the statute. The inability may arise from a suspension of right, or from the closing of the courts, but whatever the original cause, the proximate and operative reason is that the claimant is deprived of the power to institute his suit. Statutes of limitation are indeed statutes of repose. They are enacted upon the presumption that one having a well-founded *claim will not delay enforcing it beyond [*514 a reasonable time, if he has the power to sue. Such reasonable time is, therefore, defined and allowed. But the basis of presumption is gone whenever the ability to resort to the courts has been taken away. In such a case the creditor has not the time within which to bring his suit that the statute contemplated he should have. It is quite obvious that this is the case, as well where the government is the creditor as where the creditor is a citizen of the government, and if, therefore, the running of the statute is suspended in favor of the citizen, with equal reason must it be in favor of the government. There is, also, great force in the thought suggested by the observations made in *Hanger* v. *Abbott*, that "unless the rule be so, the citizens of a state may escape the payment of their debts to the government by entering into an insurrection and rebellion, if they are able to close the courts and successfully resist the laws until the bar of the statute shall have become complete. Such a doctrine is too unreasonable to be, for an instant, admitted."

It has been argued, however, on behalf of the defendants in error, that if the general rule be as above stated, it was changed by the act of Congress of June 11th, 1864. 13 Stat. at L. 123.

That statute enacted "that whenever, during the existence of the present Rebellion, any action, civil or criminal, shall accrue against any person, who, by reason of resistance to the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of such action, or the arrest of such person; or, whenever after such action, civil or criminal, shall have accrued, such person cannot, by reason of such resistance to the laws or such interruption of such judicial proceedings, be arrested or served with process for the commencement of the action, the time during which such person shall be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action."

The operation of the statute, it is said, is to direct that the time after the passage of the act, during which process might be hindered, shall be deducted in computing the time within which the action should have been brought, and hence that an implication arises that the time antecedent to its passage shall not be deducted. Such is not our understanding of the enactment. It is, doubtless, prospective as furnishing a rule for the action of courts, but it did not abrogate the common law. Even were it admitted that the time required to be deducted is only that which was after the passage of the act, there is no necessary implication that the time antecedent to its passage should be taken as a part of the period limited by law for the

commencement of actions. The act of March 2, 1867, 14 Stat. at L. 545, authorized appeals **515*]** and writs of error *from and to courts in judicial districts when the regular sessions of the courts had been suspended by insurrection or rebellion, if brought or sued out within one year from the passage of the act. This act might, with more reason, be claimed as raising an implication that such appeals or writs of error cannot be allowed after the expiration of a year from its passage. Yet in *The Protector, supra,* it was held that an appeal was in time though not taken until July 28, 1869, more than eight years after the final decree in the circuit court, and more than two years after the enactment of 1867, and this because the four years of the war were to be deducted. In other words, the statute being affirmative only, raised no implication of an intent to repeal a former statute or alter the common law to which it was not repugnant.

The purpose of the act of 1864 was manifestly remedial, to preserve and restore rights and remedies suspended by the war. Hence it is entitled to a liberal construction in favor of those whose rights and remedies were, in fact, suspended. The mischief it sought to remove would be but half remedied were it construed as contended for by the plaintiffs in error. It is not, therefore, to be admitted that the intention of Congress was to prescribe a deduction only of the time which might elapse after the passage of the act, during which it might be impossible to serve process. On the contrary, we are of opinion that the statute requires all the time to be deducted during which the suit could not be prosecuted by reason of resistance to the laws, or interruption of judicial proceedings, whether such time was before or after its passage. Such we have decided to be its meaning at the present term, in *Stewart* v. *Bloom, ante,* 176, and it is unnecessary to repeat the reasons given for the decision.

These observations are sufficient to show that, in our opinion, there was error in entering a judgment for the defendants.

The judgment of the Circuit Court is reversed, and the cause is remanded for further proceedings.

WILLIAM P. HALLIDAY *et al., Plffs. in Err.,*
v.
THOMAS A. HAMILTON and John L. Dunnica, Partners, as Hamilton & Dunnica.

(See S. C. 11 Wall. 560-566.)

When the title to goods passes to the consignees—trespass by.

Where goods are put in charge of a carrier, by the purchaser to be transported to consignees, in pursuance of a special agreement that they shall sell the goods to pay a draft made against the goods, and apply any surplus to pay previous advances made by them to such purchaser, the bill of lading being attached to and sent with the draft; held, that the legal title to the goods passed to the consignees, on delivery to the carrier.

The consignees may maintain trespass against the plaintiffs in an attachment suit, who had, after the delivery to the carrier attached and taken the goods and sold them, and received the proceeds of the sale, on a demand against the purchaser for the purchase money of the goods.

[No. 91.]

Argued Mar. 1, 1871. Decided May 1, 1871.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

Suit was brought in this case in the court below, by the defendants in error, to recover for a certain quantity of corn. Judgment having been given for the plaintiffs in that court, the defendants sued out this writ of error.

The case is fully stated by the court.

Messrs. T. L. Dickey, R. W. Johnson, and **Albert Pike,** for plaintiffs in error:

There must be a special promise and agreement on the part of the consignors to make the particular shipment in question a special previous appropriation of that special cargo, and an actual acceptance and consent thereto on the part of the consignees. There must be some obligation on the part of consignors to ship, and some obligation on the part of consignees, to accept draft, or an actual acceptance of the draft at the time the right of attaching creditors become vested by actual seizure. It is absolutely essential that consignees should have knowledge that the cargo in question was intended to be consigned to them, and that they should have done some act on the faith of that particular consignment (at the time they allege the lien existed) by reason of which they would be injured if such were denied them.

2 Pars. Cont. 94, 98, 292, 5th ed.; *Brandt* v. *Bowlby,* 2 B. & Ad. 932; *Coxe* v. *Harden,* 4 East, 211; 3 Pars. Cont. 261, 5th ed.; *Bank* v. *Jones,* 4 N. Y. 497; 1 Curt. 130; 1 Bos. & P. 563; Batem. Coml. L. 181; Holc. Lead. Cas. upon Coml. L. 56, 65; *Conard* v. *Ins. Co.* 1 Pet. 387; *Farquhar* v. *Craig,* 4 Bro. P. C. 47.

Mr. **Geo. P. Strong,** for defendants in error:

The delivery of the corn to the carrier, under a bill of lading, by which he bound himself to deliver it to defendants in error, who, by a previous agreement with the owners and shippers thereof, were to apply the proceeds to the payment of an existing balance against them, vested in the defendants such an interest in the corn as would give them the right to maintain this action against the plaintiffs in error, attaching creditors of the shippers.

Russ. Fact. & Bro. 45 Law Lib. 202; *Bryans* v. *Nix,* 4 Mees. & W. 775, 790; *Rice* v. *Austin,* 17 Mass. 204; *Anderson* v. *Clark,* 2 Bing. 20.

A price was paid to the shipper for the property shipped, and a full surrender of all possession and control of the corn took place when Sherwood, Karns, & Co. drew their bill of exchange on defendants, and sold and delivered it with the bill of lading to Cole Brothers. This act changed the title of the property. The specific lot of corn was set apart and marked.

Nor does it matter that the defendants did not accept the bill until after the corn was attached.

It nowhere appears that defendants knew the corn had been attached, at the time they accepted the bill.

Nesmith v. *Dyeing & Bleach Co.* 1 Curt. 130;

NOTE.—*How far consignment of goods vests the property in consignee and to whom the carrier is responsible for loss or injury*—see note, 12 L. ed. U. S. 1142.

Passing of title to property by delivery thereof to a carrier for transportation to consignee or vendee—see note, 22 L. R. A. 415.

Gibson v. *Stevens*, 8 How. 384; *Valle* v. *Cerre*, 36 Mo. 575; *Desha* v. *Pope*, 6 Ala. 690, in which Justice Goldthwaite sums up the doctrine, on page 694, citing Cross on Liens, 32 Law Lib. p. 253; also, *Haille* v. *Smith*, 1 Bos. & P. 563, op. p. 570; see, also, *Kollock* v. *Jackson*, 5 Ga. 153, op. p. 155; *Davis* v. *Bradley*, 28 Vt. 118, op. p. 124; *Wade* v. *Hamilton*, 30 Ga. 450; *Brownell* v. *Carnley*, 3 Duer, 9, op. p. 12; *Funkhouser* v. *Dutcher*, 14 La. Ann. 499; *Cuming* v. *Brown*, 9 East, 506; *Morison* v. *Gray*, 2 Bing. 260; *Bk.* v. *Homeyer*, 45 Mo. 145.

Mr. Justice **Davis** delivered the opinion of the court:

On the conceded facts of this case, there can be no question that the legal title to the 1,250 sacks of corn passed to Hamilton & Dunnica before the levy of the attachment by Halliday Brothers, and if so, the judgment of the circuit court must be affirmed.

The history of the case is substantially this:

In 1867, Sherwood, Karns, & Co., commission merchants of St. Louis, had a standing agreement with Hamilton & Dunnica of New Orleans, to ship produce for them, and to draw drafts on the shipments, which they were to accept and pay. In case the proceeds of any shipment left a balance due Hamilton & Dunnica, they were to apply the surplus of any other shipment in payment of it. At this time Cole Brothers were the correspondents, in St. Louis, of Hamilton & Dunnica, and were advertised to make advances on shipments made to them, and often, during the season of 1867, made advances upon shipments to this house by Sherwood, Karns, & Co. In this condition of things the transaction occurred which, is the subject of this controversy.

On the 31st day of August, 1867, Sherwood, Karns, & Co. purchased of Halliday Brothers, of Cairo. Illinois, through their agents in St. Louis, 1250 sacks of corn, lying at Price's Landing on the Mississippi river, which is a short distance above Cairo, and obtained an order for the delivery of the corn. This order they handed over to the agent of the steamboat Bee, then at her wharf in St. Louis, who issued a regular bill of lading to deliver the corn to Hamilton & Dunnica, at New Orleans. On the same day, Sherwood, Karns, & Co., drew their bill of exchange, for $2,500 on Hamilton & Dunnica, and in it told them to charge the same to account of this specific shipment. At this time there was a large balance due Hamilton & Dunnica, on acount of previous shipments of produce. This bill of ex-[*562] change was *taken to Cole Brothers for discount, and sold, indorsed, and delivered to them with the bill of lading attached, by Sherwood, Karns, & Co., to whom they paid the proceeds. Shortly after this, Cole Brothers deposited the bill of exchange, thus accompanied by the bill of lading, with a banking house in St. Louis, who sent them forward, and Hamilton & Dunnica accepted the bill of exchange, without notice of any difficulty in the matter, and paid it at maturity. In a day or two after the bill of lading was issued and transferred to Cole Brothers, the steamboat Bee proceeded on her voyage to New Orleans, as far as Price's Landing, and, having obtained the corn, stopped at Cairo. There the corn was levied on and taken from the possession of the boat, by virtue of certain attachment proceedings at the suit of Halliday Brothers against Sherwood, Karns, & Co., who, it seems, had not paid for it. These proceedings resulted in the sale of the corn, and the payment of the proceeds by the marshal to Halliday Brothers.

On this state of the case, there is no difficulty, on principle and authority, in determining the rights of the parties to this controversy.

It is not necessary to discuss the general doctrine relating *to the lien of a factor, [*564] because it has no application here. If this were the case of a mere agreement to ship produce in satisfaction of antecedent advances, which will not, in general, give the factor or consignee a lien upon it for his general balance until he obtains actual possession of it, the attachment would hold the property. But the agreement in question is of a different character, and rests on a different legal principle. It appropriates specifically 1,250 bags of corn to Hamilton & Dunnica, with an intention that they shall sell it to pay the draft drawn against it and, if there is any surplus remaining after this is done, to apply it in liquidation of the advances previously made for Sherwood, Karns, & Co. And this appropriation did not rest in intention merely, for it was executed, so far as the parties in St. Louis could execute it, by the transmission of the bill of lading to Hamilton & Dunnica. As soon as the corn was deposited with the common carrier, who was the bailee for the purpose, the title to it and right of property in it was changed and vested in Hamilton & Dunnica, to whom it was to be delivered. This is the effect of all the cases on the subject *Haille* v. *Smith*, 1 Bos. & P. 563; *Desha* v. *Pope*, 6 Ala. 690; *Gibson* v. *Stevens*, 8 How. 384; *Grove* v. *Brien*, 8 How. 429; *Bryans* v. *Nix*, 4 Mees. & W. 775; *Anderson* v. *Clark*, 2 Bing. 20; *Holbrook* v. *Wight*, 24 Wend. 169; *Grosvenor* v. *Phillips*, 2 Hill. 147; *Sumner* v. *Hamlet*, 12 Pick. 76; *Nesmith* v. *The Dyeing, etc. Co.* 1 Curt. 130; *Valle* v. *Cerre*, 36 Mo 575. A contrary rule would defeat the object which the parties to the agreement intended to accomplish by it, and would seriously embarrass commercial men in their dealings with each other, for it can be readily seen that the mode of transfer adopted in this case is necessary for the purposes of commerce. If Hamilton & Dunnica had purchased the corn outright, they could not have got a better legal title to it than they acquired under the admitted facts of this suit. The legal title to the property passed to them to carry out certain designated purposes, and they had the right to the undisturbed possession of it until those purposes were effected.

*It may be said that Sherwood, Karns, [*565] & Co. had an equitable interest in any surplus that might remain of the proceeds of the corn after the claims of Hamilton & Dunnica were satisfied, and that this equitable interest was liable to attachment by the laws of Illinois. "But that liability," says Chief Justice Taney, in *Gibson* v. *Stevens*, 8 How. 384, "will not authorize the attaching creditor to take the property out of the hands of the legal owner before his claims upon it are discharged." Besides, it is clear from the evidence that the proceeds from the corn fell far short of liquidating the

indebtedness due Hamilton & Dunnica from Sherwood, Karns, & Co.

It is argued that the bill of lading did not effect the transfer of the property, because when it was executed the corn had not been received by the transportation company. But it became operative as soon as the corn was in the custody of the boat, and the legal relations of Hamilton & Dunnica to the property were fixed from that time, and it is unnecessary to consider what would have been the rights of third persons if the attachment proceedings had preceded, instead of being subsequent to, the delivery of the corn.

It is urged that the circuit court should have instructed the jury, as it was asked to do, that Halliday Brothers were not liable in this action, unless they directed the officer to seize the corn, or personally interfered with or took control of it. But the refusal to give this instruction worked no harm to the plaintiffs in error, for the court could have well told the jury that the evidence was conclusive on these points against them. Indeed, so conclusive is it that there is no room to doubt that they took out the attachment to seize this very corn, and directed the officer to delay the boat for that purpose. On the 4th of September, Booth, their agent in St. Louis, having ascertained that Sherwood, Karns, & Co. had failed, and did not own any property there to attach, and being unable to get the money for the corn, sent a telegram to the Hallidays to stop its de-**566***]livery. This they, doubtless, *found they could not do; but on the same day they applied for the writ of attachment, which was issued and served on the following day. No other persons in Cairo could have known of the shipment of the corn, or Sherwood, Karns, & Company's connection with it, and it is idle to suppose the marshal would have made the levy without the special instructions of the plaintiffs in the suit. Besides, it was their interest to keep their proceedings as secret as possible, for fear the officers of the boat might get knowledge of them and avoid landing at Cairo. But this is not all, for they told Booth that they attached the corn, and the marshal paid them the net proceeds of the sale of it. Surely nothing more is necessary to show that the levy and sale were at their instance, and there is no evidence at all to the contrary.

These views dispose of the case, and the judgment is accordingly affirmed.

JACOB R. LUDLOW, *Appt.*, *v.* J. G. M. RAMSEY.

(See S. C. 11 Wall. 581-590.)

Errors and irregularities, not sufficient to set aside judicial sale—legal proceedings against absentee in Confederate army—ineffectual attempt at confiscation cannot make void chancery proceedings to sell property.

Where the bill seeks to set aside a judicial sale, mere errors and irregularities in the proceeding will not suffice. It must be shown that the court had no jurisdiction.

If a party voluntarily leaves his country or his residence, for the purpose of engaging in hostilities against the former, he cannot complain of legal proceedings regularly prosecuted against him as an absentee.

An ineffectual attempt at confiscation, supervening upon chancery proceedings to sell property, cannot deprive those proceedings of legal validity.

[No. 142.]

Argued Apr. 12, 1871. Decided May 1, 1871.

APPEAL from the Circuit Court of the United States for the Eastern District of Tennessee.

The bill in this case was filed in the court below, by the defendant in error, to have the judicial sale of certain real estate, declared null and void, and to obtain possession of the said property. A decree having been entered by that court in favor of the complainant, the respondent took an appeal to this court.

The case is fully stated in the opinion of the court.

Messrs. Thomas A. R. Nelson and **Horace Maynard**, for appellant:

Our positions, as to the jurisdiction of the court below, may be stated and summed up in the following propositions: 1. That the only matter that can be examined in determining the jurisdiction of the chancery court is, whether there is jurisdiction of such an attachment case as is presented in the bill, and not whether it has rightfully exercised it. 2. Whenever it is shown by the law that the chancery court had jurisdiction of attachment cases, then it was a question for that court, and not for the circuit court of the United States to decide whether it would exercise it; and the mode of its exercise can only be inquired into by a revising tribunal, and not by a Federal tribunal, having chancery jurisdiction equal only and not superior, as a chancery court, to a state tribunal. To sustain these positions, we rely on *Tipton* v. *Harris*, Peck, 423; *Christmas* v. *Russell*, 5 Wall. 291, 18 L. ed. 475; *Voorhees* v. *Bk.* 10 Pet. 473; *Huff* v. *Hutchinson*, 14 How. 588; *McGavock* v. *Bell*, 3 Cold. 512; *Paine* v. *Mooreland*, 15 Ohio, 435; and 2 Abb. Nat. Dig. 51.

If these propositions are erroneous, and this honorable court should hold that the court below could rightfully entertain jurisdiction, then we insist that his Honor erred in declaring that the proceedings in the chancery court were of no validity.

The bill of Cynthia S. White alleges that the defendant has "left the state, or so conceals himself that the ordinary process of law cannot be served upon him." The words "left the state" are equivalent to the words "resides out of the state," employed in Code, § 3455, sub. § 1. See 7 Humph. 210; Drake, Attach. §§ 105, 107. If they are not, the statutes authorize an alternative statement (Code § 3470); and that he "conceals himself so that the ordinary process of law cannot be served upon him," expressly declared one of the causes for suing out the attachment by sub. 4, in § 3455. See Drake, Attach. § 102; 3 Cold. 143.

4. The affidavit is in substantial conformity to the requirement of the Code, §§ 3455, 3469, 3516.

If it is not, the attachment law is to be liberally construed, by § 3477; and no objection lies to the form of the attachment under § 3475.

The word "justly" may be omitted. Drake, §103.

No judgment *pro confesso* could have been lawfully taken without personal service of process or publication, and the recital in the decree that the judgment *pro confesso* was regularly taken, is, without more, a conclusive and legal adjudication of the fact of publication, and could not be questioned, even in the supreme court of Tennessee, upon appeal or writ of error, without setting out the evidence on which the Chancellor acted.

See 3 Head, 303; 2 Head, 97; 2 Sneed, 637; 6 Humph. 378.

Much less could that fact be inquired into in the circuit court of the United States which, so far as this case is concerned, is only a chancery court of concurrent jurisdiction, and can exercise no supervision or control over the action of the state courts on the same subject-matter. But if the fact can be inquired into, the record shows that publication was made at January Rules, 1864, and this is substantially proved by D. A. Deaderick, the clerk and master.

See Code, § 3519.

Publication follows the levy. Code, §§ 3518, 3524.

If the decree of the chancellor would be, as above insisted, conclusive in the supreme court of the state, the court below was bound by it, and could not, in a collateral way, review or annul it.

See 6 Hump. 378; 2 Head, 98; 3 Head, 603; 3 Abb. Nat. Dig. 122, Nos. 139, 142, 146, 152, 154; *Ibid*, 61, No. 124, and p. 63.

These questions were discussed and considered by the court in *Cooper* v. *Reynolds*, 10 Wall. 308, 19 L. ed. 931, No. 37, at the present term.

Want of publication or notice may be error, but does not make the proceedings void.

Drake, §§ 437, 447.

Real estate may be attached, although there is personalty. Drake, Attach. § 233.

It is not necessary in attachment cases, to show that search was made and no personal property found.

Boggess v. *Gamble*, 3 Cold, 151.

In this case the sheriff returned: "No personal property of respondent to be found."

The fact that the Civil War was pending can have no influence on the title: First, because the acts of secession were void; and, second, because Ramsey, the complainant, voluntarily placed himself within the rebel lines, and cannot take advantage of his own wrong.

See, Mr. Janin's argument and opinion of the court in *Walker* v. *Villavaso*, 6 Wall. 126, 18 L. ed. 853.

The Tennessee Ordinance of Secession did not affect the jurisdiction of the courts, *White* v. *Cannon*, 6 Wall. 450, 18 L. ed. 925 and the general laws revived on the reoccupation.

2 Cold. 267; 3 Cold. 554.

Messrs. **J. W. Moore** and **Edward Lander**, for appellee:

The attachment sued out in the first instance by White against the appellee was not authorized by the laws of Tennessee, and all subsequent proceedings thereon were a nullity. On this point we refer to the following cases: *Woodfolk* v. *Whitworth*, 5 Cold. 561; *Thompson* v. *Carper*, 11 Humph. 542; *Morris* v. *Davis*, 1 Sneed, 453; *Smith* v. *Foster*, 3 Cold. 140; *Haynes* v. *Gates*, 2 Head, 598; *Engle* v. *McCurry*, Admr. of Herndry, etc.

The affidavit upon which said attachment was obtained does not meet, in form or substance, the requirements of the law as expounded in the foregoing cases. This record seems to us to present a case of extreme injustice to the appellee. A valuable building lot in the town of Knoxville, worth more than thirty times the amount of the debt due to White, was levied on when there were other pieces of property, not a stone's throw from it, far less valuable; yet abundantly sufficient to pay the debt, notoriously known to be the property of the appellee. Yet this valuable piece of property was levied on and exposed to sale and, as we maintain, sacrificed; for the amount for which it was sold was grossly inadequate to its value. The rents of the property amounted to much more than double the interest or $10,000, the value fixed by the appellee on the property; and yet some of the witnesses undertake to say that $5,000 was a fair price for it. This, we say, is a species of confiscation which the government would not allow in this case. And it would be strange, indeed, if courts of that government would permit private parties to do that which the government would not do. The appellee obtained his pardon from the President of the United States, and whatever may have been his sympathies with the Rebellion, he has, as he had a legal right to do, alleged in his bill the fact of the existence at the time of a public war, and that being within the lines of the rebel authorities, he had no possible opportunity to defend the suit against him, nor to obtain any information of the existence of such a proceeding.

That this court has too often recognized the late war of the Rebellion to have been a public war, to be now questioned, and the fact that the appellee, before the Federal Army took possession of the country around Knoxville, had resided there and voluntarily left and gone to another state, might have some weight in determining his status in a proceeding by the government against him, but it is difficult to perceive how it could avail Ludlow in this suit. But the appellant, while he does not deny the fact as alleged in appellee's bill, that he was within the rebel lines and could not have appeared and defended the suit, still seems to think it enough to aver that Ramsey was identified with the Rebellion. At this point there are two prominent ideas that occur to us. The first is: That a party situated as Ramsey was might have put in his bill of exceptions or have done certain things during the trial of said cause, when he was prohibited from coming within the Federal lines by the Proclamation of the President, and by the very nature of the relations then existing between the belligerents.

The second is: That Ludlow pretends not to have known of the existence of any such prohibition or regulation.

We invite the attention of the court to the law, as the same has been settled with respect to parties situated as these parties were dur-

ing the War. And first, we refer to the case of *Dean* v. *Nelson*, 10 Wall. 158, 19 L. ed. 926, and also to the following authorities: *Cuyler* v. *Ferrill*, 1 Abb. U. S. 169; see, also, the *Prize Cases*, 2 Black, 635, 17 L. ed. 459.

The chancery court at Knoxville had no jurisdiction of the suit of Cynthia G. White against J. G. M. Ramsey.

1. J. G. M. Ramsey was an alien enemy at the time. *Prize Cases, supra;* 1 Bos. & P. 163.

A state of war and nonintercourse existed. Act of July 13, 1861, 12 Stat. at L. 257; Proclamation of President.

That part of Tennessee including Knoxville was occupied by the United States troops, and within its jurisdiction during all the proceedings in case of *White* v. *Ramsey*.

The Venice, 2 Wall. 258, 17 L. ed. 866; *Ouachita Cotton*, 6 Wall. 531, 18 L. ed. 939; *Graham* v. *Merrill*, 8 Law Reg. 477.

All debts are suspended during war.

Upton, Prize, 40; Grot. ch. 20, § 16; Wheat. Int. Law, 877; *Hanger* v. *Abbott*, 6 Wall. 532, 18 L. ed. 939; *Stewart* v. *Levy, ante*, 86; *U. S.* v. *Grossmayer*, 9 Wall. 72, 19 L. ed. 627; *Dean* v. *Nelson, supra*.

Interest on debt suspended.

Ward v. *Smith*, 7 Wall. 447, 19 L. ed. 207; *Jordan* v. *Nelson*, 8 Law Reg. 225, and cases there cited.

An alien enemy cannot sue or be sued.

Sparenburgh v. *Bannatyne*, 1 Bos. & P. 163; *Bell* v. *Chapman*, 10 Johns. 182; *Clarke* v. *Morey*, 10 Johns. 69; Wheat. Int. L. 546; *Semmes* v. *Ins. Co.* 8 Am. Law Reg. 673; *Dean* v. *Nelson, supra*.

During war, a writ of attachment cannot be issued against the property of an alien enemy; nor can a service of the writ be made.

International law, like the common law, is a part of the law of the United States.

Hanger v. *Abbott*, 6 Wall. 539, 18 L. ed. 942; 7 Op. Atty. Gen. 27.

The property of the appellee, J. G. M. Ramsey, was not, at the time of the service of the writ, subject to attachment, nor afterwards to the judgment or sale.

Act July 17, 1862, 12 Stat. at L. 591; President's Proclamation, July 25, 1862, 12 Stat. at L. 1266.

Seizure by the marshal annulled the attachment of the state court.

An attachment is not a lien.

2 Story C. C. 131; 5 Law Rep. 19, see, *Prize and Revenue Cases*, 2 Black, 635, 17 L. ed. 459.

Mr. Justice **Bradley** delivered the opinion of the court:

The case below was a bill in equity filed by Ramsey, the appellee, to set aside a judicial sale of a house and lot in Knoxville, belonging to him, and to recover the rents and profits thereof. His allegation was that the proceedings by which the property was sold were null and void. The facts were briefly these:

Ramsey was indebted to Cynthia S. White by note, amounting, with interest, to $332. In September, 1863, she filed a bill against him for the recovery of the money, alleging that he had left the state, or concealed himself, so that the ordinary process of law could not be served upon him; and that he was owner of considerable estate, both real and personal, in Knox county; wherefore she prayed for process of subpœna and attachment, and that a sufficient amount of his estate should be attached to satisfy her demand; that publication be made, the property sold, etc. Having given the requisite bond in such case, an attachment was issued and the property in question was duly attached, as appeared by the sheriff's return to the writ, no personal property being found. At the January Rules, order of publication was made to notify the defendant to appear on the first Monday of April, 1864, and make defense. In October term, a decree was rendered for the amount of the debt, and directing the master to sell the property attached. The master duly advertised it for sale, and bid it off to one S. Vail, for $5,100. The sale was reported to and confirmed by the court, and a writ of possession was issued, but was opposed by persons occupying the premises. Subsequent proceedings, however, were taken, which finally resulted in putting Ludlow, the plaintiff in error, into possession, he having purchased the property of Vail.

As the bill in this case is a collateral proceeding to set aside the sale, mere errors and irregularities in the original proceeding will not suffice. It must be shown that the court had no jurisdiction. We had occasion, recently in the case of *Cooper* v. *Reynolds*, 10 Wall. 308, 19 L. ed. 931, which came from the same district as this case, and also arose upon an attachment, to examine this question, and it is unnecessary to repeat what was then said. The question is: Did the court acquire jurisdiction of the case? It is not denied that it has general jurisdiction of attachments in such cases. The Code expressly says that any person may sue out an attachment in the chancery court, upon debts or demands of a purely legal nature, except causes of action founded on torts, whenever the amount in controversy is sufficient to give the court jurisdiction. Sec. 3461. Fifty dollars gives the court jurisdiction, and the amount here is over $300. The judge below, in his decree, relies on the want of a sufficient *affidavit. We [*588 have compared the affidavit with the requirements of the statute, in the light of the cases cited by the appellee's counsel, and we see in it no defect which should make the proceedings null and void. True, it does not say that the debt is a just claim; but it states the amount of the debt, and that it is on the defendant's note or bond, a copy of which is appended, showing that it was made under the defendant's seal, and contained a promise to pay to the complainant or order $300, six months after date, for value received, with interest from date. This is a particularity beyond the requirement of the statute, and more than compensates for the omission of the statement that it was a just claim. The *dictum* of Judge McKinney, in 11th Humphrey, 545, so often quoted, that "it should be stated in the affidavit, and alleged in the attachment, that a suit has been commenced by the plaintiff against the defendant, the nature thereof, the tribunal in which it is depending,

the amount of damages laid in the action, and that the cause of action stated is just," relates to an ancillary attachment in a suit brought for an unliquidated demand, and is suggested by him as a sufficient affidavit in such cases, in which it is impossible for the plaintiff to swear (as he can do in debt) to the precise amount due. In this case the complainant not only swears to the amount due, but exhibits a copy of the defendant's bond or note, under seal, in effect admitting the debt and promising to pay it. We cannot believe that the courts of Tennessee would hold such an affidavit defective even, much less so absolutely void as to vitiate all the subsequent proceedings.

The writ of attachment appears to be in due form and to have been regularly served on the property; so that the court became fully possessed of jurisdiction over the case. Our attention has not been called to any other defect in the proceedings that amounts to anything more than a mere irregularity, unless the points next to be considered should be regarded as doing so.

First. It is alleged by Ramsey in his bill in the present suit, that at the time when the at- 589*] tachment was sued out, and *when the publication was made in the newspaper at Knoxville notifying him to appear and defend the original suit, or that judgment would be taken *pro confesso* against him, he was in no situation to see or know of such publication, and he makes various allegations in confirmation of that statement; that he was in the country held by Confederate troops, and no newspapers that were published within the Federal lines were allowed to be sent into the Confederate lines, and there were no mail facilities between them; and the only communication was by a flag of truce; that a great Civil War was raging between the Confederate government and the United States, and martial law existed in the state of Tennessee, and civil courts were only held by the will of military commanders. In his amended bill he says, that when the attachment was issued, and the proceedings had, he was known to be one of the enemy of the party governing by arms the locality of the court, and it was known that he could not have notice of the suit, could not appear at the court, and could have no communication with others at the place of the court, etc.

On these allegations the question arises: Why was the complainant in the country held by Confederate troops? Why could he not return to Knoxville? Why could he not have communication with that place? It was his place of residence. He says that he left Knoxville a short time before the Federal troops arrived. Why did he leave? Was he forced to leave, and was his return forbidden? Could he not have returned at any moment by submitting to the authority of the United States? Was not his absence a voluntary one? The order of publication was made at the January Rules, 1864. President Lincoln's Proclamation of Amnesty was issued on the 8th of December previous, offering pardon and amnesty to all persons who would take the oath of allegiance. Then, what obstacle existed to prevent the complainant's return? The causes alleged were certainly insufficient.

This case differs from that of *Dean* v. *Nelson*, 10 Wall. 158, 19 L. ed. 926, decided at the present term. In that case Nelson and his wife were driven out of Memphis by a military order and were not permitted to return, and the proceedings to foreclose their property took place during their enforced absence. The other defendant, May, was only nominally interested, and had always been within the Confederate lines. But if, as in this case, a party voluntarily leaves his country or his residence for the purpose of engaging in hostilities against the former, he cannot be permitted to complain of legal proceedings regularly prosecuted against him as an absentee, on the ground of his inability to return or hold communication with the place where the proceedings are conducted. That would be carrying the privilege of *contra non valentem* *to an unreasonable ex- [*590 tent. We think it cannot be set up in this case.

In the next place, it is alleged that the jurisdiction of the chancery court was displaced by proceedings to confiscate the property in the district court of the United States, and a seizure made for that purpose, by order of the district attorney, on the 21st of September, 1864. No record or transcript of the alleged proceedings in the district court was given in evidence in this suit; at least, none appears in the record before us. It is conceded that no confiscation took place. Ludlow, the respondent below, the appellant here, admits that proceedings were commenced by information filed October 10, 1864; but states and shows that Cynthia S. White intervened to protect her interest and insist on her prior levy, made almost a year before the seizure in behalf of the United States; that Ramsey pleaded the President's pardon, and thus obtained a release of his property and an end of the confiscation proceedings; and that a writ of possession was afterwards awarded by the chancery court on the application of Ludlow, and possession was delivered to him accordingly in execution of the decree of said court. It is said that these proceedings were in contempt of the district court. Though that be so, the matter is not before us, and we cannot adjudicate upon it. If the United States authorities had the right to seize the property, and take it out of the hands of the law, as a preliminary step to proceedings for confiscation, it would, nevertheless, seem to be the right of the chancery court to reassume possession when the confiscation proceedings failed and came to an end. And though the writ of possession awarded by that court may have been irregularly issued (which it is not necessary for us to decide) Ludlow, the purchaser of the chancery title, was, in fact, put in possession, and as between him and Ramsey, he has the better title. An ineffectual attempt at confiscation, supervening upon the chancery proceedings, cannot deprive those proceedings of legal validity.

The decree of the Circuit Court must be reversed.

591*] *WILLIAM H. REED, William Barnes, *et al., Appts.*,
v.
UNITED STATES.

and UNITED STATES, *Appt.*,
v.
WILLIAM H. REED, William Barnes, *et al.*

(See S. C. 11 Wall. 591-606.)

Steamboat hired by the United States—when voyage broken up — compensation of — when not entitled to wages of pilot and crew.

Where the owners of a steamboat are employed to transport a cargo of military supplies for the United States at a *per diem* compensation, the true relation of the United States to the adventure was that of a charterer for hire and shipper of the cargo.

Where, on the return trip, the voyage was completely broken up by the perils of navigation; held, that the owners were entitled to the agreed *per diem* compensation for the time it would have required for the steamboat to have completed the return trip.

The owners of the steamboat were not entitled to pay for the wages of a pilot and crew sent to the place where the steamboat was aground, to get her afloat and bring her down the river, although the owners of the steamboat consulted with the quarter master before they dispatched the pilot and crew to the scene of the disaster.

[No. 144, 225.]

Argued Apr. 13, 1870. Decided May 1, 1871.

CROSS appeals from the Court of Claims.

The petition in this case was filed in the court below, by the first appellants, to recover money alleged to be due them from the United States for the use of a certain steamer, and for certain expenses connected with the same. Judgment having been given for the claimants for a part of their claim, they took an appeal to this court. The United States also took a cross appeal from the same judgment, the opinion upon the decision of which immediately follows this case, with which that one was argued.

This case is fully stated by the court.

Messrs. **Wm. Lawrence** and *R. J. Atkinson* for appellants.

Messrs. **Amos T. Ackerman,** *Atty. Gen.*, and **T. H. Talbot,** *Asst. Atty. Gen.*, for appellees.

Mr. Justice **Clifford** delivered the opinion of the court in No. 144:

Affreightment contracts are of two kinds, and they differ from each other very widely in their nature as well as in their terms and legal effect.

Charterers or freighters may become the owners for the voyage without any sale or purchase of the ship, as in cases where they hire the ship and have by the terms of the contract, and assume in fact, the exclusive possession, command, and navigation of the vessel for the stipulated voyage. But where the general owner retains the possession, command and navigation of the ship, and contracts for a specified voyage, as, for example, to carry a cargo from one port to another, the arrangement in contemplation of law is a mere affreightment sounding **601***] in contract, and not a demise of the *vessel, and the charterer or freighter is not clothed with the character or legal responsibility of ownership. *Donahue* v. *Kettell*, 1 Cliff. 137; *The Volunteer*, 1 Sumn. 551; *Drinkwater* v. *The Spartan*, 1 Ware, 153; *Gracie* v. *Palmer*, 8 Wheat. 605; *Clarkson* v. *Edes*, 4 Cow. 470; *Taggard* v. *Loring*, 16 Mass. 336; *Christie* v. *Lewis*, 2 Brod. & B. 410.

Unless the ship herself is let to hire, and the owner parts with the possession, command and navigation of the same, the charterer or freighter is not to be regarded as the owner for the voyage, as the master, while the owner retains the possession, command and navigation of the ship, is the agent of the general owner, and the mariners are regarded as in his employment, and he is responsible for their conduct. *Putnam* v. *Wood*, 3 Mass. 481.

Courts of justice are not inclined to regard the contract as a demise of the ship if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer, but where the vessel herself is demised or let to hire, and the general owner parts with the possession, command and navigation of the ship, the hirer becomes the owner during the term of the contract, and if need be he may appoint the master and ship the mariners, and he becomes responsible for their acts. *Sherman* v. *Fream*, 30 Barb. 478; *Reeve* v. *Davis*, 1 Ad. & E. 312; *Frazer* v. *Marsh*, 13 East. 238; *Marcardier* v. *Ches. Ins. Co.* 8 Cranch, 39; 1 Pars. Ship. 278; *Campbell* v. *Perkins*, 8 N. Y. 430.

On the first day of June, 1865, the assistant quartermaster of the United States, stationed at St. Louis, applied to the plaintiffs, as the owners of the steamboat Belle Peoria, to transport a cargo of military supplies from that port to Fort Berthold, but the owners of the steamboat declined on account of the lateness of the season. He then ordered them to prepare for the trip, and informed them that in case of refusal the steamboat would be impressed. They protested, but under the orders given got the boat in readiness, put the cargo on board, and on the 3d of June, 1865, left St. Louis for the place of destination where the steamboat arrived *on the 22d of July following, [***602** when she discharged her cargo, and on the 24th of the same month started down the river on her return trip. She proceeded for two days in safety, when a high wind "sprung up," and in attempting to land she was blown ashore and grounded. All efforts to get her off proved unavailing, and believing it impossible to do so until a rise should occur in the river, the master, and most of the other officers and crew decided to return, leaving on board the mate, one engineer and three watchmen to take care of the boat, aided by a military guard detailed and sent from Fort Rice by the officer in command at that post. Information that the steamboat was aground reached the owners at St. Louis on the 10th of August, 1865, but she remained aground until the 15th of April of the next year, when she was swept off by an ice freshet in the river and totally destroyed. When the assistant quartermaster ordered the owners to prepare for the trip, he fixed the *per diem* compensation of the boat at $272, which appears to have been satisfactory to the owners, as they were paid at that rate to the time they received information of the disaster, and they have presented no claim for any greater allowance for that period of time. They were also paid at the rate of $101 per day from the said 10th of August to the 30th of September

in the same year, covering the period, as stated in the finding, that the mate, engineer and the three watchmen remained on board after the master and the rest of the officers and crew returned. Vouchers were also issued to the plaintiffs at the rate of $80 per day from the 30th of September of the same year to the 30th of November following, but those vouchers have never been paid or recognized, and the plaintiffs sued the United States for the amount of those vouchers and for compensation for the use of the steamboat at the same rate from the time the last voucher was issued to the time when the steamboat was swept off from the place where she was grounded by the ice freshet in the river and totally destroyed.

Although the plaintiffs objected to the order of the quartermaster at the time it was given, 603*] still it is quite evident *that they ultimately consented to perform the service as matter of contract, and that they were content to receive the *per diem* compensation fixed by the assistant quartermaster at the time he gave the order. Abundant confirmation of that view is found, if any be needed, in the fact that they voluntarily accepted the prescribed *per diem* compensation from the commencement of the trip to the 10th of August following, when they received information of the disaster, which was at the time when the master and all the steamboat's company, except the mate, one engineer and three watchmen returned to the port of departure, and that the plaintiffs make no claim for any additional compensation during that period. Compulsion is not set up by the plaintiffs and, if it was, the theory could not be supported, as the jurisdiction of the court of claims does not extend to torts. They have also been paid for the value of the steamboat, and also a *per diem* compensation of $101 per day from the 10th of August to the 30th of September, which is the date when the mate, engineer, and the three watchmen also left the steamboat and returned to St. Louis. No additional compensation is claimed for that period, but they claim for the amount of the vouchers issued at the rate of $80 per day for the two months next succeeding that period, and at the same rate from the end of that period to the 15th of April in the following year, when the steamboat was swept off by the ice freshet and was totally destroyed.

Judgment was rendered for the claimants for certain moneys, not involved in this appeal, which were expended by them in efforts to save the steamboat, but the petition, so far as respects the *per diem* compensation, was dismissed, and the claimants appealed to this court.

Throughout the litigation the plaintiffs have prosecuted their claim as a matter of contract, and it is quite clear that it could have no other foundation in the court where the suit was brought and, of course, it must depend upon the proper application of the principles of commercial law to the facts of the case as found by the court of claims.

By the terms of the contract, they were to 604*] carry the cargo *of military supplies from the port of St. Louis up the Missouri river to Fort Berthold for $272 per day during the voyage, including the return trip as well as the trip to the place of destination, in full compensation for the entire services. By necessary implication the plaintiffs were to victual and man the steamboat and keep her in a seaworthy condition, and in contemplation of law they retained the possession, control, and navigation of the steamboat, as the master was one of their own selection and the crew were in their own employment, and they were responsible for their conduct. Steamers require fuel as a means of creating motive power, and it is quite obvious that it was the duty of the plaintiffs to supply the steamboat with fuel for that purpose as well as provisions for the officers and crew, and that the master was their agent and not the agent of the charterers. Well-founded doubts cannot be entertained upon that subject, and if those conclusions of fact are correct, then it follows as a conclusion of law that the plaintiffs, as the general owners of the steamboat, were also the owners for the voyage, and that the true relation of the United States to the adventure was that of a charterer for hire and shipper of the cargo. *Saville* v. *Campion*, 2 B. & Ald. 510.

Through the assistant quartermaster at St. Louis the United States put the cargo on board the steamboat, at a fixed *per diem* compensation during the round trip, for transporting the military supplies constituting the cargo to the place of destination, the steamboat having the right to take a return cargo from other shippers or to return in ballast, at the election of her owners. She performed the trip up the river and delivered the cargo in good condition and started on the return trip, the United States, as the charterers, having no further interest in the voyage except that the steamboat should return to the port of departure without delay. All sea risks were, unquestionably, upon the owners of the steamboat, as they were the owners for the voyage as well as the owners in fact, and the record shows that they must have so understood their own rights, as the statement *in the record is that when they [*605 received information of the disaster "they made their protest in order to cover the insurance."

Suggestions may be made that the act of the United States in paying for the value of the steamboat after she was swept off by the ice freshet and destroyed is inconsistent with the theory that they were merely the charterers for hire, and that the plaintiffs were the owners for the voyage as well as the owners in fact, but the adjudication of the third auditor cannot change the rights of the parties in respect to any matters not within his jurisdiction. 9 Stat. at L. 415. Whether that adjudication was correct or incorrect is not a question in this case, and it is only referred to as showing that it cannot have any weight in the decision of the case before the court.

Freight, it is said, cannot be earned unless the voyage is performed and the cargo is delivered; but the voyage in this case, so far as respects the cargo, was performed, and the cargo was duly delivered to the consignees, and to that extent the freight was earned; but the plaintiffs were entitled, under the contract, to the same *per diem* compensation during the return trip in case it was performed without unnecessary delay, and it may be that the United States could not have claimed any deduction from the agreed compensation if the interrup-

tion in the voyage had been only a temporary one, and the master, when the cause of interruption had been removed or overcome, had proceeded with the steamboat to the return port.

Whatever repairs became necessary in consequence of the disaster would have been a charge to the steamboat or her owners, but it may be that the plaintiffs would have been entitled to the agreed compensation for the days spent in executing the repairs as well as for the days actually spent in the return trip, but it is not necessary to decide those questions in this case, and the court does not express any decided opinion upon the subject. Abb. Ship. 43; *Hawkins* v. *Twizell*, 5 Ell. & Bl. 883; *Havelock* v. *Geddes*, 10 East, 555.

606*] *But the interruption in the voyage was not merely a temporary one in any proper sense of the term. On the contrary, the voyage was completely broken up, as fully appears from the fact that the master and all the crew ultimately abandoned the steamboat, leaving her where she was stranded, and that she remained there until the 15th of April of the next year, when she was swept off by the ice freshet and became a total loss. Broken up, as the voyage was, by the perils of navigation, no doubt is entertained that the plaintiffs were entitled to the agreed *per diem* compensation to that time, and to such further allowance at the same rate and for such additional time as it would have required for the steamboat to have completed the return trip. They had performed the whole of the stipulated service for the United States and had delivered the cargo to the assignees, and were proceeding on the return trip in good faith, when the voyage was broken up by causes beyond their control and without any fault on their part or on the part of the master or crew.

Unless a carrier assumes the risk of all contingencies, he is not liable because he fails to perform what is rendered impossible by the perils of the sea. Such events as are known as the accidents of major force, or fortuitous events, or the acts of God, always constitute an implied condition in every such engagement. *The Eliza*, Davie, Adm. 318. Neither party is at liberty to abandon the contract without the consent of the other, or without legal cause, and such cause must not be one procured or occasioned by the fault of the party who relies upon it. *Clark* v. *Insurance Co.* 2 Pick. 108.

Different views have been expressed by different courts as to the effect of a temporary interruption of a voyage upon the rights of the owner of the ship and the shipper or charterer; but the rule seems to be well settled, that when the voyage is broken up by a sea peril, that neither the shipper nor the charterer is in general liable to the ship-owner beyond the time when the peril occurred; but that rule is more particularly applicable in cases where the **607*]** transportation of *the cargo is not complete, and it cannot be applied at all to the case before the court without considerable qualification. *Palmer* v. *Lorillard*, 16 Johns. 352.

Reasonably construed, the contract gives the plaintiff the agreed *per diem* compensation from the commencement of the voyage until the same was broken up, including also so many days in addition as would have been spent, if no disaster had occurred, in completing the return trip. Apply that rule to the case, and it is clear that the judgment of the court below must be affirmed, as the United States, upon the most liberal computation, have paid more than the contract would entitle the plaintiffs to demand. Payment was made to the time when the mate, engineer, and three watchmen returned home, and the plaintiffs have no right to claim anything more.

Judgment affirmed.

Mr. Justice **Clifford** delivered the opinion of the court in No. 225:

Supplies for the military service were transported by the appellees from St. Louis up the Missouri river to Fort Berthold, as more fully explained by the court in the case just decided. They were the owners of the steamboat Belle Peoria, and it appears by the findings in the court below that the assistant quartermaster at that station, on the first day of June, 1865, applied to them to take such a cargo and transport it to that place. Objections were made by the owners of the steamboat, as explained in the preceding case; but they put the cargo on board, and on the third of the same month started on the upward trip, and it appears that they made the trip in safety, delivered the cargo to the consignees, and without any unnecessary delay started on the return trip. Two days after they started on the return trip the steamboat encountered a high wind, and while those in charge of her were endeavoring to land she was blown aground and became fast. All efforts to get her off proving *unavailing, the [***608*** officers and crew, except the mate, one engineer, and three watchmen, left her and returned to the port of departure. By the findings, it appears that the mate, one engineer, and three watchmen remained on board to the 30th of September of the same year, when they also left the steamer and returned.

Claim was made by the present appellees, in the case just decided, for compensation for the service performed in addition to what they had received; but it is unnecessary to enter into any of those details, except to say that the boat remained aground until the 15th of April of the following year, when she was swept off by an ice freshet, and was totally destroyed. Before that occurred, however, the owners of the steamboat dispatched a pilot and crew up the river to the place where the steamboat was aground, to get her afloat and bring her down the river, but the steamboat had been swept off and destroyed three days before they arrived at the place of the disaster. Expenses, of course, were incurred for the wages of the pilot and crew, and for provisions and transportation, and the court below found that those expenses amounted to the sum of $2,500, and for that sum the court of claims rendered judgment for the appellees, and the United States appealed to this court.

Apart from what appears in the opinion delivered in the other appeal, the only facts found by the court below in support of the claim are what is exhibited in the following statement: "These persons, meaning the pilot and crew, were sent, after consultation with the quartermaster at St. Louis, and for the purpose of protecting the interests of the United States as well as those of the claimants."

Unless the United States, in contemplation of

law, were the owners of the steamboat for the voyage, they had no property interests in the stranded steamboat, as the cargo had, two days before the disaster occurred, been safely discharged at the place of destination and duly delivered to the consignees. They were not owners for the voyage, as the court has just decided, so that if the statement is founded 609*] *on that theory it is error, and entitled to no weight; and if not founded on that theory, it does not appear to rest on any substantial foundation, as the court has decided in the other appeal that the appellees, as the general owners and owners for the voyage, assumed all risks from sea perils for the entire trip.

Temporary delays, if any had occurred, might have increased the *per diem* compensation which the United States had agreed to pay; but the voyage had been broken up and frustrated more than six months before the pilot and crew were sent to the place of the disaster for the purpose of getting the steamboat afloat. Suppose, however, that it could be admitted that the United States had some property interests in the steamboat, still the admission would not benefit the appellees, as it is perfectly clear that the assistant quartermaster had no authority to bind the United States in any such arrangement. He did not attempt to make any contract, and nothing of the kind can be inferred from the finding of the court, even if it be competent for this court to make inferences to support the judgment, which is not admitted. All that is found is that the owners of the steamboat consulted with the quartermaster before they dispatched the pilot and crew to the scene of the disaster, which falls very far short of evidence to prove a contract, even if the quartermaster had been invested with authority for any such purpose. Viewed in any light, the record does not show any legal foundation for the judgment.

Judgment reversed, and the cause remanded, with directions to dismiss the petition.

610*] *ELIJAH M. DUNPHY, *Appt.*,

v.

T. H. KLEINSCHMIDT and Charles E. Duer.

(See S. C. 11 Wall. 610-616.)

Legislature of territory, power of—chancery case in territorial court, how tried—decree in equity—action at law.

The legislature of Montana territory has no power to pass any law in contravention of the Constitution of the United States or which shall deprive the supreme and district courts of the territory of chancery as well as common-law jurisdiction.

A chancery case in such territorial courts, should have been tried as a chancery case by the modes of proceeding known to courts of equity.

In an equitable proceeding, a decree of damages cannot be rendered against a defendant who is alleged to have taken a fraudulent assignment of property. The decree against him must be a decree for an account.

If the complainant wishes to make him answerable in damages, he must sue for damages in an action at law.

[No. 148.]

Argued April 17, 19, 20, 1871. Decided May 1, 1871.

APPEAL from the Supreme Court of the Territory of Montana.

The judgment creditor's bill was filed in this case by the appellees, in the territorial district court, Gallatin county, Montana territory, for the cancelation of a certain mortgage and assignment, and for other relief. By stipulation, the venue was changed to Lewis & Clarke county. A decree having been entered in favor of the complainants, the respondent took an appeal to the supreme court of the territory, by which the said decree was affirmed; whereupon the respondent took a further appeal to this court.

The case is fully stated by the court.

Messrs. **L. Trumbull** and *W. F. Saunders*, for appellant:

The case seems to have been tried in the court below, partly as an action at law and partly as a proceeding in chancery; and the record is as confused as are the statutes of Montana, which mix up equity and common-law proceedings in the same case. The decree is a judgment of $35,737.50, in favor of different plaintiffs, jointly, who claim different amounts under distinct and separate judgments. It is uncertain in that it directs the judgment to be credited by the money in the possession of the receiver, without specifying how much that is; nor does the record contain any order appointing a receiver.

The record contains no report from the receiver, although it does show, by the admission of one of the plaintiffs, that certain flour went into his hands, but when or how much, nowhere appears.

The decree is uncertain and the record does not furnish the means of making it certain, and it should be reversed for that, if for no other cause.

Section 13 of the organic act of Montana territory declares "that the Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said territory of Montana as elsewhere within the United States." 13 Stat. at L. 91.

Section 9 of the organic act declares "that the said supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction." 13 Stat. at L. 89.

The laws of the United States, in conferring jurisdiction on the Federal courts, make a distinction between suits at common law and in equity, to the same effect as is made in the organic act of Montana in the organization of the territorial courts.

In construing these laws, this court has said: "The Constitution and laws of the United States and the acts of Congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are, at common law or in equity, not according to the practice of the state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles. And although the forms of proceeding and practice in the state courts shall have been adopted in the circuit courts of the United States, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit."

Thompson v. *Railroad Co.* 6 Wall. 137, 18 L. ed. 767; *Robinson* v. *Campbell*, 3 Wheat. 212; *McCollum* v. *Eager*, 2 How. 64; *Noonan* v. *Lee*, 2 Black, 509, 17 L. ed. 281; *Bennett* v. *Butterworth*, 11 How. 674; *Payne* v. *Hook*, 7 Wall. 430, 19 L. ed. 261.

"Wherever a case in equity may arise and be determined, the same principles of equity must be applied to it."

Neves v. *Scott*, 13 How. 272.

Tested by these decisions, it may well be questioned whether so much of the Montana statutes as abolishes all distinction between cases at law and in equity, and requires issues of fact to be tried by a jury, is not inoperative and void. If valid, it was error to submit only part of the issues of fact to a jury. At all events, when a case comes here, this court will look to the subject-matter of the suit, and if it be of an equitable character, will dispose of the case according to the principles and practice of the high court of chancery in England, as they have been modified by its rules. "The laws or practice of the territory cannot regulate the process by which this court exercises its appellate power."

Brewster v. *Wakefield*, 22 How. 128, 16 L. ed. 304.

The subject-matter of this suit is clearly one of equitable jurisdiction, and if the proceedings have not been according to the principles and practice of equity, as established by this court, the decree must be reversed. The decree does not profess to be based upon evidence submitted to the Chancellor and contained in the record, but upon the verdict of nine of twelve jurors, on only part of the issues involved in the case.

It was held by the supreme court of Montana, that the territorial statute, giving the same force and effect to a verdict of three fourths of a jury as if it were rendered by the whole jury, was repugnant to article 7 of the amendment to the Constitution of the United States, so far as it related to suits at common law, but that such a verdict was good in an equity proceeding.

That the term "trial by jury," in so far as it regarded the number of the jury, and the unanimity of the verdict, had a definite and specific meaning at the time the Constitution was adopted, cannot be doubted. "Verdict is the unanimous decision made by a jury." Bac. Abr., title, *Verdict*.

"If the jurors do not all agree in a verdict, the verdict is bad."

Bac. Abr., title, *Verdict*, letter F; 3 Bl. Com., 376; *Parsons* v. *Bedford*, 3 Pet. 433.

It is beyond the power of the legislature of Montana, or Congress even, materially to change the character of a jury, as it was understood at the time the Constitution was adopted. "The number of jurors cannot be diminished, nor a verdict authorized short of a unanimous concurrence of all the jurors."

Work v. *Ohio*, 2 Ohio St. 306.

It is, however, conceded that the subject-matter of this suit is of an equitable character; but the issues which were submitted to the jury were issues which, according to the course of the English Chancery practice, as adopted by the Supreme Court, could only be tried in a court of law. In a court of chancery there is no jury, and when, in the opinion of the chancellor, matters of fact are involved in a suit which ought to be passed upon by a jury, the practice is to direct a feigned issue to be made up, and it is sent to a common-law court for trial. On the trial of this issue in the common-law court, questions of law in regard to the admissibility of evidence and otherwise are raised and decided by the commoun-law judge, and the case is proceeded with in the same manner as any other suit. 2 Johns. Ch. Pr., 1085, and notes.

The jury impaneled is a jury in a common-law court, it is sworn to try an issue pending in that court, and the constitutional provision in regard to jury trials applies to it just as much as if the suit had not originated out of chancery. It was, doubtless, competent for the chancellor to pass upon the facts of this case without the intervention of a jury; but if he sends them to a court of law, to be determined by a jury, it must be to such a jury as the common law provides. To refuse the motion for a new trial, and base a decree upon the verdict of nine jurors, three dissenting, was error.

It was decided by this court in *Noonan* v. *Lee*, 2 Black, 509, 17 L. ed. 281, that "the equity jurisdiction of the courts of the United States is derived from the Constitution and laws of the United States. Their powers and rules of decision are the same in all the states. Their practice is regulated by themselves, and by rules established by the Supreme Court. This court is invested by law with authority to make such rules. In all these respects they are unaffected by state legislation."

In the case of *Orchard* v. *Hughes*, 1 Wall. 77, 17 L. ed. 561, it was held that a case coming from a territorial court was governed by the decision in the case of *Noonan* v. *Lee*, *supra*. Treating this case as an equitable proceeding, to be governed by the chancery practice as it prevails in the United States courts, unaffected by territorial legislation, it is full of errors.

Messrs. **J. O. Broadhead, F. A. Dick,** and *A. M. Woodfolk*, for appellees:

It will doubtless be conceded that the 6th and 7th Amendments to the Constitution of the United States, relative to trial by jury, are not restrictive upon states or state legislation. The only question then is whether Congress is prohibited by the Constitution from conferring similar powers upon a territory. If the power was lawfully conferred, its exercise would be lawful.

It is clear from the language of the constitutional provision, that it refers exclusively to some court, either state or Federal, or both. "In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved." It does not provide that no law shall be passed impairing the right of trial by jury. Its language is like the rule of some court. It is a direct restriction upon the judicial department, and only an incidental restriction upon the legislative, to the extent that it legislates for the government of the courts. The latter clause of the amendment is still more explicit: "And no fact tried by a jury shall be otherwise re-examined in any court of the United States," etc.

The authorities leave no room for doubt that

this amendment applies exclusively to the Federal courts under the Constitution.

Barron v. *Baltimore*, 7 Pet. 243; Story, Const. §§ 1763 and 1773, notes; *In the Matter of Smith*, 10 Wend. 449; *Murphy* v. *People*, 2 Cow. 815; *Livingston* v. *Mayor of N. Y.* 8 Wend. 102; *R. Co.* v. *Heath*, 9 Ind. 559; *Boring* v. *Williams*, 17 Ala. 510; *Colt* v. *Eves*, 12 Conn. 243; Federalist, No. 83.

This amendment, then, cannot, in any manner, affect territorial courts. They are in no sense Federal courts under the Constitution, but are exclusively the creatures of Congress.

They are not constitutional courts, but legislative courts, and are not recognized nor provided for by the Constitution. The Constitution, consequently, could have no reference to courts that have no constitutional existence.

Ins. Co. v. *Canter*, 1 Pet. 541; *Benner* v. *Porter*, 9 How. 239; Story, Const. § 1325; Const. art. III. §§ 1, 2; organic act of Montana, § 9.

If we consider, too, the original design of this amendment, it is still more manifest that it could have no reference to the courts of the territories. It sought not to weaken the local governments, either state or territorial. Its whole object was to check and fetter the power of the Federal government, in its action through the Federal courts.

But this action is a bill in equity (creditor's bill) and equity cases are not embraced in the provisions of the Constitution relative to trial by jury.

Story, Const. §§ 1763, 1773; *Parsons* v. *Bedford*, 3 Pet. 433.

But it may be claimed that if a chancellor calls a jury at all, it must be a common-law jury of twelve men. But unless the Constitution prevents, a territorial legislature can abolish a common-law jury by statute, as was done in this case.

Under the common law, the chancellor might have tried this case without a jury, or he could have referred it to one or more persons to report the facts. But the legislature of Montana has made fraud a question of fact, and all facts triable by a jury. The same legislature has provided also that nine men on the jury might find a verdict. The only necessity for a jury at all, in this case, has been imposed by territorial statutes, and those statutes prescribe what the jury shall be.

In submitting special issues to a jury in chancery cases, the manner of proceeding is entirely under the control of the court of equity, and the admission of evidence, instructions to the jury, etc., are all controlled by the discretion of the chancellor.

2 Dan. Ch. Pr. 4th ed. p. 1002; *Black* v. *Shreve*, 2 Beas. 457.

The chancellor, also, in calling and organizing the jury, was properly governed by the laws, for the time being in force, in the territory of Montana, 2 Dan. Ch. Pr. 977.

As, too, the whole object of the chancellor, in submitting special issues to the jury, is not to bind the court, but to satisfy its conscience, his approval of the findings of a jury was all that was necessary to give them validity. His approval made the findings his own. The chancellor, in his discretion, could have approved the findings of even a less number than nine of the jury, and based his decree thereon, or he might have made his own findings, regardless of the verdict of the jury.

Adams, Eq. Whart. 817; Gress. Eq. Ev. 401; *Dunn* v. *Dunn*, 11 Mich. 284; *Black* v. *Shreve*, 2 Beas. 457; *Lee* v. *Beatty*, 8 Dana, 207.

Mr. Justice **Bradley** delivered the opinion of the court:

This case was a creditor's bill, filed by Kleinschmidt, the appellee, against Dunphy, the appellant, and one Benajah Morse, surviving partner of Elkanah Morse, on behalf of himself and all other judgment creditors, to obtain satisfaction of a judgment recovered by Kleinschmidt, on the 12th of March, 1868, for $16,957. The bill alleges that an execution issued on the judgment was returned wholly unsatisfied, and that no part of the judgment has been paid. It then charges that on the 31st of October, 1867, Morse and his brother Elkanah, then living, executed to Dunphy a mortgage to secure the payment of $30,000, in one year from date, covering property to the amount of $70,000, including a ranch in the county of Gallatin, containing 640 acres of land, with two thirds of the crops, and all the stock thereon, embracing 225 head of cattle and all the goods in their store at Gallatin, together with the lot and storehouse, and all the book accounts and evidences of debt of E. & B. Morse. The bill states that at the time of executing this mortgage, the Morses were largely indebted to different persons, and *charges that it was [*611 made to hinder, delay, and defraud the creditors of the firm, and was not accompanied by change of possession; but that the Morses continued in possession for several months, selling and disposing of the goods for their own benefit. It further charges that the Morses did not owe Dunphy any such amount as $30,000, did not, in fact, owe him over $6,000 or $7,000, the balance being fictitious, and both Dunphy and the Morses had acknowledged as much to different persons. The bill further charges that, by means of this fraudulent mortgage and fictitious indebtedness, Dunphy had prevented the plaintiff and other judgment creditors of E. & B. Morse from collecting their just demands; that Dunphy had claimed title to the property under the mortgage, and had forbidden the sheriff to levy upon it, and that, consequently the sheriff had refused to do so, and that Morse and Dunphy were engaged in running off the property, and Dunphy had already realized more than $30,000 therefrom. The bill prays that the mortgage may be declared fraudulent and void; that a receiver may be appointed to hold the property, and that if what was left should not be sufficient to satisfy the plaintiff and other judgment creditors, Dunphy might be made personally liable for the deficiency. By an amended bill the complainant alleges that on the 3d of January, 1868, Morse executed to Dunphy an assignment of all the property embraced in the mortgage, and authorized him to sell and dispose of it with due regard to his own interest and the interests of the creditors of E. & B. Morse: but that, notwithstanding the assignment, Morse still continued in possession and control of the property for several months, and to sell the same and collect the proofs thereof; and that

the assignment was fraudulent and void. To this bill Dunphy filed an answer, insisting on the bona fides of his debt, and setting forth that it consisted of $12,500 for a stock of goods sold to the Morses, and $10,000 for money lent to them at the date of the mortgage, the balance being for interest to accrue during the year the mortgage had to run, namely, one per 612*] cent a month on the former *sum, and five per cent a month on the latter, which was allowed by the laws of the territory. The appellee, Duer, recovered a judgment against Morse on the same day that Kleinschmidt's was entered, failed to obtain satisfaction, and filed a petition to intervene as co-complainant in the suit, and was admitted to intervene accordingly. It is unnecessary to take further notice of the pleadings. The cause was put at issue, and came on for trial in March, 1869.

It appears that, by an act of the territorial legislature, passed in December, 1867, it was declared "that there shall be in this territory but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs," § 1, and "that an issue of fact shall be tried by a jury, unless a jury trial is waived, or a reference be ordered as provided in this act," § 155. By another act, passed in January, 1869, it was provided "that, in all civil cases, if three fourths of the jurors agree upon a verdict, it shall stand and have the same force and effect as if agreed upon by the whole jury."

The cause was manifestly tried in pursuance of these provisions of the territorial law. In order to present distinct issues for trial, the court framed a number of questions (twenty two in number) and submitted them to the jury, as: 1. Did E. & B. Morse retain possession and control, and continue to dispose of the property mortgaged after the execution of their mortgage to E. M. Dunphy, on the 31st day of October, 1867? 2. State whether B. Morse, after the 3d day of January, 1868, continued to remain in possession of the property assigned to Dunphy, and also to exercise control over it, and to sell and dispose of it? . . . 4. Did E. & B. Morse owe E. M. Dunphy $30,000 at the time of their execution of their mortgage to him on the 31st day of Oc- 613*] tober, 1867? . . . 9. *Did the mortgage to Dunphy prevent the collection of the judgments of Kleinschmidt and Duer? . . . 17. Was the mortgage to Dunphy executed and accepted for the purpose of covering up the property of E. & B. Morse, and delaying or preventing the collection of demands found against them or either of them? etc., etc. To all these questions, nine of the jurors returned answers adverse to Dunphy and favorable to the complainants, and three dissented.

This verdict was rendered on the 25th of March, and accepted by the court, and on the 3d of April a decree was made which, after reciting the principal findings of the jury, proceeded as follows: "It was, therefore, ordered, adjudged, and decreed that the said mortgage from E. & B. Morse to E. M. Dunphy be set aside as fraudulent and void and of no effect, and that the said plaintiffs recover of the said E. M. Dunphy the sum of $35,737, the amount of plaintiff's judgments, interest, and costs, together with the costs of this action, taxed at $7,149; that the said judgments be credited by the money and the possession of the receiver in the above case, and that the plaintiffs have execution against the said Dunphy for the residue of the said judgment after such credit has been entered." This judgment was rendered in the district court of the 3d judicial district of the territory. It was appealed to the supreme court and affirmed, and appeal was then taken to this court.

The principal question presented by this case is, whether these proceedings, conducted in the manner stated, can be sustained.

By the organic act constituting the territory of Montana, passed by Congress May 26, 1864, § 6, the legislative power of the territory was declared to extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of that act. By the 9th section, provision was made for establishing various courts of the territory, namely: a supreme court, district *courts, probate courts, and justices of [*614 the peace; and it was enacted that the supreme and district courts, respectively, should possess chancery as well as common-law jurisdiction. By the 13th section it is declared, that the Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the territory as elsewhere in the United States.

These are the only provisions of the organic law which have been referred to in the argument.

From these it is apparent that the territorial legislature has no power to pass any law in contravention of the Constitution of the United States, or which shall deprive the supreme and district courts of the territory of chancery as well as common-law jurisdiction.

This case was clearly a case of chancery jurisdiction, and one necessarily requiring equitable, as distinguished from legal, relief. The property, according to the charge of the complainant, had been put beyond the reach of the ordinary process of the law. It had been disposed of by the assistance and through the co-operation of Dunphy in such a manner that the judgment creditors could not find it to satisfy their claims, or, if found, it was held by Dunphy under cover of an assignment, which, prima facie, gave him the legal title. This is what is charged by the judgment creditors. They further charge that this was a fraudulent contrivance to hinder and delay them in the recovery of their debts. In a country or territory where the systems of common law and chancery both substantially prevail; it is perfectly clear that chancery only could give adequate relief in such a case. And, then, the case was instituted and the pleadings were framed strictly in accordance with this view. The bill is strictly a bill in chancery praying for equitable relief.

*Now, it is perfectly obvious that, [*615 with the exception of the verdict being rendered by nine jurors, the trial was altogether conducted as a trial at common law, and that the decree was rendered on a verdict precisely as a judgment is rendered on a verdict at common law. This was clearly an error. The case, being a chancery case, and being instituted as such,

should have been tried as a chancery case by the modes of proceeding known to courts of equity. In those courts the judge or chancellor is responsible for the decree. If he refers any questions of fact to a jury, as he may do by a feigned issue, he is still to be satisfied in his own conscience that the finding is correct, and the decree must be made as the result of his own judgment, aided, it is true, by the finding of the jury. Here the judgment is pronounced as the mere conclusion of law upon the facts found by the jury.

Again; in an equitable proceeding of this kind, a decree in the nature of a judgment for damages cannot be rendered against the defendant who is alleged to have taken a fraudulent assignment of the property. The decree against him must be a decree for an account. He must be called to account for just what property has come into his hands, and no more; and he will be entitled, under ordinary circumstances, to a rebate for the amount that was justly and honestly his due. The mode of taking such an account is well known in equity proceedings. The defendant is to exhibit an account either in his answer or in the master's office, and if it is not satisfactory to the complainant, it may be surcharged or falsified; and, as the account is finally found to stand, so will the responsibility of the defendant be. But if the complainant wishes to make him answerable in damages, either for the waste of the property or for its disposal by the original proprietor by aid of the wrongful complicity of the defendant, he must sue for damages in an action at law.

No account of the kind, or in the manner indicated, seems to have been taken at all. The suit was tried like an action for damages, and the jury were left to say, in brief, whether 616*] or *not the complainants could have made their money on execution had it not been for the mortgage and assignment to the defendant. The jury answered that they could, and the defendant was made personally liable for the whole amount.

Without attempting to decide whether the territorial legislature had or had not the power to legalize a verdict rendered by three fourths of a jury, we think the proceedings were erroneous, *and the decree must be reversed and the cause remanded for further proceedings, in conformity with this opinion.*

TWO HUNDRED AND SEVEN HALF POUND PAPERS OF SMOKING TOBACCO, etc., Elias C. Boudinot *et al.*, Claimants, *Plffs. in Err.*,

v.

UNITED STATES.

(See S. C. 11 Wall. *"The Cherokee Tobacco,"* 616-624.)

Act imposing tax on tobacco applies to Cherokee country—overrides treaty.

The 107th section of the act of July 20, 1868, imposing taxes on distilled spirits, tobacco, etc., was intended to apply and does apply to the country of the Cherokee nation.

This act must prevail over the 10th article of the treaty with the Cherokee nation.

[Mr. Justice FIELD did not sit in this cause.]

[No 253.]

Argued Apr. 11, 1871. Decided May 1, 1871.

IN ERROR to the District Court of the United States for the Western District of Arkansas.

The history and facts of the case are fully stated by the court.

Messrs. E. C. Boudinot, A. H. Garland, Albert Pike, Robert W. Johnson and **Benj. F. Butler,** for plaintiffs in error:

"Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States." See art. 4, § 3, clause 2 of Const.

According to this, territory of the United States is property; that is, it is land of the United States, over which the general government possesses plenary and undivided sovereignty.

U. S. v. *Gratiot*, 14 Pet. 526; *Scott* v. *Sandford*, 19 How. 393, 15 L. ed. 691. There is no such power given in the Constitution, or in any law of Congress, or any treaty over what is called the Indian territory.

We have invariably applied the words "treaty" and "nation," words of our own language, to the Indians, precisely as we have applied them to other nations of the earth.

When the Constitution again, in article 1, § 8, clause 3, gives Congress the power to regulate commerce with foreign nations, among the several states and with the Indian tribes, it meant that the Indian tribes were something else than states and foreign nations.

See *Cherokees* v. *Ga.* 5 Pet. 1; *Worcester* v. *Ga.* 6 Pet. 515; *Kansas Indians*, 5 Wall. 737, 18 L. ed. 667.

It has been the universal rule, both from the custom of the government and the decisions of the courts, that in all laws the Indian territories are not to be regarded as included, unless they are mentioned in those laws in so many words. The cases cited above are to this effect; and in addition, in support of this proposition, are the following:

Fur Company v. *U. S.* 2 Pet. 358; *Mitchel* v. *U. S.* 9 Pet. 711; *Lattimer* v. *Poteet*, 14 Pet. 4; *U. S.* v. *Fernandez*, 10 Pet. 303; *U. S.* v. *Brooks*, 10 How. 442; *Ladiga* v. *Roland*, 2 How. 581; *Marsh* v. *Brooks*, 14 How. 513; *U. S.* v. *Ritchie*, 17 How. 525, 15 L. ed. 236; *Fellows* v. *Denniston*, 23 N. Y. 420; 1 Story, Const. pp. 6. 147, 152, 155.

Laws which appear to have any hardship in them are to be interpreted in such a manner as not to be applied or extended beyond what is clearly expressed in them.

See Smith's Com. Const. & Stat. L. 621; *Elliott* v. *Swartwout*, 10 Pet. 150.

The United States has never claimed to exercise general jurisdiction, independent of treaty provisions, over the Cherokee nation, but has always legislated in subordination to those provisions. This will very clearly appear from the provisions of the treaty of 1866.

The treaty obligations between the government and the Cherokee nation have the force of domestic compacts of the highest type and most stringent force and effect, especially upon the powerful nation who, in the position of

protectors and guardians of the Indian tribes, makes the contract with its wards.

Nothing but the plainest, most unequivocal and distinct enunciation of the law of the legislature, fully expressed, will be considered by the court as abrogating or infringing the provisions of such a compact as we find these treaty obligations to be.

The 10th article of the treaty of 1866 provides that "every Cherokee . . . shall have the right to sell any of the products of his farm . . . or any merchandise or manufactured products, and to ship and drive the same to market without restraint, paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian territory."

The very fact that it provides for a tax on the quantity sold outside of the Indian territory determines the construction, upon the principle, *Inclusio unius exclusio alterius.*

Messrs. **Amos T. Akerman,** *Atty. Gen.*, and *B. H. Bristow, Solicitor Gen.* and *C. H. Hill,* for defendant in error:

It has been held that where the subject-matter of a treaty falls within the legislative power of Congress, that body may repeal it, so far as it is a municipal law.

Taylor v. *Morton,* 2 Curt. 454.

It follows, from the ruling in that case, that if the treaty provision here is to be understood as exempting from taxation, articles manufactured in the Indian territory, while the same remain within that territory, the subject of taxation being within the legislative power, it was, undoubtedly, competent for Congress, by a subsequent law, to modify or repeal that provision, by making liable to taxation any or all such manufactured articles, irrespective of their locality; and the rule thus prescribed must be applied.

However, it is contended by counsel for plaintiffs in error, in their brief—and this seems to be the point mainly relied upon by them—that the United States has no power to levy taxes upon the property of Indians within the Indian country, without an affirmative concession of the power by the latter; and the question is regarded as one between equal sovereigns. But we submit that this position is wholly irreconcilable with the doctrine declared in the case of *U. S.* v. *Rogers,* 4 How. 567.

Mr. Justice **Swayne** delivered the opinion of the court:

This is a writ of error to the district court of the western district of Arkansas. The case, so far as it is necessary to state it, lies within a narrow compass.

The proceeding was instituted by the defendants in error to procure the condemnation and forfeiture of the tobacco in question, and of the other property described in the libel of information, for alleged violations, which are fully set forth, of the revenue laws of the United States. Elias C. Boudinot, for himself and his copartner, Stand Wattie, interposed, and by his answer submitted, among others, the following allegations: That the firm were the sole owners of the property described in the libel; that the property was found and seized in the Cherokee nation, outside of any revenue collection district of the United States; that the manufacturing of the tobacco was carried on in the Cherokee nation, and that the manufactured tobacco, raw material, and other property, were never within any collection district; nor subject to the taxes mentioned in the libel, nor were the owners bound to comply with the requirements of the revenue laws of Congress; that the revenue laws were complied with as to all tobacco sold or offered for sale outside of said Indian country, if any such there were; that the claimants are Cherokee Indians by blood, and residents of the Cherokee nation, and they deny that the property had become forfeited as alleged in the libel.

At the trial, the claimants moved the court to instruct the jury that the act of Congress entitled, "An Act Imposing Taxes on Distilled Spirits, and for Other Purposes," approved July 20th, 1868, is not in force in any part of the Indian territory embraced in the western district of Arkansas; that the 10th article of the treaty of 1866, between the Cherokee nation and the United States, was in full force with reference to the territory of the Cherokee nation; that the *67th section of the act [*618 of 1868 requires stamps to be sold only to manufacturers of tobacco in the respective collection districts, and that it gave the claimants no legal right to buy such stamps to place on their tobacco in the Cherokee nation, and that they are not responsible for not having done so. The court refused to give these instructions. The jury found for the United States, and judgment was entered accordingly. The claimants excepted to the refusal of the court to give the instructions asked for, and have brought the case here for review.

The only question argued in this court, and upon which our decision must depend, is the effect to be given respectively to the 107th section of the act of 1868, and the 10th article of the treaty of 1866, between the United States and the Cherokee nation of Indians.

They are as follows:

"Section 107. That the internal revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuff, and cigars, shall be construed to extend to such articles produced anywhere within the exterior boundaries of the United States, whether the same shall be within a collection district or not." 15 Stat. at L. 167.

"Article 10th. Every Cherokee Indian and freed person residing in the Cherokee nation shall have the right to sell any products of his farm, including his or her live stock, or any merchandise or manufactured products, and to ship and drive the same to market without restraint, paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian territory."

On behalf of the claimants it is contended that the 107th section was not intended to apply, and does not apply, to the country of the Cherokees, and that the immunities secured by the treaty are in full force there. The United States insist that the section applies with the same effect to the territory in question as to any state or other territory of the United States, and that to the extent of the provisions of the section of the treaty is annulled.

*Considering the narrowness of the [*619 questions to be decided, a remarkable wealth of

learning and ability have been expended in their discussion. The views of counsel in this court have rarely been more elaborately presented. Nevertheless, the case seems to us not difficult to be determined, and to require no very extended line of remarks to vindicate the soundness of the conclusions at which we have arrived.

In *The Cherokee Nation* v. *Georgia*, 5 Pet. 17, Chief Justice Marshall, delivering the opinion of this court, said: "The Indian territory is admitted to compose a part of the United States. In all our geographical treatises, histories, and laws, it is so considered." In *The United States* v. *Rogers*, 4 How. 572, Chief Justice Taney, also speaking for the court, held this language: "It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the states, Congress may, by law, punish any offense committed there, no matter whether the offender be a white man or an Indian." Both these propositions are so well settled in our jurisprudence that it would be a waste of time to discuss them or to refer to further authorities in their support. There is a long and unbroken current of legislation and adjudications, in accordance with them, and we are aware of nothing in conflict with either. The subject, in its historical aspect, was fully examined in *Johnson* v. *McIntosh*, 8 Wheat. 574. In the 11th section of the act of the 24th of June, 1812, it was provided "that it shall be lawful for any person or persons to whom letters testamentary or of administration shall have been or may hereafter be granted by the proper authority in any of the United States or the territories thereof to maintain any suit," etc. In *Mackey* v. *Coxe*, 18 How. 103, 15 L. ed. 301, it was held that "the Cherokee country was a territory of the United States, within the meaning of this 620*] act. The 107th *section of the act of 1868 extends the revenue laws only as to liquors and tobacco over the country in question. Nowhere would frauds to an enormous extent as to these articles be more likely to be perpetrated if this provision were withdrawn. Crowds, it is believed, would be lured thither by the prospect of illicit gain. This consideration, doubtless had great weight with those by whom the law was framed. The language of the section is as clear and explicit as could be employed. It embraces indisputably the Indian territories. Congress not having thought proper to exclude them, it is not for this court to make the exception. If the exemption had been intended it would doubtless have been expressed. There being no ambiguity, there is no room for construction. It would be out of place. *United States* v. *Wiltberger*, 5 Wheat. 95. The section must be held to mean what the language imports. When a statute is clear and imperative, reasoning *ab inconvenienti* is of no avail. It is the duty of courts to execute it. *Morehouse* v. *Rensell*, 1 Clark & F. 527; *Wolff* v. *Koppel*, 2 Den. 372. Further discussion of the subject is unnecessary. We think it would be like trying to prove a self-evident truth. The effort may confuse and obscure but cannot enlighten. It never strengthens the pre-existing conviction.

But conceding these views to be correct, it is insisted that the section cannot apply to The Cherokee nation because it is in conflict with the treaty. Undoubtedly, one or the other must yield. The repugnancy is clear and they cannot stand together.

The 2d section of the 4th article of the Constitution of the United States declares that "this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties which shall be made under the authority of the United States, shall be the supreme law of the land."

It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. *This [*621 results from the nature and fundamental principles of our government. The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress (*Foster* v. *Neilson*, 2 Pet. 314), and an act of Congress may supersede a prior treaty. *Taylor* v. *Morton*, 2 Curt. 454; *The Clinton Bridge*, 1 Woolw. 155. In the cases referred to, these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done, the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.

Does the section thus construed deserve the severe strictures which have been applied to it? As before remarked, it extends the revenue laws over the Indian territories only as to liquors and tobacco. In all other respects the Indians in those territories are exempt. As regards those articles, only the same duties are exacted as from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the public necessities. Is it unreasonable that this small portion of it shall rest upon these Indians? The frauds that might otherwise be perpetrated there by others, under the guise of Indian names and simulated Indian ownership, is also a consideration not to be overlooked.

We are glad to know that there is no ground for any imputation *upon the integrity [*662 or good faith of the claimants who prosecuted this writ of error. In a case not free from doubt and difficulty they acted under a misapprehension of their legal rights.

The judgment of the District Court is affirmed.

Mr. Justice **Bradley**, dissenting:

I dissent from the opinion of the court just

read. In my judgment it was not the intention of Congress to extend the internal revenue law to the Indian territory. That territory is an exempt jurisdiction. Whilst the United States has not relinquished its power to make such regulations as it may deem necessary in relation to that territory, and whilst Congress has occasionally passed laws affecting it, yet by repeated treaties the government has, in effect, stipulated that in all ordinary cases the Indian populations shall be autonomies, invested with the power to make and execute all laws for their domestic government. Such being the case, all laws of a general character passed by Congress will be considered as not applying to the Indian territory, unless expressly mentioned. An express law creating certain special rights and privileges is held never to be repealed by implication by any subsequent law couched in general terms, nor by any express repeal of all laws inconsistent with such general law, unless the language be such as clearly to indicate the intention of the legislature to effect such repeal. Thus it was held by the supreme court of New Jersey in *State* v. *Brannin*, 3 Zab. 484, that whilst the provisions of a city charter, it being a municipal corporation, may be repealed or altered by the legislature at will, yet a general statute repealing all acts contrary to its provisions will not be held to repeal a clause in the charter of such a municipal corporation upon the same subject-matter and inconsistent therewith. The same point is decided in numerous other cases. For example, when a railroad **623***] charter, subject to repeal, *exempted the company from all taxation except a certain percentage on the cost of its works, it was held that this exemption was not repealed by a subsequent general tax law, enacting that all corporations should be taxed for the full amount of their property as other persons are taxed, and repealing all laws inconsistent therewith. But where the repealing clause in the general law repealed all laws inconsistent therewith, whether general or local and special, it was held that it did repeal the special exemption. See, the case of *State* v. *Minton*, 3 Zab. 529. In every case the intent of the legislature is to be sought, and in the case of such special and local exemptions the general rule for ascertaining whether the legislature does or does not intend to repeal or affect them, is to inquire whether they are expressly named; if not expressly named, then whether the language used is such, nevertheless, as clearly to indicate the legislative intent to repeal or affect them.

In the case before the court, I hold that there is nothing to indicate such a legislative intent. The language used is nothing but general language, imposing a general system of requirements and penalties on the whole country. Had it been the intent of Congress to include the Indian territory, it would have been very easy to say so. Not having said so, I hold that the presumption is that Congress did not intend to include it.

The case before us is, besides a peculiar one. The exempt jurisdiction here depends on a solemn treaty entered into between the United States government and the Cherokee nation, in which the good faith of the government is involved, and not on a mere municipal law. It is conceded that the law in question cannot be extended to the Indian territory without an implied abrogation of the treaty *pro tanto*. And the opinion of the court goes upon the principle that Congress has the power to supersede the provisions of a treaty. In such a case there are peculiar reasons for applying with great strictness the rule that the exempt jurisdiction must be expressly mentioned in order to be affected.

*This view is strengthened by the fact [***624** that there is territory within the exterior bounds of the United States to which the language of the 107th section of the recent act can apply, without applying it to the Indian territory, to wit, the territory of Alaska. And it does not appear by the record that there are not other districts within the general territory of the United States which are in like predicament.

The judgment, according to these views, ought to be reversed. I am authorized to state that Mr. Justice **Davis** concurs in this opinion.

Mr. Justice **Field** did not hear the argument.

UNITED STATES, *Appt.*,
v.
THE HEIRS OF JOHN LYNDE, Deceased.

(See S. C. 11 Wall. 632-648.)

Territory of Louisiana in 1803—treaty of 1819—act of June 22, 1860—effect of Spanish grants—grant to Lynde.

*1. Under the treaty of cession of Louisiana made with France, April 30, 1803, the United States always claimed to the Perdido river on the east, although the Spanish authorities kept possession of and claimed sovereignty over the territory between that river and the Mississippi, except the island of New Orleans, until 1810, when the United States took forcible possession of it.

2. Spain, in ceding the Floridas to the United States, by the treaty of Feb. 22, 1819, only ceded so much thereof as belonged to her, and hence did not cede the above territory, lying between the Mississippi and Perdido rivers.

3. The stipulation in the 8th section of the treaty of 1819, to confirm all Spanish grants of land in the ceded territory, did not embrace grants made in the above territory after Spain ceded Louisiana to France by the treaty of St. Ildefonso, in 1801; for after that, it did not belong to Spain.

4. The act of March 26, 1804, organizing territorial government for Louisiana, expressly declared void all grants made in the territory above referred to, after the treaty of St. Ildefonso.

5. The foregoing points have been established by a long series of decisions in this court.

6. But by the act of June 22, 1860, entitled, "An Act for the Final Adjustment of Private Land Claims in the States of Florida, Louisiana, and Missouri, and for Other Purposes," the grants, made by the Spanish government in the disputed territory whilst in possession thereof, and claiming sovereignty over it, were confirmed.

7. Such a grant for 32,025 arpents, made by the Spanish intendant, Morales, on the 12th day of July, 1866, to John Lynde, the ancestor of the appellee, although rejected and declared void under previous conditions of the laws, was held to be confirmed and vaildated by the act of 1860.

[No. 84.]

Submitted Jan. 31, 1871. Decided May 1, 1871.

APPEAL from the District Court of the United States for the District of Louisiana.

The petition in this case was filed in the district court of the United States for the eastern district of Louisiana, for the confirmation of title to certain lands.

*Headnotes by Mr. Justice BRADLEY.

Judgment having been given in that court in favor of the petitioners, an appeal was taken by the respondents to this court.

The case is very fully stated by the court.

Messrs. **Amos T. Akerman,** *Atty. Gen.*, and **C. H. Hill,** *Asst. Atty. Gen.*, for appellants.

Messrs. **L. Janin** and *C. Cushing*, for appellees.

Mr. Justice **Bradley** delivered the opinion of the court:

This is a claim for 32,025 arpents of land in Louisiana, for which title was granted by Juan Ventura Morales, Spanish intendant of West Florida, to John Lynde, the ancestor of the appellee, on the 12th day of July, 1806. In pursuance of an application made by Lynde, on the 26th day of September, 1803, and regular sur-**634***] veys thereon. The lands *were situated east of the Mississippi river, and south of the 31st parallel of latitude, in a direction nearly north from Baton Rouge, and were part of the disputed territory which, after the cession of Louisiana to the United States in 1803, was claimed by them as a part of Louisiana, and by Spain as a part of West Florida. The cause of this contention originated in the various treaties of cession which had been made respecting these territories.

Louisiana, as possessed by the French, prior to 1763, embraced not only the entire territory west of the Mississippi, but also extended east of that river, along the Gulf of Mexico, as far as the Perdido, the present boundary between Alabama and Florida. By the treaties of 1763, France ceded the latter portion, lying east of the Mississippi, except the city and island of New Orleans, to Great Britain, and the residue to Spain. Subsequently (in 1783) Spain acquired the part ceded to Great Britain, and thus became possessed of the entire territory on our western and southern borders. On the 1st of October, 1800, a secret treaty was made at St. Ildefonso, between Spain and Bonaparte, then First Consul, by which Spain agreed, on certain conditions to be performed, to retrocede to the French Republic "the colony or province of Louisiana with the same extent that it now has in the hands of Spain, and that it had when France possessed it, and such as it ought to be after the treaties subsequently entered into between Spain and other states."

The ambiguity of this last expression was the cause of the subsequent misunderstanding between Spain and the United States. Did it mean that Spain was to retrocede to France **635***] *all the territory which the latter had formerly possessed under the name of Louisiana, or only so much as remained after the separation of West Florida therefrom, and the cession thereof to Great Britain? The United States contended the former, Spain the latter.

The importance of this question arose from the fact that the cession of Louisiana by Bonaparte to the United States included in precise terms what had been retroceded by Spain to France. The treaty of April 30, 1803, after reciting the exact language of the treaty of St. Ildefonso, describing the colony or province of Louisiana, as above stated, ceded "the said territory, with all its rights and appurtenances, as fully and in the same manner as they had been acquired by the French Republic in virtue of the above mentioned treaty with his Catholic Majesty."

In accordance with her construction of the treaty of St. Ildefonso, Spain refused to surrender the possession of the territory east of the Mississippi and Iberville rivers which she had acquired from Great Britain, and which the English had named West Florida, and she retained possession of it and exercised full sovereignty over it for many years afterwards.

Notwithstanding this refusal of Spain to deliver up West Florida, the United States, through the executive and legislative departments of the government, always claimed that it was covered by the two treaties of cession, and insisted that it rightfully belonged to them, though no demonstrations were made to dispossess the Spanish authorities until 1810, when President Madison issued a proclamation directing that possession should be taken, but at the same time declared that the right thereto should remain, as it had continued, a subject for amicable negotiation with the Spanish government. Possession was taken by the United States accordingly.

During the period that Spain remained in possession, her authorities continued to grant lands, not only in small parcels to actual settlers, under her colonization laws, but in large tracts to speculators and favorites.

*From 1803 to 1806, inclusive, the [***636** Spanish intendant, Morales, made many such grants (of which the grant in question was one) and which have ever since been the subject of much litigation and dispute, never being recognized as valid by our authorities, unless so recognized by the act of 1860, hereafter referred to.

Immediately after acquiring possession of Louisiana, in 1803, Congress passed an act to organize temporary governments in the newly acquired domain. This act, which was passed on the 26th day of March, 1804, created two territories: One, embracing all that part of the ceded country lying south of Mississippi territory, east of the Mississippi river, and south of the 33d parallel of latitude west of that river, to be called the territory of Orleans; the other embracing all the residue of the ceded country, namely: that portion lying west of the river Mississippi and north of the 33d parallel, to be called the district of Louisiana. By the 14th section of this act all grants of land within the ceded territories, the title whereof was, at the date of the treaty of St. Ildefonso (October 1, 1800), in the Crown, government, or nation of Spain, were declared void, except bona fide grants made to actual settlers prior to December 20, 1803, not to exceed one mile square to each settler, and the usual proportion for his wife and family.

According to the views of our government this act extended to West Florida (so called) as well as to Louisiana, and as a part thereof. President Madison, in 1810, in the proclamation referred to, which is found in 11 Stat. at L. 761, commences with these words:

"Whereas the territory south of the Mississippi territory and eastward of the river Mississippi, and extending to the river Perdido, of which possession was not delivered to the United States in pursuance of the treaty con-

cluded at Paris on the 30th of April, 1803, has at all times, as is well known, been considered and claimed by them as being within the colony of Louisiana conveyed by the said treaty, in the same extent that it had in the hands of Spain, and that it had when France originally possessed it," etc.

637*] *He then states that the United States had forborne to take possession, not from any distrust of their title, but from motives of conciliation towards Spain, and shows why it was inexpedient to delay taking possession any longer, and concludes by directing Governor Claiborne, "governor of the Orleans territory, of which the said territory is to be taken as part, to take possession of the same, and to exercise over it the authorities and functions legally appertaining to his office."

By the act of April 25, 1812, after possession of West Florida had been assumed by our government, commissioners were appointed to investigate all the titles and claims to lands in that territory, and the claim now before us was laid before the proper commissioner and rejected on the ground that the territory was a part of Louisiana ceded to the United States in 1803, and that the authority of Spain over the same had ceased by the treaty of St. Ildefonso of October 1, 1800. Other claims belonging to the same category met with a like fate. A list of these claims, rejected by the commissioner for the district between the Mississippi and Pearl rivers, may be found in the American State Papers, title *Public Lands*, vol. VI. p. 501. The commissioner reports that in his opinion these claims ought not to be confirmed: (1) Because the government of the United States claims an absolute property in the territory; (2) because the Spanish government evidently distrusted its own right to make these grants, as they were made in a manner entirely different from the usages and customs always before observed in granting lands. It was not the custom of Spain to make sale and gain of her public lands, but to grant them to actual settlers. Nevertheless, the commissioner suggests whether the United States government, by permitting Spain to remain in possession of the country, and thus to impose upon persons purchasing lands in good faith, was not morally bound by considerations of equity and policy to make these purchasers some compensation.

638*] *These events happened prior to the treaty between Spain and the United States, entered into February 22, 1819, by which his Catholic Majesty ceded to the latter all the territories belonging to him, situated to the eastward of the Mississippi known by the name of East and West Florida.

By the 8th article of that treaty it is stipulated as follows:

"All the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities in the said territories ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty."

When this treaty came before the courts it was held that it furnished no aid to the disputed claims, since it only guaranteed grants made by the King of Spain in the territory ceded by that treaty; and the territory ceded only embraced such territory as belonged to the King of Spain; and as the United States held that the disputed territory did not belong to him, no grants made by him therein were confirmed by the treaty.

In 1829 the case of *Foster* v. *Neilson* came before this court on a claim for 40,000 arpents of land under one of the grants of Morales, precisely like the claim now before the court. The case is reported in 2 Pet. 253, and contains, in the arguments of counsel and the opinion of the court, a complete history of the controversy. Chief Justice Marshall ably reviews the argument of our government in favor of its claim under the treaties of St. Ildefonso and of April 30, 1803. He admits that the former is susceptible of a twofold construction; but he concludes, and that was the judgment of the court, that the judicial department is bound by the construction adopted by its own government. He says (page 309):

"If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interest against *foreign powers, have unequivocally as- [*639 serted its rights of dominion over a country of which it is in possession, and which it claims under a treaty: if the legislature has acted on the construction thus asserted, it is not in its own courts that the construction is to be denied. A question like this respecting the boundaries of nations is, as has been truly said, more a political than a legal question, and in its discussion the courts of every country must respect the pronounced will of the legislature."

The Chief Justice then turns to the question whether the treaty of 1819 had effected any change in the position of these grants before the courts. After quoting the 8th article of the treaty, which stipulates that "all the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities, in the said territories ceded, etc., should be ratified and confirmed," he inquires what territories were ceded; and observes that the cession did not embrace all territories situated to the eastward of the Mississippi, but all the territories which belonged to him (the King of Spain) thus situated. If, according to the position assumed by our government, the United States had already acquired a full title to West Florida, as far to the eastward as the Perdido river, then Spain had no title, and ceded nothing therein; and, by consequence, the stipulation in the 8th article of the treaty in favor of grants made by his Catholic Majesty "in the territories ceded" would not apply to the grant then before the court. Another difficulty in the case, as viewed by the court, was in the form of the stipulation. It was that all grants "shall be ratified and confirmed," not "are ratified and confirmed," a form of expression which the court held required the intermediate action of the legislature confirmatory of the grants before the courts could act upon them. For these reasons the court decided against the claim.

In the subsequent case of *Arredonda*, 6 Pet. 691, on an examination of the Spanish side of the treaty, the court held that the last point *made in *Foster* v. *Neilson* was untena- [*640

ble; and that the treaty was a present confirmation of the grants referred to in it (6 Pet. 737-743), and the same was decided in *United States* v. *Percheman*, 7 Pet. 51. But this did not affect the question at issue. The main objection still remained.

Meantime attempts were made in Congress to secure the recognition of these Spanish grants, but without success. In February, 1832, a resolution was passed by the House of Representatives calling on the Secretary of State for his opinion of the justice and validity of the claims arising upon those grants, and of the expediency of providing by law for their final adjustment. Mr. Edward Livingston, the then Secretary of State, who had been counsel for the claimants, made a lengthy and able report, stating the history of the grants and the questions arising thereon, and strongly urging their justice and the expediency of providing for their settlement. He contended that this was called for in the exercise of good faith towards the Spanish government, which, whatever views we might have entertained with regard to our own title, had always considered us pledged by the treaty of 1819 to recognize and validate her grants, and had expressed very decided complaints at our failure to do so. See this report, Amer. Archives, Public Lands, Vol. VI. p. 495.

Mr. Wickliffe, from the committee on public lands in the House, to whom the Secretary's communication was referred, made a report combating its conclusions with great energy:

"Are we to be told (says the report) at this time of day, that our title to the territory between the Mississippi and Perdido was not valid until the treaty of 1819, and that by that treaty we purchased that part of Louisiana by the name of 'all the territories which belong to him (his Catholic Majesty) situated to the eastward of the Mississippi, known by the name of East and West Florida?' What was East and West Florida in 1819? Did it include any **641***] part of the territory between the *Mississippi and the Perdido? Had not the United States, under and by virtue of the treaty between France and Spain, and between the United States and France, long prior to 1819, taken possession of the same by expelling the Spanish power therefrom? And who doubted, in 1819, her right both of jurisdiction and soil? And who, till now, ever supposed that the United States, by the treaty of 1819, imposed upon herself the obligation to confirm these grants made by Spain in violation of her solemn treaty stipulations? . . . The committee will not do the then administration so much injustice as to suppose they would negotiate a treaty with Spain for the avowed purpose of the acquisition of East and West Florida, in terms designed to conceal the important fact from the Congress of the United States that by said treaty they were bound to confirm claims to near 600,000 acres of land which had, by an act of solemn legislation, been declared null and void, and which originated in a violation of the treaty of St. Ildefonso and of that with France in 1803." Public Lands, vol. VI. pp. 507, 508.

This extract serves to show the temper with which these claims were viewed at that day by many of our leading statesmen. Of course, no advance was made in their favor on this occasion.

The next case in this court in which grants of land between the Mississippi and Perdido rivers came in question was *Garcia* v. *Lee*, in 1838. 12 Pet. 511, 521. The court in that case reaffirmed *Foster* v. *Neilson*, and held that as this territory did not belong to Spain after the treaty of St. Ildefonso, but belonged to the United States, according to its construction of the treaty, the Spanish grants therein made after 1800 were invalid, and were not confirmed by the 8th article of the treaty of 1819. Chief Justice Taney, delivering the opinion of the court, said:

"Indeed, when it is once admitted that the boundary line, according to the American construction of the treaty, is to be treated as the true one in the courts of the United States, it would seem to follow, as a necessary consequence, that the *grant now before the [***642** court, which was made by the Spanish authorities within the limits of the territory which then belonged to the United States, must be null and void, unless it has been confirmed by the United States by treaty or otherwise. It is obvious that one nation cannot grant away the territory of another."

Again;

"In the case before us the grant is invalid from an intrinsic defect in the title of Spain. It is true she still claimed the country, and refused to deliver it to the United States. But her conduct was, in this respect, a violation of the rights of the United States and of the obligation of treaties."

The court relied on the act of 1804 as giving notice of the determination of the United States to claim the territory and to ignore any grants made therein, except to actual settlers.

In this state of the decisions it was in vain for claimants under these grants to think of resorting longer to the courts of the United States. They, accordingly, again applied to Congress, and on June 17, 1844, procured a law by which the act of May 26, 1824, relating to land titles in Missouri, was extended to Louisiana and Arkansas and the district between the Mississippi and Perdido rivers, and the district courts were invested with jurisdiction over land claims originating with either French, Spanish, or British authorities, 5 Stat. at L. 676. This act authorized any person claiming land by virtue of any French or Spanish grant, concession, warrant or order of survey legally made or issued before the 10th of March, 1804, which was protected or secured by the treaty with France of April 30, 1803, and which might have been perfected into a complete title had not the sovereignty been changed, to present a petition to the district court stating the case, and have the claim adjudicated upon and settled according to the law of nations, the stipulations of any treaty, the acts of Congress, and the laws of the former government, *subject to an appeal to the [***643** Supreme Court of the United States. A number of suits for lands in the disputed district were soon after commenced in the district court, amongst others, one by the heirs of John Lynde for the tract in question in this case. But the claimants were still unsuccessful in this court.

The first case reported is that of *U. S.* v. *Reynes*, 9 How. 127. It was a case precisely like the one now before the court, and was re-

jected on the ground that the act of May 26, 1824, related to inchoate and incomplete titles, and was intended to give a means of completing them. The court re-affirmed *Foster* v. *Neilson*, and held that Spain could not make any valid grant in the disputed territory after the treaty of St. Ildefonso, and that the act of March 26, 1804, which had never been repealed, had pronounced all such grants void. The court adhered to the same views in *U. S.* v. *D'Auterive*, 10 How. 609; *U. S.* v. *Phila. and New Orleans*, 11 How. 609; *Montault* v. *U. S.* 12 How. 47; *U. S.* v. *Castant*, 12 How. 437; and a number of other cases in the same term, including the case now before the court. These cases were decided in 1852.

In view of this long course of decisions, all to the same purport, it must be considered as judicially settled in this court that Louisiana, as ceded to the United States in 1803, embraced the territory between the Mississippi and Perdido rivers, and that our government had a perfect legal right, whatever may have been its moral or honorary obligations, to ignore all grants made by the Spanish authorities after the treaty of St. Ildefonso went into effect. It must also be regarded as judicially settled that the treaty of 1819 confirmed grants of land made in the Floridas, east of the Perdido, but not those made to the west of that river, unless made to actual settlers or made before the treaty of St. Ildefonso went into effect. If the political departments of the government felt bound, from considerations of honor and **644***] good faith, or from motives of conciliation and policy, to give effect to any other grants, it was for them to do so.

This is what the claimants insist has been done.

But that the government of the United States has always continued to insist upon its own construction of the treaties, whenever they are referred to as matter of right or historic derivation of title, is manifest, among other things, from the act admitting Florida into the Union as a state, passed so late as March 3, 1845, by which the boundaries are fixed as follows:

"Said state of Florida shall embrace the territories of East and West Florida, which, by the Treaty of Amity, Settlement, and Limits between the United States and Spain, on the 22d day of February, 1819, were ceded to the United States." 5 Stat. at L. 743.

It is well known that Florida, as thus limited, extended only to the Perdido river, all the territory west of which had long previously been assigned to the states of Louisiana, Mississippi, and Alabama, which were respectively admitted into the Union, with their present boundaries, in 1812, 1817, and 1819.

It is evident, therefore, that the case of the claimants, if it can stand at all, must stand on the voluntary bounty of our government, exerted through its legislative department. And the question in this case is whether that bounty has, in fact, been exerted.

After the unsuccessful attempt made in the courts, as last referred to, under the Missouri act of 1824, the subject was again brought to the attention of Congress in May, 1858. Mr. Benjamin, who had been counsel for the claimants in the last cases, made a report to the Senate as chairman of the committee on private land claims, and submitted a bill for the relief of the claimants. This report contained a very full history of the treaties and litigation, giving a favorable view of the Spanish side of the question. Suffice it to say, in consequence of this report, Congress passed the act of June 22, 1860, entitled "An Act for the Final Adjustment of Private *Land Claims in the [***645** States of Florida, Louisiana, and Missouri, and for Other Purposes." This act provides that any person claiming lands in Florida, Louisiana, or Missouri, by virtue of grant, concession, or warrant of survey emanating from any foreign government prior to the cession of the territory to the United States, or during the period when any such government claimed sovereignty, or had the actual possession of the district or territory in which the lands claimed are situated, shall be authorized to make application for the confirmation of his title in the manner pointed out in the act, which appoints commissioners to hear and determine the applications, and to make report to the Commissioner of the Land Office. This officer, if he approves, is to report the same to Congress for its action and final decision thereon; and it is provided that if the lands, or any of them, have been sold by the government, or cannot be surveyed and located, the claimant, if his title be confirmed, shall have the right to enter a quantity equal in extent to the lands thus sold, upon any of the public lands of the United States, subject to private entry at $1.25 per acre.

By the 11th section it is provided that where the lands claimed have not been in possession of and cultivated by the claimant for the period of twenty years, and where the lands are claimed by complete grant or concession, etc., made prior to the cession of the territory to the United States, or where such title was created and perfected during the period while the foreign government from which it emanated claimed sovereignty over or had the actual possession of such territory, the claimant may, at his option, instead of submitting his claim to the commissioners, proceed, by petition, in the proper district court of the United States, subject to appeal to the Supreme Court, whose decision is to be final; and if the claim be sustained, a patent is thereupon to issue for so much of the lands claimed as remained unsold, and for so much as may have been sold the claimant is to have the right to enter an equal quantity upon the public lands, as before stated.

That the object of this act was to confirm the grants in question seems hardly to admit of a doubt. It is true that, *in prescribing [***646** the powers and duties of the special commissioners and the courts to whose decision the applications were to be referred, it is provided that they shall decide thereon according to equity and justice. See, §§ 2 and 11. But it can hardly be contended, especially in view of what has already been said that Congress meant by this language to authorize the said commissioners and courts to review the entire subject, and to decide what our government ought to have done with regard to these grants. It could not have been the intention to throw the whole discussion open, from the Treaty of St. Ildefonso down to the present time, and to confer upon the tribunals named in the act the power which properly belonged to the political depart-

ment of the government, and to impose upon them the duty of declaring what the policy of the government should be; or to leave it to their, perhaps, varying judgments what was the true intent and meaning of the original treaties. That could not have been the design of Congress. The act authorizes the claimants to present their claims for confirmation; and although it does not, in so many words, say that grants made by foreign governments, while in possession of the territory and claiming sovereignty over it, if complete, regular and fair, shall be sustained; yet that is the unavoidable inference to be derived from its language, and from the events and course of decisions out of which it arose. And although it does not expressly repeal that part of the act of March 26th, 1804, which declared void all grants of land within the ceded territories made after the date of the Treaty of St. Ildefonso; yet its provisions, in order to have any effect at all, must be regarded as irreconcilable with that clause of the act of 1804 and, consequently, as repealing it by implication.

We cannot avoid the conclusion, therefore, that the act of June 22d, 1860, was intended to validate all grants which were made by the Spanish government to bona fide grantees of lands in the disputed territory whilst the government remained in possession of the territory 647*] and claimed sovereignty *over it, subject, of course, to the express exceptions of the treaty of 1819, and the supplementary declaration of the King of Spain finally annexed thereto.

What range of discretion was intended to be conferred upon the special commissioners and the courts by authorizing them to decide according to the principles of equity and justice, is, perhaps, not entirely clear. The probable meaning is that these principle are to be applied to each particular case. If it should appear that a grant was obtained by fraud, or was affected by any other special vice, it would be the duty of the tribunals to reject it. Or, if it should appear that a claim was honest and meritorious, but defective in point of form or completeness, it might be the duty of the tribunals to sustain it as an equitable, if not a strictly legal title.

This view of the subject relieves us from the ungracious task of construing treaties, and reviewing the conduct and policy of the government. Congress, by the act of 1860, has declared its own policy, and has left us simply the office of judicially carrying out its enactments in individual cases as they come before us. Congress has laid down the general rule by placing the grants in question on a platform of equality with grants made by our own government, and has left to the tribunals the duty of examining the merits of particular applications.

An examination of the case before us shows that the grant to John Lynde was made in due form and after regular surveys; and that the consideration was duly paid to the Spanish government. Nothing has been developed in the case which goes to assail the bona fides of the transaction, unless it be the fact of obtaining the grant from Morales (who was Lynde's father-in-law) after the treaty of cession, and when it was known that the United States claimed the territory. But as this can be said of all these grants, and was one of the considerations that must have been patent to the mind of Congress when it enacted the law of 1860, we must presume that it was waived by that body, and has ceased to be a valid ground of objection.

The decree of the District Court must be affirmed.

*Mr. Justice **Clifford**, dissenting: [*648

I dissent from the decree, upon the ground that the act of Congress in question did not confirm any claim previously adjudged void by the Federal courts in pursuance of a prior act of Congress conferring jurisdiction to hear and determine the controversy.

UNITED STATES, *Plff. in Err.*,
v.
THREE HUNDRED AND FIFTY-SIX CADDIES OF TOBACCO, etc., J. N. Henderson & Co., Claimants.

(See S. C. *"Henderson's Tobacco,"* 11 Wall. 652-659.)

Repeal of statute by subsequent statute—repeal by implication—proviso in internal revenue act, effect of.

The proviso to the 25th section of the internal revenue act of Mar. 2, 1867, was not repealed by the act of July 20, 1868.

A statute is impliedly repealed by a subsequent statute only so far as the provisions of the subsequent statute are repugnant to it, or so far as the latter statute, making new provisions, is plainly intended as a substitute for it.

Where the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed.

The proviso of such 25th section of the act of 1867, which limits to twenty days the time for commencing proceedings to enforce forfeitures, has no application to any other forfeitures than such as are provided for in that section.

It does not apply to proceedings to enforce forfeitures for fraudulent use of stamps and fraudulent entries and reports.

[No. 129.]

Submitted Apr. 4, 1871. Decided May 1, 1871.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

The information in this case was filed in the court below, for the forfeiture of certain caddies of tobacco. The information having been dismissed by that court, the United States sued out this writ of error.

The case is fully stated by the court.

Messrs. **Amos T. Akerman,** *Atty. Gen.*, **C. H. Hill,** *Asst. Atty. Gen.* for plaintiff in error:

By the act of July 20, 1868, §§ 36, 42, 15 Stat. at L. 140-142, new provisions were enacted in respect to the illegal manufacture of

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NOTE.—*Repeal of statute by implication.*

An important public statute of long standing will not be held to be repealed, except by express words or by strong and necessary implication. Wilson v. Spencer, 1 Rand. 76, 10 Am. Dec. 491.

The repeal by implication of a statute is not favored by the courts. Hogan v. Guigon, 29 Gratt. 709; People v. Quigg, 59 N. Y. 83; People v. Palmer, 52 N. Y. 82; W. W. Co. v. Burkhart, 41 Ind. 364; State v. Severance, 55 Mo. 378; Morgan v. Leland, 1 Code Rep. 124; Mayor, etc., of N. Y. v. Walker, 4 E. D. Smith, 267; Williams v. Potter, 2 Barb. 320; Van Rensselear v. Snyder, 9 Barb. 308; Vallance v. Bausch, 28 Barb. 643, 17 How. Pr. 253; 8 Abb. Pr. 377; People v. Deming, 1 Hilt.

distilled spirits and the punishment thereof, covering entirely the ground of the preceding statutes, and no limitation is contained therein with regard to the time in which the proceeding of forfeiture shall be commenced. And in §§ 69, 70 of the same act, 15 Stat. at L. 156, under which this information was filed, there are new provisions, covering all the provisions of previous statutes in relation to the subject-matter for the punishment of persons manufacturing tobacco or snuff in violation of the internal revenue laws, and which make no reference whatever to the proceedings for the punishment of the illegal manufacture of distilled spirits.

It is clear, therefore, that these latest statutes were intended to prescribe the only rule which should govern the process of enforcing forfeitures for the offenses included within their provisions, and that the former statute is, therefore, repealed.

Daviess v. *Fairbairn*, 3 How. 636, 644; *Bartlet* v. *King*, 12 Mass. 536; *Com.* v. *Kelliher*, 12 Allen, 480; Sedgw. Stat. & Const. L. 126, 429.

Other statutes on this subject are the acts of July 1, 1862, § 54, 12 Stat. at L. 452; July 13, 1866, § 9, 14 Stat. at L. 124; Mar. 3, 1868, § 5, 15 Stat. at L. 58.

No provision was made for affixing revenue stamps to whisky or tobacco, until the act of July 20, 1868, § 67, 15 Stat. at L. 155; but the revenue, before and at that time, was collected in an entirely different way. The offenses for which this information was filed were first created by that statute (see §§ 69, 70, p. 156), and the information was founded upon that statute alone.

By § 105 of the act of 1868, 15 Stat. at L. 166, all acts and parts of acts inconsistent with it are repealed; but it is enacted "that the provisions of said acts shall be in force for levying and collecting all taxes properly assessed, or liable to be assessed, or accruing under the provisions of former acts, the right to which has already accrued, or which may hereafter accrue under said acts, and for maintaining, continuing and enforcing liens, fines, penalties and forfeitures, incurred under and by virtue thereof. And this act shall not be construed to affect any act done, right accrued, or penalty incurred under former acts, but every such right is hereby saved; and all suits and prosecutions for acts already done in violation of any former act or acts of Congress relating to the subjects, embraced in this act, may be commenced or proceeded with in like manner as if this act had not been passed."

This section indicates the broad extent to which the former revenue acts had been revised by the act of 1868, so that Congress considered that penalties under them would be lost without such a saving clause.

The United States, therefore, contend that the act of 1868, being an entire revision of the act of 1866, and not merely amendatory thereof, the limitation relied upon by the defendants in error no longer exists.

Messrs. D. P. Dyer and **Geo. W. McCrary**, for defendants in error:

The statute of 1868 does not cover the entire ground of the preceding statutes.

There is nothing in the act of 1868 regulating or defining in any way the manner of proceeding in cases of forfeiture. The provisions of the previous acts, including the limitation clause, must be regarded as still in force, or we must come to the conclusion that there is no statute now in force for this purpose.

If the act of 1868 is to be construed as repealing the provisions of prior acts regulating the practice in seizure cases, we are left with no guide, and each court may adopt such form of proceedings, as may be deemed most appropriate. If, however, the act of 1868 is held only to repeal such prior enactments as are in necessary conflict with it, we shall find a plain provision in force, declaring that the proceedings shall be "In the nature of proceedings *in rem* in the circuit or district court of the United States for the district where such seizure is made, or in any other court of competent jurisdiction." 13 Stat. at L. 14.

Section 3 of the act of 1867, 14 Stat. at L. 471, provides certain rules under which district attorneys are to report certain things to the commission of internal revenue. Section 4 of same act places under the control of the commissioner real estate acquired by the United States under the revenue laws. Section 7 authorizes the commissioner to appoint detectives, etc., while § 8 provides a penalty for failure to pay tax when due. These are all important provisions of the act of 1867.

If the proviso imposing the limitation in question is repealed, why not these sections also? It is not reasonable to suppose that it was the

275, 13 How. Pr. 445; People v. Guild, 4 Den. 552.

Where there is plain and unavoidable repugnance between the new provision and a former statute, a repeal by implication will take place. People v. Burt, 43 Cal. 561; Forqueron v. Donally, 7 W. Va. 114; Pacific R. Co. v. Cass Co. 53 Mo. 17; Grant Co. v. Sels, 5 Oregon, 243; Hurst v. Hawn, 5 Oregon, 275; Covington v. City of East St. Louis, 78 Ill. 518; and authorities last above cited.

Such construction should be given to two statutes as to give effect to both, if possible. Iverson v. State, 52 Ala. 170; Fowler v. Perkins, 77 Ill. 271; McCartee v. Orphan Asylum Soc. 9 Cow. 437, 18 Am. Dec. 516; Walton v. Walton, Deady, 605.

Acts relating to the same subject-matter and passed on the same day, should be so construed as to give them both effect. Lorimer v. Lewis, 1 Morris, 253, 39 Am. Dec. 461.

Where a statute is passed upon a subject already covered by an existing law and the new statute revises the entire matter, making changes in the former law, and evidently intended as substitute for it, the former statute is repealed by the latter by implication, though it contains no repealing clause. Murdock v. City of Memphis, 20 Wall. 590, 22 L. ed. 429; U. S. v. Tynen, *infra*; Henderson's Tobacco, *supra*; Com. v. Cooley, 10 Pick. 36; Bartlett v. King, 12 Mass. 536, 7 Am. Dec. 99; Norris v. Crocker, 10 How. 429, 14 L. ed. 210; Longlois v. Longlois, 48 Ind. 60; Hayes v. State, 55 Ind. 99; Dowdell v. State, 58 Ind. 333; State v. Rogers, 10 Nev. 319; U. S. v. Barr, 4 Sawy. 256.

A different provision by a subsequent statute is an implied repeal of the former. Columbian Mfg. Co. v. Vanderpoel, 4 Cow. 556; Dash v. Van Kleck, 7 Johns. 477.

The repeal of existing laws is not presumed. Subsequent statutes do not abrogate former ones by containing different provisions on the same subject. They must be contrary to produce such an effect. Saul v. His Creditors, 5 Mart. N. S. 569, 16 Am. Dec. 212.

A later statute which does not, in its terms, repeal an earlier one on same subject, is not to be taken as a repeal by implication, unless it is plainly repugnant to the former or unless it fully embraces the whole subject-matter. Dugan v. Gittings, 3 Gill, 138, 43 Am. Dec. 306; Billingley v. State, 14 Md. 376.

See also note to 38 C. C. A. 136.

intention of Congress to repeal the limitation in question, and thus to leave the officer at liberty to hold property seized, for an indefinite time, without commencing proceedings of forfeiture.

The cases cited in the brief of counsel for the government are not only consistent with the views we have endeavored to set forth, but they give additional strength to our position.

We also rely with great confidence upon Sedgwick on Statute and Constitutional Law, cited by counsel for government, pages 126–136.

Among other principles applicable to this case, which are well stated and elaborated in this work, are the following:

"A statute is to be held repealed by a subsequent enactment, only when the two statutes are so flatly repugnant that both cannot be executed, and we are obliged to choose between them." P. 126.

Mr. Justice **Strong** delivered the opinion of the court:

This was an information to enforce a forfeiture, under the revenue laws, of certain caddies of tobacco, which had been seized on the 17th of August, 1869, and which were claimed by J. N. Henderson & Co. The information contains three counts. The first is, in substance, that since the first day of January, 1868, to wit, from January 1, 1868, to August 17, 1869, the claimants, being the owners of a tobacco factory with its furniture, manufactured, prepared, and placed in caddies, manufactured leaf tobacco, and sold and removed the same, without placing on the caddies the proper revenue stamps, and without having paid the special tax required by law; but that they did place on the caddies of tobacco so manufactured and so sold and removed, half stamps, that is to say, revenue stamps cut in two parts, each part of said stamp being used on separate caddies, and each separate half stamp so covered by a whole stamp as to make the half stamp so used resemble and be taken for a whole stamp. The second count is for substantially the same offense. The third is for making false and fraudulent entries of the amount of tobacco sold by them annually, and false and fraudulent reports of their annual sales, in violation of their duty under the law.

The claimants pleaded to this information, that it was not filed until more than twenty days after the caddies had been seized by the collector for the alleged violations of law. To the plea there was a demurrer, which was over-**654***] ruled by the *court, and the information was dismissed. The record is, therefore, supposed to present the question whether proceedings, to enforce a forfeiture for such violations of the revenue laws as are charged in the information, must be commenced within twenty days from the time of the collector's seizure. The claimants, in support of an affirmative answer to this question, rely upon the proviso to the 25th section of the act of Congress of March 2, 1867. 14 Stat. at L. 471.

That section enacted that the owner, agent, or superintendent of any still, boiler, or other vessel used in the distillation of spirits, who should neglect or refuse to make true and exact entry and report of the same, or to do or cause to be done any of the things by law required to be done concerning distilled spirits, shall, in addition to other fines and penalties by law provided, forfeit for every such neglect or refusal, all the spirits made by or for him, and all the vessels used in making the same, and all materials fit for use in distillation found on the premises. It also authorized the collector to seize such spirits, vessels, and materials, and hold them until a decision thereon according to law. Then followed this proviso: "Provided that proceedings to enforce said forfeiture shall be commenced by such collector within twenty days after the seizure thereof; and the proceedings to enforce said forfeiture of property shall be in the nature of a proceeding *in rem* in the circuit or district court of the United States for the district where such seizure is made, or in any other court of competent jurisdiction." The 9th section of the same act enacted that "all proceedings relating to forfeiture and sale of distilled spirits shall apply to tobacco, snuff, and cigars."

In answer to this, it is contended, on behalf of the United *States, that the proviso [***655** relied upon by the claimants was repealed by the act of July 20, 1868.

If this is so, it was a repeal by implication only. That act contains no words expressly repealing either the act of 1867 or that of 1864, to which the one of 1867 was a supplement. On the contrary, the repealing clause, which it does contain, indicates plainly the intention of Congress to leave in force some portions of former acts relative to the same subject-matter. The 125th section enacts "that all acts and parts of acts inconsistent with the provisions of this act are hereby repealed." This is an express limitation of the extent to which it was intended former acts should cease to be operative, namely, only so far as they are inconsistent with the new act. It is quite inadmissible to engraft upon this express declaration of legislative intent an implication of more *extensive repeal. Statutes are, indeed, [***657** sometimes held to be repealed by subsequent enactments, though the latter contains no repealing clauses. This is always the rule when the provisions of the latter acts are repugnant to those of the former so far as they are repugnant. The enactment of provisions inconsistent with those previously existing, manifests a clear intent to abolish the old law. In *The United States* v. *Tynen*, *ante*. 153, it was said by Mr. Justice Field that "when there are two acts upon the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet, if the latter acts covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." For this several authorities were cited, some of which have been cited on the present argument. This is, undoubtedly, a sound exposition of the law. But it must be observed that the doctrine asserts no more than that the former statute is impliedly repealed, so far as the provisions of the subsequent statute are re-

pugnant to it, or so far as the latter statute, making new provisions is plainly intended as a substitute for it. Where the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed. Dwar. Stat. 530 *et seq.; Goldson* v. *Buck*, 15 East, 377.

If, now, in the light of these principles, the act of July 20, 1868, be examined and compared with the acts of 1864 and 1867 (the latter being an amendment of the former) there will be found in it nothing inconsistent with the authority given by the amended act of 1867 to the collector to seize and hold property subject to forfeiture, or with the proviso that directs the mode of procedure to enforce forfeitures, designates the courts in which proceedings may be instituted, and limits the time within which they may be commenced. **658***] *It cannot be said that all the powers and limitations mentioned in the proviso may not subsist in entire consistency with everything prescribed in the act of 1868. Undoubtedly, that act was intended to be a revision of former acts relative to spirits and tobacco. And in some particulars it made changes. It introduced new provisions respecting the mode of paying the tax on spirits and tobacco, and it prescribed some new penalties for new offenses, but it made no provision respecting the mode of enforcing penalties and forfeitures. It cannot, therefore, have been intended as a complete substitute for all former acts relative to this subject. There are many provisions of the acts of 1864 and 1867 which it left untouched and unsupplied. Indeed, the first fifty-two sections of the act of 1864, amended as they were by the acts of 1866 and 1867, without which the revenue laws cannot be executed, are not attempted to be supplied. There is, therefore, no reason for holding that any other provisions of the acts of 1864 and 1867 have been repealed than such as are plainly inconsistent with the provisions of the act of 1868. There is nothing in this latter act repugnant to the proviso upon which the claimants rely.

But the proviso of the 25th section of the act of 1867, which limits to twenty days the time for commencing proceedings to enforce forfeitures, has no application to any other forfeitures than such as are provided for in that section. Those are, as we have seen, forfeitures for neglect or refusal to make certain true and exact entries and reports, and forfeitures for neglect or refusal to do any of the things by law required to be done concerning distilled spirits (or tobacco). They are forfeitures for acts of omission or neglect. To proceedings to enforce them, the limitation was applied. It was made applicable to no other. The proviso speaks of proceedings to enforce said forfeiture, and plainly contemplates no seizure or forfeiture for any different offense than those previously mentioned in the section. This information is founded upon no such neglect or refusal. The forfeiture claimed is for affirmative acts of the claimants; for active offenses first made grounds of forfeiture **659***] by the *act of 1868. Each count charges positive fraud—the first and second, fraudulent use of stamps, unknown under the act of 1867; and the third count charges fraudulent entries and fraudulent reports. It may well be that a distinction was intended to be made. Passive violations of law, mere neglect, may have been regarded as less culpable than active transgression. All the causes of forfeiture enumerated in the 69th section of the act of 1868, upon which all the counts in the information are based are of the latter character. We cannot hold, therefore, that the limitation of the proviso to the 25th section of the act of 1867, which the claimants have pleaded, is any protection to them. It follows that the judgment of the circuit court dismissing the information must be reversed.

The judgment of the Circuit Court is reversed, and the cause is remanded for further proceedings.

JOHN RICHEY, *Plff.*,
v.
JOHN S. WILLIAMS, Collector of Internal Revenue.

Where this court is equally divided, the case remanded to the court below.

Where this court is equally divided in opinion upon a certificate of division in opinion of the judges of the circuit court, the case remanded to the circuit court without answer.

[No. 185.]

Submitted Oct. 31, 1871. Decided Nov. 22, 1871.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the District of Indiana.

Suit was brought in the court below by the plaintiff to recover certain internal revenue tax paid under protest. The facts were that, from Jan. 1 to Jan. 8, 1863, the plaintiff owned 84 shares of stock in the Lafayette & Indianapolis R. Co., of $50 each, the whole amount of the stock being $245,000; that, on Jan. 8, 1863, that company was consolidated with the Indianapolis & Cincinnati R. Co., under the name of the Indianapolis, Cincinnati, & Lafayette R. Co.; that in consideration of surrendering his said 84 shares of stock, the plaintiff received 21 bonds of the new company, each of $1,000. The defendant alleges that the 84 shares of stock nominally worth $4,200, were actually worth, Jan. 1, 1863, only the sum of $3,140, and that the 21 bonds nominally worth $21,000 were actually worth when received by plaintiff in that same year, the sum of $15,750. The tax was assessed on the plaintiff for the difference in value between the stock surrendered and the bonds received as $12,610, "gains, profits, and income for the year."

Upon the hearing in the court below it occurred as a question to be decided whether, if the plaintiff's stock in the Lafayette & Indianapolis R. Company described in the declaration and plea, was, Jan. 1, 1867, worth only $37.50 per share, making his whole 84 shares thereof worth only $3,140, as alleged in said plea; and if the bonds mentioned in said plea, and therein alleged to have been received in said year for said stocks were, when the same were received, and within that year, worth $15,750, as alleged in the plea, the difference between said value of said stock, and said value of said bonds, amounting to $12,610, ought

to have been regarded as gain, profit or income of the plaintiff within the meaning of the internal revenue law in force, when the tax mentioned in the declaration was assessed so as to render said sum of $12,610, or any part thereof, taxable as income against plaintiff.

On which question the opinions of the judges were opposed.

Whereupon the question was certified to this court.

Messrs. J. E. McDonald and *A. L. Roache*, for plaintiff:

The section of the internal revenue law cited to support this assessment reads as follows: "There shall be levied, collected, and paid annually upon the gains, profits, and income of every person, whether derived from any kind of property, interest, dividend, or salaries, or from any profession, trade, employment, or vocation, or from any other source whatever, a tax of five per centum on the amount so derived over $1,000. . . . That this tax be assessed, collected, and paid upon the gains, profits, and income for the year ending the thirty-first day of December next preceding the time for levying, collecting, and paying said tax."

The language of the law, we admit, is quite broad and sweeping; sufficiently so, it would seem, without extending it by a latitudinous construction. But, broad as it is, it is not without some limit. It is an income, gain or profit that has been derived, that is realized and ascertained, not speculative or contingent. The terms employed exclude all other construction, and to go beyond them would be to enter the limitless field of speculation and conjecture. No assumed nor speculative change of property or values can be made the basis of any assessment for income tax; it requires something more than a mere change in the market value of property within the year, or an assumed difference in the value of property that has been received in exchange for other property, or change in the form of property to realize or derive such gains, profits, or income as will authorize the assessment of the tax.

Mr. **B. H. Bristow**, *Solicitor General*, for defendant:

The language employed by Congress is very comprehensive. The words "gains, profits, and income" were obviously used to give the act a more extended operation than it would have had, had either been omitted. They do not mean the same thing. Thus, Webster defines gain to be: (1) That which is gained, obtained, or acquired as a profit or advantage; profit; advantage; benefit; winning; opposed to loss. (2) The obtaining or amassing of profit or valuable possession; acquisition; accumulation. He defines profit to be: (1) Acquisition beyond expenditure; excess of value received for keeping or selling over cost; hence, in commerce, pecuniary gain in any transaction or occupation; emolument. He defines income to be: (3) That gain which proceeds from labor, business, or property of any kind; the produce of a farm; the rent of houses; the proceeds of professional business; the profits of commerce or of occupation; the interest of money, or stock in funds, etc.; revenue; receipts; especially the annual receipts of a private person, or a corporation, from property; as, a large income, a limited income. To hold that each is the exact equivalent of the others, violates a recognized rule of construction, namely, to construe the section, so that if possible, no sentence, clause, or word, shall be treated as superfluous, void, or insignificant. Sedgw. Stat. and Const. Law, 238.

The terms of the act are sufficiently broad to include, as a taxable gain, the difference between the value of plaintiff's stock and the value of the bonds received by him therefor.

That it was designated to be a searching law, reaching all the business transactions and property relations of the citizen, and fastening upon all his gains, profits, and income, however made and in whatever form obtained, is very manifest.

As to personal property the gain must be acquired within the year for which the tax is imposed. Whether the gain may arise in any other way than upon the sale or what is equivalent to it, need not be considered here, inasmuch as the pleadings show that in this case there was, in effect, a sale. The question is whether a gain made during the year is taxable where the property sold or transferred was owned by the party at the beginning of the year. If a person on the first day of the year owns property worth $5,000, and he sells it during the year for $10,000, he has obviously made a gain of $5,000. There is the substantial fact that he has gained $5,000; and this being ascertained, the act closes the door to any speculation as to how this result was accomplished by declaring, that a citizen shall be taxed upon a gain from any source whatever.

This transaction certainly possesses as much the character of a sale as if the stock had been transferred to an individual instead of to the company mentioned, and the plaintiff had received in payment the promissory notes of the individual instead of the bonds of the company. In either case the transfer is for a price, namely, the amount of money called for by the bonds or notes, though it is not payable until a future time, namely: when the bonds or notes mature, and the element of price distinguishes the transaction from a mere exchange, which it would be had the stock been transferred for stock or other property.

Here, then, by the sale of his bonds as aforesaid, a clear gain was obtained by the plaintiff during the year, which is capable of estimation, and which, as we think, is no more exempt from taxation under the law than would be the gains or profits arising from sales of any other description of personal property.

But the act of Congress does not limit the taxing power to the case of a sale. If it did, it would show that Congress had exhibited great care in closing the small cracks in the structure it had erected, and had left a door wide open. A person might exchange property for property, and during the year, in a series of exchanges, accumulate a large fortune in such property as would readily enable his gains to be estimated, and yet escape taxation. Government bonds are not money. Can a man exchange these bonds for land, and land for bonds, until he has made a large fortune, and yet escape taxation? If not, how can he in similar operations with other kinds of property?

The plaintiff concedes a substantial gain of $12,600; and whether this gain was derived from a sale of his stocks, or from an exchange of his stocks, or from "any source whatever," we submit that it is within the purview of the internal revenue law, in force when the tax mentioned was assessed thereon.

Mr. Chief Justice **Chase** announced the decision of the court:

On the question certified in this case the court is equally divided in opinion.

The case will, therefore, be remanded to the Circuit Court for the District of Indiana, without answer.

ANATOLE COUSIN, *Plff. in Err.*,
v.
LOUIS F. GENERES *et al.*

The decision in Bethell v. Demaret, 10 Wall. 537, 19 L. ed. 1007, governs this case.

[No. 286.]

Argued Nov. 17, 1871. Decided Nov. 20, 1871.

IN ERROR to the Supreme Court of the State of Louisiana.

On motion to dismiss.

The petition was filed in the second district court of New Orleans, by the plaintiff in error, claiming to recover for money received by defendants in error. Judgment having been given for the defendants, the plaintiff took an appeal to the supreme court of the state, by which the said judgment was affirmed. Whereupon the plaintiff sued out this writ of error.

Mr. **Louis Janin,** for defendants in error:

The supreme court of Louisiana states its views of the facts and of the law of the case, in the following few words, to wit:

"The evidence in this case satisfies us that the plaintiff delivered to the defendant's firm a sum of Confederate money to be invested, and the latter invested it, with the exception of a small portion, rendered in court, in bonds of the city of New Orleans, payable in the same currency."

"Under such circumstances, we are of opinion that the court properly rejected the demand of the plaintiff."

This is the judgment of the state court, which this court is requested to revise.

This writ of error must, undoubtedly, be dismissed, under the authority of the recent case of *Bethell* v. *Demaret*, 10 Wall. 537, 19 L. ed. 1007.

That was another Louisiana case, which presented precisely the same state of facts and questions of law, as the case now before the court. A short extract from the opinion of this court suffices to show the absolute identity of the two cases. The court says: "The suit was brought by Bethell against the defendants, in a district court of the state, to enforce a mortgage given to secure the payment of two notes of $7,500 each, given by them for the loan of Confederate currency, on 2d April, 1862."

The court says, in its opinion in the present case, that "he, the plaintiff in error, is endeavoring to enforce a contract, the consideration of which is Confederate currency. The nullity of contracts founded upon that unlawful currency has frequently been determined."

This court then concludes its opinion thus: "As no Federal question appears in the record, the motion to dismiss must be granted."

Mr. **P. Phillips,** for plaintiff in error.

Mr. Chief Justice **Chase** delivered the opinion of the court:

I am instructed by the court to say that the decision in *Bethell* v. *Demaret*, 10 Wall. 537, 19 L. ed. 1007, decided at this term, is regarded as governing this case.

The writ of error must, therefore, be dismissed.

NAPOLEON B. VAN SLYKE, *Plff. in Err.*,
v.
WISCONSIN.
and
BENJAMIN BAGNALL, *Plff. in Err.*,
v.
WISCONSIN.

State may tax shares in national banks.

A state may tax the shares of stockholders in national banking associations, within its limits.

National Bank v. Com. 9 Wall. 468, 19 L. ed. 721, and Lionberger v. Rouse, 9 Wall. 353, 19 L. ed. 701, followed.

[Nos. 261 & 262.]

Argued Nov. 15, 1871. Decided Nov. 27, 1871.

IN ERROR to the Supreme Court of the State of Wisconsin.

Suit was brought by the plaintiff in error, in the court below, to recover for certain taxes alleged to have been wrongfully assessed upon certain shares of stock in a bank, whose capital was invested in stocks, bonds and securities of the United States. Judgment having been given for the defendant, the plaintiff sued out this writ of error.

Mr. **S. U. Pinney** for plaintiff in error.

Messrs. S. S. Barlow and **P. L. Spooner,** for defendant in error.

Mr. Chief Justice **Chase** delivered the opinion of the court:

The judgment of the supreme court of Wisconsin, which asserts the right of that state to tax the shares of stockholders in national banking associations within its limits is affirmed. The case before us is governed by the cases of *Nat. Bk.* v. *Com.* 9 Wall. 468, 19 L. ed. 721, in which this court affirmed the judgment of the court of appeals of Kentucky, and *Lionberger* v. *Rouse*, 9 Wall. 353, 19 L. ed. 701, in which we affirmed the judgment of the supreme court of Missouri, on questions substantially the same as those in this case. We think it unnecessary to restate the reasons by which those decisions were sustained.

NOTE.—*State taxation of national banks*—see note, 45 L. R. A. 737.

UNITED STATES, *Plff.*,
v.
EDWARD MYNDERSE and Charles Mynderse, Survivor, etc.

Distiller's bond, with general condition, valid—action on, for what maintainable—United States v. *Hodson, 10 Wall. 395, 19 L. ed. 937, followed.*

Distiller's bond, conditioned to conform to all the provisions of the internal revenue act, is valid.

The United States may maintain an action against the principal and sureties in such a bond, for violations of the requirements of the 39th and 45th sections of the internal revenue law of July 1, 1862.

U. S. v. Hodson, 10 Wall. 395, 19 L. ed. 937, followed.

[No. 237.]

Submitted Nov. 14, 1871. Decided Nov. 27, 1871.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Northern District of New York.

This was an action of debt, brought in the court below, by the United States against the defendants and one Jane Goodwin, now deceased, as principal and sureties on a distiller's bond, given under the 39th section of the Internal Revenue Law of July 1, 1862, 12 Stat. at L. 416, the condition whereof was "that if the said Jane Goodwin should truly and faithfully conform to all the provisions of an act entitled 'An Act to Provide Internal Revenue to Support the Government and to Pay Interest on the Public Debt,' approved July 1, 1862, and of such other act or acts as were then, or might thereafter be, in that behalf enacted, then the said above obligation to be void and of no effect, otherwise it should abide and remain in full force and effect."

The 39th section of the act of 1862, cited above, describes the condition of the bond thereby required, and the 45th section of the same act enjoins certain duties upon distillers, which are prescribed in language nearly corresponding with that employed in the 39th section.

The breaches specially assigned in the declaration include and were designed to include violations of the requirements of both sections.

The case afterwards coming on to be heard, the question occurred "whether or no the condition of the said bond so far departs from the requirements of the act of Congress in that behalf that the said bond is void and, therefore, whether the said declaration and the matters therein stated are sufficient in law to entitle the plaintiffs to maintain their said action herein against the said defendants."

The opinions of the judges being opposed on this question, it was, on motion of the attorney for the United States, ordered to be certified to this court for final decision.

Mr. **B. H. Bristow**, *Solicitor Gen.*, and *C. H. Hill, Asst. Atty. Gen.*, for plaintiff:

This case appears to be governed entirely by the recent decision in *United States* v. *Hodson*, 10 Wall. 395, 19 L. ed. 937, and it is accordingly submitted that, under the authority of that decision, the first branch of the question presented should be answered in the negative, and the last branch of it in the affirmative.

(No counsel appeared for defendants.)

Mr. Chief Justice **Chase** delivered the opinion of the court:

This case comes before us on a certificate of division of opinion from the circuit court of the United States for the northern district of New York.

The answers to the questions certified must be given according to the opinion of this court, delivered at a former day in this term, in the case of *The United States* v. *Hodson*, 10 Wall. 395, 19 L. ed. 937. That opinion, to which it is needless to refer further, requires that the *first question certified to us be answered in the negative and the second in the affirmative, and they are so answered.*

END OF VOLUME 78.

NOTE.

The Extra Annotation here following is arranged in the order of the cases in the original reporter's volume which precede it. At the upper outside corner of the page is given the volume and pages of the cases to which the Annotation refers. After the official reporter's volume and page in the heading of each case is given book and page of the present edition, the abbreviation L being used for Lawyers' Edition, or Law. Ed. for brevity, as it is throughout in the duplicate citations of cases from the Supreme Court.

ABBREVIATIONS.

F. C. appended to a citation from the regular reports of the U. S. Circuit and District Courts refers to the series of reprints called the Federal Cases and gives, as its publishers do and recommend, the number of the case in that series.

Fed. Cas. is used when the case is contained in the series of Federal Cases but is not reported in the regular series of U. S. Circuit and District Court Reports, and the citation of such cases is to the volume and page of Fed. Cas., not to the number of the case.

Fed. or **Fed. Rep.** refers to the well known series Federal Reporter, containing reports of the Circuit and District Court decisions since 1880.

L. R. A. will be readily recognized as the abbreviation for the Lawyers' Reports Annotated, and particular attention should be given to these citations, as in a large proportion of cases the citing case will be found accompanied by a note on its principal point absolutely exhaustive of the authorities thereon.

Am. Dec., Am. Rep. and **Am. St. Rep.** will be readily recognized as the abbreviations for the well known trinity of selected case reports, The American Decisions, American Reports and American State Reports.

Pennsylvania State Reports (**Pa. St.**) The New Jersey Law Reports (**N. J. L.**) and Equity Reports (**N. J. Eq.**) are distinguished by the number of the series, not by the name of the reporter, while the North and South Carolina Reports, Law and Equity, are cited by the name of the reporter where the reports are so titled and it has been the universal custom.

Duplicate citations are given to the National Reporter System where cases are therein contained, and to the Reporter System alone of cases not, at the date of the preparation of the annotation, officially reported. The usual abbreviations are used, as follows:

Atl. Atlantic Reporter,
Pac. Pacific Reporter,
N. E. Northeastern Reporter,
N. W. Northwestern Reporter,
So. Southern Reporter,
S. E. Southeastern Reporter,
S. W. Southwestern Reporter,
S. Ct. Supreme Court Reporter.

We think that in all other respects the abbreviations used are clear and familiar to all who are accustomed to the use of legal reports and text books.

EDITOR.

XI WALLACE.

11 Wall. 1-36, 20 L. 90, NEW ENGLAND, ETC., INS. CO. v. DUNHAM.

Courts.— Supreme Court has jurisdiction on certificate of division in Circuit Court as well where that court is composed of a supreme and circuit judge as where composed of supreme and district judges, pp. 21, 22.

Approved in Boutton v. Moore, 11 Biss. 508, 14 Fed. 928, suggesting this mode of procedure to test question concerning seaman's wages; Industrial, etc., Co. v. Electrical, etc., Co., 58 Fed. 737, 16 U. S. App. 196, district judge holding Circuit Court has all the authority of the latter; United States v. Rider, 163 U. S. 136, 41 L. 103, 16 S. Ct. 985, under act of March 3, 1891, remedy by certificate not available in criminal case.

Admiralty.— Jurisdiction of District Courts, as regards civil cases, was made by act of 1789 co-extensive with the constitutional gift of judicial power over admiralty and maritime subjects, p. 23.

Admiralty.— Jurisdiction in England was confined by common-law courts to the high seas, and was excluded from transactions arising on waters within body of a county and on land, p. 24.

Cited in Atkins v. Disintegrating Co., 18 Wall. 304, 21 L. 845, holding that in United States, attachment of goods in Court of Admiralty gave jurisdiction of the person.

Admiralty and maritime jurisdiction of United States is not limited by English statutes or decisions, but by a more enlarged view of its essential nature and objects, p. 24.

Approved and the jurisdiction upheld in the following citing cases: In re Louisville Underwriters, 134 U. S. 490, 496, 33 L. 993, 994, 10 S. Ct. 588, 589, libel in admiralty in personam against corporation not an inhabitant of the district but represented by an agent; Haslett v. The Enterprise, 11 Fed. Cas. 764, libel filed against barge for repairs made in her home port. Approved but jurisdiction denied in Cope v. Vallette Dry Dock, 10 Fed. 143, libel for salvage of dry dock. Approved in dissenting opinion in The Lottawanna, 21 Wall. 601, 22 L. 670, majority denying jurisdiction of libel in rem for supplies furnished ship in home port.

Admiralty.— Jurisdiction extends to the main sea and all navigable waters of United States or bordering on same, whether land-locked or open, salt or fresh, tide or no tide, p. 25.

Affirmed in Stewart v. Potomac, etc., Co., 5 Hughes, 362, 12 Fed. 304, holding State statute could not create a lien for a maritime cause of action; Malony v. Milwaukee, 1 Fed. 618, sustaining liable for damages caused by collision on navigable canal; Haslett v. The Enterprise, 11 Fed. Cas. 784, libel against barge engaged in transporting goods in New York harbor; Holmes v. Oregon, etc., R. R. Co., 6 Sawy. 266, 5 Fed. 78, libel for tort committed on boat on Wallamet river; In re Long Island, etc., Co., 5 Fed. 606, holding jurisdiction extended to settlement of claims arising from loss of ship navigating East river. Approved without applying rule in The John C. Sweeney, 55 Fed. 544, holding admiralty had not jurisdiction of libel for damage to bridge caused by a vessel. Cited generally in People v. Kirsch, 67 Mich. 542, 35 N. W. 158; note, 32 Am. Dec. 67; and in exhaustive note, 62 Am. Dec. 235, 238.

Distinguished in Cope v. Vallette Dry Dock, 10 Fed. 143, holding dry dock not subject of maritime jurisdiction for salvage.

Admiralty.—The rue criterion in determining admiralty jurisdiction over contracts is the nature and subject-matter of contract, having reference to maritime service or transactions; if it is maritime, jurisdiction is asserted, pp. 26, 29.

Cited and regarded as established doctrine of our courts in Ex parte McNiel, 13 Wall. 242, 20 L. 626, holding contract relating to pilotage within jurisdiction; Maury v. Culliford, 4 Woods, 123, 125, 10 Fed. 391, 392, maintaining jurisdiction of libel for breach of charter-party; Holmes v. Oregon, etc., R. R. Co., 6 Sawy. 266, 5 Fed. 78, taking jurisdiction of libel for marine tort committed on ferry-boat on Wallamet river; The Canada, 7 Sawy. 178, 7 Fed. 123, holding contract of stevedore a maritime one; The City of Carlisle, 14 Sawy. 189, 39 Fed. 814, 5 L. R. A. 59, holding articles of indenture introduced in suit for marine tort to be a maritime contract; The Selt, 3 Biss. 347, F. C. 12,649, holding libel in rem maintainable on contract for supplies and repairs; The Williams, 1 Brown, 215, 225, F. C. 17,710, reviewing authorities and holding contract for salvage of admiralty cognizance; Roberts v. The Windermere, 2 Fed. 725, 728, holding similarly as to contract for removing ballast from ship to make room for cargo; Endner v. Greco, 3 Fed. 413, sustaining libel in personam for repairs upon four scows; Haslett v. The Enterprise, 11 Fed. Cas. 784, holding libel for repairs to barge made in her home port within jurisdiction; Coast Wrecking Co. v. Phœnix Ins. Co., 7 Fed. 242, allowing action in admiralty to recover for services provided for in average bond. The following cases also sustain the jurisdiction: The Vidal Sala, 12 Fed. 211, libel in rem for use of dry dock; San Fernando v. Jackson, 12 Fed. 341, 342, libel in personam to recover share of general average; The Hattie M. Bain, 20 Fed. 390, Florey v. The Scotia, 35 Fed. 917, and The Main, 51 Fed. 956, 957, 2 U. S. App. 349, libels for stevedore's services; The Alberto, 24 Fed. 381, liable for damages for non-

execution of charter-party; The Maggie P., 32 Fed. 301, demand for services as watchman while steamer was lying at port; The Hiram R. Dixon, 33 Fed. 299, liable for price of nets to be used on fishing voyage; The Gilbert Knapp, 37 Fed. 210, 211, 212, 213, reviewing authorities and holding that stevedore's services are maritime although lien does not always exist; The Madrid, 40 Fed. 678, claims of materialmen for supplies furnished; National Board of Underwriters v. Melchers, 45 Fed. 646, libel in personam to recover general average expenses; The Roanoke, 50 Fed. 577, libel for salvage fixed absolutely by contract; Haller v. Fox, 51 Fed. 299, 300, action upon bond given by charterer to owner as security; The Richard Winslow, 71 Fed. 428, 34 U. S. App. 542, applying rule as to contract for marine transportation, but not as to contract for storage at end of voyage; Boutin v. Rudd, 82 Fed. 686, 687, 58 U. S. App. 528, 529, granting jurisdiction in action for breach of executory contract to assist a schooner in distress; Keyser v. Blue Star S. S. Co., 91 Fed. 271, 63 U. S. App. 410, libel for breach of stipulation in charter-party, though stipulation by itself was not of maritime character; The New York, 93 Fed. 500; libel for injury to cargo resulting from unseaworthiness of barge; Baird v. Daly, 57 N. Y. 246, 15 Am. Rep. 491, holding further that State court had concurrent jurisdiction of action for damages caused by tug on St. Lawrence river.

Cited generally with approval in Manchester v. Massachusetts, 139 U. S. 263, 35 L. 166, 11 S. Ct. 564, affirming S. C., 152 Mass. 246, 23 Am. St. Rep. 834, 25 N. E. 118, 9 L. R. A. 243, holding State court had jurisdiction of crime committed by fishing in Buzzard's bay; The General Cass, 1 Brown, 341, F. C. 5,307, granting maritime lien for towage, though in home port; dissenting opinion in Atlantic Works v. Tug Glide, 157 Mass. 532, 34 Am. St. Rep. 309, and n., 33 N. E. 165, majority holding that State court had jurisdiction to enforce lien for labor furnished in repairing tugboat in her home port. Cited in note, 62 Am. Dec. 238, 239, and generally in 23 Am. St. Rep. 839.

Approved but jurisdiction denied in The Paola R., 32 Fed. 175, holding contract for compressing cotton before shipment not maritime; Doolittle v. Knobeloch, 39 Fed. 40, dismissing libel in personam for services as agent in purchasing steamer and for advances; Diefenthal v. Hamburg, etc., Co., 46 Fed. 397, suit on contract to supply vessel with provisions for period of one year at a certain place; Pacific Coast S. S. Co. v. Ferguson, 76 Fed. 996, 44 U. S. App. 708, dismissing libel to recover a balance on a contract for transportation on both land and sea; In re Hydraulic Dredge, 80 Fed. 556, 53 U. S. App. 232, holding contract to furnish coal to dredge engaged in pumping mud and water, not maritime. Limited in The Esteban de Antunano, 31 Fed. 924, holding that stevedore has no maritime lien upon ship for services in loading cargo.

Admiralty.— A contract of marine insurance is a maritime contract, and Federal District Court has jurisdiction of libel in personam on such a policy to recover a loss, pp. 31, 35.

Approved and relied upon in The Dolphin, 1 Flipp. 581, 584, F. C. 3,978, holding that underwriter may maintain suit in admiralty for the premium; The Guiding Star, 9 Fed. 524, directing order of payment of insurance premium among other maritime liens; The Daisy Day, 40 Fed. 542, holding claim for insurance subordinate to claims for supplies, etc.; New Zealand Ins. Co. v. Earnmoor S. S. Co., 79 Fed. 371, 48 U. S. App. 250, holding question of allowing interest on amount due on marine insurance properly tested by admiralty rule. Cited in New England, etc., Ins. Co. v. Dunham, 8 Cliff. 335, F. C. 10,155, where same parties litigated over manner of adjustment of loss. Cited, arguendo, in The Williams, 1 Brown, 223, 225, F. C. 17,710, holding contract for salvage a maritime one, and that there was a remedy in rem for its violation; San Fernando v. Jackson, 12 Fed. 342, granting jurisdiction of libel in personam for share of general average; Milwaukee v. The Curtis, 37 Fed. 706, 3 L. R. A. 713, and The John C. Sweeney, 55 Fed. 544, holding admiralty had not jurisdiction of libel for damages caused to bridge by vessel; Wellman v. Morse, 76 Fed. 576, 33 U. S. App. 610, holding owners of schooner had lien on cargo for general average. Approved in In re Insurance Co., 22 Fed. 115, holding contract maritime, but that no lien for premiums was created in favor of insurer; Albany City Ins. Co. v. Whitney, 70 Pa. St. 252, holding State court had concurrent jurisdiction of action in personam on contract for salvage; dissenting opinion in The Lottawanna, 21 Wall. 589, 22 L. 666, majority denying jurisdiction of libel in rem for supplies furnished ship in her home port.

11 Wall. 36-39, 20 L. 48, PARMELEE v. LAWRENCE.

Courts.— Conflict of State law with Federal Constitution, and a decision by State court in favor of its validity, must appear on face of record before it can be re-examined in Supreme Court; it must have been necessarily involved in the decision so that judgment could not have been given without deciding it, p. 38.

Cited and followed in Smith v. Adsit, 16 Wall. 189, 21 L. 311, where it did not appear that Federal question as to validity of sale of land-warrant was decided; Brown v. Atwell, 92 U. S. 329, 23 L. 513, where no question as to validity of title under patent laws was decided; Roby v. Colehour, 146 U. S. 160, 36 L. 924, 13 S. Ct. 50, holding that necessary effect of decree was to determine adversely rights claimed under bankruptcy proceedings. Rule extended in 91 Am. Dec. 197, and note.

Courts.— Supreme Court has no jurisdiction on error to State court, where a Federal question was raised in the latter only by

counsel in argument. A certificate cannot originate it; the office of certificate is to make more certain and specific, what is too general and indefinite in the record, p. 39.

Cited with approval in Brown v. Atwell, 92 U. S. 329, 23 L. 513, denying jurisdiction where Federal question was not presented by record; Felix v. Scharnweber, 125 U. S. 60, 31 L. 689, 8 S. Ct. 762, holding that certificate could not supply want of record to give jurisdiction; Roby v. Colehour, 146 U. S. 160, 36 L. 924, 13 S. Ct. 50, but holding that record was sufficient to give jurisdiction; Powell v. Supervisors, 150 U. S. 489, 37 L. 1136, 14 S. Ct. 168, where no definite issue as to validity of statute was deducible from record; Newport, etc., Co. v. Newport, 151 U. S. 537, 38 L. 262, 14 S. Ct. 432, where lower court certified that validity of State act was drawn in question but record failed to show it; Sayward v. Denny, 158 U. S. 184, 39 L. 94 15 S. Ct. 778, holding record entirely insufficient to give jurisdiction; Dibble v. Bellingham, etc., Co., 163 U. S. 70, 41 L. 74, 16 S. Ct. 941, holding that certificate was in no respect controlling in determining jurisdiction; Martin v. Cole, 38 Iowa, 155, holding that certificate would be useless on question first raised on argument on petition for rehearing. Cited generally in Snell v. Dwight, 121 Mass. 349, holding that ground of decision may be shown by certificate.

Distinguished in Gross v. United States, etc., Co., 108 U. S. 485, 27 L. 797, 2 S. Ct. 944, holding that opinion of Illinois Supreme Court could be examined to ascertain whether a Federal question was raised.

11 Wall. 39-65, 20 L. 67, VIRGINIA v. WEST VIRGINIA.

Courts.— Supreme Court has original jurisdiction of question of boundary between States of the Union, and it is not defeated because it is necessary to construe agreements between those States, or because decree will affect territorial limits of their political sovereignty, p. 55.

Cited in United States v. Texas, 143 U. S. 640, 648, 36 L. 291, 294, 12 S. Ct. 491, 494, where controversy was as to boundary between a State and a territory; Wisconsin v. Pelican Ins. Co., 127 U. S. 288, 32 L. 242, 8 S. Ct. 1373, holding court did not have original jurisdiction of action by State to recover penalty from corporation of another State.

States.— The proposition of Virginia, accepted by convention of West Virginia, that the latter be formed into a new State with one condition, that the accession of three counties depend upon a popular election, was a valid agreement, p. 59.

States.— Consent of Congress is necessary to bind an agreement between two States for a change of boundary, and act of Congress admitting West Virginia was an implied consent to compact between Virginia and West Virginia respecting boundaries, p. 60.

Cited in Martin v. Baltimore, etc., R. R. Co., 151 U. S. 680, 38 L. 314, 14 S. Ct. 586, as to fact of formation of new State of West Virginia; Woodland v. Newhall's Admr., 31 Fed. 439, holding Alexandria Constitution of Virginia valid.

States.— Action by governor of Virginia, who was invested by legislature with full discretion to determine time of taking vote and to decide result of election, was conclusive upon Virginia, pp. 62, 63.

Approved in dissenting opinion in Koehler v. Hill, 60 Iowa, 674, 15 N. W. 644, majority holding judgment of general assembly not conclusive of terms and regularity of passage of act of preceding assembly.

Distinguished in Koehler v. Hill, 60 Iowa, 625, 15 N. W. 620.

Miscellaneous.— Cited incidentally in Hedges v. Price, 2 W. Va. 236, 94 Am. Dec. 520.

11 Wall. 65-81, 20 L. 60, MORGAN v. THORNHILL.

Bankruptcy.— Circuit Courts have a general superintendence and jurisdiction of all cases and questions arising under bankruptcy act within district where bankruptcy proceedings are pending, and jurisdiction may be exercised in term time or vacation; but there is no appeal to Supreme Court in such cases, p. 74.

The following cases cite and indorse this doctrine: Hall v. Allen, 12 Wall. 454, 20 L. 458, dismissing appeal from decision on question arising during bankruptcy proceedings; Wiswall v. Campbell, 93 U. S. 348, 23 L. 923, and Mead v. Thompson, 15 Wall. 638, 21 L. 243, holding there was no appeal from decree of Circuit Court made in exercise of its supervisory jurisdiction; Coit v. Robinson, 19 Wall. 283, 22 L. 154, dismissing appeal where Circuit Court had affirmed action of District Court upon a petition for review; Sandusky v. National Bank, 23 Wall. 293, 23 L. 156, dismissing appeal from one part of proceeding in bankruptcy; Sweatt v. Boston, etc., R. R. Co., 3 Cliff. 340, F. C. 13,684, allowing application for revision, good cause being shown for delay; In re Picton, 2 Dill. 550, F. C. 11,136, reviewing order adjudicating one a bankrupt; Cady v. Knit Goods Mfg. Co., 48 Mich. 137, 11 N. W. 841, holding that under State law there was no appeal to review order of dissolution of corporation; In re Goldsmith, 12 Or. 420, 9 Pac. 566, holding no appeal from order of lower court refusing to remove assignee. Approved without applying rule in Knickerbocker Ins. Co. v. Comstock, 16 Wall. 269, 21 L. 498, holding bankruptcy case tried by jury reviewable on removal by writ of error; Marshall v. Knox, 16 Wall. 554, 555, 21 L. 483, holding bill to be original and properly filed in Circuit Court to restrain assignee from proceeding under order of Bankrupt Court; Bank v. Cooper, 20 Wall. 178, 22 L. 275, affirming action of Circuit Court in holding that there was no sufficient case calling for retrial of facts:

Stickney v. Wilt, 23 Wall. 160, 23 L. 53, holding case reviewable under another section of bankruptcy act; Glenny v. Langdon, 98 U. S. 27, 25 L. 46, holding creditor had no remedy to reach property fraudulently transferred, except through assignee; Gifford v. Helms, 98 U. S. 249, 25 L. 58, holding action by purchaser from assignee barred by provision of bankruptcy act; Sherman v. Bingham, 3 Cliff. 557, F. C. 12,762, reviewing whole subject and holding that assignee of bankrupt may collect by suit in District Court other than where proceedings were instituted. Cited generally with approval in Gilbert v. Lynch, 17 Blatchf. 405, 1 Fed. 114, holding bankruptcy act did not give jurisdiction of suit to attach dividends in hands of assignee; Graham v. Boston, etc., R. R. Co., 14 Fed. 761, holding adjudication in bankruptcy could not be impeached collaterally; In re Briggs, 61 Fed. 499, 20 U. S. App. 579, discussing jurisdiction since creation of Circuit Court of Appeals; dissenting opinion in Cleveland Ins. Co. v. Globe Ins. Co., 98 U. S. 372, 373, 25 L. 203, majority holding that this supervisory jurisdiction might be exercised on writ of error.

Bankruptcy.— Circuit Courts have concurrent jurisdiction of all suits at law or in equity brought by assignee in bankruptcy against any person claiming an adverse interest, or by such person against assignee touching any property or rights of property of bankrupt vested in assignee, and suit must be in name of one of the parties described in bankruptcy act, and be against the other, p. 75.

Cited and rule applied in Glenny v. Langdon, 98 U. S. 23, 25 L. 44, holding jurisdiction did not attach to suit by creditor to set aside fraudulent transfer; Giveen v. Smith, 1 Hask. 364, F. C. 5,467, granting jurisdiction in action by assignee to set aside fraudulent mortgage; Bachman v. Packard, 2 Sawy. 268, F. C. 709, holding Circuit Court had not jurisdiction of simple action by assignee to collect a debt; Johnson v. Price, 13 Fed. Cas. 793, dismissing bill filed by creditors before appointment of assignee to restrain disposal of estate; Sutherland v. Lake Superior, etc., Co., 23 Fed. Cas. 464, entertaining bill by assignee to ascertain extent of liens, etc.; Smith v. Mason, 14 Wall. 481, 20 L. 752, holding that stranger to proceedings in bankruptcy cannot be compelled to come into court under order to show cause; Olney v. Tanner, 10 Fed. 104, allowing action brought by adverse claimant to set aside fraudulent assignment. Cited, arguendo, in Goodall v. Tuttle, 3 Biss. 238, F. C. 5,533, holding assignee may sue in any District Court to collect assets.

Distinguished in Mitchell v. McClure, 91 Fed. 621, holding District Court had not jurisdiction of plenary action of replevin brought by bankrupt's trustee against adverse claimant.

Bankruptcy.— When bankruptcy case has proceeded to final judgment or decree in District Court, it may be removed into

Circuit Court for re-examination by writ of error, if an action at law, or by appeal, if a suit in equity, provided amount claimed exceeds $500, and the proper notices are given, p. 75.

Cited and rule applied in Knickerbocker Ins. Co. v. Comstock, 16 Wall. 267, 21 L. 497, and In re Oregon, etc., Co., 3 Sawy. 532, F. C. 10,560, both holding proceedings reviewable upon writ of error where exceptions were duly taken in jury trial; Lehman v. Strassberger, 2 Woods, 557, F. C. 8,216, holding, where question of bankruptcy vel non was tried by jury, remedy of plaintiff in error was by writ of error; arguendo in In re Briggs, 61 Fed. 499, 20 U. S. App. 579, discussing effect of act of 1891 on bankruptcy jurisdiction.

Bankruptcy.— Suit by or against an assignee in bankruptcy cannot be maintained in any court unless brought within two years from time cause of action accrued, p. 76.

Distinguished in Minot v. Tappan, 127 Mass. 339, holding statute did not apply to suit brought to obtain instructions of court as to disposal of fund.

Bankruptcy.— Where suit by or against an assignee in bankruptcy proceeds in Circuit Court to final judgment or decree, and matter in dispute exceeds sum of $2,000 exclusive of costs, it may be removed to Supreme Court by writ of error, or by appeal, p. 76.

Approved in Coit v. Robinson, 19 Wall. 282, 22 L. 153, holding question raised reviewable only in Circuit Court, although involving jurisdictional amount.

Bankruptcy.— Assignees or creditors may appeal to Circuit Court on ten days' notice for order allowing or rejecting a proffered claim, but in neither case can appeal be taken to Supreme Court. Questions of fact arising in such issues may be tried by jury, p. 77.

Followed in Wiswall v. Campbell, 93 U. S. 351, 23 L. 924.

Bankruptcy.— Debts amounting to $250, provable under the act, authorize creditor to file petition, and entry of order requiring debtor to show cause, p. 77.

Bankruptcy.— Independent of bankruptcy act the District Courts possess no equity jurisdiction whatever, and jurisdiction conferred by third clause of second section of that act is of same character as that conferred on Circuit Courts by eleventh section of judiciary act, p. 80.

Cited with approval in Jobbins v. Montague, 5 Ben. 427, F. C. 7,329, holding that process of District Court under above section could not be made effective by service outside of district.

Appeal and error — Bankruptcy.— The words "in a court of equity" in first clause of second section of act of March 2, 1867,

must be read to mean "as in a court of equity," and decrees embraced in that section, being interlocutory, cannot be re-examined by Supreme Court, p. 81.

11 Wall. 82-88, 20 L. 47, THE PROTECTOR.

Admiralty.— An appeal in admiralty prosecuted in name of "Freeborn & Co.," should be dismissed for defect of title of parties, p. 88.

Cited and rule applied in Hampton v. Rouse, 13 Wall. 188, 20 L. 594, dismissing writ of error on account of omission of parties; The Spark v. Lee Choi Chum, 1 Sawy. 717, F. C. 13,206, dismissing appeal prosecuted in name of steamer only; In re Woerishoffer, 74 Fed. 916, 41 U. S. App. 411, holding appeal ineffectual as to members of firm whose names were not on bond, etc.

Distinguished in Moore v. Simonds, 100 U. S. 146, and Estes v. Trabue, 128 U. S. 229, 32 L. 438, 9 S. Ct. 59, both holding defect amendable under act of June 1, 1872; Miltenberger v. Logansport R. R. Co., 106 U. S. 306, 27 L. 125, 1 S. Ct. 157, where appeals were in open court and decree sufficiently designated the parties; Gumpel v. Pitkin, 113 U. S. 548, 549, 28 L. 1129, 1130, 5 S. Ct. 617, where parties appeared as partnerships throughout the record; Walton v. Marietta Chair Co., 157 U. S. 346, 39 L. 727, 15 S. Ct. 627, allowing amendment of writ under act of 1872; The Natchez, 27 Fed. 310, holding appeal good irrespective of bond, the party being notified and having appeared.

11 Wall. 88-95, 20 L. 153, UNITED STATES v. TYNEN.

Statutes.— Where there are two acts on same subject, rule is to give effect to both if possible, but if repugnant in any of their provisions, the latter, without any repealing clause, operates to extent of repugnancy, as repeal of first, p. 92.

The following citing cases affirm and apply this principle: United States v. Henderson, 11 Wall. 657, 20 L. 237, holding revenue acts of 1867 and 1868 not inconsistent as to certain authority of collector; The State v. Stoll, 17 Wall. 431, 21 L. 654, holding provision in act incorporating bank not repealed by general law as to receivability of bank notes for taxes; Arthur v. Homer, 96 U. S. 140, 24 L. 812, holding duty on embroidered goods not repealed by general provision in subsequent act; Red Rock v. Henry, 106 U. S. 601, 27 L. 253, 2 S. Ct. 438, holding no repeal was intended of act authorizing issue of bonds by county; Pana v. Bowler, 107 U. S. 538, 27 L. 428, 2 S. Ct. 712, holding that amendatory act operated as a repeal as to certain restrictions in railroad donations; United States v. Fisher, 109 U. S. 145, 27 L. 886, 3 S. Ct. 155, holding act appropriating a certain salary repealed by implication; Ex parte Crow Dog, 109 U. S. 570, 27 L. 1035, 3 S. Ct. 405, holding treaty with

Indians did not repeal act limiting jurisdiction of courts over crimes committed by Indians; Fussell v. Gregg, 113 U. S. 560, 28 L. 997, 5 S. Ct. 637, holding act of 1804 respecting Virginia military district not repealed by implication by any subsequent acts; Frost v. Wenie, 157 U. S. 58, 39 L. 619, 15 S. Ct. 537, giving effect to two acts relating to pre-emption of Indian lands; Henrietta, etc., Co. v. Gardner, 173 U. S. 128, 19 S. Ct. 329, holding provision in act relating to attachments repealed on account of repugnancy; United States v. Barr, 4 Sawy. 256, F. C. 14,527, holding provision of law defining crime of having counterfeit coin repugnant to prior act; Stubblefield v. Menzies, 8 Sawy. 49, 11 Fed. 275, holding provisions of two acts concerning rights of married women not repugnant; Woods v. Jackson, etc., Co., 1 Holmes, 385, F. C. 17,993, holding recording law repealed by implication pro tanto to extent of repugnancy to former act; Cooke v. Ford, 2 Flipp. 32, F. C. 3,173, holding act of 1875 and part of section 639, revised statutes, relating to removal of causes not inconsistent; Sixty-Five Terra Cotta Vases, 10 Fed. 883, holding act of 1870 was not designed to repeal former act making certain articles entitled to free entry; Northern Pac. R. R. Co. v. United States, 36 Fed. 286, holding act of May 31, 1870, conferred additional rights on railroad and was not a substitute for chartered rights; United States v. Mexican, etc., R. R. Co., 40 Fed. 772, holding two acts conferring jurisdiction on Circuit Courts to be in harmony; United States v. Whitcomb, etc., Co., 45 Fed. 90, holding under same ruling, that concurrent jurisdiction of District Courts was not taken away; Butler v. United States, 87 Fed. 660, construing acts relating to clerk's fees so as to give effect to all; Cleveland, etc., R. R. Co. v. Cleveland, 94 Fed. 396, construing ordinances and charters respecting rates of fare prescribed for railroad companies; Coats v. Hill, 41 Ark. 151, holding act entitled "an act to grant land titles," etc., modified by later general laws; Purmort v. Tucker, etc., Co., 2 Colo. 472, holding act, so far as it related to liens upon real property, repealed by later statute; Hayes v. The State, 55 Ind. 101, holding part of act making it a felony to keep gaming apparatus impliedly repealed by act making it a misdemeanor; Sharp v. Gutcher, 74 Ind. 359, holding provision in earlier act embracing additional cause for removal on account of prejudice, etc., not repealed by later act; State v. Yewell, 63 Md. 121, holding special provisions regulating sale of liquor superseded by local option law; Lane v. Commrs., 6 Mont. 477, 13 Pac. 137, holding law fixing fees of sheriffs impliedly repealed provision in prior act; State v. Donnelly, 20 Nev. 216, 19 Pac. 681, holding two acts respecting compensation for collection of poll tax not in conflict; Cortesy v. Territory, 7 N. Mex. 99, 32 Pac. 507, 19 L. R. A. 356, holding that omitted words in an amendment did not have the effect to make it a repealing statute; Justice v. Commonwealth, 81 Va. 211, holding that provisions of law prohibiting lot

teries prevailed over special act authorizing a lottery; also Union Pac. R. R. v. Ryan, 2 Wyo. 412. Cited, arguendo, in Bogardus v. Gordon, 53 N. J. Eq. 42, 30 Atl. 813, holding that general usury law repealed former special law inconsistent with its provisions. Approved generally in Breitung v. Lindauer, 37 Mich. 233, State v. Swan, 1 N. Dak. 11, 44 N. W. 493, and Collins v. State, 3 S. Dak. 24, 51 N. W. 778,

Explained in Water-Works Co. v. Burkhart, 41 Ind. 383, construing entire legislation on subject of condemnation of land for canals, as parts of one system.

Statutes.— Where two acts are not in express terms repugnant, but the latter covers whole subject of first and embraces new provisions it will operate as a repeal of that act; thus the act of July 14, 1870, repealed thirteenth section of act of 1813, prescribing punishments for violation of naturalization laws, p. 95.

Cited and followed as authority in Murdock v. Memphis, 20 Wall. 617, 22 L. 438, holding twenty-fifth section of judiciary act technically repealed by second section of act of 1867, governing removal of causes; Baltimore, etc., R. R. Co. v. Grant, 98 U. S. 401, 25 L. 232, holding statute conferring jurisdiction on Supreme Court wholly repealed by later statute; King v. Cornell, 106 U. S. 396, 27 L. 60, 1 S. Ct. 313, holding whole of second subdivision of section 639, revised statutes, repealed by act of 1875, governing removal of causes; Cook County Nat. Bank v. United States, 107 U. S. 451, 27 L. 539, 2 S. Ct. 567, holding provisions of banking law superseded those of insolvency law respecting priority of payment of demands of United States; United States v. Auffmordt, 122 U. S. 209, 30 L. 1185, 7 S. Ct. 1186, affirming S. C., 19 Fed. 897, 902, holding that section 12 of act of June 22, 1874, repealed section 2864, revised statutes, respecting forfeiture under revenue law; Tracy v. Tuffly, 134 U. S. 223, 33 L. 885, 10 S. Ct. 531, holding law respecting assignments by limited partnership repealed by general law on subject; District of Columbia v. Hutton, 143 U. S. 26, 36 L. 62, 12 S. Ct. 372, holding prior act in respect to police force of District of Columbia repealed by implication; United States v. Cheesman, 3 Sawy. 429, F. C. 14,790, holding revenue law of 1864 repealed act of 1862, embracing same subject-matter; United States v. Barr, 4 Sawy. 256, F. C. 14,527, holding act defining crime of uttering counterfeit coin wholly repealed by implication; United States v. Bennett, 12 Blatchf. 348, 349, F. C. 14,570, holding act of 1870 was intended to embrace whole subject of duty of pension agents and repealed former statute; The Aurania, 29 Fed. 103, holding the international rules of navigation covered whole ground of former rules and superseded them; United States v. Crawford, 47 Fed. 569, holding that act of March 1, 1889, was intended as substitute for sections 2103, 2104, revised statutes, relating to con-

tracts with Indians; Gladstone v. Throop, 71 Fed. 847, 37 U. S. App. 481, holding that act giving trustees power to pave streets, etc., covered ground of earlier statute and repealed it; Rogers v. Nashville, etc., R. R. Co., 91 Fed. 323, 62 U. S. App. 701, holding Tennessee act of 1891 upon subject of leasing of branch railroads operated as repeal of former statute; Wood v. State, 47 Ark. 491, 1 S. W. 710, holding act passed for punishment of embezzlement repealed by implication; Hogane v. Hogane, 57 Ark. 511, 22 S. W. 168, applying rule where general statute covered whole subject of probate appeals; Treadwell v. Yolo Co., 62 Cal. 564, holding that law changing time of election superseded the section which it revised; Keese v. Denver, 10 Colo. 122, 15 Pac. 330, where later statute covered whole subject of power to maintain sewer system; State v. Chatfield, 71 Conn. 112, 40 Atl. 925, holding provision in new city charter respecting streets a substitute for the old; State v. Courtney, 73 Iowa, 623, 35 N. W. 687, holding that last enactment respecting sale of liquors by pharmacists repealed prior statute; State v. Studt, 31 Kan. 246, 1 Pac. 636, applying rule to acts regulating power to issue county bonds; People v. Bussell, 59 Mich. 112, 26 N. W. 310, holding provisions of new charter controlled as to sale of unwholesome meats; Feiger v. Michigan, etc., R. R. Co., 62 Mich. 8, 28 N. W. 688, giving force to the last act prescribing manner of fixing railroad's liability; De Lano v. Doyle, — Mich. —, 79 N. W. 190, holding that ordinance for removal of garbage, etc., superseded former ordinance which fixed a penalty for its violation; Young v. Kansas City, etc., R. R. Co., 33 Mo. App. 515, holding that legislature revised whole subject of carriage of freight, and statute became substitute for common law; Brome v. Cuming County, 31 Neb. 367, 47 N. W. 1051, where acts providing for legal services for county were repugnant and former held repealed; Phillips v. Eureka Co., 19 Nev. 353, 11 Pac. 35, holding that act of 1883 of Nevada was intended to revise whole subject-matter of jury fees; Opinion of the Justices, 66 N. H. 669, 33 Atl. 1097, applying rule as to acts respecting exercise of right of eminent domain: Roche v. Mayor, 40 N. J. L. 261, holding that successive ordinances embraced whole subject of Sunday liquor law, etc.; Bracken v. Smith, 39 N. J. Eq. 172, holding that later act was plainly intended as substitute for one earlier; Mersereau v. Mersereau Co., 51 N. J. Eq. 385, 30 Atl. 813, holding similarly as to laws regarding workmen's liens; Bogardus v. Gordon, 53 N. J. Eq. 43, 45, 30 Atl. 813, 814, as to successive special and general usury laws; Laughlin v. County Commrs., 3 N. Mex. 301 (424), 5 Pac. 819, holding last act comprehensive of whole subject of ordinary revenues; Cortesy v. Territory, 7 N. Mex. 93, 32 Pac. 505, 19 L. R. A. 354, holding that a revision of a Sunday law amounted to a substitute; People v. Jaehne, 103 N. Y. 195, 8 N. E. 379, holding that general provision in penal code for punishing bribery superseded local provision in

city charter; Little v. Cogswell, 20 Or. 347, 25 Pac. 728, holding that later fee-bill operated as repeal of former; State v. Rogers, 22 Or. 360, 30 Pac. 76, holding similarly as to laws establishing and regulating freight rates; Collins v. State, 3 S. Dak. 24, 25, 51 N. W. 778, 779, as to acts fixing salary of public officer; Terrell v. State, 86 Tenn. 531, 8 S. W. 214, holding that act defining mayhem repealed all former acts on that subject; State v. Carbon, etc., Co., 4 Wash. 423, 30 Pac. 728, where act regulating coal mines was held to cover precisely same ground as previous act; McCartin v. Traphagen, 43 N. J. Eq. 332, 11 Atl. 161, act of 1880 repealed prior law as to competency of witnesses; State v. Boogher, 71 Mo. 633, holding common law repealed by statute precisely covering the matter. See also Union Pac. R. R. v. Ryan, 2 Wyo. 412.

Approved in Breitung v. Lindauer, 37 Mich. 233, without deciding whether statutes were repugnant; State v. Tomahawk, 96 Wis. 86, 71 N. W. 91, holding general law and provisions of city charter not inconsistent as to power to issue bonds. Cited, arguendo, in Gowen v. Harley, 56 Fed. 977, 12 U. S. App. 574, holding provision in railroad charter not repealed by act of March 1, 1889, establishing court in Indian Territory; Hogan v. Guigon, 29 Gratt. 710, construing together acts concerning license taxes on wines, etc.; Davies v. Creighton, 33 Gratt. 699, holding act authorizing incorporation of building association not repealed by subsequent legislation. See 14 Am. Dec. 210, note.

Approved but not applied in Red Rock v. Henry, 106 U. S. 601, 27 L. 253, 2 S. Ct. 438, holding later act was not intended as substitute of act authorizing county bonds; Frost v. Wenie, 157 U. S. 58, 39 L. 619, 15 S. Ct. 537, holding two acts respecting pre-emption of Indian lands reconcilable and in harmony; United States v. Kuentsler, 74 Fed. 220, holding later act narrower in scope and repealed former penal statute only in part; State v. Wells, 112 Ind. 242, 13 N. E. 724, holding that new statute did not cover subject-matter of prior statute on embezzlement; State v. Swan, 1 N. Dak. 11, 19, 44 N. W. 493, 496, holding provision in Constitution not self-executing and therefore of no force to repeal pre-existing statute; Winslow v. Morton, 118 N. C. 492, 24 S. E. 419, holding two acts giving power to governor to revoke commissions, etc., reconcilable; Durham v. State, 89 Tenn. 730, 18 S. W. 75, holding new act did not cover all provisions of former law respecting confinement in workhouse. Distinguished in Patterson v. Tatum, 3 Sawy. 169, F. C. 10,830, holding implication did not arise where revisory statute itself limited its operation on previous act; Gowen v. Harley, 56 Fed. 979, 12 U. S. App. 574, holding acts under consideration foreign to one another and therefore not repugnant; People v. Sponsler, 1 Dak. 281, 46 N. W. 461, holding former penal statute repealed only in part.

Criminal law.— There can be no legal conviction, nor any valid judgment thereon, unless the law creating the offense be at the time

in existence. After repeal no further proceedings can be had, p. 95.

Followed in United States v. Hague, 22 Fed. 706, holding that prosecution for taking illegal fee in pension case fell with repeal of statute; Manley v. Olney, 32 Fed. 709, holding repeal of statute conferring jurisdiction cut off further proceedings in pending suit; Moore v. United States, 85 Fed. 468, 56 U. S. App. 477, holding that prosecution in Federal court for crime could not continue after admission of Utah as a State; McClain v. Williams, 10 S. Dak. 836, 73 N. W. 74, 43 L. R. A. 289, holding that pending case fell with repeal of law conferring appellate jurisdiction. Cited generally in United States v Coppersmith, 2 Flipp. 555, 4 Fed. 206. Approved in Texas Mexican R. R. Co. v. Jarvis, 80 Tex. 464, 15 S. W. 1091, and Simonson v. Jordon, 24 Blatchf. 375, 30 Fed. 721. Cited in note, 94 Am. Dec. 218, on this point.

Limited in United States v. Barr, 4 Sawy. 255, F. C. 14,527, and United States v. Van Vliet, 23 Fed. 35, holding that by virtue of section 13, revised statutes, crime might be prosecuted after repeal of statute creating offense; United States v. Baum, 74 Fed. 43, holding that admission of Utah as a State did not operate as remission of past offenses against Federal government. Distinguished in State v. Crusius, 57 N. J. L. 282, 31 Atl. 236, holding that special statute saved offense committed from being released by repeal of statute creating it.

11 Wall. 96-108, 20 L. 155, NEW ALBANY v. BURKE.

Corporations have no power to part with bonds in fraud of stockholders or creditors, but they can make preferences among their creditors, p. 103.

Municipal corporations.— A city may purchase its own bonds directly or indirectly from first holder, assuming there is no fraud, p. 104.

Municipal corporation cannot modify or alter a stock subscription voted by the people in absence of power from legislature, p. 105.

Followed in Green v. Dyersburg, 2 Flipp. 489, F. C. 5,756, holding town unauthorized to issue bonds for longer time and greater rate of interest than allowed by special act; State v. Wilkinson, 20 Neb. 319, 31 N. W. 381, holding county estopped to deny validity of bonds in hands of bona fide purchaser.

Corporations.— Subscribed capital stock of a corporation is a fund held in trust for its creditors, as is also all its other property, p. 106.

Cited and doctrine approved and followed in Sawyer v. Hoag, 17 Wall. 620, 21 L. 736, holding that an unpaid subscription could

not be changed into the character of a loan; Scovill v. Thayer, 105 U. S. 154, 26 L. 973, holding agreement void as to creditors by which unpaid subscriptions were declared full-paid; Scott v. Latimer, 89 Fed. 852, 60 U. S. App. 737, but see dissenting opinion, p. 858, 60 U. S. App. 745, enforcing stockholder's liability on subscription to increased capital stock; Jones, etc., Co. v. Arkansas, etc., Co., 38 Ark. 25, holding that directors bought property of corporation charged with trust in favor of creditors; Carter v. Union Printing Co., 54 Ark. 582, 16 S. W. 581, holding that a release from liability for unpaid installments was fraudulent; Melvin v. Lamar Ins. Co., 80 Ill. 459, 22 Am. Rep. 208, holding that paid-up stock could not be cancelled and money paid back, to prejudice of other stockholders; Union Ins. Co. v. Frear, etc., Co., 97 Ill. 550, 37 Am. Rep. 136, holding secret agreement void attempting to reduce stockholder's liability; Van Cleve v. Berkey, 143 Mo. 122, 123, 44 S. W. 745, 746, 42 L. R. A. 599, and n., holding contract void as to creditors by which paid-up shares were given for property of less value; Marshall, etc., Co. v. Killian, 99 N. C. 506, 6 Am. St. Rep. 543, 6 S. E. 682, holding stockholder in spurious organization liable to creditor. Approved in Fogg v. Blair, 139 U. S. 125, 35 L. 106, 11 S. Ct. 477, but holding allegations of fraud set out in bill insufficient; National Bank v. Texas Inv. Co., 74 Tex. 437, 12 S. W. 104, holding assets assigned by one corporation to another subject to lien in favor of creditors of former company. Cited generally in Winters v. Armstrong, 37 Fed. 521. See 5 Dill. 87, note, F. C. 7,393, note, 12 Am. Dec. 243, and exhaustive note, 57 Am. St. Rep. 66, 81.

Corporations.— Where directors in good faith applied municipal bonds taken in payment for stockholders' subscriptions, to extinguishment of corporate debts, and all was obtained for them that they were worth, the arrangement is valid. It is a question of fact whether so applied, p. 106.

Cited and principle followed in Clark v. Bever, 139 U. S. 113, 35 L. 95, 11 S. Ct. 474, holding transaction valid by which railroad discharged its debt by selling its stock to creditor; Handley v. Stutz, 139 U. S. 431, 35 L. 235, 11 S. Ct. 585, holding purchaser of stock taken at price fairly representing its value, and which was issued to increase capital stock, not liable to respond for par value; Ellerman v. Chicago, etc., R. R. Co., 49 N. J. Eq. 251, 23 Atl. 299, holding directors had authority to compromise suits; dissenting opinion in Jackson v. Traer, 64 Iowa, 486, 20 N. W. 772, majority holding creditor receiving stock liable as a stockholder; also in Jackson v. Traer, 64 Iowa, 483, 52 Am. Rep. 458, 20 N. W. 770, holding that creditor taking unpaid stock in payment of debt became liable as stockholder. See 3 Am. St. Rep. 823, note.

Equity.— Where suit at law, founded upon alleged fraud in making compromise, would have been barred by statute in six years, the defense is likewise available in equity, p. 107.

Cited and followed in Young v. [illegible] 363, 10 S. Ct. 112, holding suit barred by [illegible] pressing claims against county; Wade v. [illegible] U. S. 115, 36 L. 910, 13 S. Ct. 33, holding [illegible] fer of stock barred by Texas statute; [illegible] Sawy. 58, 11 Fed. 102, holding bill in equity by [illegible] lapse of time in analogy to California statute; [illegible] etc., R. R. Co., 4 Cliff. 226, F. C. [illegible], holding [illegible] aside foreclosure barred in analogy to statute; [illegible] Iowa, 530, 50 N. W. 26, holding suit to quiet title [illegible] v. Lake Superior Iron Co., 41 Mich. [illegible], 2 N. W. [illegible] authorities, and holding claim for mining [illegible] delay.

Limitations of actions.— Party should allege [illegible] means of detecting fraud to excuse delay, for [illegible] of knowledge is, in equity, the same as knowledge itself. [illegible]

Cited with approval in Norris v. Haggin, 12 Sawy. [illegible] dismissing bill where plaintiff had means of [illegible] for fifteen years; Teall v. Slaven, 14 Sawy. [illegible] to annul conveyance held barred by want of diligence [illegible] ing fraud; Marsh v. Whitmore, 1 Hask. [illegible] bill for failure of plaintiff to allege with particularity [illegible] was discovered; Jesup v. Illinois, etc., R. R. Co., [illegible] ing relief from terms of lease where party [illegible] twenty years with full opportunity to [illegible] Bardon, 47 Fed. 789, dismissing bill to recover land [illegible] ant for more than ten years had knowledge of [illegible] Dugan v. O'Donnell, 68 Fed. 992, and Lent v. [illegible] sustaining defense of laches where facts [illegible] lands might easily have been ascertained; [illegible] 171, 15 Pac. 672, holding statute run where [illegible] parties to examine stock-books; Loomis v. [illegible] 60, collecting authorities and holding [illegible] to recover property.

11 Wall. 108–112, 20 L. 65, DOWS v. CITY OF CHICAGO.

Taxation.— Illegality of tax is not of itself [illegible] collection of tax in a court of equity; [illegible] circumstances bringing case under some [illegible] jurisdiction, such as would lead to a multiplicity [illegible] irreparable injury, or throw a cloud upon [illegible] 109, 110.

Numerous cases cite, affirm and apply this rule. [illegible] Georgetown, 15 Wall. 549, 21 L. 222, [illegible] ground of suit was the illegality of a tax; [illegible] 92 U. S. 613, 23 L. 673, and Shelton v. Platt, [illegible]

11 S. Ct. 647, dismissing bills to enjoin tax on ground of its unconstitutionality; Union Pac. R. R. Co. v. Cheyenne, 113 U. S. 526, 28 L. 1102, 5 S. Ct. 605, holding that multiplicity of suits and title to real estate were involved and jurisdiction attached; Milwaukee v. Koeffler, 116 U. S. 222, 224, 29 L. 613, 614, 6 S. Ct. 373, 374, holding suit to restrain collection of personal tax on ground of non-residence not maintainable; Ogden City v. Armstrong, 168 U. S. 237, 239, 42 L. 451, 452, 18 S. Ct. 103, 104, where there were several grounds for equitable relief in suit to restrain collection of illegal tax; Wilson v. Lambert, 168 U. S. 612, 42 L. 600, 18 S. Ct. 217, extending jurisdiction where land was to be assessed to locate and improve a park under statute alleged to be void; Pittsburgh, etc., Ry. v. Board of Public Works, 172 U. S. 37, 38, 39, 19 S. Ct. 92, 93, refusing to enjoin where party had neglected available legal remedy; Albany, etc., Bank v. Maher, 19 Blatchf. 182, 6 Fed. 424, holding bank might maintain bill to restrain collection of tax to prevent multiplicity of suits, though remedy was not open to stockholders; Union, etc., Bank v. Chicago, 3 Biss. 88, 89, F. C. 14,374, and City Nat. Bank, etc. v. Paducah, 2 Flipp. 62, 65, F. C. 2,743, taking jurisdiction of bills to prevent multiplicity of suits; Trask v. Maguire, 2 Dill. 184, and note, F. C. 14,145, holding no ground for equitable interference with tax on railroad property; Union Pac. R. R. Co. v. Lincoln County, 2 Dill. 281, F. C. 14,379, refusing equitable relief from tax on omitted property; Huntington v. Central Pac. R. R. Co., 2 Sawy. 514, F. C. 6,911, and Tilton v. Oregon, etc., R. R. Co., 3 Sawy. 25, F. C. 14,055, enjoining tax where assessment was void and cloud would be cast upon title to real estate; Forbes v. Gracey, 9 Fed. Cas. 402, holding stockholder may sue to restrain collection of illegal tax where corporation refuses; Jessup v. Chicago, etc., R. R. Co., 13 Fed. Cas. 575, sustaining bill where assessment by board was entirely erroneous; Second Nat. Bank v. Caldwell, 13 Fed. 433, holding tax illegal but refusing equitable relief; Schulenberg, etc., Co. v. Hayward, 20 Fed. 425, dismissing bill alleging unjust assessment and seeking to enjoin; Pacific Exp. Co. v. Seibert, 44 Fed. 313, allowing bill where there could be no adequate remedy at law if tax were illegal; Powder River, etc., Co. v. Board of Commissioners, 45 Fed. 330, holding case founded on irregular assessment properly brought in court of law; California, etc., Co. v. Gowen, 48 Fed. 774, granting jurisdiction where tax if enforced would cast cloud upon title of plaintiff; Gregg v. Sanford, 65 Fed. 157, 28 U. S. App. 313, holding similarly as to State tax illegally imposed upon joint-stock company in Pennsylvania; Robinson v. Wilmington, 65 Fed. 858, 25 U. S. App. 144, denying jurisdiction to correct error in assessment of bank shares; Linehan, etc., Co. v. Pendergrass, 70 Fed. 2, 36 U. S. App. 48, holding Federal court would not enjoin collection of tax which was only a personal charge; Preston v. Finley, 72 Fed. 854, refusing to enjoin occupation tax; Brown v. French, 80 Fed. 169,

enjoining sale to enforce payment of illegal tax under law making sale a cloud on real estate; Tayler v. Louisville, etc., R. R. Co., 88 Fed. 357, 358, 60 U. S. App. 183, 184, granting jurisdiction where complainant to have vindicated rights would have been compelled to bring thirty-five suits at law; Bank of Kentucky v. Stone, 88 Fed. 390, allowing bill where under State statute there was no adequate remedy at law to recover back illegal taxes; Mayor, etc. v. Baldwin, 57 Ala. 72, 29 Am. Rep. 718, holding illegal tax on personalty afforded no ground for equitable interference; Floyd v. Gilbreath, 27 Ark. 688, holding adequate remedy at law existed to recover for over-assessment; Savings, etc., Soc. v. Austin, 46 Cal. 488, holding, if tax on bank were illegal, court could not interfere by injunction; Insurance Co. of N. A. v. Bonner, 24 Colo. 223, 49 Pac. 367, affirming S. C., 7 Colo. App. 101, 42 Pac. 682, holding bill to enjoin. etc., insufficient even if tax were void; Wason v. Major, 10 Colo. App. 184, 50 Pac. 742, holding that legality and all other matters affecting assessment could have been tested at law; Murphy v. Wilmington, 6 Houst. 137, 22 Am. St. Rep. 354, holding no grounds existed for enjoining collection of tax to construct sewer; Lewton v. Hower, 18 Fla. 677, holding levy and sale cast such a cloud upon title to land exempt by law as to authorize injunction; Carlton v. Newman, 77 Me. 410, 1 Atl. 195, sustaining bill to enjoin collection of illegal school district tax to prevent multiplicity of suits; Youngblood v. Sexton, 32 Mich. 409, 20 Am. Rep. 655, collecting authorities, and holding collection of personal liquor tax, conceding it to be illegal, could not be enjoined; Laird, etc., Co. v. County of Pine, 72 Minn. 414, 75 N. W. 724, holding similarly as to personal tax on lumber; McDonald v. Murphree, 45 Miss. 711, dismissing bill seeking to enjoin tax levied in aid of railroad; Irwin v. Lewis, 50 Miss. 368, enjoining sheriff's sale where complainant was entitled to homestead exemption; Mobile, etc., R. R. Co. v. Moseley, 52 Miss. 137, sustaining jurisdiction to prevent levy and sale of rolling stock; Northern, etc., R. R. v. Carland, 5 Mont. 190, 3 Pac. 157, reviewing whole subject and allowing bill seeking to enjoin tax upon railroad and rolling stock; Wells, Fargo & Co. v. Dayton, 11 Nev. 168, dismissing bill brought to enjoin illegal assessment; Liebstein v. Mayor, etc., 24 N. J. Eq. 204, refusing equitable relief where assessments were made and improvements paid for by city; Farrington v. New England, etc., Co., 1 N. Dak. 118, 45 N. W. 196, applying rule where enforcement of tax void for want of assessment would have cast a cloud on title; Northern Pac. R. R. v. Barnes, 2 N. Dak. 324, 51 N. W. 387, sustaining jurisdiction where tax sale would have created cloud upon title to land described in certificate; Kinney v. Zimpleman, 36 Tex. 571, holding if school tax were illegal, complainant had remedy at law; Oregon, etc., Co. v. Standing, 10 Utah, 459, 37 Pac. 688, dismissing bill brought to enjoin county poor tax on ground of illegality; Douglass v. Harrisville, 9 W. Va. 166, 168,

27 Am. Rep. 550, 551, holding that there was remedy at law to recover for illegal assessment to build sidewalk; Corrothers v. Board of Education, 16 W. Va. 541, holding bill to enjoin school tax showed no equity; Williams v. County Court, 26 W. Va. 498, 498, 53 Am. Rep. 95, reviewing authorities, and dismissing bill to enjoin illegal dog tax on ground that necessary parties were not joined to prevent multiplicity of suits; Wilson v. Philippi, 39 W. Va. 79, 19 S. E. 554, dismissing bill complaining of sidewalk assessment; Judd v. Fox Lake, 28 Wis. 588, refusing to enjoin town officers from assessing tax on ground of its illegality.

Approved, without applying rule, in Muncey v. Joest, 74 Ind. 414, holding party guilty of laches in objecting to ditching assessment; Butler v. Ellerbe, 44 S. C. 259, 22 S. E. 428, dismissing petition seeking to enjoin payment of registration warrants by State officers. Cited approvingly in Sharpleigh v. Surdam, 1 Flipp. 473, F. C. 12,711, holding court of equity will inquire into validity of tax sale which defendant holds over owner in possession as a cloud. Approved in concurring opinion in Lent v. Tillson, 72 Cal. 485, 14 Pac. 88, court holding equity could not relieve for fraud and irregularities in expending taxes being collected for street improvement; dissenting opinion in Pollock v. Farmers, etc., Co., 157 U. S. 611, 39 L. 830, 15 S. Ct. 701, majority holding stockholder might maintain bill to restrain corporation from voluntarily paying tax claimed to be illegal; Baltimore, etc., R. R. Co. v. Allen, 17 Fed. 178, majority holding it proper case for equity cognisance, on account of threatened injury; Floyd v. Gilbreath, 27 Ark. 697, majority holding adequate remedy at law existed to recover for over-assessment. Cited generally in dissenting opinion in Verdin v. St. Louis, 131 Mo. 157, 33 S. W. 515, majority granting relief from tax for unauthorized street work. See valuable note in point, 69 Am. Dec. 199; also 23 Am. Rep. 623, and note, and 53 Am. Rep. 110, 111, 112, and note.

Limited in Delphi v. Bowen, 61 Ind. 38, collecting authorities, and holding that in Indiana injunction will lie to restrain collection of an illegal tax.

Taxation.— It is of utmost importance that means adopted to enforce taxation should be interfered with as little as possible by courts, p. 110.

Cited and principle followed in Cheatham v. United States, 92 U. S. 89, 23 L. 563, holding party suing to recover tax barred by long delay in paying it; State Railroad Tax Cases, 92 U. S. 614, 23 L. 673, dismissing bill to enjoin tax on ground of its unconstitutionality; Pacific Exp. Co. v. Seibert, 44 Fed. 314, holding suit to restrain collection of tax cognizable in equity, there being no adequate remedy at law; Richmond, etc., Co. v. Blake, 49 Fed. 905, ordering taxes, previously tendered and refused, paid into court; Tallassee, etc., Co. v. Spigener, 49 Ala. 264, holding taxes properly assessed should have been paid before seeking relief; Alabama, etc., Co. v.

Lott, 54 Ala. 507, discussing taxable assets of company, but refusing to interfere with collection of tax; Wells, Fargo & Co. v. Dayton, 11 Nev. 168, dismissing bill seeking to enjoin collection of tax on ground of over-valuation; dissenting opinion in Pollock v. Farmers, etc., Co., 157 U. S. 610, 611, 39 L. 829, 830, 15 S. Ct. 701, majority holding income tax unconstitutional in suit by stockholder against corporation to restrain payment of tax. See note, 53 Am. Rep. 111.

Taxation.—Equity jurisdiction has sometimes been extended to restrain collection of illegal tax, where parties voluntarily submitted themselves to it, p. 110.

Cited in Williams v. County Court, 26 W. Va. 580, dismissing bill for want of equity, which sought to restrain dog-tax as illegal.

Taxation.—Party from whom illegal tax is collected has ample remedy at law, unless he would be compelled to resort to multiplicity of suits, or would suffer irreparable injury, p. 112.

Approved in Wells, Fargo & Co. v. Dayton, 11 Nev. 170, dismissing bill seeking to enjoin collection of unjust tax.

Equity.—Where decree dismissing original bill disposes of controversy between parties, cross-bill falls with it, p. 112.

Cited and followed in Industrial, etc., Co. v. Electrical Supply Co., 58 Fed. 742, 16 U. S. App. 196, holding cross-bill dissolved where original bill was dismissed for want of jurisdiction; Blythe v. Hinckley, 84 Fed. 235, 238, holding that no final decree could be entered on cross-bill while motion to dismiss original bill was pending; Gilmer v. Felhour, 45 Miss. 631, holding cross-bill being purely of legal character, should have been dismissed with original bill; Alleman v. Knight & Bro., 19 W. Va. 219, holding court erred in ordering answer to be filed as cross-bill, and dismissing case without prejudice. Approved in Bound v. South Car. R. R. Co., 47 Fed. 33.

Distinguished in Barnard v. Hartford, 2 Fed. Cas. 836, holding where cross-bill sets up additional facts complainant is entitled to independent relief.

11 Wall. 113–129, 20 L. 122, THE COLLECTOR v. DAY.

Taxation by the States of means and instrumentalities of general government is impliedly prohibited by the Constitution, p. 124.

Cited and followed in Van Brocklin v. Tennessee, 117 U. S. 177, 29 L. 854, 6 S. Ct. 684, holding lands owned by United States exempt from State taxation; Andrews v. Auditor, 28 Gratt. 126, holding buildings owned by United States exempt from State taxation. Cited, arguendo, in Camden v. Village Corporation, 77 Me. 536, 1 Atl. 691.

Distinguished in County of Santa Clara v. Southern Pac. R. R., 9 Sawy. 171, 18 Fed. 388, holding State could tax railroad, though latter performed certain services for the government.

Internal revenue.— The general government is prohibited from taxing the salary of a judicial officer of a State, pp. 124, 126.

Doctrine approved and applied in Pollock v. Farmers, etc., Co., 157 U. S. 584, 39 L. 820, 15 S. Ct. 690, holding direct Federal tax on income from municipal bonds unconstitutional; Freedman v. Sigel, 10 Blatchf. 328, 329, 330, 331, F. C. 5,080, holding Federal tax on salary of judge of Superior Court of New York city invalid; Rushworth v. Judges of Hudson Pleas, 58 N. J. L. 100, 32 Atl. 744, 30 L. R. A. 764, holding Congress could not interfere with action of State courts upon applications for naturalization; Andrews v. Auditor, 28 Gratt. 126, holding buildings belonging to United States exempt from State taxation. Cited, arguendo, in McCullough v. Brown, 41 S. C. 250, 19 S. E. 474, 23 L. R. A. 422. Approved in the following dissenting opinions: United States v. Railroad Co., 17 Wall. 333, 21 L. 601, majority holding that tax in dispute was in reality not a tax on the municipality, but upon the bondholders; Ex parte Virginia, 100 U. S. 359, 361, 25 L. 684, 685, majority holding that State judicial officer was not relieved in his selection of jury from obeying Federal Constitution; Pollock v. Farmers, etc., Co., 158 U. S. 693, 39 L. 1145, 15 S. Ct. 942, majority also holding Federal tax on income of municipal bonds invalid; People v. Tobey, 153 N. Y. 401, 47 N. E. 807, majority holding clerk of Police Court of city within civil service regulations of the city; State v. Aiken, 42 S. C. 262, 20 S. E. 236, 26 L. R. A. 363, majority holding State, in exercise of its police power, could regulate and control liquor traffic.

Distinguished in Ex parte Virginia, 100 U. S. 348, 25 L. 680, holding State judicial officer not relieved from obeying Federal Constitution in his selection of jury panel, as regards race distinctions; Manhattan Co. v. Blake, 148 U. S. 426, 37 L. 509, 13 S. Ct. 645, holding money deposited in bank by State treasurer subject to Federal tax; Sweatt v. Boston, etc., R. R. Co., 3 Cliff. 351, F. C. 13,684, holding that corporations of commercial character are subject to provisions of Federal bankrupt law; United States v. Kindred, 4 Hughes, 499, 5 Fed. 45, holding justice of peace amenable to prosecution in Federal court for corrupt violation of laws of Congress; dissenting opinion in Pollock v. Farmers, etc., Co., 158 U. S. 666, 39 L. 1135, 15 S. Ct. 931, majority holding tax on income from real estate a direct tax.

State.— The sovereign powers vested in State governments by their Constitutions remained unaltered and unimpaired, except so far as they were granted to the general government, p. 124.

Cited and relied upon in State v. Gibson, 36 Ind. 398, 10 Am. Rep. 49, and Frasher v. State, 3 Tex. App. 273, 30 Am. Rep. 137, both holding State had power to prohibit marriages between whites and negroes; Cory v. Carter, 48 Ind. 360, 17 Am. Rep. 762, holding State legislature free to fix qualifications of pupils to be admitted to its schools, classifying them with reference to difference of race or color; dissenting opinion in Ex parte Virginia, 100 U. S. 358, 25 L.

688, majority holding that State judge was bound by Federal Constitution not to discriminate against colored race in selecting jurymen.

United States can claim no powers which are not granted by the Constitution, expressly or by necessary implication, p. 124.

Cited and rule applied in State v. Gibson, 36 Ind. 398, 10 Am. Rep. 49, and Frasher v. State, 3 Tex. App. 273, 30 Am. Rep. 137, both holding no Federal law abrogated State statute rendering it a felony for white man to marry negro woman. Cited generally in North Carolina v. Vanderford, 35 Fed. 286, holding Congress has power to enact a law authorizing destruction of illicit spirits; Wood v. Drake, 70 Fed. 883, holding Federal court had jurisdiction of action alleging unlawful conduct of United States marshal; dissenting opinion in Legal-Tender Cases, 12 Wall. 613, 20 L. 382, majority holding legal-tender acts of Congress constitutional.

States.— The general government and the States are separate and distinct sovereignties, acting independently within their respective spheres, p. 124.

Cited approvingly in Van Brocklin v. Tennessee, 117 U. S. 178, 29 L. 854, 6 S. Ct. 685, holding land owned by United States exempt from State taxation; Pollock v. Farmers, etc., Co., 157 U. S. 584, 39 L. 820, 15 S. Ct. 690, holding Federal tax on income from municipal bonds unconstitutional; County of Santa Clara v. Southern Pac. R. R., 9 Sawy. 171, 18 Fed. 388, holding, however, State may tax railroad, though latter receives aid from and performs services for general government; Sweatt v. Boston, etc., R. R. Co., 3 Cliff. 352, F. C. 13,684, holding commercial corporations subject to Federal bankrupt law; State v. Gibson, 36 Ind. 398, 10 Am. Rep. 49, and Frasher v. State, 3 Tex. App. 273, 30 Am. Rep. 137, both holding State had power to pass statute making it a felony for white to marry a negro; concurring opinion in Pollock v. Farmers, etc., Co., 157 U. S. 603, 39 L. 827, 15 S. Ct. 698, court holding Federal tax on municipal bonds, etc., unconstitutional; dissenting opinion in Boyd v. Nebraska, 143 U. S. 182, 36 L. 117, 12 S. Ct. 389, majority holding Federal court had jurisdiction to determine disputed question as to right of governorship of a State; Baltimore, etc., R. R. v. Baugh, 149 U. S. 401, 37 L. 786, 13 S. Ct. 927, majority applying general law of the country to question of negligence of fellow-servant.

Miscellaneous.— Miscited in Murphy v. Wilmington, 6 Houst. 138, 22 Am. St. Rep. 355.

11 Wall. 129-135, 20 L. 160, WESTERN TRANSPORTATION CO. v. DOWNER.

Carriers.— Plaintiff makes prima facie case by production of bill of lading, showing receipt of goods and contract for transportation, and by proving arrival of cargo in ruined condition, p. 133.

Cited and rule followed in Inland, etc., Co. v. Tolson, 139 U. S. 555, 35 L. 271, 11 S. Ct. 654, holding damage to wharf by steamboat, on calm day, in smooth water, made out prima facie case; The Majestic, 166 U. S. 386, 41 L. 1043, 17 S. Ct. 602, where damage was caused to luggage by seawater coming through damaged porthole; The Carlotta, 9 Ben. 12, F. C. 2,413, where damage was caused by rats and odor of petroleum; The Queen of the Pacific, 75 Fed. 78, where damage to merchandise was caused by seawater; Mitchell v. Carolina, etc., R. R. Co., 124 N. C. 244, 32 S. E. 673, where live stock was injured in transportation, held, that railroad was bound to show due care; Insurance Co. v. Lake Erie, etc., R. R. Co., 152 Ind. 338, 53 N. E. 383, holding defendant again shifted burden by showing loss by fire, an excepted risk.

Shipping.— The term "dangers of lake navigation" includes all ordinary perils, and among others that which arises from shallowness of waters at entrance of harbors, p. 133.

Approved and relied upon in Hostetter v. Park, 137 U. S. 40, 34 L. 572, 11 S. Ct. 4, affirming S. C., 11 Fed. 188, holding loss, caused by hidden object below surface water while barge was making deviation according to usage, within terms of definition; The Chasca, 23 Fed. 160, holding severe gale true cause of loss and within exception "perils of the sea." See note, 41 Am. Dec. 281, defining "perils of the sea," and note, 41 Am. Dec. 286, as to injuries resulting from low water and grounding.

Criticised in The Ocean Wave, 8 Biss. 319, F. C. 10,416, holding damage to barge and cargo caused by striking bar due to want of care.

Carriers.— If danger might have been avoided, loss should be attributed to negligence of company and it should be held liable notwithstanding exception in bill of lading, but burden to establish such negligence is upon plaintiff, p. 133.

This rule is affirmed and applied as follows: Liverpool, etc., Co. v. Phenix Ins. Co., 129 U. S. 438, 32 L. 791, 9 S. Ct. 471, holding carrier liable for loss caused by stranding of ship through negligence of officers; Compania La Flecha v. Brauer, 168 U. S. 120, 42 L. 405, 18 S. Ct. 16, holding company liable for negligence in throwing cattle overboard with no apparent necessity for jettison; The Victory, 168 U. S. 423, 42 L. 528, 18 S. Ct. 155, holding burden upon insurance company to show negligence, where loss by collision was excepted in bill of lading; The Shand, 10 Ben. 311, F. C. 12,702, where portion of damage was caused by peril of sea and part by negligence of crew in operating steam pump; The Sloga, 10 Ben. 320, F. C. 12,955, holding vessel might have prevented injury to cargo by proper stowage, etc.; Wertheimer v. Pennsylvania R. R. Co., 17 Blatchf. 422, 1 Fed. 234, holding defendant not liable for loss by fire which was the act of a mob; The Saratoga, 20 Fed. 871, holding ship liable for money stolen notwithstanding exception

in bill of lading; The Sidney, 23 Fed. 97, holding proof failed to show negligence in loss caused by stranding; The New Orleans, 26 Fed. 45, holding burden on libellant to prove that loss from heat was due to negligence; The Brantford City, 29 Fed. 377, holding ship liable for loss of cattle caused by a lurch which might have been avoided; Northwest, etc., Co. v. Boston, etc., Ins. Co., 41 Fed. 797, holding insurance company bound to prove that stranding, being a peril covered by policy, was due to negligence; The Guy C. Goss, 53 Fed. 828, 840, holding evidence insufficient to show that rust on iron was caused by improper stowage; The G. R. Booth, 64 Fed. 879, holding burden on libellant to prove that damage by water was due to negligence; The Etona, 64 Fed. 882, dismissing libel for want of evidence of negligence where damage was caused by stranding; The Timor, 67 Fed. 357, 85 U. S. App. 278, holding burden on libellant where loss was caused by vermin, an excepted risk; Little Rock, etc., R. R. Co. v. Talbot & Co., 39 Ark. 530, and Insurance Co. v. Lake Erie, etc., R. R. Co., 152 Ind. 338, 53 N. E. 383, both holding similarly as to loss by fire; Reid v. Evansville, etc., R. R. Co., 10 Ind. App. 389, 53 Am. St. Rep. 393, 35 N. E. 704, holding railroad not liable for loss, by fire, not due to negligence; Louisville, etc., R. R. Co. v. Manchester Mills, 88 Tenn. 662, 14 S. W. 316, and Schaller v. Chicago, etc., R. R. Co., 97 Wis. 39, 71 N. W. 1045, both holding plaintiff bound to prove negligence where defendant showed loss by fire, provided against in bill of lading; The Henry B. Hyde, 90 Fed. 115, 61 U. S. App. 149, excepting loss by breakage. Cited generally in The Hadji, 18 Fed. 461. Approved in concurring opinion in Union Ins. Co. v. Shaw, 2 Dill. 23, F. C. 14,366, holding proof insufficient to prove that fire was caused by negligence of officers of vessel.

Denied in Chicago, etc., R. R. Co. v. Moss, 60 Miss. 1013, 45 Am. Rep. 429, holding burden on defendant to prove excepted risk and also absence of negligence. Denied in dissenting opinion, collecting authorities, in Lamb v. Camden, etc., R. R. Co., 46 N. Y. 287, 289, majority holding burden upon plaintiff to show that loss by fire was due to negligence.

Negligence.— A presumption of negligence from simple occurrence of accident seldom arises, except where, due care being taken, no injury ordinarily ensues in similar cases, or where it is caused by mismanagement or misconstruction of thing over which defendant has immediate control and for which he is responsible, p. 134.

Cited and rule approved and followed in The Shand, 10 Ben. 312, F. C. 12,702, holding ship liable for damaged goods where loss was caused by fault in operating pump; Rose v. Stephens, etc., Co., 20 Blatchf. 412, 11 Fed. 439, and The Sydney, 27 Fed. 128, both holding inference justifiable that explosion of boiler was due to want of care; Rintoul v. The New York, etc., R. R. Co., 21 Blatchf. 442, 17 Fed. 907, holding negligence presumed from loss by fire

caused by collision; The Adelia, 1 Hask. 568, F. C. 79, holding tug liable for damage to tow in attempting to wind the latter; The William Branfoot, 48 Fed. 916, holding ship liable for injury to stevedore occasioned by falling stanchion; The E. B. Simpson, 60 Fed. 453, 23 U. S. App. 265, holding prima facie case against tug, where tow was grounded in Mobile bay while in its charge; Birmingham, etc., R. R. Co. v. Hale, 90 Ala. 12, 24 Am. St. Rep. 751, 8 So. 143, holding prima facie case established where plaintiff was injured in getting off car, being thrown by sudden starting of car; Atchison, etc., R. R. Co. v. Swarts, 58 Kan. 248, 48 Pac. 956, holding railroad not liable for injury to employee caused by defective switch track; Hill v. Scott, 38 Mo. App. 374, holding inference properly drawn that there was negligence in manner of hitching runaway horse; Foss v. Baker, 62 N. H. 249, holding presumption did not arise where plaintiff was injured while working in wheelpit in factory; San Antonio, etc., R. R. Co. v. Robinson, 73 Tex. 285, 11 S. W. 329, holding charge erroneous that proof of derailment of train was sufficient proof of negligence to authorize a verdict; Washington v. Missouri, etc., R. R. Co., 90 Tex. 320, 38 S. W. 766, holding proper question for jury whether separation and derailment of train was due to negligence; Kaples v. Orth, 61 Wis. 535, 21 N. W. 635, holding negligence properly inferred where plaintiff was injured by cake of ice falling from hands of one having full control of it. Approved in The B. B. Saunders, 23 Blatchf. 384, 25 Fed. 729, holding rule did not apply where facts did not indicate which of two boats was at fault; Norfolk, etc., R. R. Co. v. Marshall, 90 Va. 837, 20 S. E. 824, where it was conceded that wreck was caused by act of God, and company held not liable. Cited, arguendo, in Chicago, etc., R. R. Co. v. Rood, 163 Ill. 483, 54 Am. St. Rep. 480, 45 N. E. 240, holding presumption did not arise where passenger on street car was injured by passing wagon. See note, 62 Am. Dec. 680, 681; elaborate note, 20 Am. St. Rep. 490.

Explained in Sprague v. Southern R. R. Co., 92 Fed. 62, 63 U. S. App. 716, holding question whether plaintiff was injured through negligence in management of train should have been submitted to jury.

11 Wall. 136-139, 20 L. 101, AMY v. SUPERVISORS.

Mandamus.— Federal court may resort to mandamus to compel State officer to satisfy its judgment, and State court is powerless to prevent its execution, p. 137.

Cited and applied in United States v. Jefferson County, 1 McCrary, 369, 5 Dill. 323, F. C. 15,472, holding county bound to levy a tax to pay principal and interest on bonds; Prugh v. Portsmouth, etc., Bank, 48 Neb. 418, 67 N. W. 311, holding State court could not enjoin marshal from proceeding with execution. Approved in Talcott v. Pine Grove, 1 Flipp. 133, F. C. 13,735.

Courts.— Neither Federal nor State courts can impede any action the other may take within the limits of its jurisdiction for the satisfaction of its judgments or decrees, p. 138.

Cited and doctrine affirmed in Central Nat. Bank v. Stevens, 169 U. S. 465, 42 L. 819, 18 S. Ct. 415, holding judgments of State courts erroneous so far as they affected rights of parties adjudged in Federal court; Central Nat. Bank v. Hazard, 49 Fed. 295, holding State court could not enjoin sale under control of Federal court; Adams v. Mercantile Trust Co., 66 Fed. 620, 30 U. S. App. 204, holding State court entitled to possession of property for further exercise of its jurisdiction; Sinton v. The R. R. Roberts, 46 Ind. 479, holding admiralty jurisdiction did not extend to cases where liens were claimed by builders of vessel.

Courts.— Where either Federal or State court is in possession of res sought to be reached, process of other court must pause until that possession has terminated, p. 138.

Cited in Central Nat. Bank v. Hazard, 49 Fed. 295, holding Federal court had exclusive control of property ordered sold; Dunham v. Dunham, 162 Ill. 614, 44 N. E. 849, 35 L. R. A. 80, holding decree of divorce, obtained while similar suit was pending in another State, void.

Distinguished in Thomas v. Mahone, 9 Bush, 121, holding that a Federal military encampment did not interfere with constructive possession of State court; Baker v. Daily, 6 Neb. 471, holding that marshal waived his right to possession by failure to plead his authority.

Statutes.— Repeal of a statute does not affect a pre-existing common-law liability covering same ground, p. 138.

Officers.— Where law requires absolutely a ministerial act to be done by public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to extent of injury arising from his conduct, p. 138.

Cited and adopted as authority in People v. Smith, 123 Cal. 74, 55 Pac. 767, holding sureties of assessor liable for failure of latter to collect certain taxes; Raynsford v. Phelps, 43 Mich. 345, 38 Am. Rep. 190, 5 N. W. 403, holding tax collector liable for injury resulting from false return; Knox Co. v. Hunolt, 110 Mo. 75, 19 S. W. 630, holding county judges liable for misapplication of school funds to other county purposes; Merritt v. McNally, 14 Mont. 238, 36 Pac. 46, holding building inspector responsible for injuries resulting from neglect of duty; Mock v. Santa Rosa, 126 Cal. 344, 58 Pac. 830, holding judgment against official for wrongful act, bound him personally. Approved in St. Joseph School Board v. Hull, 72 Mo. App. 407, holding county treasurer discharged where his tender of a certain amount was accepted. Cited, without particular application, in

Talcott v. Pine rove, 1 Flipp. 181, F. C. 13,735, municipal bond case; National, etc., Co. v. Leland, 94 Fed. 509, involving corporate directors' liability; Louisville, etc., R. R. Co. v. Tennessee, 8 Heisk. 788. See valuable note, 79 Am. Dec. 473, 476, and note, 90 Am. Dec. 730, 731.

Distinguished in Stephenson v. Monmouth, etc., Co., 84 Fed. 115, 54 U. S. App. 504, holding city council not liable for mistake in taking bond not made as required by statute; Muscatine, etc., R. R. Co. v. Horton, 38 Iowa, 47, holding county trustees, acting in quasi-judicial capacity, not liable for erroneous interpretation of law.

Officers.— A mistake as to his duty and honest intentions will not excuse public officer, p. 138.

Followed in Beardslee v. Dolge, 143 N. Y. 165, 42 Am. St. Rep. 710, 38 N. E. 207, action against highway commissioner for false return to a writ of certiorari. Cited approvingly in note, 90 Am. Dec. 730.

11 Wall. 139, note, 20 L. 102, FARR v. THOMPSON.

Affirming Amy v. Supervisors, supra.

11 Wall. 139-164, 20 L. 102, SMITH v. SAC COUNTY.

Appeal and error.— Where lower court, without jury, made special findings of fact on which it held law to be for defendant, the question on appeal is whether judgment is justified by facts found, p. 146.

Approved in Press v. Davis, 54 Fed. 268, 9 U. S. App. 546, affirming judgment of lower court where proper objection to judgment was not made.

Bills and notes.— Circumstances, such as fraud or illegality, may be shown in connection with origin of negotiable paper which will devolve upon holder burden of showing that he gave value for it before maturity, p. 147.

Cited as authority and rule applied in Stewart v. Lansing, 104 U. S. 510, 26 L. 868, and Lansing v. Lytle, 38 Fed. 207, where holder of illegal bonds was held to have insufficient evidence to prove consideration; King v. Doane, 139 U. S. 173, 35 L. 87, 11 S. Ct. 467, holding bona fide holder for value entitled to recover on note originally obtained by fraud; Bailey v. Lansing, 13 Blatchf. 427, F. C. 738, where plaintiff failed to show how he acquired title to coupons illegally issued; National Exch. Bank v. White, 30 Fed. 415, where proof was uncontradicted that plaintiff was bona fide holder for value of securities fraudulently negotiated; Simmons v. Taylor, 38 Fed. 686, holding certain holders of bonds, purchased after maturity, entitled to recover, others not; Louisville, etc., R.

R. Co. v. Ohio, etc., Co., 57 Fed. 44, holding, in action to cancel bonds for illegality, burden is on defendant to show that he is bona fide holder for value; Louisville Trust Co. v. Louisville, etc., R. R. Co., 75 Fed. 469, 43 U. S. App. 550, holding transferee of bonds bound to show want of notice and good faith as to defect in guaranty of bonds; Woodward v. Rogers, 31 Iowa, 343, and Carrier v. Cameron, 31 Mich. 379, 18 Am. Rep. 197, holding error to exclude evidence offered by defendant to establish fraud by payee; Rock Island, etc., Bank v. Nelson, 41 Iowa, 565, holding indorser of note given for intoxicating liquors in violation of law, compelled to show that he was bona fide purchaser for value; Light v. West, 42 Iowa, 141, holding assignee of tax certificate tainted with fraud bound to show good faith; Union, etc., Bank v. Barber, 56 Iowa, 562, 9 N. W. 892, applying rule where note was wrongfully indorsed and delivered; Hamilton v. Marks, 63 Mo. 179, holding instruction embodying above rule correct; Cannon v. Moore, 17 Mo. App. 102, holding there was sufficient evidence of consideration by holder to warrant jury's verdict; Thamling v. Duffey, 14 Mont. 576, 43 Am. St. Rep. 668, 37 Pac. 365, holding plaintiff should plead bona fides where defendant set up plea of fraud in the inception of note; Vosburgh v. Diefendorf, 119 N. Y. 366, 16 Am. St. Rep. 840, 23 N. E. 802, holding bona fides of holder should have been proved and question left to jury; Rische v. Planters' Nat. Bank, 84 Tex. 420, 19 S. W. 611, holding exceptions to answer, setting up fraud in inception of note, improperly sustained; Jamison v. Independent School Dist., 90 Fed. 389, applying rule to transferee of school bonds. Cited approvingly in Dallas County v. MacKenzie, 94 U. S. 663, 24 L. 183, holding plaintiff erred in demurring to answer denying that county ever exercised its power to issue bonds; Gutwillig v. Stumes, 47 Wis. 433, 2 N. W. 778, holding that agreement to compromise between original parties without disclosing fact of negotiation of note was not such fraud as to cast burden upon innocent purchaser. Cited, arguendo, in Collins v. Gilbert, 94 U. S. 759, 24 L. 172, applying presumption that bona fide holder of note became the holder of it for value. Approved without applying rule in Allemania Fire Ins. Co. v. McLeod, 4 Mo. App. 440, holding indorsee taking note for prior indebtedness and promise to forbear a purchaser for value; Turley v. Bartlett, 10 Heisk. 225, holding question of fraud in procurement of note open as between payor and payees; Supervisors v. Randolph, 89 Va. 620, 16 S. E. 724, holding railroad bonds valid and particularly in hands of bona fide purchaser. See 98 Am. Dec. 685, note; also exhaustive note, 11 Am. St. Rep. 324.

Distinguished in Pana v. Bowler, 107 U. S. 542, 27 L. 429, 2 S. Ct. 715, collecting authorities, and holding irregularity in election not such an illegality as to cast burden of proving consideration upon holder of coupons; Rahm v. King, etc., Mfg., 16 Kan. 533, holding rule did not apply to notes not fraudulently issued though

without consideration; dissenting opinion in Simons v. Fe
Fed. 910, 17 U. S. App. 1, 20 L. R. A. 557, majority holding t
through fraud of its president did not become purchaser f

Bonds.— A finding that one became holder by transf
maturity, does not imply that he was purchaser for value

Approved in United Water, etc., Co. v. Farmers, etc., C
App. 240, 53 Pac. 517, holding, under circumstances of
transfer of bonds without agreement was not a sale
ment.

Bonds.— Plaintiff, holder of county bonds found t
illegally signed and issued without consideration, is
titled to recover against county than original holder,
of consideration, p. 149.

Bonds.— Coupons attached as interest warrants to
are negotiable instruments, subject to same rules
per Clifford, J., dissenting, p. 149.

Approved in Indiana, etc., R. R. Co. v. Spragu
26 L. 557, holding that past-due unpaid coupon di
dishonored paper; McKim v. King, 58 Md. 504,
holding transferee of coupons delivered after
quire no better title than transferrer. Cited in n
527.

Bills and notes.— Possession of bill is prima
owner came by it honestly, per Clifford, J., d

Cited in 80 Am. Dec. 68, note.

Bills and notes.— If holder of note prove
duce the note, it goes to jury clothed with
holder for value without notice of anythi
per Clifford, J., dissenting, p. 155.

Cited in brief note in 63 Am. Dec. 779.

Municipal bonds.— When corporation
tiable securities, a bona fide holder has
were issued under requisite authority,
peached in his hands for any infirmity,
p. 156.

Questioned in Green v. Dyersburg, 2
ing power of municipal corporation t
imply power to pay for it in negotiab
not protected.

Bills and notes.— Possession is
other evidence is produced to contr
p. 158.

Cited in note in 90 Am. Dec. 695.

11 Wall. 164-171, 20 L. 127, THE SAPPHIRE.

International law.—A foreign sovereign, who, has demand of civil nature against any person in United States, may prosecute it in courts of the latter, p. 167.

Cited in Wisconsin v. Pelican Ins. Co., 127 U. S. 290, 32 L. 243, 8 S. Ct. 1374, holding Supreme Court could not entertain original action by State against corporation of another State to enforce penal liability.

Abatement and revival.—The reigning sovereign of France is but the agent of the national sovereignty, and his successor is competent to carry on suit already commenced in our courts, p. 168.

Cited in Comanche County v. Lewis, 133 U. S. 205, 33 L. 607, 10 S. Ct. 289, holding county liable for debts contracted under a previous and entirely different organization.

International law.—A deed to, or treaty with, a sovereign inures to his successor in the government of the country, p. 168.

Courts.—Substitution of names is a formal matter and can be made by the court under its power to regulate forms of proceeding, p. 168.

Followed in Devereaux v. Brownsville, 29 Fed. 750, holding suggestion of fact of change of name in town sufficient to meet requirements of procedure.

Abatement and revival.—If injustice should result from continuance of proceedings after death of sovereign, court may take such order as exigency may require, p. 169.

Collision.—It is not general practice of Supreme Court to scrutinize very carefully the weight of evidence in cases of collision, where it is substantially conflicting, p. 169.

Collision.—A distance of 250 yards is a good and sufficient berth for a vessel in the harbor of San Francisco, p. 170.

Cited in The Mary Fraser, 26 Fed. 873, holding that vessel anchoring 800 yards from another in New York harbor not guilty of taking foul berth.

Collision.—Where two vessels at anchor collide, and one is at fault for want of sufficient anchors, and the other for want of proper watch, damages should be equally divided, p. 171.

Cited as prevailing authority and followed in The North Star, 106 U. S. 22, 27 L. 93, 1 S. Ct. 46, where entire loss occurring by fault of both parties in collision was divided; The Max Morris, 137 U. S. 9, 34 L. 587, 11 S. Ct. 31, applying rule where passenger on vessel was injured partly through negligence of officers and partly through his own; The Nereus, 23 Fed. 458, where both vessels were

found at fault for confusing whistles, etc., and loss divided; The Ogemaw, 32 Fed. 925, holding both vessels at fault in collision between a tow and vessel at anchor; The Aneriy, 58 Fed. 795, dividing loss between two barges and a ship, held negligent for not letting both anchors go. Cited approvingly in The Clara, 102 U. S. 203, 26 L. 146, affirming S. C., 13 Blatchf. 511, F. C. 2,787, dismissing libel brought by owners of vessel, where failure to keep watch on latter was cause of collision; The Oliver, 22 Fed. 851, holding similarly where vessel was sunk by reason of its failure to have either lights or watch; The Erastus Corning, 25 Fed. 574, holding collision due solely to want of proper light on anchored vessel. See note on this subject in 45 Am. Dec. 53, and also as to duty to keep anchor watch in note in 75 Am. Dec. 605.

11 Wall. 172-178, 20 L. 179, COAL CO. v. BLATCHFORD.

Courts.—Jurisdiction of Circuit Court cannot be entertained, unless each of several plaintiffs is competent to sue, and each of several defendants liable to be sued, under requirements of eleventh section of judiciary act of 1789, pp. 174, 175.

This rule of decision has been widely affirmed, and is applied and cited as follows: Case of the Sewing-Machine Cos., 18 Wall. 575, 21 L. 919, 12 Am. Rep. 546, and n., denying jurisdiction where one defendant corporation and plaintiff were residents of same State; Gardner v. Brown, 21 Wall. 41, 22 L. 527, holding similarly in action to foreclose, where defendant trustee and plaintiff were residents of same State; Peninsular, etc., Co. v. Stone, 121 U. S. 633, 30 L. 1020, 7 S. Ct. 1011, dismissing bill where citizens of Ohio were parties on both sides of controversy; Smith v. Lyon, 133 U. S. 319, 33 L. 636, 10 S. Ct. 304, denying jurisdiction where two plaintiffs and defendant were residents of three different States; Hanrick v. Hanrick, 153 U. S. 195, 38 L. 686, 14 S. Ct. 836, and Patterson v. Chapman, 13 Blatchf. 397, F. C. 11,042, where one defendant and plaintiffs were residents of same State; Bybee v. Hawkett, 6 Sawy. 599, 5 Fed. 6, holding, under act of 1875, cause removable where controversies in suit were all between citizens of different States; Case v. Douglas, 1 Dill. 300, F. C. 2,491, denying jurisdiction, where petition failed to show that all the plaintiffs having joint interest were residents of same State; Brigham v. Luddington, 12 Blatchf. 241, F. C. 1,874, holding, if party defendant were brought in, jurisdiction would be defeated for want of diverse citizenship; Saginaw, etc., Co. v. Saginaw, 28 Fed. 531, holding jurisdiction could not be acquired where plaintiff and principal defendant were residents of same State; Gann v. Northeastern R. R. Co., 57 Fed. 420, where plaintiffs jointly interested were not all citizens of same State; Tug River, etc., Co. v. Brigel, 67 Fed. 628, 31 U. S. App. 665, denying jurisdiction, where plaintiff and some defendants were residents of same State, and residence of some parties unknown; Excelsior,

etc., Co. v. Brown, 74 Fed. 324, 42 U. S. App. 55, holding parties plaintiff not entitled to sue in Federal court under acts of 1887 and 1888; New Orleans, etc., Co. v. Recorder, etc., 27 La. Ann. 292, where parties plaintiff and defendants were citizens of Louisiana; Robb v. Parker, 3 S. C. 69, denying jurisdiction where citizen of New York sued citizen of Michigan in Federal court of South Carolina.

Distinguished in Fisk v. Henarie, 13 Sawy. 44, 32 Fed. 422, holding, under act of 1887, case removable where a "controversy" involved in suit was between parties of diverse citizenship, without regard to other parties; Removal Cases, 100 U. S. 469, 25 L. 598, holding case removable where only controversy was between citizens of different States, without reference to form of pleadings; Sands v. Smith, 1 Dill. 293, F. C. 12,305, sustaining jurisdiction, under acts of 1839, 1866 and 1867, although defendants were citizens of different States; Froment v. Duclos, 30 Fed. 385, holding jurisdiction of Federal courts over consuls and vice-consuls exclusive. Limited in Pond v. Vermont, etc., R. R. Co., 12 Blatchf. 290, F. C. 11,265, holding that rule does not prevent citizen of third State from appearing voluntarily as party defendant.

Courts.— Executors and trustees come within rule as to clear averment of the jurisdictional diversity of citizenship in the Federal courts, and jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified, p. 175.

Rule approved and cited as follows: Rice v. Houston, 13 Wall. 67, 20 L. 484, holding administrator changing his residence to State other than that of defendant entitled to sue in Federal court; Knapp v. Railroad Co., 20 Wall. 123, 124, 22 L. 331, determining jurisdiction by residence of trustees of mortgage bonds and not by residence of bondholders; Gardner v. Brown, 21 Wall. 41, 22 L. 527, Donohoe v. Mariposa, etc., Co., 5 Sawy. 167, F. C. 3,989, and Teal v. Walker, 23 Fed. Cas. 822, all denying jurisdiction where a defendant trustee and plaintiff were residents of same State; Thayer v. Life Assn., 112 U. S. 720, 28 L. 866, 5 S. Ct. 357, and Mitchell v. Tillotson, 11 Biss. 327, 12 Fed. 738, both holding similarly where trustee was indispensable party; New Orleans v. Gaines, 138 U. S. 607, 34 L. 1106, 11 S. Ct. 431, holding subrogated creditor entitled to stand upon his own citizenship in determining jurisdiction; Weed, etc., Co. v. Wicks, 3 Dill. 266, F. C. 17,348, upholding jurisdiction in action brought by "real party in interest;" Farlow v. Lea, 8 Fed. Cas. 1018, holding receiver of Ohio corporation, resident of Massachusetts, could sue citizen of Ohio in Circuit Court; Graham v. Boston, 14 Fed. 763, applying rule where shareholder brought suit in behalf of himself and other shareholders; In re M'Clean, 26 Fed. 50, testing jurisdiction by citizenship of guardian; Harper v. Norfolk, etc., R. R. Co., 36 Fed. 104, and Goff's Admr. v. Norfolk, etc.,

R. R. Co., 36 Fed. 301, both sustaining jurisdiction wher
istrator and defendant were citizens of different States;
Sewell, 56 Fed. 131, holding that insolvency discharge
through trustee upon all beneficiaries; Bangs v. Loverid
965, and Miller v. Sunde, 1 N. Dak. 4, 44 N. W. 302, b
citizenship of administrator test of jurisdiction; Shipp
62 Fed. 6, 22 U. S. App. 380, and Vimont v. Chicago, et
Iowa, 517, 17 N. W. 33, 64 Iowa, 524, 21 N. W. 12,
where trustee was disqualified, non-resident beneficia
confer Federal jurisdiction; Pennington v. Smith, 78
U. S. App. 409, determining jurisdiction by citizen
mentary trustee; Seccomb v. Wurster, 83 Fed. 86
payer suing by virtue of New York statute, and
citizenship, entitled to sue in Federal court; Robi
etc., Co., 112 N. Y. 321, 19 N. E. 625, 2 L. R. A.
resident appointed administrator does not become
dent of place where appointed; Popp v. Cincin
Fed. 467, upholding foreign administrator's suit
testator, notwithstanding beneficiaries' disabilit
but without application, in M'Donald v. Sell
holding bill ancillary and citizenship of parties
son v. Van Cleave, 129 Ind. 220, 26 N. E. 900,
holding, where trustee is in court, decree bin
trust property. Cited generally in Jones v. M
2 So. 471.

Distinguished in Dodd v. Ghiselin, 27 Fed.
of minor and not of guardian determines
Atlantic, etc., R. R. Co., 58 Fed. 38, holding
is himself complainant, jurisdiction is n
of trustee.

Courts.—Where law compels use of n
has not any interest in suit, the Federal
dictional purposes, only those as partie
before them exists, p. 177.

Cited and followed in State of Florid
23 L. 297, holding suit by public trus
State, giving jurisdiction to Federal
Skinner, 101 U. S. 589, 25 L. 968, h
court not defeated because executo
to perform ministerial act; Patterso
marshal was mere nominal party,
May v. St. John, 88 Fed. 771, wher
were held mere nominal parties.

Distinguished in New Orleans v.
11 S. Ct. 431, holding subrogated
titled to stand upon his own c
Shipp v. Williams, 62 Fed. 6, 22

a nominal party, and his citizenship, therefore, material as to jurisdiction.

Courts.— Suit by trustees, one being resident of State different from, and the other of same State with, defendant, cannot be sustained in Federal court, p. 176.

Pleading.— Where defect in jurisdiction on account of citizenship of parties is apparent from averments in bill, it may be reached by demurrer or motion at any stage in proceedings, p. 178.

Approved and applied in Southern Pac. Co. v. Denton, 146 U. S. 206, 36 L. 944, 13 S. Ct. 46, where want of jurisdiction was apparent on face of petition; Meyer v. Herrera, 41 Fed. 65, holding defect in jurisdiction properly reached by demurrer; Laskey v. Newtown Mining Co., 50 Fed. 636, sustaining demurrer, where averments of complaint failed to show jurisdiction; Municipal Inv. Co. v. Gardiner, 62 Fed. 955, dismissing bill on demurrer.

Pleading.— Plea of abatement is required only where citizenship averred is such as to support jurisdiction, and defendant desires to controvert it, p. 178.

Cited and affirmed in Sharon v. Hill, 10 Sawy. 668, 26 Fed. 723, holding question of citizenship of parties conclusively determined on plea in abatement; Pond v. Vermont, etc., R. R. Co., 12 Blatchf. 297, F. C. 11,265, holding it too late to interpose plea after answer on the merits; Gager v. Harrison, 9 Fed. Cas. 1031, holding denial of citizenship of parties could not be pleaded with the merits. Approved also in Fisk v. Henarie, 13 Sawy. 43, 32 Fed. 421, holding sufficiency of affidavit required in removal of cause to Federal court not open to question.

Distinguished in Curnow v. Phœnix Ins. Co., 44 Fed. 305, holding motion to remand, supported by petition denying diverse citizenship, sufficient traverse of petition to remove.

Pleading.— Question of sufficient jurisdictional citizenship constitutes no part of the issue upon the merits, p. 178.

Cited as authority in Consolidated, etc., Co. v. Champion, etc., Co., 62 Fed. 949, holding that question of value, so far as fixing jurisdiction, constituted no part of issue upon merits.

11 Wall. 178-184, 20 L. 131, UNITED STATES v. O'KEEFE.

Action.— All governments possess immunity from suit, and it is only in spirit of liberality, and to promote ends of justice, that they ever allow themselves to be brought into court, p. 182.

Approved in dissenting opinion in United States v. Lee, 106 U. S. 227, 27 L. 184, 1 S. Ct. 266, majority holding that suit could be maintained against persons holding property as officers of the United States.

Action.— Although in England mandatory process cannot issue against sovereign, the law allows subject, by petition, to inform king of nature of grievance, and relief is granted as of course, except in extraordinary cases; the privilege is available to citizens of United States, pp. 183, 184.

Cited, arguendo, in United States v. Lee, 106 U. S. 205, 27 L. 176, 188, 1 S. Ct. 248, 276, holding action could be maintained against parties holding property as officers and agents of United States; The Fidelity, 16 Blatchf. 574, F. C. 4,758, holding vessel belonging to municipality of New York could not be seized.

Courts.— Congress intended to confer on British subjects right to sue in Court of Claims, under act relating to captured and abandoned property, if similar rights were secured to American citizens in England. Such right, therefore, exists, p. 184.

Cited and followed in Carlisle v. United States, 16 Wall. 156, 21 L. 430, action by British subject to recover proceeds from sale of cotton confiscated during the Rebellion; Young v. United States, 97 U. S. 62, 24 L. 998, similar action by British subject who was a non-resident during the war; Phelps v. McDonald, 99 U. S. 307, 25 L. 476, holding that United States court could determine rights of parties to fund paid English government for one of its subjects.

11 Wall. 185–192, 20 L. 74, LEON v. GALCERAN.

Admiralty.— Mariners, in suit to recover wages, may proceed against owner or master of ship in personam, or they may proceed in rem against ship, or ship and freight, at their election, p. 187.

Followed in Smith v. Oakes, 141 Mass. 454, 55 Am. Rep. 488, 5 N. E. 826, holding action at law proper remedy to recover seaman's wages.

Seamen — Admiralty.— If suit to recover mariners' wages is in rem, the District Court has exclusive original jurisdiction; if in personam, mariner may proceed by libel in District Court, or an action at law in Circuit Court, if parties are citizens of different States, or in State court, under common-law jurisdiction, as provided by judiciary act, p. 188.

The rule is cited and applied as follows: Steamboat Co. v. Chase, 16 Wall. 533, 534, 21 L. 372, sustaining jurisdiction of State court of action for personal injuries caused by steamboat; Norton v. Switzer, 93 U. S. 356, 23 L. 904, holding decree in bankruptcy did not divest State court of authority to proceed in action on maritime contract; United States v. Ames, 99 U. S. 43, 25 L. 300, holding question whether property seized in rem and released on bond should be recalled, cognizable only in District Court; Schoonmaker v. Gilmore, 102 U. S. 119, 26 L. 95, affirming jurisdiction of State court in action in personam for damages resulting from collision;

Johnson v. Chicago, etc., Co., 119 U. S. 398, 30 L. 450, 7 S. Ct. 259, action in personam in State court for damages to warehouse, etc., caused by river boat and tow; New England, etc., Ins. Co. v. Dunham, 3 Cliff. 336, F. C. 10,155, holding action on contract of marine insurance cognizable in District Court or in courts of common law; Davis v. Mason, 44 Ark. 555, sustaining attachment in State court upon debt for materials furnished to build boat; Smith v. Oakes, 141 Mass. 454, 55 Am. Rep. 488, 5 N. E. 826, holding action at law proper remedy to recover seaman's wages; Billings v. Breinig, 45 Mich. 69, 7 N. W. 722, holding State court had jurisdiction of maritime tort made actionable by State statute; Conrad v. De Montcourt, 138 Mo. 322, 39 S. W. 808, holding similarly as to personal action upon general average bond; Baird v. Daly, 57 N. Y. 249, 15 Am. Rep. 493, sustaining action in State court for damages for breach of maritime contract of transportation; Braithwaite v. Jordan, 5 N. Dak. 218, 65 N. W. 708, 31 L. R. A. 248, reviewing authorities, and holding State court could take cognizance of suit on bond given in admiralty proceedings; Brown v. Gilmore, 92 Pa. St. 46, action in State court for damages resulting from collision on Ohio river; Waggoner v. St. John, 10 Heisk. 512, sustaining action in State court to recover for materials, work, etc., on vessel. Cited generally, with approval, in Manchester v. Massachusetts, 139 U. S. 263, 35 L. 166, 11 S. Ct. 564, affirming S. C., 152 Mass. 246, 25 N. E. 118, 9 L. R. A. 243, holding State court had jurisdiction of crime committed on Buzzard's bay, in absence of act of Congress. Cited also in note, 23 Am. St. Rep. 839, and note, 62 Am. Dec. 236, 242, 244.

Admiralty.— Writ of sequestration may be granted by State court and levied upon vessels as security to respond to judgments which may be recovered, and they are not proceedings in rem, pp. 188, 189.

Cited and followed in Pennywit v. Eaton, 15 Wall. 384, 21 L. 114, holding writ of attachment properly issued by State court against vessel; Johnson v. Chicago, etc., Co., 119 U. S. 398, 30 L. 450, 7 S. Ct. 259, suit and attachment by State court for damage to granary by river steamer; Switzer v. Heinn, 27 La. Ann. 25, and State v. Voorheis, 39 La. Ann. 501, 4 Am. St. Rep. 276, 2 So. 39, holding that enforcement of maritime lien in a personal action is not a proceeding in rem. Cited, arguendo, in The Frank G. Fowler, 8 Fed. 336, determining order of payment of successive claims against vessel for tort; Pacific, etc., Co. v. Bancroft-Whitney Co., 94 Fed. 186, holding legal nature of proceeding in rem against vessel was not changed by claim interposed by company.

Distinguished in Stewart v. Potomac Ferry Co., 5 Hughes, 385, 12 Fed. 306, holding State statute invalid giving proceeding in rem against ship for maritime cause of action; In re Surplus, etc., of the Ship Edith, 11 Blatchf. 456, 466, F. C. 4,283, holding that State could not create lien interfering with priorities given by law maritime. Qualified and questioned in The Ironsides, 13 Fed. Cas. 106,

directing mortgages on propellers paid, without reference to liens asserted by State law.

Admiralty.— Action may be maintained in State court to recover on bond given for sale of schooner seized under process of State court, in action in personam, p. 190.

Admiralty.— Common-law remedies are not competent to enforce maritime lien by proceeding in rem, and State court cannot enforce maritime lien by such proceeding, pp. 191, 192.

Rule cited as settled authority in The Cerro Gordo, 62 Conn. 584, 54 Fed. 395, holding maritime lien not waived by action in State court, where judgment remained unsatisfied; Warren v. Kelley, 80 Me. 531, 15 Atl. 54, holding statute unconstitutional authorizing proceedings in rem in State court to enforce maritime liens. Cited on subject of maritime liens in 62 Am. Dec. 241, 244; also note, 34 Am. St. Rep. 310.

Maritime liens do not arise for materials and supplies furnished to vessel in her home port, and in respect to such contracts State may create such liens as their legislatures deem just and expedient, within constitutional limitations, p. 192.

Approved in The Surplus, etc., of Ship Edith, 11 Blatchf. 455, 466, F. C. 4,283, affirming S. C., 5 Ben. 436, 437, F. C. 4,282, holding no lien created by New York statute for materials furnished vessel in home port; Sinton v. Steamboat, etc., 46 Ind. 479, holding admiralty jurisdiction did not extend to case where lien was claimed for materials furnished in construction. Cited generally in The Lottawanna, 20 Wall. 218, 22 L. 262.

Limited in The Glide, 167 U. S. 618, 42 L. 300, 17 S. Ct. 934, reversing S. C., 157 Mass. 530, 533, 33 N. E. 165, 166, holding, where State authorizes proceedings in nature of process in rem, District Court has exclusive jurisdiction.

Maritime lien.— Where maritime lien arises, party may waive his lien, and proceed by libel in personam in admiralty, or may resort to common-law remedy in subordinate court, p. 188.

Approved in Southern Bank v. McNeil, 22 Fed. Cas. 822, holding maritime lien for money loaned a vessel in foreign port not waived by action commenced and voluntarily dismissed in State court.

11 Wall. 193–199, 20 L. 110, GENERES v. CAMPBELL.

Appeal and error.— Act of March 3, 1865, provides that finding of court upon facts, either generally or specially, shall have same effect as verdict of jury; that rulings of court may be reviewed by Supreme Court on bill of exceptions, and where finding is special, review extends to sufficiency of facts, pp. 197, 198.

Exceptions, bill of.— Bill of exceptions is not required to be sealed in courts of United States. Signature of judge is sufficient, p. 198.

Cited and rule applied in Stanton v. Embrey, 93 U. S. 555, 23 L. 985, where bill was signed after jury retired and filed nunc pro tunc; Herbert v. Butler, 97 U. S. 320, 24 L. 958, holding bill sufficient, signed after trial and without seal. Cited, arguendo, in Wolf v. Cook, 40 Fed. 437.

Exceptions, bill of.— Bill of exceptions is insufficient, where it consists of interlocations between court and counsel, does not give all the evidence on subjects excepted to, and sets forth no reasons stated for entry of judgment, p. 198.

Approved in Hudson v. Charleston, etc., R. R. Co., 55 Fed. 256, court refusing to sign abstract of parol testimony for use of appellate court.

Appeal and error.— Writ of error is not proper remedy to revise and review facts, p. 199.

Affirmed in Dowar v. Richards, 151 U. S. 666, 38 L. 308, 14 S. Ct. 455, refusing to review question of knowledge of value of mining ledge.

Appeal and error.— If facts are sufficient to support judgment, the remedy is by motion for new trial, but if facts are specially found, writ of error will lie to correct any wrong, p. 199.

Cited in Folsom v. Mercantile, etc., Co., 9 Blatchf. 204, F. C. 4,903, holding it not error for court, trying case without jury, to refuse to make special findings.

11 Wall. 199-203, 20 L. 134, CASE v. TERRELL.

United States.— A moneyed judgment cannot be rendered against United States in any Federal court, except Court of Claims, p. 201.

Approved in United States v. Wickersham, 10 Fed. 510, holding court had no jurisdiction to appoint receiver of property in possession of the United States.

Distinguished in Lee v. Kaufman, 3 Hughes, 125, F. C. 8,191, holding, in suit to test title to property, agents of United States in possession, as such, might be sued.

Banks and banking.— Receiver of national bank represents the bank, stockholders and creditors, and in no sense represents the government, p. 202.

Cited and approved in Bank of Bethel v. Pahquioque Bank, 14 Wall. 400, 20 L. 844, holding national bank, in hands of receiver, capable of suing or being sued in its corporate name; Movius v. Lee, 24 Blatchf. 294, 80 Fed. 300, holding receiver of national bank may sue directors for loss resulting from negligence; Gibson v.

Peters, 35 Fed. 725, 728, holding compensation of attorney for receiver of national bank not payable by United States; Thompson v. German Ins. Co., 76 Fed. 894, holding action by receiver of national bank against stockholders may be barred by statute of limitations; Bridges v. Stephens, 132 Mo. 547, 34 S. W. 561, holding receiver of national bank subject to suit in State court and without special privileges.

Qualified in Price v. Abbott, 17 Fed. 508, holding receiver an officer of the government and that actions brought by him to recover assessments are suits at common law; and also in dissenting opinion in Bridges v. Stephens, 132 Mo. 554, 34 S. W. 563, majority holding receiver amenable to State court, as any ordinary suitor.

United States.— Comptroller of the currency has no authority to subject United States to jurisdiction of courts, and submit its rights to litigation without some provision of law authorizing him to do so, p. 202.

Cited and principle followed in Belknap v. Schild, 161 U. S. 17, 40 L. 601, 16 S. Ct. 445, holding injunction would not lie against United States for infringement of patent; Stanley v. Schwalby, 162 U. S. 270, 40 L. 965, 16 S. Ct. 760, holding that attorney-general could not submit United States to jurisdiction of State court; United States v. Wickersham, 10 Fed. 510, holding court had no power to enforce surrender of property of United States to a receiver; State v. Burke, 33 La. Ann. 510, holding State auditor and treasurer without authority to represent State in mandamus proceedings. Cited approvingly in People v. State Auditors, 42 Mich. 427, 4 N. W. 277, also dissenting opinion in United States v. Lee, 106 U. S. 227, 248, 27 L. 184, 191, 1 S. Ct. 266, 284, majority holding that agents of the United States may be sued for property in their possession.

Court of claims has exclusive jurisdiction of claims against government arising from contract, p. 203.

Equity.— Bill will be dismissed where only substantial relief asked is against the United States, and the latter is not party to suit, p. 203.

11 Wall. 204-210, 20 L. 112, INSURANCE CO. v. THE TREASURER.

Courts.— It must appear by record, and not from opinion of court, that Federal question was raised in order to give Supreme Court jurisdiction on error to State court, p. 208.

Cited and rule applied in Klinger v. State, 13 Wall. 268, 20 L. 637, where it did not certainly appear that lower court based judgment on validity of law requiring juror to take oath; Commercial Bank v. Rochester, 15 Wall. 642, 21 L. 117, dismissing appeal where case

in lower court may have been decided on form of remedy; Connecticut v. Woodruff, 153 U. S. 691, 38 L. 871, 14 S. Ct 976, applying rule and collecting cases.

Courts.— Construction of State statutes belongs to State courts, and it is not a Federal question which can be revised in Supreme Court on writ of error, unless it is made to conflict with Constitution of United States and its validity is sustained, p. 208.

Approved in concurring opinion in Hall v. De Cuir, 95 U. S. 500, 24 L. 552, court holding State law unconstitutional as interfering with interstate commerce; dissenting opinion in Underwood v. McVeigh, 131 U. S. cxxiii (appendix), 21 L. 954, majority dismissing writ on account of misdirection.

Courts.— On error to State court, where it does not appear what construction was given to State statute, jurisdiction of Supreme Court cannot attach, p. 209.

11 Wall. 210-216, 20 L. 77, INSURANCE CO. v. FRANCIS.

Courts.— Where declaration does not show that one of the parties to suit in Mississippi is citizen of that State, as required by act of March 2, 1867, jurisdiction of District Court cannot attach, p. 216.

Rule cited and jurisdiction denied in the following cases: Shaw v. Quincy, etc., Co., 145 U. S. 451, 36 L. 772, 12 S. Ct. 938, action against Michigan corporation brought in New York by citizen of another State; Booth v. St. Louis, etc., Co., 40 Fed. 2, where none of the parties were citizens of State where suit was filed; National, etc., Co. v. New York, etc., Co., 44 Fed. 711, where defendant corporation was resident of another State, and jurisdiction denied under act of March 3, 1887; Adams Exp. Co. v. Trego, 35 Md. 62, where record failed to show either party citizen of Maryland; Liverpool, etc., Ins. Co. v. McGuire, 52 Miss. 230, where petition for removal was similarly deficient.

Distinguished in Zambrino v. Galveston, etc., R. R. Co., 38 Fed. 457, holding corporation could be sued in district where it was doing business, its principal office being in another district of State; Duncan v. Associated Press, 81 Fed. 421, holding fact that parties were citizens of different States sufficient to sustain jurisdiction. Limited in United States v. Southern Pac. Co., 49 Fed. 302, holding, under act of 1887, defendant corporation need only be inhabitant of district where sued.

Courts.— Averment that defendant is corporation created by laws of New York, and doing business in Mississippi is, in legal effect, an averment that defendant is a citizen of New York, not of Mississippi, for corporation has no legal existence outside of sovereignty by which it was created, p. 216.

Cited and rule approved and applied in Shaw v. Quincy, etc., Co., 145 U. S. 451, 36 L. 772, 12 S. Ct. 938, holding corporation of Michigan could not be compelled to answer in suit brought against it in New York; Booth v. St. Louis, etc., Co., 40 Fed. 2, holding foreign corporation could acquire no residence in Missouri; Myers v. Murray, 43 Fed. 696, 11 L. R. A. 217, and n., applying rule to Illinois corporation doing business in Iowa; Baughman v. National Water-Works Co., 46 Fed. 5, holding citizenship fixed by State granting charter; Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. 578, reviewing authorities, and holding corporation, to acquire residence in new State, must be incorporated or adopted by such State; St. Louis R. R. Co. v. Pacific R. R. Co., 52 Fed. 772, denying jurisdiction where both parties were foreign corporations; Block v. Standard, etc., Co., 95 Fed. 979, holding averment that corporation was organized under and pursuant to laws of New Jersey an affirmative statement of its citizenship; Holbrook v. Ford, 153 Ill. 645, 46 Am. St. Rep. 923, 39 N. E. 1095, 27 L. R. A. 328, holding location of debts due company fixed by its domicile and place of its creation; Elston v. Piggott, 94 Ind. 23, holding corporation entitled to sue in Federal court upon same terms as an individual; Tunstall v. Parish of Madison, 30 La. Ann. 475, holding parish a citizen of Louisiana for purposes of jurisdiction; Rece v. Newport News, etc., Co., 32 W. Va. 171, 9 S. E. 214, 3 L. R. A. 575, and n., holding State cannot take away corporation's privilege to be heard in Federal court by simply declaring it a citizen of the State. Approved also, without applying rule, in United States v. Southern Pac. R. R. Co., 49 Fed. 302, and Farmers, etc., Ins. Co. v. Harrah, 47 Ind. 241. Cited, arguendo, in dissenting opinion in Baltimore, etc., R. R. Co. v. Cary, 28 Ohio St. 221, majority holding foreign corporation did not become citizen of Ohio by leasing railroad in that State.

Distinguished in Berry v. Mobile, etc., Co., 3 Fed. Cas. 290, holding, on account of nature of corporation's citizenship, issuance of insurance policy is not transaction of commerce within meaning of article 4, section 2, of Federal Constitution. Limited in Zambrino v. Galveston, etc., R. R. Co., 38 Fed. 455, 456, 457, holding railroad corporation could be sued in district where it was doing business, although principal office was in another district.

Corporations may transact business where its charter does not operate, but it cannot on that account acquire residence there, p. 216.

Followed in Shaw v. Quincy, etc., Co., 145 U. S. 451, 36 L. 772, 12 S. Ct. 938, holding Michigan corporation doing business in New York did not acquire residence in latter State; Holbrook v. Ford, 153 Ill. 645, 46 Am. St. Rep. 923, 39 N. E. 1095, 27 L. R. A. 328, holding debts due company situated at its domicile, and not in State where it did business; Boston Inv. Co. v. Boston, 158 Mass. 463, 33 N. E. 581, holding foreign corporations doing business in State not within meaning of word "inhabitants" in tax law.

11 Wall. 217-238, 20 L. 59, MAY v. LE CLAIRE.

Compromise.— Propositions and acceptances to settle unadjusted demands made in spirit of compromise may constitute a contract, and it is duty of court of equity to uphold such agreements as far as possible, p. 228.

Approved in Bunkley v. Lynch, 47 Ala. 214, holding vendee presumed to accept and consent to recitals in deed.

Deeds.— One acquiring title by quitclaim deed cannot be regarded as bona fide purchaser without notice, as conveyance only passes grantor's title, p. 232.

Cited as authority and relied upon in Villa v. Rodriguez, 12 Wall. 339, 20 L. 410, holding grantee, under quitclaim deed, takes subject to unrecorded mortgage; Dickerson v. Colgrove, 100 U. S. 584, 25 L. 621, holding title of grantee subject to acts of grantor creating estoppel; Baker v. Humphrey, 101 U. S. 499, 25 L. 1067, holding one claiming under quitclaim deed, fraudulently obtained, not bona fide purchaser; Gest v. Packwood, 13 Sawy. 208, 34 Fed. 372, holding one taking quitclaim deed not protected from prior right of which he had no notice; Wallerton v. Snow, 5 McCrary, 68, 15 Fed. 404, holding land subject to prior claim under bond as against holder of equitable title or quitclaim deed; Runyon v. Smith, 18 Fed. 582, holding grantee under quitclaim and release charged with notice of paramount claims; Taylor v. Irwin, 20 Fed. 621, holding grantee not entitled where his grantor, as assignee in bankruptcy, had failed to assert title; United States v. Sliney, 21 Fed. 895, holding grantee under quitclaim deeds put to inquiry, where parties were in possession, etc.; Hastings v. Nissen, 31 Fed. 600, applying rule where grantors released interests as "heirs;" M'Clung v. Steen, 32 Fed. 374, holding, where full equitable title had passed, subsequent quitclaim conveyed nothing; Dunn v. Barnum, 51 Fed. 361, 10 U. S. App. 86, reviewing authorities and holding, where grantor had no title, his quitclaim passed none; May v. Courtnay, 47 Ala. 190, holding mortgagee's interest subject to prior attachment lien; Smith v. Perry, 56 Ala. 269, holding purchaser from assignee of bankrupt takes only bankrupt's interest in same; Busch v. Huston, 75 Ill. 346, holding quitclaim of an undivided fourth was color of title only to extent of that interest; Watson v. Phelps, 40 Iowa, 483, holding grant of quitclaim deed from assignee of certificate of tax sale, void, on account of fraud not protected; Laraway v. Larue, 63 Iowa, 412, 19 N. W. 244, holding grantee, under quitclaim deeds, in no better position than grantors, as against those in possession; Steele v. Sioux Valley Bank, 79 Iowa, 346, 18 Am. St. Rep. 375, 44 N. W. 566, 7 L. R. A. 526, reviewing authorities, and holding quitclaim deed inferior to prior unrecorded bond for deed; Johnson v. Williams, 37 Kan. 181, 1 Am. St. Rep. 245, 14 Pac. 538, collecting authorities, and hold-

ing one who holds by quitclaim not bona fide purchaser as to prior discoverable equities; Nash v. Bean, 74 Me. 343, holding release conveyed no title where grantor had none, although recorded before prior deed; Battershall v. Stephens, 34 Mich. 74, holding purchaser buying dubious title, as speculation, could not defeat prior unrecorded deed; Beakley v. Robert, — Mich. —, 79 N. W. 193, and Marshall v. Roberts, 18 Minn. 408, 10 Am. Rep. 203, holding quitclaim deed, recorded, inferior to prior unrecorded deed; Mann v. Best, 62 Mo. 497, holding title by quitclaim deed subject to be set aside by reason of fraud of grantor; Sharp v. Cheatham, 88 Mo. 510, holding purchaser under quitclaim charged with notice of equitable easements; McAdow v. Black, 6 Mont. 608, 13 Pac. 381, holding purchaser at execution sale not a bona fide purchaser entitled to notice; Bradt v. Church, 110 N. Y. 546, 18 N. E. 360, holding grantee could take no more than grantor's leasehold interest; Baker v. Woodward, 12 Or. 11, 6 Pac. 178, holding quitclaim deed passed estate subject to prior equities of original patentee; Aultman v. Utsey, 34 S. C. 572, 13 S. E. 852, holding grantee, under quitclaim, charged with constructive notice of fraud; Fletcher v. Ellison, 1 Posey, 670, holding title of purchaser at bankrupt sale inferior to prior unrecorded deed; Lewis v. Lichty, 3 Wash. 224, 28 Am. St. Rep. 33, 28 Pac. 360, where purchaser of quitclaim deed had full notice of prior claims; Martin v. Morris, 62 Wis. 428, 22 N. W. 530, holding quitclaim conveyed only one-half undivided interest, grantee being charged with constructive notice of prior conveyance.

Cited generally in Barclift v. Lillie, 82 Ala. 320, 2 So. 121, holding quitclaim deed cut off equity of a prior grantor; Miller v. Wolf, 63 Iowa, 238, 18 N. W. 892, holding verdict without judgment created no lien and plaintiff's title under quitclaim good. Cited, arguendo, in Gress v. Evans, 1 Dak. 384, 46 N. W. 1134, holding holder of quitclaim deed charged with other constructive notice of prior conveyance; Hentig v. Redden, 35 Kan. 475, 11 Pac. 401, holding owner of quitclaim better entitled than one claiming under invalid tax deed. See notes, 25 Am. Dec. 165, and 53 Am. Rep. 751.

Questioned in United States v. California, etc., Co., 148 U. S. 45, 37 L. 361, 13 S. Ct. 463, affirming S. C., 49 Fed. 504, 7 U. S. App. 128, holding grantee tracing title through quitclaim deed protected from prior defect. Criticised in Ellison v. Torpin, 44 W. Va. 432, 446, 30 S. E. 189, 195. Distinguished in Griswold v. Bragg, 19 Blatchf. 97, 6 Fed. 346, holding grantee, by virtue of State statute, entitled to value of improvements made in good faith, under title derived by quitclaim deed; Chrisman v. Hay, 43 Fed. 553, holding under Iowa statute grantee not charged with notice of vendor's lien not reserved in writing and recorded. Limited in White v. McGarry, 2 Flipp. 574, 47 Fed. 421, holding grantee under quitclaim better entitled than holder of unrecorded mortgage; Wilhelm v. Wilken, 149 N. Y. 451, 52 Am. St. Rep. 745, 44 N. E. 83, 32 L. R. A. 372, holding re-

corded quitclaim deed superior to prior unrecorded conveyance. Denied in Chapman v. Sims, 53 Miss. 165, 167, holding quitclaim deed as effectual to convey title as one with general warranty, and grantee not put upon inquiry; Fox v. Hall, 74 Mo. 316, 41 Am. Rep. 316, and Schott v. Dosh, 49 Neb. 194, 59 Am. St. Rep. 537, 68 N. W. 349, holding grantee for value in quitclaim deed better entitled than holder of unrecorded deed.

Attorney and client.— Knowledge of counsel is notice to client, p. 233.

Approved and followed in Goodenough v. Warren, 5 Sawy. 502, F. C. 5,534, holding purchaser of land chargeable with knowledge of agent, as to prior deed; Consolidated, etc., Co. v. Kansas City Varnish Co., 45 Fed. 16, holding corporation charged with knowledge of its attorney in drawing fraudulent deed of trust for its benefit; Noble v. Moses, 81 Ala. 545, 60 Am. Rep. 188, 1 So. 228, holding parties charged with knowledge of fiduciary relations of father and daughter in particular case; Walker v. Schreiber, 47 Iowa, 533, holding client charged with knowledge of his attorney that one claimed interest in note and mortgage; Presstman v. Mason, 68 Md. 92, 11 Atl. 767, imputing parties with knowledge of counsel as to irregularities in proceedings before decree. Cited approvingly in Ross v. Chicago, etc., R. R. Co., 55 Iowa, 696, 8 N. W. 646.

Trover and conversion.— If property is tortiously taken or converted, tort-feasor may be sued in trespass or trover, or injured party may waive tort and sue in assumpsit, p. 235.

Approved in Mills v. United States, 46 Fed. 748, 12 L. R. A. 681, and n., holding government committed no tort in diverting watercourse.

Election of remedies.— Defendant cannot set up tort to defeat action in assumpsit, and recovery of judgment will bar further action ex delicto by plaintiff, p. 235.

Followed in Farmers, etc., Co. v. Toledo, etc., R. R. Co., 54 Fed. 766, 6 U. S. App. 469, holding party bound by election to take personal judgment in place of accepting specific shares.

Trover and conversion.— If property converted assumes altered forms owner may follow it as far as he can trace it and sue at law for substituted property, or hold wrongdoer for damages, p. 236.

Cited with approval and rule applied in United States v. State Nat. Bank, 96 U. S. 35, 24 L. 648, allowing recovery from the United States for moneys fraudulently obtained by its agent; M'Clellan v. Pyeatt, 66 Fed. 847, 32 U. S. App. 104, directing improvements to be sold which were made from proceeds of trust property wrongfully sold; McEachin v. Stewart, 106 N. C. 343, 11 S. E. 277, holding cestui que trust could follow funds used to release mortgage on land.

Trusts.— When trustee has abused his trust, cestui que trust has option to take original or substituted property, and if either has passed to bona fide purchaser, then its value in money, p. 236.

Cited and rule approved and applied as follows: Partee v. Thomas, 11 Fed. 773, sustaining action by cestui que trust under a will to recover possession of property; Dow v. Berry, 18 Fed. 125, holding complainant entitled to recover specific substituted property in form of notes and securities; M'Clellan v. Pyeatt, 66 Fed. 847, 32 U. S. App. 104, directing improvements to be sold which were made by conversion of trust property; Glenn v. Glenn, 47 Ala. 210, holding wife entitled to property purchased by trustee with trust funds; Atkinson v. Ward, 47 Ark. 539, 2 S. W. 79, holding trustee liable for converting trust fund into a house on his own land; Henninger v. Heald, 52 N. J. Eq. 440, 29 Atl. 194, holding purchaser of land under corrupt agreement liable as trustee; Meehan v. Forrester, 52 N. Y. 281, holding one wrongfully conveying land liable to return proceeds or to account for its value; McEachin v. Stewart, 106 N. C. 343, 11 S. E. 277, holding land might be charged where mortgage upon it was fraudulently released with trust funds; Burwell v. Burwell, 78 Va. 582, holding guardian liable to respond in money for conversion of ward's property. Cited generally in Slaughter v. Glenn, 98 U. S. 245, 25 L. 123, and National Bank v. Insurance Co., 104 U. S. 70, 26 L. 700, holding bank chargeable with notice of nature of funds on deposit by insurance agent; Hamilton v. Dooly, 15 Utah, 303, 49 Pac. 776. Approved also in Sackett v. Rumbaugh, 45 Fed. 37, holding trustee has right in equity to have a trust fund restored and trust deed re-executed; note, 42 Am. Rep. 169.

Distinguished in Smith v. American Nat. Bk., 69 Fed. 840, 6, U. S. App. 447, holding cestui que trust could not sue innocent purchaser at law for conversion of trust funds.

Specific performance.— Parties seeking specific performance are sometimes remitted to court of law, but not unless remedy will be as effectual and complete as in equity, p. 236.

Rule indorsed in following citing cases: Plummer v. Connecticut, etc., Ins. Co., 1 Holmes, 270, F. C. 11,232, allowing bill in equity where remedy at law involved multiplicity of suits and impracticable computations; Partee v. Thomas, 11 Fed. 773, holding equity had jurisdiction of bill by cestui que trust out of possession to enforce execution of trust; Gowdy v. Grenn, 69 Fed. 866, denying equitable relief sought by bill to restrain registering officer from discharging any of his duties; Bumgardner v. Leavitt, 35 W. Va. 204, 13 S. E. 70, holding equity properly enforced contract for sale of stock where remedy at law would have been inadequate.

Trusts.— Where trustee guilty of improperly converting trust funds into realty, has died, equity cannot decree conveyance of

such real estate when necessary residuary devisees are not before the court; but the legal representatives being present, the proper course is to give money judgment against them, embracing value of property, p. 237.

Approved in McPike v. Wells, 54 Miss. 156, holding intestate not bound by decree in case to which he was not a party.

11 Wall. 238-243, 20 L. 114, THE FANNIE.

Collision.— Steamer approaching schooner is bound to keep out of the way, and give latter unobstructed passage; and if schooner performs her duty of keeping her course, steamer is liable for collision, p. 240.

Cited and rule affirmed and followed in The Lucille, 15 Wall. 679, 21 L. 248, holding steamer approaching schooner in nearly parallel line liable for loss by collision; The Golden Grove, 13 Fed. 688, holding steamer liable for collision with sailing vessel, where they were attempting to cross each other's paths; The Plymouth, 26 Fed. 880, holding sailing boat at fault for changing its course; The Oregon, 27 Fed. 752, holding both vessels at fault, schooner not having exhibited torch; The Iron Chief, 63 Fed. 290, 22 U. S. App. 473, applying presumption that steamer is guilty of negligence in colliding with schooner; The Captain Weber, 89 Fed. 960, 61 U. S. App. 212, holding steamer at fault for collision with sloop; Bill v. Smith, 39 Conn. 211, holding propeller liable for damage caused to dredger at anchor; Lord v. Hazeltine, 67 Me. 403, holding evidence convincing that schooner kept her course; Mailler v. Express Propeller Line, 61 N. Y. 316, holding steam propeller liable for collision. See 75 Am. Dec. 603, note.

Collision.— Want of proper lookout can make no difference, when it in no way contributed to disaster, p. 242.

Cited and rule applied in The Annie Lindsley, 104 U. S. 191, 26 L. 719, where cause of collision was held to be fault of brig in starboarding helm; The Nacoochee, 137 U. S. 341, 34 L. 691, 11 S. Ct. 126, where fog was too dense for lookout to have seen steamer first; The Blue Jacket, 144 U. S. 390, 36 L. 478, 12 S. Ct. 718, where collision was due to fault of sailing vessel and lookout on tug was of no avail; The Canima, 23 Blatchf. 166, 32 Fed. 304, holding absence of captain and crew from boat moored at pier did not contribute to collision; Higbee v. The Nipoti Accame, 12 Fed. Cas. 126, holding question of lookout immaterial in collision between two sailing vessels; The George Murray, 22 Fed. 122, holding that lookout could have been of no service on schooner and latter not liable; The Havana, 54 Fed. 413, holding want of competent lookout immaterial where schooner kept her course on clear day; Lord v. Haseltine, 67 Me. 404, holding question of proper lookout immaterial. Approved in The Excelsior, 12 Fed. 201, but holding ab-

sence of proper lookout on schooner contributed to loss by collision; M'Cabe v. Old Dominion S. S. Co., 31 Fed. 240, holding that lookout forward might have prevented collision and schooner therefore at fault.

11 Wall. 244-256, 20 L. 86, LEVY v. STEWART.

Limitations of actions.— Statutes of limitation exist in all the States and are regarded as statutes of repose and presume claims extinguished if not litigated in proper forum within prescribed time, p. 249.

Approved in In re Cornwall, 9 Blatchf. 127, F. C. 3,250, holding one whose claim is barred by statute cannot petition to have his debtor declared bankrupt; Andrae v. Redfield, 12 Blatchf. 411, F. C. 367, where court of equity refused to annul statute on ground that it was waived; In re Eldridge, 2 Hughes, 257, F. C. 4,331, holding Federal Bankruptcy Court will respect State statutes of limitation.

War.— Enemy creditors cannot prosecute claims after commencement of hostilities, but restoration of peace opens the doors of the courts, p. 250.

Limitations of actions.— Statutes of limitation generally do not cease to run, where a first suit is abated or discontinued and a second begun, p. 252.

Followed in Harrison v. Myer, 92 U. S. 115, 23 L. 607, prior suit filed and abandoned caused no interruption.

War.— Proclamations of president marked beginning and end of the Civil War, p. 253.

Cited in United States v. One Thousand, etc., Cotton, 27 Fed. Cas. 328, reviewing authorities, and holding Congress and executive department determined when war was at end.

Limitation of actions.— Statutes of limitation were suspended during time of Rebellion, and rule applies to actions founded on bills and notes, pp. 254, 255.

Approved and applied in Caperton v. Bowyer, 14 Wall. 236, 20 L. 884, action for false imprisonment limited by Virginia code to one year; Ross v. Jones, 22 Wall. 587, 22 L. 733, applying rule as to controversy between citizens of Confederate States; Metropolitan Nat. Bank v. Gordon, 28 Ark. 117, action on contract; Jones v. Johnson, 28 Ark. 233, suit in equity to recover land; Selden v. Preston, 11 Bush, 204, action on note between citizens of both sides in Civil War; Aby v. Brigham, 28 La. Ann. 841, action for money advanced and commissions; Ahnert v. Zann, 40 Wis. 629, holding rule applied as to citizens of Wisconsin and Louisiana so long only as States were in possession of hostile forces. Approved generally in Bauserman v. Blunt, 147 U. S. 654, 37 L. 319, 13 S. Ct. 469, and Brockway v. Oswego, 40 Fed. 615. See 13 Am. Dec. 370, 372, note.

Distinguished in Harrison v. Myer, 92 U. S. 115, 23 L. 607, holding rule did not apply as to citizens of same State, under control of United States, during war; Mayo v. Cartwright, 30 Ark. 414, holding exception did not extend to interrupt adverse possession, as against trustee of personal trust; McKinzie v. Hill, 51 Mo. 307, 11 Am. Rep. 453, holding Rebellion did not stop running of statute as to action on note between residents of same county in Missouri.

Courts.— State decisions not founded upon any express enactment are not obligatory upon Federal courts, when reasons assigned are not satisfactory, p. 255.

Approved in Murray v. Chicago, etc., R. R. Co., 92 Fed. 871, holding State decisions not binding as to construction of statute of limitations, according to rules of common law.

War.— Where debt has not been confiscated during war, right to sue revives with peace restored, and both remedy and right are returned to creditor, p. 255.

Approved in Hubbard v. Matthews, 54 N. Y. 49, 13 Am. Rep. 565, holding dissolution of partnership by force of war did not change prior contract of indorsement by firm.

11 Wall. 256-259, 20 L. 79, GARNETT v. UNITED STATES.

Courts.— Supreme Court can only examine proceedings of District Court of District of Columbia after revision by Supreme Court of District, and then only in connection with action of higher court, pp. 258, 259.

Cited by following cases, involving similar facts under confiscation acts: McVeigh v. United States, 11 Wall. 266, 20 L. 81, Tyler v. Defrees, 11 Wall. 344, 20 L. 163, and The Confiscation Cases, 1 Woods, 225, 229, F. C. 3,097.

11 Wall. 259-268, 20 L. 80, McVEIGH v. UNITED STATES.

Judgments.— After decree pro confesso, defendant occupies same relation to record as defendant against whom judgment by default is taken, p. 267.

War.— Alien enemy assailed in the courts is entitled to all defenses, and may sue out writ of error in action for forfeiture of his goods under confiscation acts, p. 267.

Cited and doctrine affirmed in Miller v. United States, 11 Wall. 293, 20 L. 141, and dissenting opinion, p. 321, 20 L. 149, entertaining writ in proceeding begun under same act; Lasere v. Rochereau, 17 Wall. 438, 21 L. 695, directing proceedings taken against Confederate, without opportunity of being heard, to be vacated; Windor v. McVeigh, 93 U. S. 277, 23 L. 915, holding sentence of confiscation inoperative where claim and answer of respondent were stricken

from files; Ensminger v. Powers, 108 U. S. 301, 27 L. 736, 2 S. Ct. 651, holding decree void where plaintiff was denied a hearing on the merits; Hovey v. Elliott, 167 U. S. 414, 42 L. 220, 17 S. Ct. 843, affirming S. C., 145 N. Y. 140, 39 N. E. 844, 39 L. R. A. 462, and n., reviewing authorities, and holding error to strike answer from files to punish defendant for contempt; The Jas. W. French, 5 Hughes, 437, 13 Fed. 922, holding condemnation proceedings void where owner was not before the court; The Confiscation Cases, 1 Woods, 225, 229, 230, F. C. 3,097, holding writ of error proper remedy to review Confiscation Cases; Henry v. Carson, 96 Ind. 423, holding judgment void where answer was stricken out because there was no affidavit of loyalty; Buford v. Speed, 11 Bush, 342, holding alien enemy had right to appear in suit by counsel employed by his agent; State v. New Orleans, 42 La. Ann. 98, 7 So. 676, holding defendants, commanded to show cause, entitled to be heard; M'Nair v. Toler, 21 Minn. 185, holding alien enemy might employ attorney to defend suit; Fairfax v. Alexandria, 28 Gratt. 33, 34, holding decree of confiscation void where defendant was not allowed to appear; Boggs v. Commonwealth, 76 Va. 999, holding confiscation of vessel void where owners were denied a hearing; Dorr v. Rohr, 82 Va. 362, 3 Am. St. Rep. 108, holding publication of notice in Virginia, during the war, could not bind citizen of New York; Baltimore, etc., R. R. Co. v. Pittsburgh, etc., R. R. Co., 17 W. Va. 835, holding owner of land entitled to notice of application for appropriation of his land to public use; Grinnan v. Edwards, 21 W. Va. 362, and Haymond v. Camden, 22 W. Va. 200, 202, 203, holding decree void rendered against defendant while within Confederate lines; Fowler v. Lewis, 36 W. Va. 138, 14 S. E. 456, holding error to make decree without allowing defense, and while controversy was pending on appeal; Schiltz v. Roenitz, 86 Wis. 40, 39 Am. St. Rep. 876, 56 N. W. 196, 21 L. R. A. 486, holding court could not order adoption of child without notice to parents.

Approved also, without applying rule, in Seymour v. Bailey, 66 Ill. 297, 301, holding that defendant, though an alien enemy, had opportunity to defend suit; Pasteur v. Lewis, 39 La. Ann. 11, 1 So. 311, holding parties had opportunity to answer monition; Micou v. Benjamin, 26 La. Ann. 719. See also 48 Am. Dec. 270, note, 76 Am. Dec. 668, note, and exhaustive note, 96 Am. Dec. 624.

Distinguished in University v. Finch, 18 Wall. 111, 21 L. 821, holding sale under deed of trust valid, although grantor, at time, was citizen of State in insurrection; The Fred M. Lawrence, 94 Fed. 1018, holding answer properly stricken out and default taken, where, in action in rem in admiralty, claimant failed to furnish securities as ordered; Selden v. Preston, 11 Bush, 200, holding alien enemy could not be sued to recover debt until close of war, and statute of limitations was suspended; Grigg v. Dalsheimer, 88 Va. 511, 13 S. E. 994, where defendant had appeared, but plea was a nullity for want of affidavit, held judgment not void.

War.— Whatever may be extent of disability of alien enemy to sue in courts of hostile country, it is clear that he is liable to be sued, p. 267.

Cited and followed in Thomas v. Mahone, 9 Bush, 123, Dorsey v. Thompson, 37 Md. 40, and Dorsey v. Dorsey, 37 Md. 80, 11 Am. Rep. 534, all holding courts of States of Federal Union had jurisdiction of suits against such of their citizens as joined Confederacy; De Jarnett v. De Giverville, 56 Mo. 447, holding sale, under deed of trust, valid, although grantor, on account of war, could have no notice; Rodgers v. Dibrell, 6 Lea, 80, holding former decree valid against complainant, whether he became an alien enemy or not. Cited generally in Lee v. Rogers, 2 Sawy. 569, F. C. 8,201, holding court had jurisdiction of suit by alien enemy, where defendant appeared by counsel; arguendo, State ex rel. v. Board of Liquidation, 51 La. Ann. 1852, 26 So. 680. See note, 76 Am. Dec. 667.

Miscellaneous.— Miscited in Hull v. Bank of Virginia, 14 W. Va. 616.

11 Wall. 268-331, 20 L. 135, MILLER v. UNITED STATES.

War.— Writ of error may be sued out by claimant, though an alien enemy, against whom there has been a decree in confiscation proceedings, p. 293.

Approved in The Confiscation Cases, 1 Woods, 225, F. C. 3,097, holding proceedings for confiscation proceedings at common law require jury trial.

War.— In revenue and admiralty cases in rem, seizure is necessary to jurisdiction of court, and law provides that confiscation proceedings shall conform as near as may be to those in admiralty or revenue cases, p. 294.

Cited and principle followed in Tyler v. Defrees, 11 Wall. 344, 346, 20 L. 163, 164, holding seizure of land under confiscation acts sufficient to give court jurisdiction; The Confiscation Cases, 20 Wall. 104, 22 L. 322, holding seizure of land under condemnation, and sale after default, regular and valid; Daily v. Doe, 3 Fed. 917, holding seizure of vessel gave jurisdiction of action in rem in admiralty; Brennan v. The Anna P. Dorr, 4 Fed. 461, holding mere personal service of writ was not seizure of tug, and jurisdiction in admiralty did not adhere; Gould v. Jacobson, 58 Mich. 292, 25 N. W. 196, holding return failed to show seizure in admiralty case, thus defeating jurisdiction. Cited also with approval in The Confiscation Cases, 1 Woods, 228, F. C. 3,097, sustaining proceedings under confiscation acts; The Young America, 30 Fed. 791, holding mere formal arrest of vessel sufficient to give jurisdiction, but not to defeat jurisdiction of other courts; Gindele v. Corrigan, 129 Ill. 586, 16 Am. St. Rep. 293, 22 N. E. 516, holding State court had jurisdiction of marine tort, and proceeding by attachment where

Federal jurisdiction had not attached; Pasteur v. Lewis, 39 La. Ann. 9, 1 So. 310, holding confiscation proceedings properly brought in Circuit Court as action at law. Cited, arguendo, in The Oriental, 2 Flipp. 47, F. C. 10,570.

Searches and seizures.— Judicial seizure of stock in confiscation cases, made by service of writ on vice-president of the corporation, is sufficient to give the District Court jurisdiction, p. 294.

Cited and rule applied in Brown v. Kennedy, 15 Wall. 599, 21 L. 196, holding return that bond, mortgage and credit were attached established seizure and warranted confiscation; Two Hundred Fifty Tons, etc., 5 Fed. 217, holding attachment of goods held for duties by service of writ sufficient to confer admiralty jurisdiction.

Approved in Phœnix Bank v. Risley, 111 U. S. 130, 28 L. 376, 4 S. Ct. 324, but holding marshal's seizure of certain sum of money in bank, to confiscate an indebtedness to depositor on balance of accounts, insufficient; arguendo, in Ashley v. Quintard, 90 Fed. 96.

Distinguished in Pelham v. Way, 15 Wall. 201, 21 L. 57, holding marshal's arrest of promissory note was not a seizure of the debt, and damage was nominal; Alexandria v. Fairfax, 95 U. S. 778, 24 L. 584, affirming S. C., 28 Gratt. 26, 30, holding service on auditor of city insufficient foundation for confiscation of bonds.

Searches and seizures.— Seizure, under order of president, is necessary to warrant proceedings in rem for confiscation, under act of July 17, 1862, p. 295.

Cited in Pike v. Wassell, 94 U. S. 712, 24 L. 309, holding part of property not seized by United States was never confiscated.

Distinguished in Oakes v. United States, 174 U. S. 790, 19 S. Ct. 868, holding seizure and libel of vessel, under act of 1861, valid without preliminary order of president.

Searches and seizures.— An assertion of control, with present power and intent to exercise it, is sufficient seizure, p. 297.

Approved in Two Hundred Fifty Tons, etc., 5 Fed. 218, holding, in admiralty case, service of writ on collector, who was holding goods for duties, sufficient seizure.

Corporations hold their stock as quasi-trustees for their stockholders, p. 297.

Garnishment.— Service of attachment by notice binds debt or stock, in hands of garnishee, from time of service, p. 297.

Appeal and error.— Proceedings in court of record are presumed to be regular; irregularity may be shown in court of error, but burden is on him who alleges it, pp. 299, 300.

Cited and rule followed in Salisbury v. Sands, 2 Dill. 277, F. C. 12,251, holding decree of foreclosure in territorial court not void for reason of defect in petition or in service; Alexander v. Knox, 6

Sawy. 60, F. C. 170, holding that decree was duly given in sufficient proceeding, where it might have been given in either of two, one being illegal; Bush v. Glover, 47 Ala. 174, holding former judgment valid, court having had jurisdiction of parties and subject-matter; Schneider v. Ferguson, 77 Tex. 576, 14 S. W. 155, holding return of sheriff in another suit between parties conclusive and not subject to collateral attack.

Courts.— In courts of limited jurisdiction there is a presumption against the jurisdiction, but when that appears they are entitled to same presumption in favor of their actions as other courts, p. 299.

Cited and approved in New Lamp Chimney Co. v. Ansonia Brass Co., 91 U. S. 661, 23 L. 339, holding decree of District Court could not be collaterally impeached; Ex parte Cooper, 143 U. S. 506, 36 L. 243, 12 S. Ct. 462, holding that upon face of record Alaska District Court clearly had jurisdiction of forfeiture for killing seals, etc.

Judgment.— Effect of default in admiralty, revenue or confiscation cases is ordinarily same as in other actions at law. It is a virtual confession, and no hearing is required, p. 301.

Cited and rule applied in The Confiscation Cases, 20 Wall. 108, 111, 112, 22 L. 322, 323, 324, holding default established truth of averments that there had been an executive seizure of property of rebel; United States v. The Mollie, 2 Woods, 319, F. C. 15,795, holding in admiralty case court should be governed by its discretion, whether to require proofs or not after default; Rostron v. The Water Witch, 44 Fed. 96, holding default of owner of vessel equivalent to admission of lien of libellants at that time; Briggs v. Taylor, 84 Fed. 683, 42 U. S. App. 681, and Cape Fair, etc., Co. v. Pearsall, 90 Fed. 438, 61 U. S. App. 527, affirming judgment pro confesso in libel for recovery of vessel.

Distinguished in The Lopez, 43 Fed. 96, holding in admiralty suit ex contractu court must proceed after decree pro confesso to ascertain sum to be decreed.

Trial.— After default there is no issue of fact requiring intervention of jury, p. 304.

Followed in Pasteur v. Lewis, 39 La. Ann. 10, 1 So. 311, holding failure to order jury in default case under act of 1861 not fatal defect. Cited generally with approval in The Confiscation Cases, 1 Woods, 229, F. C. 3,097.

War.— Power of Congress to declare war involves power to prosecute it by all means and in any manner in which war may be legitimately prosecuted, and includes power to confiscate all property of enemy, p. 305.

Cited with approval in Springer v. United States, 102 U. S. 594, 26 L. 256, holding property distrained and sold to pay income tax taken by due process of law; Kirk v. Lynd, 106 U. S. 316, 27 L. 193, 1 S. Ct. 297, holding purchaser of real estate condemned under confiscation act of 1861 takes the fee; The Confiscation Cases, 1 Woods, 228 F. C. 3,097, where court disposes of cases under confiscation acts; Opinion of the Justices, 66 N. H. 632, 33 Atl. 1078, holding property taken for public use could not be taken for less than its value; concurring opinion in State v. Express Co., 60 N. H. 255, court holding a railroad-express tax unconstitutional. See note in 91 Am. Dec. 280.

War.— Confiscation of property has no reference to personal guilt of owner, and act of confiscation is not proceeding against him, p. 305.

Cited in Semmes v. United States, 91 U. S. 27, 23 L. 195, pardon for treason will not restore property previously confiscated and in hands of bona fide purchaser.

War.— Any property which enemy may use by appropriation or by exercise of control over its owner is subject to confiscation, p. 306.

See note in 91 Am. Dec. 280.

War.— Belligerents in civil war have same rights of war as against each other as two independent nations at war, and this applies to power of confiscation, p. 306.

War.— United States in Civil War had both belligerent and sovereign rights, and enactment of confiscation acts was an exercise of former power, p. 308.

Cited approvingly in The Confiscation Cases, 1 Woods, 228, F. C. 3,097, where court disposed of cases arising under acts of 1861 and 1862; Kirk v. Lewis, 4 Woods, 101, 9 Fed. 646, holding confiscation and sale under act of 1861 passed the absolute fee.

War.— When a rebellion becomes a recognized war those engaged in it are enemies, and the words "rebels" and "enemies" in such case are synonymous, p. 309.

Constitutional law.— Legislature is presumed to act within scope of its authority, p. 309.

War does not justify seizure and confiscation of property other than that of enemies, p. 310.

War.— Enemies include all inhabitants of enemy's country, with rare exceptions, and those who are in service of hostile State, though subjects of State in amity with United States, pp. 310, 311.

Cited in note on subject in 91 Am. Dec. 280.

War.— Confiscation acts of 1861 and 1862 are not unconstitutional, since property was confiscated as property of enemies and not as that of offenders against municipal law, pp. 310, 313.

Cited and affirmed in Wallach v. Van Riswick, 92 U. S. 207, 23 L. 475, holding statute gave no authority to seize less than the whole of enemy's estate; Kirk v. Lynd, 106 U. S. 319, 27 L. 193, 1 S. Ct. 299, holding purchaser of real estate confiscated under act of 1861 took the fee. Cited as authority in Jenkins v. Collard, 145 U. S. 552, 36 L. 814, 12 S. Ct. 870, holding where life estate was confiscated, reversionary estate continued in owner.

Distinguished in Micou v. Benjamin, 26 La. Ann. 721, but see dissenting opinion, 726, holding confiscation under act of 1862 only extended to life estate.

Miscellaneous.— Cited in dissenting opinions in Tyler v. Defrees, 11 Wall. 351, 354, 20 L. 166, 167, and The Confiscation Cases, 20 Wall. 113, 20 L. 325, where Field, J., dissented on same grounds as in principal case. Cited in The Bremena v. Card, 38 Fed. 145, to point made by counsel in argument.

11 Wall. 331-356, 20 L. 161, TYLER v. DEFREES.

Appeal and error.— Confiscation proceedings coming before appellate court collaterally as foundation for title cannot be reviewed except to extent of showing want of jurisdiction in court which rendered judgment condemning property, p. 344.

Cited in Bragg v. Lorio, 1 Woods, 210, F. C. 1,800, holding record amply showed seizure sufficient to give jurisdiction.

United States.— Congress, to which is confided power to make war, suppress insurrection, etc., is not deprived of these powers, when necessity arises for their exercise in domestic insurrection and civil war, p. 345.

Cited, arguendo, in Todd v. Neal, 49 Ala. 269, holding acts of notary public acting under Confederate government invalid. Cited generally in note, 91 Am. Dec. 280.

War.— Court sitting in review on judicial proceedings under confiscation acts, is to be governed by sound and reasonable rules applicable to analogous cases in the courts, p. 345.

Approved in Bragg v. Lorio, 1 Woods, 211, F. C. 1,800, holding record of returns sufficient to show valid seizure.

Distinguished in Micou v. Benjamin, 26 La. Ann. 721, but see dissenting opinion, p. 726, holding life estate only could be confiscated under act of July 17, 1862.

Searches and seizures.— Return by marshal showing seizure of land under confiscation act of Congress is sufficient to give court jurisdiction; although second return failed to state that he had seized it under monition of court, pp. 347, 349.

Cited with approval in Bragg v. Lorio, 1 Woods, 212, F. C. 1,800, where the two returns established sufficient seizure to give juris-

diction. Cited generally in Springer v. U
26 L. 256.

Distinguished in Alexandria v. Fairfa
holding service of notice on auditor of ci
diction of proceedings to confiscate bon

Miscellaneous.— Cited in The Confiscat
L. 325, where Field, J., dissents on sa
case.

11 Wall. 356–369, 20 L. 167, THE DISTI

Internal revenue.— Removal of disti
warehouse, procured by false and fraud
according to law, and spirits so remove
p. 364.

Followed in Henderson's Distilled Sp
818, holding removal from distillery to b

Internal revenue.— Forty-eighth sectio
relative to forfeitures, applicable to disti

Internal revenue.— General section 48
1864, as amended in 1866, and the part
distilled spirits, may both stand, p. 365.

Statutes in pari materia are to be const
by implication are not favored, if the s
together, p. 365.

Approved and applied in Fabbri v. Murp
holding that twenty-sixth section of act of
did not repeal like provision of act of Mar
ley, 56 Fed. 979, 12 U. S. App. 574, citing
Stat. 35, as to jurisdiction of District Cou
tions, was not repealed by 25 Stat. 783, c
Fed. 950, holding section 14, organic act of
of intoxicating liquors, did not repeal rev
In re Secretary of Treasury, 71 Fed. 510, i
ing sections 2970–2973, revised statutes,
to enforce payment of duties, not repea
1890, or Wilson bill, of 1894; Anglo-Cal. F
753, 48 U. S. App. 48, affirming S. C.,
revised statutes, section 2971, was not r
quent acts; Coats v. Hill, 41 Ark. 151, col
act to quiet tax titles was held not to b
act; New Orleans, etc., R. Co. v. New Orle
ing that later act did not repeal charte
Commissioners, 6 Mont. 476, 13 Pac. 137,
repealed earlier by implication; dissenti
Board of Commissioners, 77 Fed. 582, 40

refusing writ of mandamus to compel payment of tax, under local statute.

Principal and agent.— A principal is bound by such knowledge or notice as his agent obtains in negotiating the particular transaction, p. 366.

Cited with approval and rule applied in Peters v. Bain, 133 U. S. 697, 33 L. 706, 10 S. Ct. 363, citing cases, and holding beneficiaries bound by knowledge of trustee, obtained as attorney for trustor, in the transaction; Denver v. Sherret, 88 Fed. 234, 60 U. S. App. 119, where employer was charged with knowledge of servant, obtained in course of employment; Robinson v. Pebworth, 71 Ala. 246, collecting cases, where wife was charged with notice to her husband as agent; Watson v. Sutro, 86 Cal. 517, 24 Pac. 177, reviewing authorities, where purchaser was bound by knowledge of his attorney, obtained in examining title; Christie v. Sherwood, 113 Cal. 530, 531, 45 Pac. 821, where bank was bound by knowledge of cashier; Fishel v. Bennett, 56 Conn. 44, 12 Atl. 103, where principal was charged with agent's knowledge that contract was illegal; McGurk v. Metropolitan L. Ins. Co., 56 Conn. 539, 16 Atl. 266, 1 L. R. A. 567, and note, where insurance company was bound by agent's knowledge of facts constituting forfeiture; Hardten v. The State, 32 Kan. 639, 5 Pac. 213, where lessor was charged with agent's knowledge of illegal purpose of lease; Suit v. Woodhall, 113 Mass. 395, holding principal bound by agent's knowledge of unlawful purpose of purchaser of liquors; Carr v. Hibernia Ins. Co., 2 Mo. App. 474, where insurance company was bound by agent's knowledge that other insurance had been taken; Trust Co. v. Insurance Co., 79 Mo. App. 369, holding insurance company charged with notice to agent of closing of insured premises. Approved in Wittenbrock v. Parker, 102 Cal. 101, 41 Am. St. Rep. 177, 36 Pac. 376, 24 L. R. A. 199, where client was not charged with constructive notice to attorney; Atlantic Mills v. Indian O. Mills, 147 Mass. 276, 9 Am. St. Rep. 702, 17 N. E. 502, where company was charged with knowledge of its treasurer's fraud. Cited also in elaborate note in 24 Am. St. Rep. 228.

Limited in Thompson, etc., Co. v. Capitol, etc., Co., 65 Fed. 343, 22 U. S. App. 669, where principal was not bound by agent's knowledge of his attempt to defraud her; Allen v. South B. R. R., 150 Mass. 206, 15 Am. St. Rep. 191, 22 N. E. 919, 5 L. R. A. 719, collecting authorities, where principal was not charged with agent's knowledge of his independent fraudulent act.

Principal and agent.— Rule that principal is bound by knowledge of agent is based upon presumption that agent, in accordance with his duty, has communicated such knowledge to principal, p. 367.

Cited with approval and applied in Consolidated, etc., Co. v. Kansas, etc., Co., 45 Fed. 15, where client was charged with knowl-

edge of attorney as to solvency of another client; Western, etc., Co. v. Ganzer, 63 Fed. 650, 23 U. S. App. 608, reviewing authorities, where principal was not charged with knowledge of agent, obtained in a collusive arrangement to defraud former; Thompson, etc., Co. v. Capitol, etc., Co., 65 Fed. 343, 22 U. S. App. 669, holding principal not bound by agent's knowledge of his attempt to defraud her; Denver v. Sherret, 88 Fed. 234, 60 U. S. App. 119, where employer was charged with knowledge gained by servant in his employment; Donald v. Beals, 57 Cal. 405, where assignee was charged with knowledge of attorney acting for both parties; Watson v. Sutro, 86 Cal. 517, 24 Pac. 177, reviewing authorities, where purchaser was charged with knowledge acquired by his attorney in examining title; Fishel v. Bennett, 56 Conn. 44, 12 Atl. 103, where principal was bound by agent's knowledge that the transaction was illegal; McGurk v. Metropolitan Life Ins. Co., 56 Conn. 539, 16 Atl. 266, 1 L. R. A. 567, and note, where insurance company was bound by agent's knowledge of facts constituting forfeiture; Bramblett v. Henderson, — Ky. —, 41 S. W. 576, where purchaser was bound by agent's knowledge that another claimed interest in the goods; Mathews v. Riggs, 80 Me. 110, 13 Atl. 49, reviewing authorities, where creditor was charged with his agent's knowledge of debtor's insolvency; Bennett v. Buchan, 76 N. Y. 390, where principal was estopped by agent's knowledge that covenant was untrue; Cox v. Pearce, 112 N. Y. 641, 20 N. E. 567, 3 L. R. A. 564, where constructive notice in prior, was binding in subsequent transaction; Enos v. St. Paul, etc., Ins. Co., 4 S. Dak. 652, 46 Am. St. Rep. 805, 57 N. W. 922, where insurance company was bound by knowledge of adjuster that insured relied on his representations; Riordan v. Britton, 60 Tex. 204, 5 Am. St. Rep. 40, 7 S. W. 53, where attaching creditor was bound by attorney's knowledge of prior levy; George v. Butler, 16 Utah, 116, 50 Pac. 1034, charging wife with notice given to husband. Approved in Easley v. Barksdale, 75 Va. 284; dissenting opinion in Western, etc., Co. v. Ganzer, 63 Fed. 671, 23 U. S. App. 608, majority holding principal not bound by knowledge of agent as to collusive arrangement between agent and others to defraud principal. Cited also in note in 39 Am. Rep. 330; also in good note in 24 Am. St. Rep. 230.

Limited in Stanley v. Schwalby, 162 U. S. 276, 40 L. 967, 16 S. Ct. 763, reviewing uathorities, and holding client not bound by notice to attorney who passed record title, of unrecorded deed; American S. Co. v. Pauly, 170 U. S. 155, 42 L. 985, 18 S. Ct. 561, where bank was not bound by false representations of president, as to cashier's honesty; Davis, etc., Co. v. Davis, etc., Co., 22 Blatchf. 224, 20 Fed. 701, holding corporation not bound by knowledge of director contracting with it; Starr v. Galgate S. Co., 68 Fed. 243, 29 U. S. App. 599, where principal was not bound by act of agent beyond his authority; American S. Co. v. Pauly, 72 Fed. 481, 38 U.

S. App. 254, where bank was not bound by president's false representations as to cashier's honesty; Hummel v. Bank, 75 Iowa, 691, 37 N. W. 955, where bank was not bound by cashier's knowledge of his own fraud; Clark v. Marshall, 62 N. H. 500, 501, collecting numerous cases, where principal purchasing of agent was not charged with knowledge of agent's purpose; Henry v. Allen, 151 N. Y. 9, 45 N. E. 357, 36 L. R. A. 662, and Benedict v. Arnoux, 154 N. Y. 729, 49 N. E. 330, where principal was not charged with knowledge of agent's acts in fraud of former; Societe v. Mackintosh, 5 Utah, 578, 18 Pac. 367, holding rule could not be invoked by one who knew agent was deceiving principal. Criticised in Sooy v. State, 41 N. J. L. 400, where State was not bound by notice to member of legislative committee.

Principal and agent.— Presumption that agent has communicated his knowledge to his principal will not be entertained when it is not his duty, or would not be lawful for him to do so, p. 367.

Approved and applied in Akers v. Rowan, 33 S. C. 472, 12 S. E. 172, 10 L. R. A. 715, and n., where knowledge of attorney, obtained as attorney for another, was not imputed to client bank; Knobelock v. Bank, 50 S. C. 289, 27 S. E. 972, collecting numerous authorities, where bank was not chargeable with its officer's knowledge in fraud for his own benefit; Melms v. Pabst, 93 Wis. 168, 57 Am. St. Rep. 907, 66 N. W. 522, collecting cases, where client was not bound by confidential information of attorney; American S. Co. v. Pauly, 72 Fed. 481, 38 U. S. App. 254, holding bank not bound by president's false representations as to cashier's honesty; Hummel v. Bank, 75 Iowa, 692, 37 N. W. 956, where bank was not bound by cashier's knowledge of his own fraud. Cited also in note in 39 Am. Rep. 330, and in good note in 57 Am. St. Rep. 916.

Distinguished in Zang v. Adams, 23 Colo. 410, 58 Am. St. Rep. 251, 48 Pac. 510, holding company liable for fraudulent representation of its agent.

Principal and agent.— Notice to agent is notice to principal, as to knowledge acquired by agent prior to, and present in his mind at the time he is acting as such, if it be of such a nature that it may be communicated to principal, p. 368.

Cited with approval and principle applied in McIntire v. Pryor, 173 U. S. 52, 19 S. Ct. 357, holding principal bound by fraud of agent in the transaction; Goodenough v. Warren, 5 Sawy. 502, F. C. 5,534, where purchaser was bound by agent's knowledge of unrecorded deed; Brown v. Jefferson, etc., Bank, 19 Blatchf. 336, 9 Fed. 274, holding client bound by knowledge of attorney as to another client's affairs; Beecher v. Gillespie, 6 Ben. 366, F. C. 1,224, where client was bound by notice to attorney, though he did not recur to the knowledge; In re Douglass, 11 Fed. 405, where client was charged with knowledge of attorney, obtained in other

proceedings against same bankrupt; Brown v. Cranberry, etc., Co., 72 Fed. 101, 25 U. S. App. 679, where exclusion of evidence that knowledge was so present in agent's mind was error; Louisville T. Co. v. Louisville, etc., R. Co., 75 Fed. 469, 43 U. S. App. 550, reviewing cases, and holding bank charged with knowledge of its president, obtained in another capacity; City Nat. Bank v. Jeffries, 73 Ala. 195, collecting authorities, and holding client bound by knowledge of attorney as to other clients' dealings; Phœnix Ins. Co. v. Flemming, 65 Ark. 63, 67 Am. St. Rep. 906, 44 S. W. 467, 39 L. R. A. 793, where, in absence of proof that knowledge was present in agent's mind, principal was not bound; Christie v. Sherwood, 113 Cal. 530, 531, 45 Pac. 821, where bank was bound by notice to cashier, acquired in prior transaction; Armstrong v. Abbott, 11 Colo. 223, 17 Pac. 519, where company was not bound by previously acquired knowledge of director, it not being present in his mind; Campbell v. First Nat. Bank, 22 Colo. 189, 43 Pac. 1011, reversing 2 Colo. App. 285, 30 Pac. 362, where notice to bank president, prior to transaction, was notice to bank; First Nat. Bank. v. Campbell, 2 Colo. App. 285, 30 Pac. 362, where notice to president was not notice to bank, under circumstances; German, etc., Assn. v. Farley, 102 Ga. 739, 740, 29 S. E. 622, 623, holding insurance company bound by representations to agent; Snyder v. Partridge, 138 Ill. 185, 32 Am. St. Rep. 137, 29 N. E. 854, where purchaser was bound by agent's knowledge that land was mortgaged by mistake; Yerger v. Barz, 56 Iowa, 82, 8 N. W. 771, where, knowledge not being present in agent's mind, principal was not bound; Lebanon Sav. Bank v. Hallenbeck, 29 Minn. 326, 13 N. W. 147, where client was bound by knowledge of attorney, acquired before the agency; Constant v. University, 111 N. Y. 609, 7 Am. St. Rep. 771, 19 N. E. 632, 2 L. A. R. 737, and n., reviewing authorities, where, in absence of proof that such knowledge was present, principal was not bound; Cox v. Pearce, 112 N. Y. 641, 20 N. E. 567, 3 L. R. A. 564, where principal was bound by constructive notice received in prior transaction; Dupree v. Virginia, etc., Ins. Co., 93 N. C. 240, holding company bound by agent's valuation; Pennoyer v. Willis, 26 Or. 12, 46 Am. St. Rep. 601, 36 Pac. 571, where principal was bound by such knowledge of attorney passing title; Morrison v. Bausemer, 32 Gratt. 232, citing cases, holding principal unaffected in absence of proof that such knowledge was present in agent's mind; Brothers v. Bank, 84 Wis. 395, 36 Am. St. Rep. 935, 54 N. W. 791, holding bank bound by cashier's knowledge as to mortgagor's competency; Red River, etc., Co. v. Smith, 7 N. Dak. 245, 74 N. W. 197, holding notice not imputable to corporation where given to its officers long previously. Approved in Hoover v. Wise, 91 U. S. 310, 23 L. 394, holding attorney for collection company was not agent of creditor; Hummel v. First Nat. Bank, 2 Colo. App. 579, 32 Pac. 75, where one sending drafts for collection

was not bound by knowledge of collecting bank; Fairfield Sav. Bank v. Chase, 72 Me. 230, 39 Am. Rep. 322, collecting authorities; Melms v. Pabst, 93 Wis. 167, 57 Am. St. Rep. 906, 66 N. W. 522, holding client not charged with knowledge of attorney, obtained confidentially. Cited also in note in 39 Am. Rep. 326, 330, and in good note in 24 Am. St. Rep. 232, and in extensive note in 57 Am. St. Rep. 918.

Limited in Satterfield v. Malone, 35 Fed. 453, 1 L. R. A. 39, where, under Pennsylvania law, principal was not charged with knowledge of agent not obtained in course of the business; Little, etc., Min. Co. v. Little, etc., Min. Co., 11 Colo. 240, 7 Am. St. Rep. 240, 17 Pac. 768, where mining company was bound by knowledge of superintendent, as to boundary; State v. Sitlington, 51 Mo. App. 258, where notice of unrecorded chattel mortgage did not estop subsequent mortgagee; Arrington v. Arrington, 114 N. C. 172, 19 S. E. 358, where client was not bound by knowledge of attorney who merely examined title. Distinguished in Mack v. McIntosh, 181 Ill. 644, 54 N. E. 1022. Criticised in Wittenbrock v. Parker, 102 Cal. 103, 41 Am. St. Rep. 178, 36 Pac. 377, 24 L. R. A. 199, reviewing cases, where constructive notice to attorney did not bind client; Sooy v. State, 41 N. J. L. 400, where State was not bound by notice to member of committee of legislature.

Confusion of goods.— Where distilled spirits, forfeited under revenue laws, are mixed with other distilled spirits belonging to same person, but not forfeited, the government is entitled to its portion of the result, p. 369.

11 Wall. 369-378, 20 L. 172, FIRST NAT. BANK v. LANIER.

Banks and banking.— Currency act of 1864 governs existing national banks, whether organized before or after its passage, p. 374.

Banks and banking.— National banks are forbidden, by currency act of 1864, to loan or discount on their own capital stock as security, and may not become holders of such stock, except when necessary to prevent loss on antecedent debt, p. 374.

Approved in Goodbar v. City Nat. Bank, 78 Tex. 475, 14 S. W. 855, holding that bank had no lien on shareholder's stock for advances; Wallace v. Hood, 89 Fed. 13, holding bank cannot withdraw stock; Hagar v. Union Nat. Bank, 63 Me. 512, collecting cases, where bank was given lien on dividends declared; Nicollet Nat. Bank v. City Bank, 38 Minn. 87, 8 Am. St. Rep. 645, 35 N. W. 579, construing similar provision of State statute.

Limited in Hagar v. Union Nat. Bank, 63 Me. 514, sustaining attachment lien, favor of bank, on shares of its own capital stock; Bohmer v. City Bank, 77 Va. 448, where assignee of certificate took with notice of lien given by charter.

Banks and banking.— National banks were created to subserve public purposes, and not the private interests of their stockholders, p. 374.

Cited in Nicollet Nat. Bank v. City Bank, 38 Minn. 89, 8 Am. St. Rep. 646, 35 N. W. 579, construing State statute forbidding banks to acquire liens on their own stock.

Banks and banking.— Deposit by one bank with another, whether with or without interest, is nothing but a loan of money, p. 375.

Approved in Conklin v. Second Nat. Bank, 45 N. Y. 659, holding illegal an agreement that deposit should be secured by lien on depositor's capital stock.

Banks and banking.— Contract by which national bank makes loan, and takes shares of its own capital stock as security, is illegal, p. 375.

Followed in Conklin v. Second Nat. Bank, 45 N. Y. 659, holding invalid such an agreement. Approved in Fowler v. Scully, 72 Pa. St. 467, 13 Am. Rep. 708, mortgage on real estate, to secure loan by national bank, was void.

Banks and banking.— Thirty-sixth section of act of 1863, forbidding shareholder in national bank to transfer his stock while owing the bank, was repealed by currency act of 1864, and cannot be continued in force by a by-law to same effect, p. 376.

Cited and principle applied in Bullard v. Nat. E. Bank, 18 Wall. 594, 21 L. 925, holding that national bank cannot acquire lien on shares of its stockholders under act of 1864; Evansville Nat. Bank v. Metropolitan Nat. Bank, 2 Biss. 529, F. C. 4,573, holding valid a bona fide transfer of stock, though a by-law attempted such restrictions; State v. First Nat. Bank, 89 Ind. 310, where sale of stock on execution was unaffected by such by-law; Second Nat. Bank v. National State Bank, 10 Bush, 375, holding that such restriction could not be imposed by articles of association and by-law; Feckheimer v. National Exch. Bank, 79 Va. 83, holding void a by-law to same effect. Approved in Richardson v. Wallace, 39 S. C. 224, 17 S. E. 727, where bank, having procured sale of its stock by sheriff, was estopped to deny title of purchaser. Cited, arguendo, in Nicollet Nat. Bank v. City Bank, 38 Minn. 87, 8 Am. St. Rep. 645, 35 N. W. 579, construing similar State statute as to all banks. Cited also in valuable note in 11 Am. Dec. 581; and in elaborate note in 85 Am. Dec. 621 and 43 Am. St. Rep. 157.

Distinguished in Knight v. Old Nat. Bank, 3 Cliff. 438, F. C. 7,885, holding such restriction in by-law, authorized by articles of association, valid under act of 1864.

Corporations.— Stock certificates, though not negotiable paper, in form or character, approximate to it as nearly as possible, p. 377.

Cited with approval and applied in Matthews v. Massachusetts Nat. Bank, 1 Holmes, 406, F. C. 9,286, reviewing authorities, where bank was held liable as assignor of fraudulently altered certificate; Knight v. Old National Bank, 3 Cliff. 439, F. C. 7,885, holding that assignee of certificate must take notice of restrictions in articles of association; Johnson v. Laflin, 5 Dill. 78, F. C. 7,393, reviewing authorities, and holding sale of stock complete upon proper assignment of certificates; Steacy v. Little Rock, etc., R. Co., 5 Dill. 372, F. C. 13,329, where bona fide holder was not chargeable with equities affecting his assignor; New Orleans Banking Assn. v. Wiltz, 4 Woods, 47, 10 Fed. 333, holding that pledgee of stock was not affected by unauthorized restriction in by-laws; Scott v. Pequonnock Nat. Bank, 21 Blatchf. 210, 15 Fed. 501, holding unrecorded transfer of certificates had precedence over attachment; Continental Nat. Bank v. Eliot Nat. Bank, 7 Fed. 372, collecting cases, where a transfer of stock certificate prevailed over subsequent attachment; Gould v. Head, 41 Fed. 247, holding trustees of American Cattle Trust had power to sell stock held in trust; Rood v. Whorton 67 Fed. 437, where bona fide purchaser of fully paid-up stock was not liable for assessment; Supply D. Co. v. Elliott, 10 Colo. 333, 3 Am. St. Rep. 591, 15 Pac. 694, where company was protected in refusing to transfer stock, the certificates not being produced; Smith v. Crescent City, etc., Co., 30 La. Ann. 1383, where rights of bona fide holder of certificates were superior to those of judgment creditor of assignor; Bank v. Pinson, 58 Miss. 438, 38 Am. Rep. 335, where bona fide purchaser of certificate was not affected by lien authorized in by-laws; Bank v. Durfee, 118 Mo. 446, 40 Am. St. Rep. 404, 24 S. W. 136, where bona fide purchaser of certificates was unaffected by secret lien; Brinkerhoff, etc., Co. v. Home L. Co., 118 Mo. 458, 24 S. W. 131, where bona fide purchaser of certificate was not bound by by-law of which he had no notice; Merchants' Nat. Bank v. Richards, 6 Mo. App. 461, reviewing authorities, where right of purchaser of certificate was held superior to that of subsequent attaching creditor; Cincinnati, etc., R. Co. v. Citizens' Nat. Bank, 56 Ohio St. 383, 47 N. E. 254, 43 L. R. A. 785, allowing recovery by holder of spurious certificates issued by bank's officers; State v. Smith, 15 Or. 128, 15 Pac. 390, holding that pledgee of certificates wrongfully caused transfer of stock; Smith v. Railroad, 91 Tenn. 237, 18 S. W. 549, reviewing authorities, where company was not liable to beneficiary for transfer in breach of trust, though with notice; concurring opinion in Guilford v. Western Union Tel. Co., 43 Minn. 437, 46 N. W. 71, holding that assignee of lost certificate, asking transfer of stock, should indemnify company; Keller v. Eureka, etc., Co., 48 Mo. App. 88, 94. 11 L. R. A. 473, 475, collecting authorities, and refusing to compel issue of certificates in lieu of those lost. Cited also in note in 43 Am. St. Rep. 156.

Corporations.—Stockholder having bought in good faith, who produces certificates, regularly assigned, with power to transfer is entitled to have the stock transferred to him, p. 378.

Approved and applied in Johnston v. Laflin, 103 U. S. 804, 26 L. 535, affirming 5 Dill. 75, 76, 78, 79, 80, F. C. 7,393, collecting authorities, where sale of stock was complete upon proper assignment of certificate; Johnston v. Laflin, 5 Dill. 75, 76, 78, 79, 80, 88, n., F. C. 7,393, reviewing authorities, and holding sale of national bank stock complete upon proper assignment of certificates, with power to transfer; Skinner v. Ft. Wayne, etc., R. Co., 58 Fed. 58, holding that such holder could compel transfer without joining his assignor; Smith v. Crescent City, etc., Co., 30 La. Ann. 1382, where unregistered assignment of certificate was good against judgment creditor of assignor; Bath Sav. Inst. v. Sagadahoc Nat. Bank, 89 Me. 504, 36 Atl. 997, collecting cases, where bank was liable to assignee of certificate for dividends paid assignor; Hughes v. Drovers' Bank, 86 Md. 422, 38 Atl. 937, where bank was not charged with notice that shares were held in trust; Selby v. Quinsigamond Nat. Bank, 133 Mass. 520, 523, holding that rights of assignee of certificate were superior to rights of assignee in bankruptcy; Fitchburg Sav. Bank v. Torrey, 134 Mass. 242, holding that pledgee of stock certificate might demand transfer; Walker v. Detroit, etc., Ry. Co., 47 Mich. 347, 11 N. W. 190, where bona fide purchaser of stock from one having apparent authority to transfer was protected; Joslyn v. St. Paul Dis. Co., 44 Minn. 185, 186, 46 N. W. 337, 338, where judgment commanding partial cancellation of outstanding certificate was erroneous; Bank v. Pinson, 58 Miss. 437, 38 Am. Rep. 334, holding bona fide purchaser of certificate was not subject to lien authorized by by-law; Leyson v. Davis, 17 Mont. 292, 42 Pac. 796, 31 L. R. A. 453, sustaining gift causa mortis, of national bank stock, by mere delivery; Doty v. First Nat. Bank, 3 N. Dak. 13, 14, 53 N. W. 79, 17 L. R. A. 261, 262, refusing to compel transfer to one claiming under attachment, subsequent to unrecorded assignment; Cincinnati, etc., R. R. v. Citizens' Nat. Bank, 56 Ohio St. 383, 47 N. E. 254, 43 L. R. A. 785, reviewing cases, and allowing recovery by bona fide holder of spurious certificate; State v. Smith, 15 Or. 128, 15 Pac. 390, holding that pledgee of certificate wrongfully caused transfer of stock. Cited, arguendo, in Windram v. French, 151 Mass. 550, 24 N. E. 915, 8 L. R. A. 750, where issue of spurious stock certificates was held to constitute false representation by officers issuing; Keller v. Eureka, etc., Co., 43 Mo. App. 94, 11 L. R. A. 475, refusing to compel issue of certificates in lieu of those lost; Caulkins v. Gas-Light Co., 85 Tenn. 695, 4 Am. St. Rep. 793, 4 S. W. 291, holding company having notice of trust liable for transfer at trustee's request; concurring opinion in Guilford v. Western Union Tel. Co., 43 Minn. 437, 46 N. W. 71, holding that assignee of lost certificate, asking

transfer of stock, should indemnify company; Fraser v. Charleston, 8 S. C. 342, holding stock transfer-book competent evidence of transfer of stock. Cited also in elaborate note in 37 Am. Rep. 354.

Limited in Bangor E. Co. v. Robinson, 52 Fed. 521, where stockholder's rights were unaffected by unauthorized sale of certificate indorsed in blank; Supply Ditch Co. v. Elliott, 10 Colo. 334, 3 Am. St. Rep. 592, 15 Pac. 694, where, stock certificates not being accounted for, company was protected in refusing transfer.

Corporations.—Certificates of stock assure the stockholder that the corporation will not transfer the stock to any one not in possession of the certificates, p. 378.

Denied in Guilford v. Western Union Tel. Co., 59 Minn. 345, 50 Am. St. Rep. 415, 61 N. W. 327, holding assignee of lost certificates entitled to transfer of stock, without indemnity.

Corporations.—National bank allowing stock to be transferred to other parties, while certificates were outstanding in hands of bona fide holders, is guilty of breach of corporate duty, and liable to such holders for the injury, p. 378.

Cited and doctrine followed in Moores v. Citizens' Nat. Bank, 104 U. S. 630, 26 L. 872, where such facts were held to constitute a cause of action; Johnson v. Laflin, 5 Dill. 76, 80, 89, and n., F. C. 7,393, reviewing authorities and holding sale of national bank stock complete before transfer on books; Continental Nat. Bank v. Eliot Nat. Bank, 7 Fed. 376, collecting authorities, where attaching creditor could not hold against holder of unrecorded certificate; Hazard v. National Exch. Bank, 26 Fed. 94, where right of assignee of certificate to transfer of stock was not affected by subsequent attachment; Bath Sav. Inst. v. Sagadahoc Nat. Bank, 89 Me. 504, 36 Atl. 997, collecting cases, where bank was liable to assignee of certificates for dividends paid assignor; Pratt v. Taunton C. Co., 123 Mass. 112, 25 Am. Rep. 39, holding that one innocently holding stock issued on surrender of stock, fraudulently transferred, was not liable with company to original owner; Cincinnati, etc., R. R. v. Citizens' Nat. Bank, 56 Ohio St. 387, 47 N. E. 255, 43 L. R. A. 786, allowing recovery in favor of one holding spurious certificate issued by bank's officers; Strange v. Houston, etc., R. Co., 53 Tex. 168, reviewing authorities, and holding company liable to holder for transfer with knowledge of outstanding certificate; Baker v. Wasson, 59 Tex. 145, holding company and secretary liable for such transfer; Moores v. Citizens' Nat. Bank, 111 U. S. 166, 28 L. 389, 4 S. Ct. 350, holding bank not liable on forged certificate, in hands of holder with notice; Burt v. Bailey, 73 Fed. 696, 36 U. S. App. 676, where parties appearing as shareholders, on books, were liable to assessment. Cited also in elaborate note, in 85 Am. Dec. 621, and in 37 Am. Rep. 356.

Distinguished in Masury v. Arkansas Nat. Bank, 87 Fed. 385, where, under local statute, unregistered pledge of stock certificates was void as against attachment.

11 Wall. 379-380, 20 L. 189, DEWING v. SEARS.

Tender.— Judgment on contract calling for payment in specified weight of pure gold, solvable in coined money, should be entered for coined dollars and parts of dollars, and not for treasury notes, of equivalent market value, p. 380.

Approved and applied in Hittson v. Davenport, 4 Colo. 174, sustaining judgment for "gold dollars," where contract was payable in gold; Bowen v. Darby, 14 Fla. 218, where note being payable in gold, it was error to instruct jury to compute amount due in currency; Belford v. Woodward, 158 Ill. 136, 41 N. E. 1101, 29 L. R. A. 600, and n., holding judgment for gold coin invalid, where there was no allegation or proof of such promise; Knox v. Gerhauser, 3 Mont. 280, citing cases, where judgment on such contract was modified by inserting amount in gold coin; Phillips v. Dugan, 21 Ohio St. 471, 8 Am. Rep. 69, holding plaintiff suing on note payable in gold or silver, entitled to judgment for specie; Townsend v. Jennison, 44 Vt. 318, holding it error, in such case, to give judgment for currency of same market value; dissenting opinion in Legal-Tender Cases, 12 Wall. 624, 20 L. 336, majority holding legal-tender, acts constitutional. Cited also in elaborate note in 87 Am. Dec. 127.

11 Wall. 380-382, 20 L. 175, RANKIN v. TENNESSEE.

Criminal law.— In capital cases, where plea in bar is found against prisoner, he may plead over to the felony the general issue, pp. 381, 382.

Appeal and error.— Where judgment of acquittal in lower court is reversed, for insufficiency of plea, and cause remanded for trial, there is no final judgment of which Supreme Court can take cognizance on writ of error, p. 382.

Cited in Cowan v. East, etc., R. Co., 6 Baxt. 71, dismissing appeal from order sustaining demurrer, there being no refusal to amend. Cited also in note, 60 Am. Dec. 439.

11 Wall. 382-391, 20 L. 44, EDMONDSON v. BLOOMSHIRE.

Wills.— Clause in will giving to testatrix's husband "My certificates now in the hands of my brother Ben," did not include certificate as to bounty lands never in hands of brother, nor did it include a warrant for bounty lands, issued on that certificate, pp. 383-391.

Not cited.

11 Wall. 391-395, 20 L. 190, SECOND NATIONAL BANK v. HUNT.

Trial.— Courts cannot assume, in instructions to juries, that material facts, on which parties rely, are established, unless they are admitted, or the evidence respecting them is uncontroverted, p. 394.

Approved in Smith v. Craft, 123 U. S. 441, 31 L. 268, 8 S. Ct. 197, holding that question of fraud, in preference by insolvent, should have gone to jury.

Fraudulent conveyances.— Oral agreement by debtor to transfer personal property to creditor, when desired, is void as to creditors, and sale under such agreement takes effect only from delivery of property, p. 394.

Approved and principle applied in In re Duncan, 8 Ben. 382, F. C. 4,131, holding assignee entitled to recover property fraudulently transferred though not representing creditor so entitled; In re Foster, 9 Fed. Cas. 525, collecting cases, and holding transfer under such agreement an act of bankruptcy; Lloyd v. Strobridge, 15 Fed. Cas. 732, where promise to give security did not validate mortgage given after debtor became insolvent; Goodrich v. Michael, 3 Colo. 79, where sale of personal property without delivery was void, as against assignee in bankruptcy; dissenting opinion in Watson v. Taylor, 21 Wall. 385, 22 L. 575, majority holding mere entry of judgment did not constitute a preference.

Distinguished in Scammon v. Bowers, 1 Hask. 503, F. C. 12,431, allowing one who purchased goods to be delivered as manufactured to retain goods received when vendor was insolvent; Sawyer v. Turpin, 2 Low. 34, F. C. 12,410, sustaining contract to deliver goods to debtor only upon payment; Teitig v. Boseman, 12 Mont. 451, 31 Pac. 385, reviewing cases, holding agreement that notes should become due upon insolvency, not void without proof of fraud.

Bankruptcy.— Chattel mortgage, not deposited in proper office, being void under the law of the State, as against creditors, is also void as against mortgagor's assignee in bankruptcy, p. 394.

Doctrine followed in Edmondson v. Hyde, 2 Sawy. 215, 217, F. C. 4,285, and Bayne v. Brewer Pottery Co., 90 Fed. 756, where bills of sale and mortgage, void as against creditors, were, as against assignee; Farmers' L. & T. Co. v. Minneapolis, etc., Co., 35 Minn. 546, 29 N. W. 350, holding receiver, in proceedings supplementary to execution, might avoid such mortgage. Cited, arguendo, in Chipman v. McClellan, 159 Mass. 371, 34 N. E. 382. Explained in Coggeshall v. Potter, 1 Holmes, 78, F. C. 2,955, where mortgage, good between the parties, was good as against assignee.

Distinguished in Goss v. Coffin, 66 Me. 485, 22 Am. Rep. 588, holding unrecorded lease, good as between the parties, valid as against assignee in bankruptcy.

Chattel mortgage, by terms of which mortgagee retains possession of goods, to sell in course of trade, mortgagee to take posses-

sion on default of payment, is void as against creditors, pp. 394, 395.

Approved and principle applied in Means v. Dowd, 128 U. S. 282, 32 L. 434, 9 S. Ct. 68, reviewing authorities, where assignment, reserving beneficial interest for debtor, was void; Platt v. Stewart, 13 Blatchf. 501, F. C. 11,220, holding assignee in bankruptcy entitled to recover property transferred in fraud of creditors; In re Morrill, 2 Sawy. 361, F. C. 9,821, holding such mortgage void as against assignee; Kane v. Rice, 14 Fed. Cas. 128, holding assignee might recover property transferred under such mortgage; City Nat. Bank v. Goodrich, 3 Colo. 142, collecting cases, where similar arrangement was void as against mortgagor's assignee; Moors v. Reading, 167 Mass. 325, 57 Am. St. Rep. 463, 45 N. E. 761, collecting numerous authorities, where mortgagee's rights, under similar mortgage, were inferior to those of assignee in insolvency; Horton v. Williams, 21 Minn. 190, where such mortgage was void as against subsequent purchaser without notice; Rocheleau v. Boyle, 11 Mont. 463, 28 Pac. 876, holding such mortgage void as to creditors, though properly filed.

Criticised in Cameron v. Marvin, 26 Kan. 627, holding such mortgage valid where possession was taken before attachment was levied. Limited in Etheridge v. Sperry, 139 U. S. 272, 35 L. 174, 11 S. Ct. 567, reviewing authorities, where recorded chattel mortgage, without reservation in favor of debtor, was not void; Huntley v. Kingman, 152 U. S. 535, 38 L. 543, 14 S. Ct. 691, holding deed of trust valid, possession having been surrendered; Ephraim v. Kelleher, 4 Wash. 256, 29 Pac. 989, 18 L. R. A. 624, and n., where possession was retained and proceeds applied on debt and in replenishing, mortgage was valid.

Miscellaneous.—Miscited in Nat. Park Bank v. Whitmore, 104 N. Y. 303, 10 N. E. 526, holding valid an agreement to give preference in case of bankruptcy.

11 Wall. 395–411, 20 L. 116, MISSOURI v. KENTUCKY.

Courts.—Original jurisdiction of suit between two States, to establish their boundaries, entertained by Supreme Court, pp. 395–401.

Cited in United States v. Texas, 143 U. S. 640, 648, 36 L. 291, 294, 12 S. Ct. 491, 494, reviewing authorities, entertaining suit in equity, by United States against State, to establish boundary of territory; Wisconsin v. Pelican Ins. Co., 127 U. S. 288, 32 L. 242, 8 S. Ct. 1373, reviewing authorities, and refusing to entertain suit by State to recover statutory penalty from citizen of another State.

States.—Kentucky, on becoming a State, succeeded to the ancient right and possession of Virginia, which, by virtue of the treaty between France, Spain and England, February, 1763, and treaty of

peace with Great Britain, 1783, extended to middle of the bed of Mississippi river, p. 401.

Approved in Cessill v. State, 40 Ark. 506, determining in like manner the boundary of Arkansas; Moss v. Gibbs, 10 Heisk. 291, holding that shifting of channel of Mississippi, in 1822 or 1823, did not alter boundary of Tennessee.

States.— Boundary between Kentucky and Missouri, having been once fixed at middle of Mississippi river, subsequent changes in its course do not affect the ownership of an island on Kentucky side of original boundary line, p. 401.

Cited as authority and applied in Indiana v. Kentucky, 136 U. S. 508, 34 L. 332, 10 S. Ct. 1053, holding that Green River Island, in Ohio river, belongs to Kentucky; Buttenuth v. St. Louis B. Co., 123 Ill. 553, 5 Am. St. Rep. 558, 17 N. E. 446, holding that boundary between Illinois and Missouri is middle of main channel of Mississippi; Cooley v. Golden, 52 Mo. App. 235, reviewing authorities, holding that boundary between Missouri and Nebraska is center of river channel, as it was when line was established; Holbrook v. Moore, 4 Neb. 438, holding that change in channel of Missouri river did not alter boundary line between Nebraska and Iowa.

Evidence.— Maps and books of early explorers are mere hearsay, as to facts within memory of living witnesses, and, if different, the latter is to be preferred, p. 410.

Approved in Gallagher v. Market St. Ry. Co., 67 Cal. 16, 6 Pac. 871, reviewing authorities, where medical work was not admissible to prove probable effect of injury. See also note in 51 Am. Rep. 682.

States.— Evidence examined at length, with conclusion that Wolf Island, in Mississippi river, is a part of the State of Kentucky, pp. 402-411.

Cited in Pike v. Hood, 67 N. H. 172, 27 Atl. 140, holding that deed, bounding land by bank of brook, refers to main branch; Branham v. Turnpike Co., 1 Lea, 706, 708, 27 Am. Rep. 791, 792, reviewing authorities, where a line down center of creek was held to refer to main channel.

11 Wall. 411-416, 20 L. 191, THE MONTELLO.

Evidence.— Supreme Court is supposed to know judicially the principal features of the geography of our country, and as part of it, what streams are navigable waters of the United States, p. 414.

Limited in United States v. Rio Grande Irr. Co., 174 U. S. 697, 19 S. Ct. 773, determining on the evidence that Rio Grande is not navigable within limits of New Mexico.

Admiralty.— Navigable water of the United States is one that, by itself or by connection with other waters, forms a continued high-

way, over which commerce may be carried on with other States or foreign countries, in the customary modes in which such commerce is conducted by water, p. 415.

Approved and rule applied in United States v. The Str. Montello, 20 Wall. 439, 22 L. 393, collecting cases, and holding Fox river a navigable water of the United States; The E. M. McChesney, 8 Ben. 157, F. C. 4,463, reviewing authorities, and holding that admiralty had jurisdiction in action on contract of carriage on Erie canal; Malony v. Milwaukee, 1 Fed. 613, where District Court took jurisdiction of action for collision on Erie canal. Approved in note to The Tug Oconto, 5 Biss. 464, F. C. 10,421, and Brown v. United States, 81 Fed. 57. Cited, arguendo, in United States v. Burlington, etc., Co., 21 Fed. 333, The Katie, 40 Fed. 488, 7 L. R. A. 63, and n.; also in elaborate note in 13 Am. Rep. 262. Cited generally in Morse v. Home Ins. Co., 30 Wis. 506, holding Fox river, above Oshkosh, not a navigable river of the United States.

Admiralty.— River that does not, by itself or in connection with other waters, form continuous highway for interstate or foreign commerce, and is only navigable between places in same State, is only a navigable water of the State, p. 415.

Approved and applied in Commonwealth v. King, 150 Mass. 225, 22 N. E. 906, 5 L. R. A. 538, citing cases, where court took judicial notice that part of Connecticut river was not within maritime jurisdiction of United States; Hodges v. Williams, 95 N. C. 334, 59 Am. Rep. 243, holding non-navigable an inland lake, fifteen miles long by eight in width; Heyward v. Farmers' Co., 42 S. C. 153, 46 Am. St. Rep. 714, 19 S. E. 971, 28 L. R. A. 47, holding that title to bed of such stream was in State. Approved also in Covington, etc., Co. v. Commonwealth, 154 U. S. 210, 38 L. 966, 14 S. Ct. 1089, reviewing authorities; in note to The Tug Oconto, 5 Biss. 464, F. C. 10,421, Chisolm v. Caines, 67 Fed. 292, Shaw v. Oswego Iron Co., 10 Or. 378, 45 Am. Rep. 151, Trout, etc., Club v. Mather, 68 Vt. 345, 35 Atl. 325, 33 L. R. A. 571, and in Willow River Club v. Wade, 100 Wis. 99, 76 N. W. 276, 42 L. R. A. 318, and n., holding Willow river to be a public navigable water, in which anyone may fish. Approved in concurring opinion in Louisville, etc., R. Co. v. Railroad Commissioners, 19 Fed. 708; dissenting opinion in Hutton v. Webb, 124 N. C. 754, 33 S. E. 170, majority holding legislature could not impose duties on navigation to pay for bridges, etc. Cited generally in The Clymene, 9 Fed. 167, holding that Delaware has authority over pilotage in navigable waters within her limits, but not exclusive.

Commerce.— Acts of Congress for license and enrollment of vessels only require enrollment and license for vessels employed upon navigable waters of the United States, p. 415.

Cited in United States v. Beacham, 29 Fed. 204, sustaining indictment against captain of steamer plying on Chesapeake bay; also in note in 62 Am. Dec. 236.

Limited in The Katie, 40 Fed. 482, 488, 7 L. R. A. 59, 63, and n., reviewing authorities, and sustaining limited liability act of July 19, 1886.

Commerce.— Congress has not prescribed any regulations governing commerce between States, except so far as it is conducted in vessels on the navigable waters of the United States, p. 415.

Cited in note in 62 Am. Dec. 238.

11 Wall. 416-423, 20 L. 181, MONCURE v. ZUNTS.

Courts.— By act of May 26, 1824, practice of Louisiana State courts was established as that of Federal courts in that State; this act was not repealed or modified by act of March 2, 1867, pp. 421, 422.

Judicial sale.— A sale of land by marshal, under executory process of Federal court, in Louisiana, notice of which is not given as required by the Louisiana code, is invalid, p. 423.

Approved in dissenting opinion in Wilcox v. Emerson, 10 R. I. 275, majority holding that officer's return must show compliance with requirements as to advertising.

Miscellaneous.— Wilcox v. Emerson, 10 R. I. 277, citing proposition found in statement of facts in principal case.

11 Wall. 423-432, 20 L. 192, ST. LOUIS v. THE FERRY CO.

Appeal and error.— In case of special findings by the court, no bill of exceptions is necessary to raise the question whether the facts found support the judgment, p. 428.

Approved in Seeberger v. Schlesinger, 152 U. S. 586, 38 L. 562, 14 S. Ct. 731, where failure to take exception, in such case, was immaterial.

Corporation is regarded as in effect a citizen of the State which created it; it has no faculty to emigrate, p. 429.

Approved and principle applied in Ward v. Blake Mfg. Co., 56 Fed. 439, 12 U. S. App. 295, reviewing authorities, and holding allegation of organization in another State showed diversity of citizenship; Commonwealth v. Standard Oil Co., 101 Pa. St. 146, reviewing authorities, and holding that foreign corporation could be taxed only to extent of property brought into State. Cited, arguendo, in Berry v. Windham, 59 N. H. 290, 47 Am. Rep. 204.

Corporation can exercise its franchises extra-territorially only so far as may be permitted by other sovereignties; but with that con-

sent, may do any act not ultra vires, and may have special or constructive residence, p. 429.

Approved and applied in Duke v. Taylor, 37 Fla. 71, 53 Am. St. Rep. 233, 19 So. 174, reviewing authorities, and holding illegal an attempted organization in Florida, under Tennessee charter; St. Louis v. Consolidated C. Co., 113 Mo. 87, 20 S. W. 700, holding taxable, tugs of foreign corporation, having actual situs in the State.

Taxation.— It is for legislature to decide the mode, form and extent of taxation of persons and property within its jurisdiction, limited only by those principles which lie at the foundation of all free government, p. 429.

Cited with approval and rule applied in Kirtland v. Hotchkiss, 100 U. S. 497, 25 L. 562, reviewing authorities, sustaining tax on bonds secured by mortgage upon land in another State, the residence of debtor; Cincinnati, etc., R. Co. v. Commonwealth, 81 Ky. 500, reviewing authorities, and sustaining Kentucky's scheme for taxing railroads; State v. Shaw, 21 Nev. 226, 29 Pac. 322, holding cattle taxable in county of situs, regardless of owner's residence; arguendo, in State v. Central Pacific R. Co., 21 Nev. 264, 30 Pac. 690.

Taxation.— Jurisdiction is as necessary to valid legislative as to valid judicial action, p. 430.

Cited with approval and principle applied in Gloucester F. Co. v. Pennsylvania, 114 U. S. 208, 29 L. 163, 5 S. Ct. 830, reviewing authorities, and holding invalid a tax on capital stock of foreign ferry company; New York, etc., R. Co. v. Pennsylvania, 153 U. S. 646, 38 L. 853, 14 S. Ct. 958, reviewing authorities, and holding Pennsylvania could not compel foreign corporation to withhold part of interest, payable in New York, on its bonds held in Pennsylvania; Commonwealth v. Standard Oil Co., 101 Pa. St. 146, reviewing cases, and holding foreign corporation taxable only as to property brought into State; Street R. Co. v. Morrow, 87 Tenn. 438, 11 S. W. 855, 2 L. R. A. 862, holding illegal, a State tax on foreign-held bonds; dissenting opinion in Adams Exp. Co. v. Ohio, 165 U. S. 230, 41 L. 698, 17 S. Ct. 313, majority holding valid Ohio's scheme of taxation, as to foreign express companies; Commonwealth v. Gloucester F. Co., 98 Pa. St. 118, majority sustaining tax on capital stock of foreign ferry company.

Taxation.— Rule that locality of personal property is that of its owner, does not affect the taxing power where the property has its actual situs, and legislative jurisdiction exists, p. 430.

Shipping.— "Home port" of a vessel depends upon locality of her owner's residence, and not upon the place of enrollment, p. 431.

Approved and applied in The Lotus No. 2, 26 Fed. 641, reviewing authorities, and holding that port of enrollment was not vessel's

home port; Mayor v. Baldwin, 57 Ala. 70, 29 Am. Rep. 716, holding illegal, a tax on ferry-boat at port of registration.

Taxation.—Tax imposed on ferry-boats belonging to Illinois corporation, having their home port in that State, and touching at St. Louis only to take on and discharge cargo, as property within that city, is invalid, though the corporation had offices, and most of its stockholders lived, in St. Louis, pp. 431, 432.

Approved and principle applied in Gloucester F. Co. v. Pennsylvania, 114 U. S. 208, 29 L. 163, 5 S. Ct. 830, reviewing authorities, where tax on capital stock of foreign ferry company was invalid; Baltimore, etc., R. Co. v. Allen, 22 Fed. 379, holding that State could not tax rolling stock of foreign railroad corporation; Mayor v. Baldwin, 57 Ala. 70, 29 Am. Rep. 716, holding tax illegal, under similar circumstances; Johnson v. De Bary-Baya, 37 Fla. 518, 19 So. 646, 37 L. R. A. 526, and note, restraining seizure of vessel for tax imposed away from home port; Philadelphia, etc., R. Co. v. Appeal Tax Court, 50 Md. 416, holding invalid, a tax on rolling stock of foreign railroad corporation; Roberts v. Charlevoix Township, 60 Mich. 198, 26 N. W. 878, holding vessel enrolled and licensed not taxable in other than home port; Graham v. St. Joseph Township, 67 Mich. 656, 35 N. W. 810, holding vessel belonging to foreign corporation not taxable because used in the State; Conley v. Chedic, 7 Nev. 342, holding goods in transitu not taxable in State through which they pass; Barnes v. Woodbury, 17 Nev. 388, 30 Pac. 1069, holding that cattle were not taxable in county where they were temporarily grazing; Connecticut, etc., Co. v. Columbia, 62 N. H. 287, where logs in transit were not taxable in State where temporarily stored. Approved generally in State ex rel., etc. v. State Board, 3 S. Dak. 351, 53 N. W. 196, and dissenting opinion in Commonwealth v. Gloucester Ferry Co., 98 Pa. St. 119, majority holding capital stock of foreign ferry company taxable. Cited also in note in 56 Am. Dec. 526, 527, and in elaborate note in 62 Am. St. Rep. 471.

Distinguished in Pullman's Car Co. v. Pennsylvania, 141 U. S. 23, 35 L. 616, 11 S. Ct. 878, sustaining tax on capital stock of foreign sleeping-car company; Pullman's, etc., Co. v. Twombly, 29 Fed. 628, reviewing authorities, and sustaining Iowa's scheme of taxation as to Pullman cars; St. Louis v. Consolidated Coal Co., 113 Mo. 87, 89, 20 S. W. 700, holding taxable the tugs of foreign corporation having actual situs in the State; Union, etc., Co. v. Lynch, 18 Utah, 390, 55 Pac. 642, holding refrigerator cars of foreign corporation, used in State, taxable. Limited in dissenting opinion in Johnson v. De Bary-Baya, 37 Fla. 522, 523, 525, 19 So. 647, 648, 37 L. R. A. 527, 528, and note, majority holding illegal, a tax on vessel having home port in another State; Irvin v. New Orleans, etc., R. Co., 94 Ill. 110, 34 Am. Rep. 211, sustaining tax on ferry-boat owned one-half by local company, plying between Illinois and Kentucky.

11 Wall. 432-438, 20 L. 195, UNITED STATES v. HOWELL.

Statutes.— Courts must, if possible, avoid declaring an act invalid, for want of any meaning, p. 436.

Counterfeiting.— Section 6 of the act of July 25, 1862, relative to counterfeiting, etc., certain government obligations, is not void for repugnancy, pp. 435, 437.

Counterfeiting.— Words "false, forged and counterfeit," in sixth section, act of July 25, 1862, when applied to any obligation of the government therein mentioned, imply that it purports to be such an instrument, but is not genuine or valid, p. 437.

Approved in United States v. Owens, 37 Fla. 115, to same effect. Cited, arguendo, in United States v. Patterson, 55 Fed. 640, holding words "trade and commerce" in act of July 2, 1890, synonymous.

Counterfeiting.— Indictment, under section 6, act of July 25, 1862, for passing counterfeit treasury notes, following words of that section, is not void for repugnancy, pp. 435, 438.

Followed in United States v. Carll, 105 U. S. 613, 26 L. 1136, holding that indictment must charge that defendant knew the instrument to be false.

11 Wall. 438-442, 20 L. 197, INSURANCE CO. v. WEIDE.

Evidence.— Rules of evidence must expand according to exigencies of society, p. 440.

Approved in Lane v. Missouri Pacific R. Co., 132 Mo. 19, 33 S. W. 650, holding evidence of deceased's habit of drunkenness admissible on question of contributory negligence.

Evidence offered, which conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, should go to the jury, p. 440.

Cited as authority in Plumb v. Curtis, 66 Conn. 166, 33 Atl. 1000, admitting, on question of agency, testimony of plaintiff that supposed agent was impecunious; Lane v. Missouri Pacific R. Co., 132 Mo. 19, 33 S. W. 650, holding evidence of deceased's habit of drunkenness admissible on question of contributory negligence; Dodge v. Weill, 158 N. Y. 350, 53 N. E. 35, admitting evidence of item not in bill of particulars to prove contract; Roberts v. Continental Ins. Co., 41 Wis. 328, admitting evidence of a rule of company on question of its knowledge of previous insurance.

Insurance.— In action on insurance policy, direct evidence not being possible, testimony of class of merchants as to uniform relation between stock on hand and the annual sales, in their business, is admissible on question of loss by fire to similar stock of goods, p. 441.

Approved in Lane v. Missouri Pacific R. Co., 182 Mo. 19, 33 S. W. 650, holding evidence of deceased's habit of drunkenness admissible on question of contributory negligence.

Limited in Jones v. Mechanics' Ins. Co., 36 N. J. L. 43, 13 Am. Rep. 416, excluding such testimony by city dealer, on question of value of country stock.

Evidence.— Presumption is an inference as to existence of a fact not actually known, arising from its usual connection with another, which is known, pp. 441, 442.

Approved in Lane v. Missouri Pacific R. Co., 182 Mo. 19, 33 S. W. 650, holding evidence of deceased's habit of drunkenness admissible on question of contributory negligence; Burkholder v. Henderson, 78 Mo. App. 295, collecting cases, and holding that it was rightly left to jury to draw this inference.

Customs and usages.— Witness may not be asked what the course of trade is in a particular business; it is only through the aggregated testimony of all the witnesses, as to their personal experiences, that the fact can be proved, p. 442.

Followed in Wier v. Allen, 51 N. H. 185, admitting evidence of individual statements to prove common report.

Miscellaneous.— Miscited in United States v. San Pedro, etc., Co., 4 N. Mex. 591 (308), 17 Pac. 420. Cited to note in report of principal case in L. R. A. incidentally, and in Kahn v. Traders' Ins. Co., 4 Wyo. 472, 62 Am. St. Rep. 78, 34 Pac. 1076.

11 Wall. 442-458, 20 L. 184, MEADER v. NORTON.

Public lands.— Appellants' claim to Rancho El Refugio under Mexican grant, held fraudulent, pp. 452-457.

Officers.— Where jurisdiction is delegated to a tribunal over a subject-matter, and its exercise is discretionary, the decision of the matter, in absence of fraud, is, in general, valid and conclusive, p. 457.

Public lands.— Decrees by commissioners, or by District or Supreme Court, and patents issued, under the act authorizing commissioners to settle Mexican land grants in California, are conclusive only between United States and claimants, and do not affect rights of third persons, p. 457.

Approved in De Guyer v. Banning, 167 U. S. 742, 42 L. 346, 17 S. Ct. 944, reviewing authorities, and holding description in such patent conclusive against grantee of patentee; Weeks v. Milwaukee, etc., R. Co., 78 Wis. 519, 47 N. W. 742, collecting cases, where issue of certificate of location did not prejudice rights of real owner.

Public lands.— Land patents, in suits at law, are conclusive evidence of title as against United States and all claiming under United States by junior title, p. 457.

Approved in dissenting opinion in Northern Pacific R. Co. v. Barden, 46 Fed. 620, majority overruling demurrer to complaint at law to recover land claimed as mineral.

Equity.— The jurisdiction of a court of equity to relieve against fraud or mistake, extends to cases where one man has procured land patent which belonged to another at time patent was issued, p. 458.

Approved and principle applied in Mahn v. Harwood, 112 U. S. 358, 28 L. 667, 5 S. Ct. 177, holding rule applicable to case of patent for invention; Bisson v. Curry, 35 Iowa, 78, collecting authorities, where one claiming rights as pre-emptioner was permitted to contest plaintiff's patent. Cited, arguendo, in Colorado Coal Co. v. United States, 123 U. S. 314, 31 L. 185, 8 S. Ct. 134, where bill to cancel patents was dismissed as to innocent purchaser.

Trusts.— Where one party has acquired the legal right to property to which another has a better right, court of equity will convert him into a trustee and compel him to convey the legal title, p. 458.

Approved and applied in Widdicombe v. Childers, 124 U. S. 405, 31 L. 430, 8 S. Ct. 520, collecting authorities, and holding patent not conclusive as between patentee and one with superior right; Hodge v. Palms, 68 Fed. 63, 37 U. S. App. 61, collecting cases, where defendants claimed under a void probate proceeding; Dale v. Turner, 34 Mich. 417, where complainant claimed under military bounty warrant and defendant under patent.

Vendor and purchaser.—Purchasers of land, having at the time notice of title in another than their grantee, are not innocent purchasers, p. 458.

Approved in Widdicombe v. Childers, 124 U. S. 405, 31 L. 430, 8 S. Ct. 520, collecting cases, where subsequent patentee had notice of mistake in original patent; Felix v. Patrick, 145 U. S. 327, 36 L. 725, 12 S. Ct. 865, where bill to cancel patent fraudulently obtained was dismissed for laches.

Limitation of actions.— Laches and statute of limitations cannot prevail where relief sought is grounded on charge of secret fraud, and suit was brought within reasonable time after evidence of the fraud was discovered, p. 458.

Cited with approval and doctrine applied in Kirby v. Lake Shore, etc., R. Co., 120 U. S. 136, 30 L. 572, 7 S. Ct. 433, collecting cases, and holding that local statute of limitations did not change rule; Jones v. Van Doren, 130 U. S. 693, 32 L. 1080, 9 S. Ct. 687, a suit by widow for dower; McIntire v. Pryor, 173 U. S. 56, 19 S. Ct. 359, reviewing authorities, and annulling foreclosure sale for fraud; M'Alpine v. Hedges, 21 Fed. 690, where there was a deed in fraud

of creditors kept off the records; Hodge v. Palms, 68 Fed. 64, 37 U. S. App. 61, where act complained of was void probate sale; McKneely v. Terry, 61 Ark. 543, 33 S. W. 957, reviewing cases, where there was a delay of sixteen years owing to secreted deed; Priston v. Cutter, 64 N. H. 468, 13 Atl. 879, reviewing authorities, and allowing bill for recovery of property fraudulently conveyed by deceased; Todd v. Rafferty, 30 N. J. Eq. 258, where statute did not run against surviving partner's right to demand accounting for fraud; United States v. San Pedro, etc., Co., 4 N. Mex. 590 (308), 17 Pac. 420, holding same rule applicable to suit by United States to set aside patent; Peck v. Bank, 16 R. I. 715, 19 Atl. 371, 7 L. R. A. 331, and note, where statute ran from discovery of fraudulent transfer of stock; Weeks v. Milwaukee, etc., R. Co., 78 Wis. 515, 47 N. W. 741, where there had been sale under fraudulent probate proceedings; Rogers v. Van Nortwick, 87 Wis. 431, 58 N. W. 763, where plaintiff failed to make showing of reasonable diligence after discovery of fraud. Cited also in elaborate note in 2 Am. St. Rep. 301.

Miscellaneous.— Cited in note to Norton v. Meader, 4 Sawy. 629, F. C. 10,351, report of same case in lower court; McCurdy v. Baughman, 43 Ohio St. 83, 1 N. E. 96, to effect that principal case did not pass on validity of judgment against married woman.

11 Wall. 459-483, 20 L. 199, GALVESTON R. R. v. COWDREY.

Railroads.— Charter of company examined and held to authorize mortgage of any real estate that might be acquired, p. 474.

Limited in Morgan v. Donovan, 58 Ala. 263, holding that mortgage in question did not extend to real estate not necessary, etc., to company's business.

Railroads.— Act of December 19, 1857 (Texas Stats.), authorizes railroads to mortgage and sell rights of way, franchises, etc., and inures to benefit of mortgages or trust deeds given before its passage, p. 475.

Approved and principle applied in Houston, etc., Ry. v. Texas, 170 U. S. 259, 42 L. 1028, 18 S. Ct. 616, where sale of railroad was ratified by subsequent act; Abbott v. New York, etc., R. Co., 145 Mass. 454, 15 N. E. 99, where attempted transfer of right of eminent domain was ratified by subsequent act; Houston, etc., R. Co. v. Shirley, 54 Tex. 139, holding sale under this statute passed franchises, etc., but purchaser did not assume antecedent liabilities. Cited, arguendo, in New Orleans, etc., R. Co. v. Delaware, 114 U. S. 510, 29 L. 247, 5 S. Ct. 1013, holding, under similar statute, that franchises might be sold at bankruptcy sale.

Corporation cannot repudiate its bonds in bona fide hands, and after receiving their proceeds, upon the ground that the directors' meeting authorizing them was unlawfully held outside of the State of its creation, pp. 476, 477.

Cited and principle followed in Lynde v. The County, 16 Wall. 14, 21 L. 275, sustaining validity of county bonds, issued by county judge while out of State; Handley v. Stutz, 139 U. S. 422, 35 L. 232, 11 S. Ct. 532, affirming S. C., 41 Fed. 538, reviewing authorities, where stockholders were bound by their action at meeting out of State; Oregonian R. Co. v. Oregon, etc., Co., 11 Sawy. 569, 27 Fed. 280, holding immaterial, an allegation that lease was executed out of the State; Hodder v. Kentucky, etc., R. Co., 7 Fed. 795, collecting cases, and sustaining mortgage, executed by president in another State; Stutz v. Handley, 41 Fed. 538, where stockholders were bound by increase of capital stock, voted at meeting held in another State; Reichwald v. Commercial H. Co., 106 Ill. 451, sustaining notes and mortgages given out of State; Coe v. New Jersey, etc., R. Co., 31 N. J. Eq. 117, overruling objection that mortgage was authorized by resolution at meeting held in another State; Miller v. Insurance Co., 92 Tenn. 181, 21 S. W. 42, 20 L. R. A. 772, and note, where company was estopped to claim that it had not adopted certain amendment. Cited generally in Dorian v. City of Shreveport, 28 Fed. 292, sustaining action on city bonds, though issue was not specially authorized. Cited, arguendo, in Slocum v. Warren, 10 R. I. 123, stockholder could not avoid liability on ground that corporation was not properly organized. Approved also in note to Alexander v. Central Rd., 3 Dill. 490, F. C. 166.

Limited in State v. Milwaukee, etc., R. Co., 45 Wis. 599, holding that forfeiture might be adjudged where corporation had its principal place of business, officers, books, etc., in another State.

Corporations, while generally existing only where created, may transact business by agents in another jurisdiction, so long as local authorities do not object, p. 477.

Approved and applied in Oregonian Ry. Co. v. Oregon, etc., Co., 11 Sawy. 569, 27 Fed. 280, holding immaterial an allegation that lease was signed out of the State; Reichwald v. Commercial H. Co., 106 Ill. 451, collecting cases, where notes and mortgages, given by directors in another State, were sustained.

Limited in Franco-Texan L. Co. v. Laigle, 59 Tex. 343, holding attempted election of directors, in foreign country, void.

Execution.— Purchaser at execution sale takes only the right, title and interest of debtor, subject to equities existing at time of judgment, p. 477.

Approved in Holland v. The State, 15 Fla. 518, a case of sale of franchise, under statutory power. Cited, arguendo, in Broadwell v. Merritt, 87 Mo. 102.

Bonds.— Purchaser of railroad bonds in open market, supposing them to be valid, in absence of proof to the contrary, will be deemed a bona fide holder for value, p. 478.

Cited and followed in Long Island, etc., Co. v. Columbus, etc., R. Co., 65 Fed. 457, reviewing cases, where purchaser of bonds, with unpaid coupons attached, was bona fide holder; Seybel v. National Cur. Bank, 54 N. Y. 302, 13 Am. Rep. 593, holding purchaser of stolen United States bond, not bound to inquire as to seller's title; Miller v. Insurance Co., 92 Tenn. 181, 21 S. W. 42, 20 L. A. R. 772, and n., where company was estopped to deny adoption of amendment.

Limited in Spence v. Mobile, etc., R. Co., 79 Ala. 586, reviewing authorities, where purchasers of first mortgage bonds were charged with notice of lien preserved by act of consolidation.

Bonds.— There being three railroad mortgages, to secure different classes of bonds, and the trustees being dead, bill of foreclosure may be brought by parties holding bonds of the various classes, on behalf of themselves, and all other bondholders, p. 478.

Cited approvingly and principle relied upon in Reinach v. Atlantic, etc., R. Co., 58 Fed. 38, taking jurisdiction of bill by alien bondholder, though trustees and other defendants resided in same State; Henry v. Travellers' Ins. Co., 16 Colo. 186, 26 Pac. 320, allowing intervention by bondholder, where trustee was acting in bad faith; McFadden v. Mays Landing, etc., R. Co., 49 N. J. Eq. 185, 22 Atl. 935, collecting cases, and allowing action by one bondholder, trustee refusing to act; Hammond v. Tarver, 89 Tex. 294, 34 S. W. 730, sustaining validity of sale, under decree in like suit.

Bonds.— Where suit to foreclose is brought by certain bondholders, on behalf of themselves and others, any bondholder proving his claim may contest the claim of any other, p. 479.

Approved in Sutherland v. Lake, etc., R. Co., 23 Fed. Cas. 461, where, prior mortgagee having begun suit to foreclose, separate action by junior was unnecessary; Galveston, etc., R. Co. v. Butler, 56 Tex. 512, holding, under particular circumstances, that other creditors than plaintiff need not be joined.

Limited in Chester v. Life Assn., 4 Fed. 492, refusing to make assignee of insolvent corporation a defendant, in suit against the corporation.

Bonds.— Decree of foreclosure, in suit by bondholders, on behalf of themselves and others, is not conclusive as to amount of bonds outstanding and due, before those bonds have been regularly produced and proved, p. 479.

Approved in Toler v. East Tenn., etc., R. Co., 67 Fed. 181, reviewing authorities, and holding that it was not necessary to produce bonds and coupons, before decree nisi.

Mortgages.— Railroad and its privies are estopped to claim that mortgages or deeds of trust, given by the company, which purport to cover after-acquired property, do not cover that which they pro-

fess to; such mortgages or deeds attach to the company's property as it comes into existence, p. 481.

Approved and applied in Thompson v. White, etc., R. Co., 182 U. S. 74, 33 L. 260, 10 S. Ct. 31, where such mortgage was good against vendor of subsequently-acquired real estate; Central Trust Co. v. Kneeland, 138 U. S. 419, 34 L. 1016, 11 S. Ct. 358, reviewing authorities, where such mortgage was held to cover terminal facilities; United States Tel. Co. v. Boston T. Co., 147 U. S. 448, 37 L. 237, 13 S. Ct. 402, where such mortgage took prior right to after-acquired property; Wade v. Chicago, etc., R. Co., 149 U. S. 341, 37 L. 761, 13 S. Ct. 898, collecting cases, where after-acquired clause prevailed against grantee of one to whom mortgagor had conveyed; Barnard v. Norwich, etc., R. Co., 4 Cliff. 365, F. C. 1,007, where leasehold interest passed under after-acquired clause; Dillon v. Barnard, 1 Holmes, 394, F. C. 3,915, where mortgage attached to construction work, to exclusion of contractor; Scott v. Clinton, etc., R. Co., 6 Biss. 535, F. C. 12,527, where after-acquired clause was held to cover rolling stock; Boston, etc., T. Co. v. Bankers, etc., Tel. Co., 36 Fed. 298, where, of two mortgages of after-acquired property, prior in time had superior lien; Manhattan T. Co. v. Sioux City, etc., R. Co., 68 Fed. 73, where lien of such mortgage was held superior to lien of lessor for rent; Compton v. Jesup, 68 Fed. 288, 31 U. S. App. 486, where mortgage attached to property in hands of successor in title; Harris v. Youngstown Bridge Co., 90 Fed. 328, 332, 62 U. S. App. 123, 130, and Meyer v. Johnston, 53 Ala. 324, holding valid the after-acquired clause of railroad mortgage; Colt v. Barnes, 64 Ala. 122, where statutory lien, favor of State, attached to after-acquired property; Campbell v. Quinton, 4 Kan. App. 329, 45 Pac. 918, holding mortgage on stock includes additions thereto; Bell v. Chicago, etc., R. Co., 34 La. Ann. 791, 792, holding that local statute, restricting mortgage of after-acquired property, did not apply to railroads; Hamlin v. Jerrard, 72 Me. 75, collecting authorities, where such mortgage attached to personal property, on which was unrecorded chattel mortgage; Manchester L. Works v. Truesdale, 44 Minn. 118, 46 N. W. 302, 9 L. R. A. 143, and n., where conditional sale of locomotive became absolute, and mortgage attached upon suit for its price; Williamson v. New Jersey, etc., R. Co., 26 N. J. Eq. 403, where after-acquired clause covered capital stock, without recordation as chattel mortgage; dissenting opinion in Drennen v. Mercantile, etc., Co., 115 Ala. 634, 23 So. 177, 39 L. R. A. 635, majority holding claims of employees have priority over mortgage securing bonds. Cited, arguendo, in Edwards v. Peterson, 80 Me. 371, 6 Am. St. Rep. 209, 14 Atl. 937; also Thompson v. Foerstel, 10 Mo. App. 299, where trustee in trust deed, conveying after-acquired property, maintained replevin for same, on being deprived of possession. See also elaborate note on this point in 46 Am. Dec. 717.

Distinguished in Watkins v. Houck, 44 Kan. 512, 24 Pac. 364, holding that fraudulent decree quieting title did not inure to benefit of

mortgagee; Williams v. Briggs, 11 R. I. 478, reviewing authorities, and holding that one claiming after-acquired property under mortgage, could not maintain trover for it; Hand v. Savannah, etc., R. Co., 12 S. C. 364, where purchase-money mortgage of land took precedence over mortgage of after-acquired property; this rule distinguished and explained in note in 22 Am. Rep. 654.

Mortgages.— Junior mortgagee, with notice of prior mortgages, is in privity with mortgagor, p. 482.

Cited and followed in Dodge v. Smith, 5 Kan. App. 745, 46 Pac. 993, holding junior mortgagee estopped to contest validity of prior mortgage.

Liens.— Rule giving priority to last creditor for aiding to conserve the property against which other liens have attached, has never been introduced into our laws, except in maritime cases, p. 482.

Approved and doctrine followed in Fogg v. Blair, 133 U. S. 539, 33 L. 724, 10 S. Ct. 340, reviewing cases, where mortgagee's rights were superior to subsequent judgment for work and materials; Duncan v. Mobile, etc., R. Co., 2 Woods, 546, F. C. 4,137, refusing to apply income of road, during foreclosure, to payment of such creditor; Dillon v. Barnard, 1 Holmes, 395, F. C. 3,915, refusing priority to claim for construction work on mortgaged railroad; Boston, etc., T. Co. v. Bankers, etc., Tel. Co., 36 Fed. 298, where, of two mortgages of after-acquired property, prior in time had first lien; Farmers' L. & T. Co. v. Northern Pac. R. Co., 68 Fed. 40, refusing to pay sureties on appeal bond, out of profits accrued during receivership; Lackawanna, etc., Co. v. Farmers' L. & T. Co., 79 Fed. 210, 52 U. S. App. 106, refusing to allow preference to claim for rails, furnished to keep road in operation; International T. Co. v. T. B. Townsend, etc., Co., 95 Fed. 863, where claim was for bridge built on mortgaged railroad; Meyer v. Johnston, 53 Ala. 344, where receiver's certificates to pay such debts were inferior to lien of prior mortgage; Central T. Co. v. Thurman, 94 Ga. 742, 20 S. E. 143, refusing preference to such claims, in distributing proceeds of foreclosure sale; Coe v. New Jersey, etc., R. Co., 31 N. J. Eq. 133, refusing priority to laborers' wages.

Criticised in Farmers' L. & T. Co. v. Kansas City, etc., Co., 53 Fed. 190, requiring payment of such creditors as condition precedent to appointment of receiver.

Fixtures.— At common law, whatever is affixed to the freehold becomes a part of the realty, except certain fixtures erected by tenants, p. 482.

Mortgages.— In absence of mechanics' lien law, one who allows his property, such as rails, to go into or become a part of a railroad, covered by mortgages attaching as the road is built, acquires no lien which can displace the mortgages, p. 482.

Cited with approval and rule applied in Porter v. Pittsburgh, etc., Steel Co., 122 U. S. 283, 30 L. 1211, 7 S. Ct. 1208, collecting cases, holding contract that property in bridge should not pass till paid for, void as to bona fide bondholders; Thompson v. White, etc., R. Co., 132 U. S. 74, 33 L. 260, 10 S. Ct. 31, where rights of mortgagee prevailed over lien for construction work; Fogg v. Blair, 133 U. S. 539, 33 L. 724, 10 S. Ct. 340, reviewing cases, where mortgage lien was superior to judgment lien for work done subsequently; Toledo, etc., R. Co. v. Hamilton, 134 U. S. 300, 33 L. 907, 10 S. Ct. 548, reviewing authorities, where mortgage lien took precedence over subsequent mechanic's lien; Duncan v. Mobile, etc., R. Co., 2 Woods, 546, F. C. 4,137, refusing to apply income of road, during foreclosure, to payment of such creditors; New York, etc., Co. v. Capital Ry. Co., 77 Fed. 531, collecting cases, and holding that lien of vendor was lost, upon machinery being attached to such property; Phœnix, etc., Co. v. New York S. & T. Co., 83 Fed. 759, 54 U. S. App. 413, 414, where contract that title to fixtures should remain in vendor was void as against prior mortgage; International T. Co. v. T. B. Townsend, etc., Co., 95 Fed. 863, where claim for bridge built had no preference over rights of prior mortgagee; dissenting opinion in Kilpatrick v. Kansas City, etc., R. Co., 38 Neb. 644, 645, 57 N. W. 672, majority giving preference to statutory liens for construction; New Mexico v. U. S. Trust Co., 172 U. S. 185, 19 S. Ct. 133, and Meyer v. Johnston, 53 Ala. 330, obiter. Cited, arguendo, in Evans v. Kister, 92 Fed. 886, holding that failure to record agreement that fixtures should remain personalty, did not injure surety. See also note in 41 Am. St. Rep. 759.

Distinguished in United States v. New Orleans R. Co., 12 Wall. 365, 20 L. 436, where vendor's lien on rolling stock prevailed against such mortgage; Sunflower Oil Co. v. Wilson, 142 U. S. 325, 35 L. 1029, 12 S. Ct. 238, there being no question as to rights of other creditors, receiver allowed to recover accrued freights; Bear Lake Irr. Co. v. Garland, 164 U. S. 15, 21, 41 L. 333, 335, 17 S. Ct. 11, 13, and Williamson v. New Jersey, etc., R. Co., 29 N. J. Eq. 317, where after-acquired clause gave right subject to lien attached before acquisition; Central T. Co. v. Arctic, etc., Mfg. Co., 77 Md. 234, 26 Atl. 498, where fixtures were subject to chattel mortgage as against bondholders who created the lien; Roddy v. Brick, 42 N. J. Eq. 225, 6 Atl. 811, where mortgage of foundry did not include hoisting blocks and chain, lathes and drill press; Daly v. New York, etc., R. Co., 55 N. J. Eq. 603, 38 Atl. 205, where after-acquired clause did not give lien superior to mortgage given for purchase-money; General Electric Co. v. Transit Eq. Co., 57 N. J. Eq. 474, 42 Atl. 106, 107, holding that mortgage of after-acquired property did not attach to chattels delivered under conditional sale; Hand v. Savannah, etc., R. Co., 12 S. C. 364, where purchase-money mortgage of land was given priority. Limited in

Binkley v. Forkner, 117 Ind. 186, 19 N. E. 757, 8 L. R. A. 36, and n., allowing lien of chattel mortgage, where original security would not be diminished; Farmers' L. & T. Co. v. Canada, etc., R. Co., 127 Ind. 269, 26 N. E. 789, 11 L. R. A. 747, and n., where mortgage lien on after-acquired property of road was subject to statutory mechanic's lien; Williamson v. New Jersey, etc., R. Co., 29 N. J. Eq. 317, where after-acquired property was subject to lien attached before its acquisition.

Railroads.— Mortgage of tolls and income of railroad, with provision for change of possession upon default, did not make mortgagor or its assignee accountable therefor before demand made by mortgagee, p. 483.

Cited with approval and principle applied in Gilman v. Illinois, etc., Co., 91 U. S. 617, 23 L. 410, holding such income subject to rights of general creditors, before demand; American Bridge Co. v. Heidelbach, 94 U. S. 800, 24 L. 144, where, mortgage providing for receiver, mortgagee could not reach profits accrued prior to possession; Fosdick v. Schall, 99 U. S. 253, 25 L. 343, collecting authorities, and requiring receiver to pay certain general creditors out of accrued profits; Dow v. Memphis R. Co., 124 U. S. 654, 31 L. 566, 8 S. Ct. 674, where bill to enforce surrender of possession was sufficient demand; Sage v. Memphis, etc., R. Co., 125 U. S. 378, 31 L. 698, 8 S. Ct. 892, collecting authorities, where mortgagees out of possession were not entitled to profits; Freedman's Saving Co. v. Shepherd, 127 U. S. 501, 32 L. 166, 8 S. Ct. 1253, reviewing authorities, where redemptioner was entitled to profits as against mortgagee out of possession; United States T. Co. v. Wabash Ry., 150 U. S. 306, 37 L. 1091, 14 S. Ct. 92, reviewing authorities, where receiver in insolvency proceedings took such earnings in preference to mortgagee; Gilman v. Illinois, etc., Tel. Co., 1 McCrary, 173, F. C. 5,443, where garnishment of income after decree of foreclosure was good, having been no demand; Young v. Northern, etc., Co., 9 Biss. 305, 13 Fed. 809, where mortgagee of coal mine, out of possession, had no claim on profits; Dow v. Memphis, etc., R. Co., 20 Fed. 770, reviewing authorities, where mortgagor in possession after default was entitled to rents and profits; Mercantile T. Co. v. Missouri, etc., R. Co., 36 Fed. 225, 1 L. R. A. 400, and n., holding that in suit to foreclose such mortgage receiver should be appointed; Thomas v. Peoria, etc., Co., 36 Fed. 818, directing payment of certain car rents out of income; Hook v. Bosworth, 64 Fed. 448, 24 U. S. App. 341, where receivers were not entitled to earnings accrued at time of their appointment; Veatch v. American L. & T. Co., 84 Fed. 276, 55 U. S. App. 196, holding mortgagee not entitled to earnings during receivership at request of stockholders; Hall v. Mobile, etc., R. Co., 58 Ala. 24, holding mortgagee out of possession not entitled to rents; Johnston v. Stewart, 70 Ala. 226, where lien of garnishment, levied on such

profits before suit for foreclosure, took precedence; Drennen v. Mercantile T. Co., 115 Ala. 608, 67 Am. St. Rep. 78, 23 So. 166, 39 L. R. A. 626, where, accrued profits having been diverted to bondholders, employees were given preference; Green v. Coast Line R. Co., 97 Ga. 22, 54 Am. St. Rep. 384, 24 S. E. 816, 33 L. R. A. 809, directing payment of damages for tort out of income after possession taken; Mississippi, etc., R. Co. v. United States Ex. Co., 81 Ill. 538, sustaining garnishment of earnings of mortgaged road, before possession taken; Emerson v. European, etc., R. Co., 67 Me. 394, 24 Am. Rep. 44, holding that rents accruing while mortgagor was in possession were not part of mortgaged property; De Graff v. Thompson, 24 Minn. 457, sustaining garnishment of accrued earnings after they passed to mortgagee's possession; In re Life Assn., 96 Mo. 636, 10 S. W. 70, where mortgagor in possession was not accountable for rents; White v. Wear, 4 Mo. App. 347, holding that mortgagee could not recover rents from mortgagor's lessee, before default; New York S. Co. v. Saratoga, etc., L. Co., 159 N. Y. 144, 53 N. E. 760, 45 L. R. A. 135, where, as between bondholders and other creditors, latter were entitled to earnings only after possession taken; Giles v. Stanton, 86 Tex. 627, 26 S. W. 618, where mortgagee had no right to earnings, accumulating in hands of receiver appointed at instance of State; Gilbert v. Washington City, etc., R. Co., 33 Gratt. 649, holding execution creditors entitled to earnings as against trust creditors; Childs v. Hurd, 32 W. Va. 89, 9 S. E. 371, holding mortgagee entitled to rents and profits, from time of suit brought.

Cited, arguendo, in In re Tallassee Mfg. Co., 64 Ala. 597, also Frazier v. Railway Co., 88 Tenn. 166, 12 S. W. 544, both holding that general creditors might reach corpus of mortgaged property, where income had been paid to mortgagee before possession; McIlhenny v. Binz, 80 Tex. 17, 26 Am. St. Rep. 723, 13 S. W. 662, where, earnings having been paid on mortgage interest, laborers, etc., were given priority. Approved also, but without application, in Meyer v. Johnston, 53 Ala. 320. Cited generally in Hand v. Savannah, etc., R. Co., 17 S. C. 268, and McIlhenny v. Binz, 80 Tex. 13, 26 Am. St. Rep. 719, 13 S. W. 660, both allowing priority to certain claims for labor, etc.

Distinguished in Macalester v. Maryland, 114 U. S. 605, 29 L. 235, 5 S. Ct. 1069, where, under local statute, general creditor could not levy on profits; Des Moines Gas Co. v. West, 50 Iowa, 29, where general creditors were refused access to accrued profits in possession of receiver. Limited in Dow v. Memphis R. Co., 124 U. S. 655, 31 L. 566, 8 S. Ct. 674, where the bill to compel surrender of possession was held sufficient demand.

Miscellaneous.— Cited incidentally in Ruggles v. Southern Minn. R. Co., 20 Fed. Cas. 1330, Meyer v. Johnston, 53 Ala. 347, 354, and Zorn v. Railroad Co., 5 S. C. 95.

11 Wall. 484-488, 20 L. 297, FORSYTH v. WOODS.

Partnership, being a distinct thing from the partners, a joint contract of the latter, in their individual names, in matter that has no connection with firm business, creates no liability of the firm as such, p. 486.

Approved and applied in In re Nims, 16 Blatchf. 444, F. C. 10,269, holding that only creditors of firm, as such, could share assets of bankrupt partnership; Second Nat. Bank v. Burt, 93 N. Y. 245, holding that two firms, composed of same persons, were two persons within meaning of bank by-law.

Distinguished in Berkshire W. Co. v. Juillard, 75 N. Y. 540, 31 Am. Rep. 490, holding joint obligation of partners, given in course of firm's business, an obligation of the firm.

Partnership.— Rule that sets apart firm assets of bankrupt partnership exclusively, in first instance, to payment of firm debts, presumes that those debts were incurred for benefit of firm, and that its property consists, in whole or in part, of what has been obtained from its creditors, p. 486.

Explained and followed in In re Nims, 16 Blatchf. 445, F. C. 10,269, reversing S. C., 10 Ben. 56, F. C. 10,268, holding that one not a creditor of the bankrupt partnership, as such, could not prove claim against its assets. Cited generally in Ex parte Nason, 70 Me. 369, allowing holder of partners' joint and several note to prove against firm assets.

Criticised in In re Nims, 10 Ben. 56, F. C. 10,268, holding that creditor of partners, not creditor of firm, might share in assets of bankrupt partnership. Distinguished in In re Tesson, 23 Fed. Cas. 867, where, executor having mingled trust funds with his partnership business, beneficiaries were allowed to prove claim against estate of bankrupt firm.

Executors and administrators.— Letters of administration are a trust granted by the Probate Court or ordinary, because of the confidence reposed in grantee. Administrator is required to take exclusive charge of personal property of intestate, and give administration his personal attention, p. 487.

Principal and surety.— Contract of suretyship, having as its object that a firm of which administrator is member shall take assets of estate into its possession and share in their disposition, is against public policy, and void, p. 487.

Distinguished in Rogers v. Hopkins, 70 Ga. 460, holding valid agreement to invest ward's money in bonds and deposit same with surety.

Miscellaneous.— Cited in Sutherland v. Lake, etc., R. Co., 23 Fed. Cas. 464, as instance of suit by assignee to recover debt due bankrupt partnership.

11 Wall. 488-492, 20 L. 209, EUREKA CO. v. BAILEY CO.

Corporation, having authorized execution of contract by agent, or having ratified same, neither the seal of the corporation, nor a resolution in writing, is necessary, p. 491.

Cited and principle applied in Jacksonville, etc., Ry. v. Hooper, 160 U. S. 521, 40 L. 522, 16 S. Ct. 382, reviewing authorities, where lease executed by president was valid, though no resolution produced; Oregonian Ry. Co. v. Oregon R. & N. Co., 12 Sawy. 112, 28 Fed. 507, where lease by officers of corporation was ratified by subsequent action of company; Allis v. Jones, 45 Fed. 149, collecting authorities, and admitting parol evidence to prove action of board, conferring authority on officers; G. V. B. Min. Co. v. First Nat. Bank, 95 Fed. 33, collecting cases, where, under circumstances, the designation "[L. S.]" was sufficient corporate seal; Scott v. Trustees, 50 Mich. 532, 15 N. W. 892, sustaining validity of mortgage, given by two of three church trustees; Penn. Nat. Gas Co. v. Cook, 123 Pa. St. 184, 16 Atl. 764, where scroll after officers' names was deemed the corporate seal; Kelly v. Board of Pub. Works, 75 Va. 271, admitting parol evidence as to terms of employment of agent by said board.

Patents.—Where one agreeing to pay royalties for use of a patent in manufacturing a certain machine, is sued in equity for such royalties, it is doubtful whether he can set up defense that machine is not covered by patent, in the absence of allegation of fraud, surprise, or imposition, and where he has furnished samples of the machine to be made, pp. 491, 492.

Followed in Magic Ruffle Co. v. Elm City Co., 13 Blatchf. 158, F. C. 8,949, citing cases, where such party was estopped to deny his admission that patent was valid. Approved in Forncrook Mfg. Co. v. E. T. Barnum, etc., Works, 54 Mich. 556, 20 N. W. 583, holding that similar case should be brought in Federal court.

Distinguished in National Mfg. Co. v. Meyers, 7 Fed. 357, where, in suit for account of profits and injunction for infringement, defendant was allowed to question validity of patent.

Patents.—Question as to whether patent was procured through fraud on commissioner, can be considered only in a direct suit to impeach and set aside patent, p. 492.

Approved in Gear v. Grosvenor, 1 Holmes, 216, F. C. 5,291, holding patent could not be collaterally impeached for fraud in obtaining extension.

Limited in Marsh v. Nichols, etc., Co., 128 U. S. 610, 32 L. 540, 9 S. Ct. 169, citing cases, and holding that letters-patent might be attached collaterally for defect in execution; Moorman v. Hoge, 2 Sawy. 84, F. C. 9,783, holding that certificate of registry of trademark was not conclusive of its validity.

Patents.— In a suit for royalties and injunction for infringement of patent right, question of novelty of invention cannot be considered if no notice is given of the attempt, or witnesses, or other evidence to support charge, p. 492.

Patents.— In this case, bill in equity, to recover royalties and restrain infringement of patent right, was entertained, and judgment accordingly, p. 492.

Approved in Magic Ruffle Co. v. Elm City Co., 13 Blatchf. 157, F. C. 8,949, sustaining bill in equity for discovery and accounting, though patent had expired; Atwood v. Portland Co., 10 Fed. 283, reviewing cases, where bill for accounting, upon patent, was entertained, though no injunction was asked; McKay v. Smith, 29 Fed. 296, collecting authorities, and refusing to dismiss bill for discovery, account and injunction; Hat Sweat Mfg. Co. v. Porter, 34 Fed. 747, issuing injunction in similar case.

Distinguished in Root v. Railway Co., 105 U. S. 204, 26 L. 980, dismissing bill for want of jurisdiction, where mere accounting for profits was asked; Washburn, etc., Co. v. Cincinnati, etc., Co., 42 Fed. 678, 679, dismissing bill for royalties and injunction, where contract contained forfeiture clause.

11 Wall. 493-507, 20 L. 176, STEWART v. KAHN.

Statutes.— Change of language in revised statutes will not change law from what it was before, unless apparent that such was intention of legislature, p. 502.

Statutes.— Where revising statute, or one enacted for another, omits provisions contained in original act, parts omitted cannot be kept in force by construction, but are annulled, p. 502.

Approved and principle applied in United States v. Bennett, 12 Blatchf. 349, F. C. 14,570, citing cases, holding that act of 1870, relative to fees of pension agents, repealed certain provisions of former acts; Weiskittle v. State, 58 Md. 157, where right taken away by changed Constitution could not be continued by statutes; Ex parte Coombs, 38 Tex. Cr. 657, 44 S. W. 858, reviewing cases, and holding that omission of court from subsequent Constitution operated to repeal said court.

Courts.— Record disclosing that judgment was given against plaintiff, in Supreme Court of Louisiana, upon sole ground that he was not entitled to immunity claimed under act of Congress of June 11, 1864, Supreme Court has jurisdiction, pp. 502, 503.

Followed in Trebilcock v. Wilson, 12 Wall. 694, 20 L. 461, where party claimed right, under Constitution, to have note paid in gold or silver.

Distinguished in Texas, etc., Ry. Co. v. Southern Pacific Co., 137 U. S. 54, 34 L. 617, 11 S. Ct. 12, holding Federal question not prop-

erly claimed, where set up for first time in petition for rehearing; Castillo v. McConnico, 168 U. S. 679, 42 L. 624, 18 S. Ct. 231, dismissing writ of error where decision below was sustained by State law. Criticised in Auchincloss v. Frois, 24 La. Ann. 32, where court said that Federal question was presented, in principal case, only in petition for rehearing.

Statutes.— Case may be within meaning of statute and not within its letter, and vice versa; intention of lawmaker constitutes the law, p. 504.

Cited approvingly and relied upon in Raymond v. Thomas, 91 U. S. 715, 23 L. 435, holding void, under reconstruction acts, a military order annulling decree of Chancery Court in South Carolina; Price v. Stone, 49 Ala. 550, where intention was taken as indicated by language of legislature; Barclay v. Plant, 50 Ala. 515, reviewing authorities, and holding that husband might convey property to wife, in payment of debt, at time of marriage.

Statutes.— Remedial statutes should be construed liberally, p. 504.

Limitation of actions.— Act of Congress, June 11, 1864, relative to statute of limitations, means that time which elapsed while suit could not be brought, by reason of Rebellion, whether before or after the passage of the act, is to be deducted, pp. 504, 505.

Approved and applied in United States v. Wiley, 11 Wall. 515, 20 L. 214, where benefit of the statute was extended to government; Metropolitan Nat. Bank v. Gordon, 28 Ark. 117, reviewing cases, where suit was between citizen of New York and one of Arkansas; Auchincloss v. Frois, 24 La. Ann. 32, a suit between citizens of New York and of Louisiana; Aby v. Brigham, 28 La. Ann. 841, the suit being between citizen of Mississippi and one of New Orleans. Cited also in note, 4 Am. Rep. 124. Cited obiter in Jones v. Johnson, 28 Ark. 233.

Distinguished in Mayo v. Cartwright, 30 Ark. 414, refusing benefit of statute, in case of personal trust that might have been executed without aid of court; McKinzie v. Hill, 51 Mo. 307, 11 Am. Rep. 453, holding that statute was not suspended during time courts were closed in Missouri, on account of Rebellion, that being loyal State. Denied in Harrison v. Adger, 24 La. Ann. 565, 566, refusing to give this statute any retroactive effect.

Limitation of actions.— Act of Congress of June 11, 1864, relating to statute of limitations, applies to cases pending in courts of States, as well as the Federal courts, p. 506.

Approved and applied in Mayfield v. Richards, 115 U. S. 142, 29 L. 336, 5 S. Ct. 1190, to same effect, plaintiff being within Federal and defendant within Confederate lines; Harrison v. Myer, 92 U. S. 116, 23 L. 607, holding that local statute of limitations ran against cause, where parties were at all times within Federal control. Cited,

arguendo, in Brown v. Walker, 161 U. S. 606, 40 L. 824, 16 S. Ct. 650.

Denied in Succession of Winn, 33 La. Ann. 1898, holding that statute was not binding on actions in State court.

Distinguished in dissenting opinion in Brown v. Walker, 161 U. S. 623, 624, 40 L. 830, 16 S. Ct. 661, majority holding constitutional the act of February 11, 1893, relating to testimony before commerce commission.

Courts.— To have one rule of property in State court, and a different one in the Federal court for same State, would be contrary to uniform spirit of our national jurisprudence, from judiciary act of 1789, p. 506.

Approved and applied in In re Eldridge & Co., 2 Hughes, 257, F. C. 4,331, citing cases, where Federal court applied local statute of limitations; In re Cornwall, 9 Blatchf. 128, F. C. 3,250, reviewing authorities, and holding one whose claim was barred by State law could not prosecute claim in bankruptcy.

United States.— Congress is authorized to make all laws necessary and proper to carry into effect the granted powers, p. 506.

United States.— Decision of questions as to measures to be taken in carrying on war and suppressing insurrection rests wholly in discretion of Congress, to whom the substantial powers involved are confided by Constitution, p. 506.

Approved and applied in United States v. One Thousand Five Hundred Bales of Cotton, 27 Fed. Cas. 328, holding hostilities between North and South ceased with proclamation of president, not with decisive battle.

United States.— Power of Congress to suppress insurrection carries with it inherently the power to guard against immediate renewal of conflict and to remedy evils which have arisen from its rise and progress, p. 507.

Cited approvingly and relied upon in White v. Hart, 13 Wall. 651, 20 L. 687, holding that reconstructed States had never been out of Union, their rights having been merely suspended; Raymond v. Thomas, 91 U. S. 715, 23 L. 435, holding void, under reconstruction acts, an order by military officer annulling decree of Chancery Court. Cited, arguendo, in United States v. One, etc., Bales Cotton, 27 Fed. Cas. 328.

Distinguished in dissenting opinion in Brown v. Walker, 161 U. S. 623, 624, 40 L. 830, 16 S. Ct. 661, majority holding constitutional, act of February 11, 1893, relating to testimony before commerce commission.

United States.— Power of Congress to pass act of June 11, 1864, relative to the statute of limitations, is necessarily implied from the powers to make wars and suppress insurrections, p. 507.

Followed in Mayfield v. Richards, 115 U. S. 142, 29 L. 336, 5 S. Ct. 1190, reaffirming constitutionality of same act. Approved in Caperton v. Bowyer, 14 Wall. 235, 20 L. 884.

Statutes.— What is clearly implied in a written instrument is as effectual as what is expressed, p. 507.

United States.— The war power and treaty-making power of Congress, each carries with it authority to acquire territory, p. 507.

11 Wall. 508-515, 20 L. 211, UNITED STATES v. WILEY.

Evidence.— Supreme Court takes judicial notice that a state of war existed in Virginia, from May 24, 1861, to May 24, 1865, p. 513.

Limitation of actions.— Statutes of limitation are statutes of repose, enacted upon presumption that one having well-founded claim will not delay enforcing it beyond reasonable time, if he has power to sue, pp. 513, 514.

Cited and principle applied in Bauserman v. Blunt, 147 U. S. 658, 37 L. 320, 13 S. Ct. 471, reviewing authorities, and holding that Kansas statutes ceased to run, on death of debtor, only for reasonable time; In re Cornwall, 9 Blatchf. 127, F. C. 3,250, reviewing cases, where Bankruptcy Court refused to recognize claim barred by State statute; Andrae v. Redfield, 12 Blatchf. 411, F. C. 367, where United States court dismissed bill in equity on claim barred by State law.

Limitation of actions.— When ability to resort to courts is taken away, basis of presumption upon which such laws are enacted is gone; and creditor has not the time within which to bring his suit that the statutes contemplate, p. 514.

Cited with approval and doctrine relied upon in Greenwald v. Appell, 5 McCrary, 341, 17 Fed. 141, deducting from statutory period the time of pending bankruptcy proceedings; In re Eldridge & Co., 2 Hughes, 257, F. C. 4,331, holding that statute ceased to run upon filing petition, by debtor, in bankruptcy; Devereaux v. Brownsville, 29 Fed. 751, where statute did not run, during time charter was repealed, for purpose of obstructing creditor; Jackson v. Fidelity, etc., Co., 75 Fed. 365, 41 U. S. App. 552, collecting authorities, where time did not run against bank while in hands of receiver; Broadfoot v. Fayetteville, 124 N. C. 495, 70 Am. St. Rep. 620, 32 S. E. 809, where time did not run against holder of interest coupons, while city was disincorporated; Treasurer v. Martin, 50 Ohio St. 204, 33 N. E. 1114, reviewing authorities, where time during which party was enjoined from bringing suit was deducted. Cited, arguendo, in Mutual, etc., Ins. Co. v. Hillyard, 37 N. J. L. 467, 18 Am. Rep. 747.

Limitation of actions.— Act of Congress of June 11, 1864, suspending statutes of limitations in certain cases, applies to suits by

the government as well as citizens; e. g., suit by United States, on marshal's bond, p. 514.

Approved in Harrison v. Myer, 92 U. S. 115, 23 L. 607, refusing benefit of act to case where cause of action arose in district controlled by United States.

Statute being affirmative only, raises no implication of intent to repeal former statute or to alter the common law, to which it is not repugnant, p. 515.

Statutes.— Remedial statutes are entitled to liberal construction, p. 515.

Limitation of actions.— Act of Congress of June 11, 1864, suspending statute of limitations in certain cases, requires all the time to be deducted during which suit could not be prosecuted, whether such time was before or after its passage, p. 515.

Approved and followed in Metropolitan Nat. Bank v. Gordon, 28 Ark. 117, an action on contract between citizen of New York and one of Arkansas; Aby v. Brigham, 28 La. Ann. 841, where benefit of statute was extended to suit between resident within Federal lines, against resident of Mississippi. Cited generally in Stewart v. Kahn, 11 Wall. 504, to same effect; Brown v. Walker, 161 U. S. 607, 40 L. 824, 16 S. Ct. 651, see dissenting opinion, p. 623, 40 L. 830, 16 S. Ct. 661, sustaining act of February 11, 1893, relating to testimony before Commerce Commission. Cited, arguendo, in In re Eldridge & Co., 2 Hughes, 258, F. C. 4,331, holding that statute ceased to run against claim upon filing of debtor's petition in bankruptcy; also in Jones v. Johnson, 28 Ark. 283. See also notes in 13 Am. Dec. 370, and in 4 Am. Rep. 124.

Distinguished in McKinzie v. Hill, 51 Mo. 307, 11 Am. Rep. 453, refusing benefit of statute, when both parties were citizens of loyal State; Ahnert v. Zaun, 40 Wis. 629, where statute of Wisconsin ran against citizen of New Orleans, after that city came under Federal control. Limited in Sands v. New York L. Ins. Co., 50 N. Y. 632, 10 Am. Rep. 540, holding that war did not destroy contract of insurance with citizen of rebel State, but suspended payment of premium.

11 Wall. 516-560, 20 L. 33, SEYMOUR v. OSBORNE.

Patents.— Inventions secured by letters-patent are property in holder of patent, entitled to protection as any other property, consisting of franchise, during term for which franchise or exclusive right is granted, p. 533.

Approved and relied upon in Cammeyer v. Newton, 94 U. S. 226, 24 L. 72, where action was brought by assignee of original inventor; McCormick Machine Co. v. Aultman, 169 U. S. 609, 42 L. 876, 18 S. Ct. 444, holding patent office lost jurisdiction on granting original

patent, and did not regain same on application for reissue; Brady v. Atlantic Works, 4 Cliff. 412, F. C. 1,794, sustaining bill for infringement of patent for dredger.

Patent duly granted is itself prima facie evidence that patentee is original and first inventor of that therein described and secured to him as his invention, p. 538.

Cited with approval and rule applied in Mitchell v. Tilghman, 19 Wall. 391, 22 L. 135, where presumption by production of letters-patent was held not to be overcome; Cammeyer v. Newton, 94 U. S. 231, 24 L. 74, where, in absence of proof to contrary, patent was conclusive; Marsh v. Seymour, 97 U. S. 352, 24 L. 964, holding, patent being produced, burden was on defendant to prove prior invention; Bates v. Coe, 98 U. S. 49, 25 L. 74, where production of patent cast burden on respondent; Herring v. Nelson, 14 Blatchf. 305, F. C. 6,424, requiring clear and satisfactory proof to overcome this presumption; Corvallis F. Co. v. Curran, 7 Sawy. 273, 8 Fed. 152, holding presumption not overcome by other patents introduced; Storrs v. Howe, 4 Cliff. 389, F. C. 13,495, where, patent being introduced and not contradicted, only question was as to infringement; Tucker v. Tucker, etc., Co., 4 Cliff. 401, F. C. 14,227, where presumption raised by production of patent, confined case to special defenses; Brady v. Atlantic Works, 4 Cliff. 413, F. C. 1,794, holding that after introduction of patent, question of infringement and defenses in answer alone remained; Kelleher v. Darling, 4 Cliff. 442, F. C. 7,653, holding patent conclusive where defense of prior invention was not pleaded properly; Cahill v. Brown, 4 Fed. Cas. 1006, where, proof to contrary failing, letters-patent were conclusive as to prior invention; Shaver v. Skinner Mfg. Co., 30 Fed. 70, sustaining patent for combination of known ingredients; Page, etc., Co. v. Land, 49 Fed. 937, where production of patent, in absence of contrary proof, was conclusive; Pacific, etc., Co. v. Butte City R. Co., 52 Fed. 865, where, of two patents granted for similar invention, the later patentee was presumed to be first inventor; Blount v. Societe Anonyme, etc., 53 Fed. 102, 6 U. S. App. 335, where production of patent demanded clear proof of its invalidity; Hunt Bros. v. Cassidy, 53 Fed. 259, 7 U. S. App. 424, holding, where patent was produced, that infringer was not entitled to verdict for want of proof of novelty; Anderson v. Monroe, 55 Fed. 397, holding that production of patent cast burden of disproving novelty on infringer; Western E. Co. v. Millheim E. Tel. Co., 88 Fed. 507, a case where this presumption prevailed as to novelty and patentability of telephone circuit device.

Patents.— Burden of proof is on parties suing for infringement to prove that they, or those under whom they claim, are original and first inventors of improvement embodied in letters-patent, on which suit is founded, and that same have been infringed by party against whom suit is brought, p. 538.

Approved and applied in Mitchell v. Tilghman, 19 Wall. 391, 22 L. 185, and Herring v. Nelson, 14 Blatchf. 305, F. C. 6,424, where production of letters-patent raised presumption that complainant was first inventor; Bates v. Coe, 98 U. S. 49, 25 L. 74, holding denial of infringement cast burden on complainant, which was fully sustained; Storrs v. Howe, 4 Cliff. 389, F. C. 13,495, holding infringement of patent for pressing machine, proved.

Patents.— Parties sued as infringers are not allowed, in action at law, to set up defense of previous invention, knowledge or use, without giving thirty days' notice, and in equity same information must be given in answer, p. 539.

Approved and applied in Cammeyer v. Newton, 94 U. S. 231, 24 L. 74, where, no notice having been given, evidence of previous invention was excluded; Roemer v. Simon, 95 U. S. 215, 24 L. 385, allowing evidence of prior invention, notice having been given; Marsh v. Seymour, 97 U. S. 352, 24 L. 964, holding that burden was on defendant to establish this defense, patent being produced; Goff v. Stafford, 10 Fed. Cas. 583, admitting evidence to support such defense to suit for infringement.

Patents.— Recital in letters-patent that required oath was taken before letters issued is, in absence of fraud, conclusive evidence of the fact, p. 541.

Approved in Hancock Insp. Co. v. Jenks, 21 Fed. 914, refusing to examine into truth of such recital; Holmes, etc., Co. v. Domestic, etc., Co., 42 Fed. 222, refusing to go into question as to whether oath taken covered reissue.

Distinguished in Smith v. Reynolds, 10 Blatchf. 86, F. C. 13,097, refusing to give such effect to certificate of registration of trademark.

Patents.— Where invention embraces an entire machine, it is sufficient if it appear that claim is co-extensive with invention, p. 541.

Patents.— Where invention embraces only one or more parts of machine, part or parts claimed must be specified or pointed out so that inventors and contractors and the public may know how to make the invention and what is withdrawn from general use, p. 541.

Cited and reaffirmed in Carnegie, etc., Co. v. Cambria, etc., Co., 89 Fed. 738. Approved in Goshen Sweeper Co. v. Bissell, etc., Co., 72 Fed. 74, 37 U. S. App. 555, citing cases, and holding claim and specifications good. Cited obiter in Reece, etc., Co. v. Globe, etc., Co., 61 Fed. 971, 21 U. S. App. 244.

Patents.— Where invention embraces a new ingredient and a combination of old ingredients, embodied in same machine, the invention must be described with great particularity, p. 541.

Patents.—Inventions consisting entirely of new combinations of old ingredients, whereby new and useful result is obtained, are as much entitled to protection as any other class, pp. 542, 556.

Cited as authority and relied upon in Sayles v. Chicago, etc., R. Co., 3 Biss. 58, F. C. 12,415, holding patentee of combination entitled to suppress subsequent invention embodying it; Pacific, etc., R. Co. v. Butte City R. Co., 52 Fed. 865, holding improved brake to be patentable combination, not mere aggregation; Thompson v. Citizens' Nat. Bank, 53 Fed. 253, 10 U. S. App. 500, and Griswold v. Harker, 62 Fed. 391, 27 U. S. App. 122, citing cases, holding objection to combination of old ingredients not tenable; P. H. Murphy Mfg. Co. v. Excelsior, etc., Co., 76 Fed. 975, 40 U. S. App. 200, where, though patent for combination was valid, omission of ingredient avoided infringement of it. Approved in Adams E. Ry. Co. v. Lindell Ry. Co., 77 Fed. 441, 40 U. S. App. 482.

Patents.—Where invention consists of new combination of old ingredients, it is sufficient if ingredients are named, mode of operation given, and new result pointed out, so that extent and nature of claim and what the parts are which co-operate to produce new and useful result, may be known, p. 542.

Approved in Bates v. Coe, 98 U. S. 39, 25 L. 71, holding description sufficient; Springfield, etc., Co. v. Miller, etc. Co., 96 Fed. 421, holding, where description of foreign patent is clear, similar United States patent void for anticipation.

Patents.—Neither reissued nor extended patent can be abrogated by infringer, in suit for infringement, upon ground that letters-patent were procured by fraud, p. 545.

Approved and applied in Tilghman v. Mitchell, 9 Blatchf. 27, F. C. 14,042, where, extension being regular on its face, question of fraud refused consideration; La Baw v. Hawkins, 14 Fed. Cas. 896, refusing to consider such defense, in infringement suit; Parham v. American, etc., Co., 18 Fed. Cas. 1098, citing cases, and refusing to consider objection that there was no cause for reissue.

Patents.—Where commissioner accepts surrender of original patent and grants new one, his decision in premises is not re-examinable in suit for infringement, unless apparent on face of patent that he has exceeded his authority, pp. 543, 544.

Cited with approval and principle applied in Christman v. Rumsey, 17 Blatchf. 151, F. C. 2,704, citing cases, and holding commissioner's decision final as to facts in petition for reissue; Hoe v. Cottrell, 17 Blatchf. 549, 1 Fed. 600, citing cases, and holding commissioner's decision conclusive, in collateral proceeding, as to drawing, model, etc.; Selden v. Stockwell, etc., Co., 19 Blatchf. 554, 9 Fed. 397, holding question as to fact justifying reissue, concluded by commissioner; Chicago, etc., Co. v. Busch, 2 Biss. 478,

F. C. 2,669, where reissue was not avoided by fact that it did not include all specified in original; Metropolitan W. Co. v. Providence T. Co., 1 Holmes, 168, F. C. 9,507, refusing to examine facts connected with surrender and reissue; Gear v. Grosvenor, 1 Holmes, 219, F. C. 5,291, where absence of recitals concerning notices, etc., in reissued patent, did not affect rule; Carew v. Boston, etc., Co., 3 Cliff. 359, F. C. 2,397, holding that old and new patents in question were not repugnant; Milligan, etc., Co. v. Upton, 4 Cliff. 289, F. C. 9,607, holding commissioner's decision conclusive, want of jurisdiction not being made out; Dorsey, etc., Co. v. Marsh, 7 Fed. Cas. 943, refusing to admit parol evidence of irregularity in issue of patent, regular on its face; Kerosene, etc., Co. v. Littell, 14 Fed. Cas. 377, holding commissioner's decision conclusive as to cause for reissue; La Baw v. Hawkins, 14 Fed. Cas. 896, refusing to consider defendant's denial that patents were surrendered for good cause; Miller, etc., Co. v. Du Brul, 17 Fed. Cas. 367, refusing to consider objections to validity of reissue; Thomas v. Shoe Mfg. Co., 23 Fed. Cas. 972, overruling objection, in suit on reissued patent, that original was still in force; Wells v. Jacques, 29 Fed. Cas. 661, holding that question as to whether reissue was for same invention was to be determined solely by comparison of old and new; Smith v. Merriam, 6 Fed. 718, 719, where decision of commissioner, upon reissue, was conclusive as to its necessity; Spaeth v. Barney, 22 Fed. 829, holding it unnecessary to aver, in infringement suit, the grounds of reissue. Approved in Flower v. Detroit, 22 Fed. 294, holding reissue invalid as an attempt to introduce new invention; American Bell Tel. Co. v. United States, 68 Fed. 568, 33 U. S. App. 236, holding commissioner's power to issue patent dependent on result of his own examination. Cited also in note in Edgarton v. Furst, 10 Biss. 418.

Distinguished in Reckendorfer v. Faber, 92 U. S. 354, 23 L. 712, reviewing authorities, and holding commissioner's decision only prima facie right as to novelty, invention and prior use; Herring v. Nelson, 14 Blatchf. 300, F. C. 6,424, holding decision of commissioner not conclusive as to question of repugnancy between old and new patent.

Patents.— Reissued letters-patent must be for same invention; and where it appears, as matter of law, on comparison of the instruments, that this is not true, reissue is invalid, p. 544.

Approved and doctrine followed in Russell v. Dodge, 93 U. S. 464, 23 L. 975, holding reissue invalid where it appeared on its face to be for another invention; Powder Co. v. Powder Works, 98 U. S. 139, 25 L. 82, citing cases, and holding reissue void on this account, under act of 1870; Ball v. Langles, 102 U. S. 130, 26 L. 105, holding void a reissue, which appeared to be intended to cover new devices; Parker, etc., Co. v. Yale C. Co., 123 U. S. 97, 31 L. 105, 8 S. Ct. 43, explaining principal case and holding void a reissue

of patent for clock movement; Giant Pow. Co. v. California Pow. Works, 3 Sawy. 467, F. C. 5,379, holding that reissued letters-patent in question were not for same invention; Carew v. Boston, etc., Co., 3 Cliff. 360, F. C. 2,397, where, upon examination, reissue was found to be for same invention; Sarven v. Hall, 9 Blatchf. 526, F. C. 12,369, holding, on comparison, that reissued patent for carriage wheel was valid; Decker v. Grote, 10 Blatchf. 343, F. C. 3,726, holding reissue of patents, for billiard tables, valid; Peoria T. Co. v. Cleveland T. Co., 47 Fed. 789, holding reissues invalid for introduction of new device. Approved in Metropolitan W. Co. v. Providence T. Co., 1 Holmes, 163, F. C. 9,507, no want of jurisdiction appearing, facts concerning surrender and reissue could not be re-examined; Goodyear, etc., Co. v. Smith, 1 Holmes, 357, F. C. 5,598, where reissued patent was examined and invention was held to be same as original. Cited also in note in Edgarton v. Furst, 10 Biss. 416.

Patents.— On application for reissue, commissioner may not open case to new parol testimony and new hearing as to nature and extent of improvement, except in cases provided in 16 Stat. at L. 206, pp. 544, 545.

Approved in concurring opinion in Giant Pow. Co. v. California Pow. Works, 3 Sawy. 468, F. C. 5,379, court holding reissue invalid as not being for same invention.

Patents.— Commissioner has power, upon reissue of letters-patent, to allow certain amendments and corrections, but no material additions, not described, suggested or substantially indicated in original specifications, drawings or patent-office model, may be made, pp. 544, 545.

Cited approvingly and relied upon as authority in Parker, etc., Co. v. Yale C. Co., 123 U. S. 97, 99, 31 L. 105, 8 S. Ct. 43, 45, explaining remarks in principal case and refusing to go beyond force of language in original specifications; Freeman v. Asmus, 145 U. S. 240, 36 L. 690, 12 S. Ct. 943, reviewing authorities, and holding invalid a reissue of patent where original specifications did not indicate the claim; Badische Anilin, etc. v. Higgin, 15 Blatchf. 291, F. C. 722, holding reissue proper, where original specification was defective and patent did not cover whole invention; Wilson v. Coon, 18 Blatchf. 538, 6 Fed. 618, reviewing authorities, and holding that reissue was not void because original patent was valid; Calkins v. Bertrand, 6 Biss. 496, F. C. 2,317, holding valid a reissue of patent for cultivators; Goodyear, etc., Co. v. Smith, 1 Holmes, 357, F. C. 5,598, holding reissue valid, though the description was more complete than in original; Kelleher v. Darling, 4 Cliff. 437, F. C. 7,653, holding reissue void where it included both the patented article and the process; Sarven v. Hall, 9 Blatchf. 526, F. C. 12,369, holding reissue of patent for wheel, within specifica-

tions of original; Atlantic, etc., Co. v. Goodyear, 2 Fed. Cas. 137, where omission, in reissue, of ambiguous word used in original, did not invalidate reissue; Kerosene, etc., Co. v. Littell, 14 Fed. Cas. 378, where additional elements were substantially indicated by original specifications; Reissner v. Anness, 20 Fed. Cas. 514, where reference to model was had, in determining validity of reissue; Seymour v. Marsh, 21 Fed. Cas. 1119, holding that claims of reissues might, in proper case, be broader than those of original patents; Swain, etc., Co. v. Ladd, 23 Fed. Cas. 487, holding that one could not widen the scope of his claim by repeated reissues; Dederick v. Cassell, 9 Fed. 308, collecting authorities, where reissue for minor combinations, embraced in original patented combination, but not claimed, was held valid; Combined Pat. Can. Co. v. Lloyd, 11 Fed. 150, where, however, patentee was estopped from claiming infringement, by his laches; Hendy v. Golden, etc., Works, 17 Fed. 516, refusing to hold that reissue embraced too much, before examining model; Holmes, etc., Co. v. Domestic, etc., Co., 42 Fed. 224, sustaining reissued patent covering parts found in original model, but not in specifications.

Criticised in Kells v. M'Kenzie, 9 Fed. 286, holding void a reissued patent for part of machine, not claimed in original specifications, though shown in original designs.

Patents.— Whether reissued patent is for same invention as that embodied in original patent, is question for court, in equity case, to be determined on comparison of the two instruments, aided by expert testimony when technical terms demand it, p. 546.

Approved and applied in Heald v. Rice, 104 U. S. 749, 26 L. 914, collecting cases, and holding that validity of reissue was question for court, and verdict for defendant should have been directed; Giant Pow. Co. v. California Pow. Works, 3 Sawy. 467, F. C. 5,879, where, upon such comparison, court held reissued patents invalid; Kerosene, etc., Co. v. Littell, 14 Fed. Cas. 378, where, on comparison, reissue held valid; Parham v. American, etc., Co., 18 Fed. Cas. 1098, holding that reference might also be had to drawings and models. Cited generally in National, etc., Co. v. John R. Williams Co., 44 Fed. 194, 12 L. R. A. 110, and n., where claim limited to mechanism shown was strictly construed; arguendo, in Hardwick v. Masland, 71 Fed. 890, where, defendant justifying under subsequent patent, court determined infringement by comparison of patents.

Patents.— Cases doubtless arise where language of specification and claim is so interspersed with technical terms and terms of art, that testimony of scientific witness is indispensable, and it would be error to reject it, p. 546.

Distinguished in Moran v. Prather, 23 Wall. 499, 23 L. 122, excluding testimony as to peculiar meaning of "steamboat debts," as used in written instrument.

Approved and applied in Bates v. Coe, 98 U. S. 45, 25 L. 73, where publication was insufficient; Downton v. Yeager M. Co., 108 U. S. 471, 27 L. 791, 3 S. Ct. 13, where defense of prior publication was made out as to process for manufacturing flour; Eames v. Andrews, 122 U. S. 66, 30 L. 1073, 7 S. Ct. 1087, reviewing cases, and holding publication did not anticipate invention of driven well; Jones v. Sewall, 3 Cliff. 584, F. C. 7,495, holding that defense of prior publication was not sustained; Cahill v. Brown, 4 Fed. Cas. 1007, where specifications in other patents introduced did not comply with rule, they could not supersede plaintiff's; Goff v. Stafford, 10 Fed. Cas. 535, where English publication introduced did not support defense; Reeves v. Keystone B. Co., 20 Fed. Cas. 471, where publication of drawing was not sufficient to overcome subsequent patent; Hood v. Boston, etc., Co., 21 Fed. 69, and Cary v. Lovell Mfg. Co., 31 Fed. 347, both citing cases, where publication was held incomplete; New Process Fer. Co. v. Koch, 21 Fed. 586, where foreign publications were held uncertain; Edison E. L. Co. v. Westinghouse, 55 Fed. 505, reviewing authorities, and holding prior foreign patent did not describe invention within meaning of rule; Chase v. Fillebrown, 58 Fed. 377, reviewing cases, and holding publication in foreign patent insufficient; American, etc., Co. v. Howlands, etc., Co., 70 Fed. 994, where prior publication failed to state substance of which patent material was composed; Potts & Co. v. Creager, 77 Fed. 460, where publication was not full and clear, within rule; Heap v. Tremont, etc., Mills, 82 Fed. 453, 50 U. S. App. 219, where mere suggestion of complainant's combination, in foreign patent, was not sufficient; Hanifen v. Godshalk Co., 84 Fed. 651, 55 U. S. App. 475, holding that description in foreign patent must be so clear as to enable practice of the invention without experiment; Truman v. Carvill Mfg. Co., 87 Fed. 476, where certain magazine descriptions were held to anticipate complainant's invention of breaking cart; Badische, etc. v. Kalle, 94 Fed. 167, holding insufficient a publication requiring extrinsic evidence to make it understood; dissenting opinion in Sewall v. Jones, 91 U. S. 194, 23 L. 281, reversing S. C., 3 Cliff. 584, F. C. 7,495, majority holding patent for preserved corn void for want of novelty. Cited generally in New Process Fer. Co. v. Koch, 21 Fed. 587, holding business circulars, sent only to the trade, were not sufficient prior publication.

Patents.— Inventors of combination cannot suppress subsequent improvements which are substantially different, whether consisting in new combination of same ingredients, or substitution of newly discovered ingredient, or of some old one performing new function not known at date of letters-patent, as proper substitute, pp. 555, 556.

Approved and principle applied in Rees v. Gould, 15 Wall. 193. 21 L. 41, holding erroneous, instruction that substitution of another

ingredient will not avoid infringement of combination; Gill v. Wells, 22 Wall. 31, 22 L. 712, reviewing authorities, where rule was used as test of equivalents; Rowell v. Lindsay, 113 U. S. 102, 28 L. 907, 5 S. Ct. 510, affirming S. C., 10 Biss. 224, 6 Fed. 296, collecting cases, and holding that complainant's combination was not infringed; Electric Signal Co. v. Hall Signal Co., 114 U. S. 98, 29 L. 99, 5 S. Ct. 1076, collecting authorities, and sustaining subsequent improvement in electric signal, as substantially different; Rowell v. Lindsay, 10 Biss. 224, 6 Fed. 296, and Norton v. Jensen, 90 Fed. 429, 61 U. S. App. 369, both holding substantially different an invention which omitted parts of the combination patent; Sanford v. Merrimac Hat Co., 4 Cliff. 408, F. C. 12,318, citing cases, where, not all ingredients of combination being used in subsequent invention, there was no infringement; Travers v. Palmer, 23 Fed. 512, where combination was not infringed by subsequent invention omitting three ingredients; dissenting opinion in Brown v. Guild, 23 Wall. 245, 23 L. 177, majority sustaining patent of combination of old devices; Edison, etc., Co. v. Waring E. Co., 59 Fed. 362, holding incandescent lamp infringed by one with less perfect vacuum.

Patents.— All patentees are entitled to invoke doctrine of equivalents, to some extent, and mere formal alterations in combination in letters-patent are no defense to charge of infringement; e. g., withdrawal of ingredient and substitution of another, well known, at date of patent, as proper substitute, performing substantially same function, p. 556.

Approved and applied in Rumford Chem. Works v. Lauer, 10 Blatchf. 139, 140, F. C. 12,135, where a substitution of acids was held to be merely a colorable alteration; Phillips v. Detroit, 2 Flipp. 96, F. C. 11,101, suppressing invention of paving blocks, where change was merely colorable; Sayles v. Chicago, etc., R. Co., 3 Biss. 58, F. C. 12,415, where patentee of combination was protected against subsequent invention embodying same; Tatum v. Gregory, 14 Sawy. 379, 41 Fed. 144, holding doctrine of mechanical equivalents applicable to claim for combination; King v. Louisville C. Co., 14 Fed. Cas. 536, suppressing infringement of combination patent for improvement in baling-presses; Dederick v. Cassell, 9 Fed. 308, a case of infringement of combination patent for baling-press; Norton v. Jensen, 49 Fed. 369, 7 U. S. App. 103, reviewing authorities, where change in combination was not such as to avoid infringement. Approved in Rowell v. Lindsay, 113 U. S. 102, 28 L. 907, 5 S. Ct. 510, affirming S. C., 10 Biss. 224, 6 Fed. 296, citing cases, and holding that improvement in question, on seeding-machine, was substantially different; Hopkins, etc., Co. v. Corbin, 14 Blatchf. 401, F. C. 6,695, where patentee of combination was not entitled to pre-existing devices, under his claim; Rowell v. Lindsay, 10 Biss. 224, 6 Fed. 290, where improvement omitting certain features of combination was held substantially different; arguendo, in Ready Roofing Co. v. Taylor, 15 Blatchf. 101, F. C. 11,613.

Patents — Evidence.— Person suing on reissued letters-patent for infringement is not obliged to introduce surrendered patent; and if defendant does not give old patent in evidence, he cannot have benefit of defense that reissued letters are not for same invention, p. 546.

Approved and principle followed in Bates v. Coe, 98 U. S. 40, 25 L. 71, where original patent not being in, such defense was excluded; Doherty v. Haynes, 4 Cliff. 294, F. C. 3,963, refusing to consider this defense, where patent was not in evidence.

Patents.— Where claim immediately follows description of invention it may be construed in connection with explanations contained in specifications, and where it refers back to specifications, cannot be construed otherwise, p. 547.

Cited approvingly and relied upon in Mitchell v. Tilghman, 19 Wall. 391, 22 L. 135, where reference to specifications was implied; Fuller v. Yentzer, 94 U. S. 288, 24 L. 104, where, thus construed, the patent was held to be for mere combination, and not infringed; Westinghouse v. Boyden, etc., Co., 170 U. S. 558, 42 L. 1144, 18 S. Ct. 717, and Roberts v. Dickey, 20 Fed. Cas. 885, where words "substantially as set forth" imported into claim the particulars of specifications; Gottfried v. Phillip Best B. Co., 10 Fed. Cas. 854, holding words "by means substantially as described" sufficient reference to specifications; Henderson v. Cleveland, etc., Co., 11 Fed. Cas. 1081, holding words referring back to be for mechanism and not result; Westinghouse v. Gardner, etc., Co., 29 Fed. Cas. 799, where, in light of specifications referred to, ambiguity of claim was removed; Bortree v. Jackson, 43 Fed. 138, where, thus construed, complainant's patent for bustle was held not to be infringed; Rapid, etc., Co. v. Taylor, 43 Fed. 251, holding that, limited by his reference to specifications, complainant had not claimed monopoly; St. Paul P. Works v. Deere, 54 Fed. 502, where claim thus limited, and owing to prior state of art, was not infringed; Burnham, etc., Co. v. Naumkeag St. Ry. Co., 57 Fed. 651, where clerical error and other deficiencies in claim were corrected by reference to specifications; American, etc., Co. v. Howland, etc., Co., 80 Fed. 405, 50 U. S. App. 76, 77, reversing S. C., 70 Fed. 994, collecting cases, and holding it error for Circuit Court to refuse thus to construe claim; Burke v. Partridge, 58 N. H. 351, collecting cases, where inventor was entitled to benefit of use to which machine could be put, though he had not conceived the idea. Approved in Rousseau v. Peck, 78 Fed. 115, 45 U. S. App. 266, doubting validity of patent for electric apparatus in question.

Patents.— Change in construction of old machine which adapts it to new and valuable use, not known before, and produces new and useful result, is patentable, p. 548.

Cited with approval and applied in Cantrell v. Wallick, 117 U. S. 694, 29 L. 1018, 6 S. Ct. 973, holding patent for improvement was

not void because it included the old machine; McComb v. Ernst, 1 Woods, 204, F. C. 8,710, sustaining invention of cotton-bale tie; Rose v. Sibley Mach. Co., 20 Fed. Cas. 1192, relieving against infringement of patented modification of pulp engine; Pacific, etc., R. Co. v. Butte City R. Co., 52 Fed. 865, holding improved brake to be a patentable combination.

Patents.— Requirement that improvements for which patent will issue must be new and useful is satisfied if combination is new and machine is capable of being beneficially used for designed purpose, p. 549.

Approved and applied in Cantrell v. Wallick, 117 U. S. 694, 29 L. 1018, 6 S. Ct. 973, where infringer could not object that improvement on patented invention included same; Strobridge v. Lindsay, 2 Fed. 695, where, practical utility being shown, degree was immaterial; Gibbs v. Hoefner, 22 Blatchf. 36, 19 Fed. 324, holding degree of utility material only on question of damages; Britton v. White Mfg. Co., 61 Fed. 96, holding court may determine from state of art what was open to patentee.

Patents.— The Hussey harvesting machine, claimed to be a prior invention, examined and held to have been a mere experiment, never adapted to use, and not superior to complainant's machine, pp. 550, 551.

Followed in Seymour v. Marsh, 21 Fed. Cas. 1120, to same effect as principal case.

Patents.— He is first inventor and entitled to patent who first perfected and adapted invention to use; and until invention is so perfected and adapted, it is not patentable, p. 552.

Approved and doctrine applied in Kelleher v. Darling, 4 Cliff. 440, F. C. 7,653, where defendant not having pleaded prior invention, complainant's case made out, in this regard, by production of patent; Gottfried v. Phillip Best B. Co., 10 Fed. Cas. 851, where prior invention, never adapted to use, did not affect subsequently patented invention; Judson v. Bradford, 14 Fed. Cas. 9, where proof of prior invention of corset, without practical use, did not sustain defense; Moore v. Thomas, 17 Fed. Cas. 702, where two inventions, the one first perfected and used gave superior right; Lamson v. Martin, 159 Mass. 565, 35 N. E. 81, collecting authorities, and construing word "inventions," in contract, not to include mere conceptions; dissenting opinion in Brown v. Guild, 23 Wall. 245, 23 L. 177, majority sustaining patent of combination of old ingredients.

Patents.— Patented invention is not to be superseded by introduction of foreign publication containing mere vague representations; account published must be of complete and operative invention, capable of being put into practical operation, p. 555.

Patents.— In a suit for royalties and injunction for infringement of patent right, question of novelty of invention cannot be considered if no notice is given of the attempt, or witnesses, or other evidence to support charge, p. 492.

Patents.— In this case, bill in equity, to recover royalties and restrain infringement of patent right, was entertained, and judgment accordingly, p. 492.

Approved in Magic Ruffle Co. v. Elm City Co., 13 Blatchf. 157, F. C. 8,949, sustaining bill in equity for discovery and accounting, though patent had expired; Atwood v. Portland Co., 10 Fed. 283, reviewing cases, where bill for accounting, upon patent, was entertained, though no injunction was asked; McKay v. Smith, 29 Fed. 296, collecting authorities, and refusing to dismiss bill for discovery, account and injunction; Hat Sweat Mfg. Co. v. Porter, 34 Fed. 747, issuing injunction in similar case.

Distinguished in Root v. Railway Co., 105 U. S. 204, 26 L. 980, dismissing bill for want of jurisdiction, where mere accounting for profits was asked; Washburn, etc., Co. v. Cincinnati, etc., Co., 42 Fed. 678, 679, dismissing bill for royalties and injunction, where contract contained forfeiture clause.

11 Wall. 493-507, 20 L. 176, STEWART v. KAHN.

Statutes.— Change of language in revised statutes will not change law from what it was before, unless apparent that such was intention of legislature, p. 502.

Statutes.— Where revising statute, or one enacted for another, omits provisions contained in original act, parts omitted cannot be kept in force by construction, but are annulled, p. 502.

Approved and principle applied in United States v. Bennett, 12 Blatchf. 349, F. C. 14,570, citing cases, holding that act of 1870, relative to fees of pension agents, repealed certain provisions of former acts; Weiskittle v. State, 58 Md. 157, where right taken away by changed Constitution could not be continued by statutes; Ex parte Coombs, 38 Tex. Cr. 657, 44 S. W. 858, reviewing cases, and holding that omission of court from subsequent Constitution operated to repeal said court.

Courts.— Record disclosing that judgment was given against plaintiff, in Supreme Court of Louisiana, upon sole ground that he was not entitled to immunity claimed under act of Congress of June 11, 1864, Supreme Court has jurisdiction, pp. 502, 503.

Followed in Trebilcock v. Wilson, 12 Wall. 694, 20 L. 461, where party claimed right, under Constitution, to have note paid in gold or silver.

Distinguished in Texas, etc., Ry. Co. v. Southern Pacific Co., 137 U. S. 54, 34 L. 617, 11 S. Ct. 12, holding Federal question not prop-

erly claimed, where set up for first time in petition for rehearing; Castillo v. McConnico, 168 U. S. 679, 42 L. 624, 18 S. Ct. 231, dismissing writ of error where decision below was sustained by State law. Criticised in Auchincloss v. Frois, 24 La. Ann. 32, where court said that Federal question was presented, in principal case, only in petition for rehearing.

Statutes.— Case may be within meaning of statute and not within its letter, and vice versa; intention of lawmaker constitutes the law, p. 504.

Cited approvingly and relied upon in Raymond v. Thomas, 91 U. S. 715, 23 L. 435, holding void, under reconstruction acts, a military order annulling decree of Chancery Court in South Carolina; Price v. Stone, 49 Ala. 550, where intention was taken as indicated by language of legislature; Barclay v. Plant, 50 Ala. 515, reviewing authorities, and holding that husband might convey property to wife, in payment of debt, at time of marriage.

Statutes.— Remedial statutes should be construed liberally, p. 504.

Limitation of actions.— Act of Congress, June 11, 1864, relative to statute of limitations, means that time which elapsed while suit could not be brought, by reason of Rebellion, whether before or after the passage of the act, is to be deducted, pp. 504, 505.

Approved and applied in United States v. Wiley, 11 Wall. 515, 20 L. 214, where benefit of the statute was extended to government; Metropolitan Nat. Bank v. Gordon, 28 Ark. 117, reviewing cases, where suit was between citizen of New York and one of Arkansas; Auchincloss v. Frois, 24 La. Ann. 32, a suit between citizens of New York and of Louisiana; Aby v. Brigham, 28 La. Ann. 841, the suit being between citizen of Mississippi and one of New Orleans. Cited also in note, 4 Am. Rep. 124. Cited obiter in Jones v. Johnson, 28 Ark. 233.

Distinguished in Mayo v. Cartwright, 30 Ark. 414, refusing benefit of statute, in case of personal trust that might have been executed without aid of court; McKinzie v. Hill, 51 Mo. 307, 11 Am. Rep. 453, holding that statute was not suspended during time courts were closed in Missouri, on account of Rebellion, that being loyal State. Denied in Harrison v. Adger, 24 La. Ann. 565, 566, refusing to give this statute any retroactive effect.

Limitation of actions.— Act of Congress of June 11, 1864, relating to statute of limitations, applies to cases pending in courts of States, as well as the Federal courts, p. 506.

Approved and applied in Mayfield v. Richards, 115 U. S. 142, 29 L. 336, 5 S. Ct. 1190, to same effect, plaintiff being within Federal and defendant within Confederate lines; Harrison v. Myer, 92 U. S. 116, 23 L. 607, holding that local statute of limitations ran against cause, where parties were at all times within Federal control. Cited,

arguendo, in Brown v. Walker, 161 U. S. 606, 40 L. 824, 16 S. Ct. 650.

Denied in Succession of Winn, 33 La. Ann. 1898, holding that statute was not binding on actions in State court.

Distinguished in dissenting opinion in Brown v. Walker, 161 U. S. 623, 624, 40 L. 830, 16 S. Ct. 661, majority holding constitutional the act of February 11, 1893, relating to testimony before commerce commission.

Courts.— To have one rule of property in State court, and a different one in the Federal court for same State, would be contrary to uniform spirit of our national jurisprudence, from judiciary act of 1789, p. 506.

Approved and applied in In re Eldridge & Co., 2 Hughes, 257, F. C. 4,331, citing cases, where Federal court applied local statute of limitations; In re Cornwall, 9 Blatchf. 128, F. C. 3,250, reviewing authorities, and holding one whose claim was barred by State law could not prosecute claim in bankruptcy.

United States.— Congress is authorized to make all laws necessary and proper to carry into effect the granted powers, p. 506.

United States.— Decision of questions as to measures to be taken in carrying on war and suppressing insurrection rests wholly in discretion of Congress, to whom the substantial powers involved are confided by Constitution, p. 506.

Approved and applied in United States v. One Thousand Five Hundred Bales of Cotton, 27 Fed. Cas. 328, holding hostilities between North and South ceased with proclamation of president, not with decisive battle.

United States.— Power of Congress to suppress insurrection carries with it inherently the power to guard against immediate renewal of conflict and to remedy evils which have arisen from its rise and progress, p. 507.

Cited approvingly and relied upon in White v. Hart, 13 Wall. 651, 20 L. 687, holding that reconstructed States had never been out of Union, their rights having been merely suspended; Raymond v. Thomas, 91 U. S. 715, 23 L. 435, holding void, under reconstruction acts, an order by military officer annulling decree of Chancery Court. Cited, arguendo, in United States v. One, etc., Bales Cotton, 27 Fed. Cas. 328.

Distinguished in dissenting opinion in Brown v. Walker, 161 U. S. 623, 624, 40 L. 830, 16 S. Ct. 661, majority holding constitutional, act of February 11, 1893, relating to testimony before commerce commission.

United States.— Power of Congress to pass act of June 11, 1864, relative to the statute of limitations, is necessarily implied from the powers to make wars and suppress insurrections, p. 507.

Followed in Mayfield v. Richards, 115 U. S. 142, 29 L. 336, 5 S. Ct. 1190, reaffirming constitutionality of same act. Approved in Caperton v. Bowyer, 14 Wall. 235, 20 L. 884.

Statutes.— What is clearly implied in a written instrument is as effectual as what is expressed, p. 507.

United States.— The war power and treaty-making power of Congress, each carries with it authority to acquire territory, p. 507.

11 Wall. 508-515, 20 L. 211, UNITED STATES v. WILEY.

Evidence.— Supreme Court takes judicial notice that a state of war existed in Virginia, from May 24, 1861, to May 24, 1865, p. 513.

Limitation of actions.— Statutes of limitation are statutes of repose, enacted upon presumption that one having well-founded claim will not delay enforcing it beyond reasonable time, if he has power to sue, pp. 513, 514.

Cited and principle applied in Bauserman v. Blunt, 147 U. S. 658, 37 L. 320, 13 S. Ct. 471, reviewing authorities, and holding that Kansas statutes ceased to run, on death of debtor, only for reasonable time; In re Cornwall, 9 Blatchf. 127, F. C. 3,250, reviewing cases, where Bankruptcy Court refused to recognize claim barred by State statute; Andrae v. Redfield, 12 Blatchf. 411, F. C. 367, where United States court dismissed bill in equity on claim barred by State law.

Limitation of actions.— When ability to resort to courts is taken away, basis of presumption upon which such laws are enacted is gone; and creditor has not the time within which to bring his suit that the statutes contemplate, p. 514.

Cited with approval and doctrine relied upon in Greenwald v. Appell, 5 McCrary, 341, 17 Fed. 141, deducting from statutory period the time of pending bankruptcy proceedings; In re Eldridge & Co., 2 Hughes, 257, F. C. 4,331, holding that statute ceased to run upon filing petition, by debtor, in bankruptcy; Devereaux v. Brownsville, 29 Fed. 751, where statute did not run, during time charter was repealed, for purpose of obstructing creditor; Jackson v. Fidelity, etc., Co., 75 Fed. 365, 41 U. S. App. 552, collecting authorities, where time did not run against bank while in hands of receiver; Broadfoot v. Fayetteville, 124 N. C. 495, 70 Am. St. Rep. 620, 32 S. E. 809, where time did not run against holder of interest coupons, while city was disincorporated; Treasurer v. Martin, 50 Ohio St. 204, 33 N. E. 1114, reviewing authorities, where time during which party was enjoined from bringing suit was deducted. Cited, arguendo, in Mutual, etc., Ins. Co. v. Hillyard, 37 N. J. L. 467, 18 Am. Rep. 747.

Limitation of actions.— Act of Congress of June 11, 1864, suspending statutes of limitations in certain cases, applies to suits by

the government as well as citizens; e. g., suit by United States, on marshal's bond, p. 514.

Approved in Harrison v. Myer, 92 U. S. 125, 23 L. 607, refusing benefit of act to case where cause of action arose in district controlled by United States.

Statute being affirmative only, raises no implication of intent to repeal former statute or to alter the common law, to which it is not repugnant, p. 515.

Statutes.— Remedial statutes are entitled to liberal construction, p. 515.

Limitation of actions.— Act of Congress of June 11, 1864, suspending statute of limitations in certain cases, requires all the time to be deducted during which suit could not be prosecuted, whether such time was before or after its passage, p. 515.

Approved and followed in Metropolitan Nat. Bank v. Gordon, 28 Ark. 117, an action on contract between citizen of New York and one of Arkansas; Aby v. Brigham, 28 La. Ann. 841, where benefit of statute was extended to suit between resident within Federal lines, against resident of Mississippi. Cited generally in Stewart v. Kahn, 11 Wall. 504, to same effect; Brown v. Walker, 161 U. S. 607, 40 L. 824, 16 S. Ct. 651, see dissenting opinion, p. 623, 40 L. 830, 16 S. Ct. 661, sustaining act of February 11, 1896, relating to testimony before Commerce Commission. Cited, arguendo, in In re Eldridge & Co., 2 Hughes, 258, F. C. 4,331, holding that statute ceased to run against claim upon filing of debtor's petition in bankruptcy; also in Jones v. Johnson, 28 Ark. 233. See also notes in 13 Am. Dec. 370, and in 4 Am. Rep. 124.

Distinguished in McKinzie v. Hill, 51 Mo. 307, 11 Am. Rep. 453, refusing benefit of statute, when both parties were citizens of loyal State; Ahnert v. Zaun, 40 Wis. 629, where statute of Wisconsin ran against citizen of New Orleans, after that city came under Federal control. Limited in Sands v. New York L. Ins. Co., 50 N. Y. 632, 10 Am. Rep. 540, holding that war did not destroy contract of insurance with citizen of rebel State, but suspended payment of premium.

11 Wall. 516-560, 20 L. 83, SEYMOUR v. OSBORNE.

Patents.— Inventions secured by letters-patent are property in holder of patent, entitled to protection as any other property, consisting of franchise, during term for which franchise or exclusive right is granted, p. 533.

Approved and relied upon in Cammeyer v. Newton, 94 U. S. 226, 24 L. 72, where action was brought by assignee of original inventor; McCormick Machine Co. v. Aultman, 169 U. S. 609, 42 L. 876, 18 S. Ct. 444, holding patent office lost jurisdiction on granting original

patent, and did not regain same on application for reissue; Brady v. Atlantic Works, 4 Cliff. 412, F. C. 1,794, sustaining bill for infringement of patent for dredges.

Patent duly granted is itself prima facie evidence that patentee is original and first inventor of that therein described and secured to him as his invention, p. 538.

Cited with approval and rule applied in Mitchell v. Tilghman, 19 Wall. 391, 22 L. 135, where presumption by production of letters-patent was held not to be overcome; Cammeyer v. Newton, 94 U. S. 231, 24 L. 74, where, in absence of proof to contrary, patent was conclusive; Marsh v. Seymour, 97 U. S. 352, 24 L. 964, holding, patent being produced, burden was on defendant to prove prior invention; Bates v. Coe, 98 U. S. 40, 25 L. 74, where production of patent cast burden on respondent; Herring v. Nelson, 14 Blatchf. 305, F. C. 6,424, requiring clear and satisfactory proof to overcome this presumption; Corvallis F. Co. v. Curran, 7 Sawy. 273, 8 Fed. 152, holding presumption not overcome by other patents introduced; Storrs v. Howe, 4 Cliff. 389, F. C. 13,495, where, patent being introduced and not contradicted, only question was as to infringement; Tucker v. Tucker, etc., Co., 4 Cliff. 401, F. C. 14,227, where presumption raised by production of patent, confined case to special defenses; Brady v. Atlantic Works, 4 Cliff. 413, F. C. 1,794, holding that after introduction of patent, question of infringement and defenses in answer alone remained; Kelleher v. Darling, 4 Cliff. 442, F. C. 7,653, holding patent conclusive where defense of prior invention was not pleaded properly; Cahill v. Brown, 4 Fed. Cas. 1006, where, proof to contrary failing, letters-patent were conclusive as to prior invention; Shaver v. Skinner Mfg. Co., 30 Fed. 70, sustaining patent for combination of known ingredients; Page, etc., Co. v. Land, 49 Fed. 937, where production of patent, in absence of contrary proof, was conclusive; Pacific, etc., Co. v. Butte City R. Co., 52 Fed. 865, where, of two patents granted for similar invention, the later patentee was presumed to be first inventor; Blount v. Societe Anonyme, etc., 53 Fed. 102, 6 U. S. App. 335, where production of patent demanded clear proof of its invalidity; Hunt Bros. v. Cassidy, 53 Fed. 259, 7 U. S. App. 424, holding, where patent was produced, that infringer was not entitled to verdict for want of proof of novelty; Anderson v. Monroe, 55 Fed. 397, holding that production of patent cast burden of disproving novelty on infringer; Western E. Co. v. Millheim E. Tel. Co., 88 Fed. 507, a case where this presumption prevailed as to novelty and patentability of telephone circuit device.

Patents.— Burden of proof is on parties suing for infringement to prove that they, or those under whom they claim, are original and first inventors of improvement embodied in letters-patent, on which suit is founded, and that same have been infringed by party against whom suit is brought, p. 538.

Approved and applied in Mitchell v. Tilghman, 19 Wall. 391, 22 L. 125, and Hearing v. Nelson, 14 Blatchf. 305, F. C. 6,424, where production of letters-patent raised presumption that complainant was first inventor; Bates v. Coe, 98 U. S. 49, 25 L. 74, holding denial of infringement cast burden on complainant, which was fully sustained; Storrs v. Howe, 4 Cliff. 389, F. C. 13,495, holding infringement of patent for pressing machine, proved.

Patents.— Parties sued as infringers are not allowed, in action at law, to set up defense of previous invention, knowledge or use, without giving thirty days' notice, and in equity same information must be given in answer, p. 539.

Approved and applied in Cammeyer v. Newton, 94 U. S. 231, 24 L. 74, where, no notice having been given, evidence of previous invention was excluded; Roemer v. Simon, 95 U. S. 215, 24 L. 385, allowing evidence of prior invention, notice having been given; Marsh v. Seymour, 97 U. S. 352, 24 L. 964, holding that burden was on defendant to establish this defense, patent being produced; Goff v. Stafford, 10 Fed. Cas. 533, admitting evidence to support such defense to suit for infringement.

Patents.— Recital in letters-patent that required oath was taken before letters issued is, in absence of fraud, conclusive evidence of the fact, p. 541.

Approved in Hancock Insp. Co. v. Jenks, 21 Fed. 914, refusing to examine into truth of such recital; Holmes, etc., Co. v. Domestic, etc., Co., 42 Fed. 222, refusing to go into question as to whether oath taken covered reissue.

Distinguished in Smith v. Reynolds, 10 Blatchf. 86, F. C. 13,097, refusing to give such effect to certificate of registration of trademark.

Patents.— Where invention embraces an entire machine, it is sufficient if it appear that claim is co-extensive with invention, p. 541.

Patents.— Where invention embraces only one or more parts of machine, part or parts claimed must be specified or pointed out so that inventors and contractors and the public may know how to make the invention and what is withdrawn from general use, p. 541.

Cited and reaffirmed in Carnegie, etc., Co. v. Cambria, etc., Co., 89 Fed. 738. Approved in Goshen Sweeper Co. v. Bissell, etc., Co., 72 Fed. 74, 37 U. S. App. 555, citing cases, and holding claim and specifications good. Cited obiter in Reece, etc., Co. v. Globe, etc., Co., 61 Fed. 971, 21 U. S. App. 244.

Patents.— Where invention embraces a new ingredient and a combination of old ingredients, embodied in same machine, the invention must be described with great particularity, p. 541.

Patents.—Inventions consisting entirely of new combinations of old ingredients, whereby new and useful result is obtained, are as much entitled to protection as any other class, pp. 542, 556.

Cited as authority and relied upon in Sayles v. Chicago, etc., R. Co., 3 Biss. 58, F. C. 12,415, holding patentee of combination entitled to suppress subsequent invention embodying it; Pacific, etc., R. Co. v. Butte City R. Co., 52 Fed. 865, holding improved brake to be patentable combination, not mere aggregation; Thompson v. Citizens' Nat. Bank, 53 Fed. 253, 10 U. S. App. 500, and Griswold v. Harker, 62 Fed. 391, 27 U. S. App. 122, citing cases, holding objection to combination of old ingredients not tenable; P. H. Murphy Mfg. Co. v. Excelsior, etc., Co., 76 Fed. 975, 40 U. S. App. 200, where, though patent for combination was valid, omission of ingredient avoided infringement of it. Approved in Adams E. Ry. Co. v. Lindell Ry. Co., 77 Fed. 441, 40 U. S. App. 482.

Patents.—Where invention consists of new combination of old ingredients, it is sufficient if ingredients are named, mode of operation given, and new result pointed out, so that extent and nature of claim and what the parts are which co-operate to produce new and useful result, may be known, p. 542.

Approved in Bates v. Coe, 98 U. S. 39, 25 L. 71, holding description sufficient; Springfield, etc., Co. v. Miller, etc. Co., 96 Fed. 421, holding, where description of foreign patent is clear, similar United States patent void for anticipation.

Patents.—Neither reissued nor extended patent can be abrogated by infringer, in suit for infringement, upon ground that letters-patent were procured by fraud, p. 545.

Approved and applied in Tilghman v. Mitchell, 9 Blatchf. 27, F. C. 14,042, where, extension being regular on its face, question of fraud refused consideration; La Baw v. Hawkins, 14 Fed. Cas. 896, refusing to consider such defense, in infringement suit; Parham v. American, etc., Co., 18 Fed. Cas. 1098, citing cases, and refusing to consider objection that there was no cause for reissue.

Patents.—Where commissioner accepts surrender of original patent and grants new one, his decision in premises is not re-examinable in suit for infringement, unless apparent on face of patent that he has exceeded his authority, pp. 543, 544.

Cited with approval and principle applied in Christman v. Rumsey, 17 Blatchf. 151, F. C. 2,704, citing cases, and holding commissioner's decision final as to facts in petition for reissue; Hoe v. Cottrell, 17 Blatchf. 549, 1 Fed. 600, citing cases, and holding commissioner's decision conclusive, in collateral proceeding, as to drawing, model, etc.; Selden v. Stockwell, etc., Co., 19 Blatchf. 554, 9 Fed. 397, holding question as to fact justifying reissue, concluded by commissioner; Chicago, etc., Co. v. Basch, 2 Biss. 478,

F. C. 2,669, where reissue was not avoided by fact that it did not include all specified in original; Metropolitan W. Co. v. Providence T. Co., 1 Holmes, 163, F. C. 9,507, refusing to examine facts connected with surrender and reissue; Gear v. Grosvenor, 1 Holmes, 219, F. C. 5,291, where absence of recitals concerning notices, etc., in reissued patent, did not affect rule; Carew v. Boston, etc., Co., 3 Cliff. 359, F. C. 2,397, holding that old and new patents in question were not repugnant; Milligan, etc., Co. v. Upton, 4 Cliff. 289, F. C. 9,607, holding commissioner's decision conclusive, want of jurisdiction not being made out; Dorsey, etc., Co. v. Marsh, 7 Fed. Cas. 943, refusing to admit parol evidence of irregularity in issue of patent, regular on its face; Kerosene, etc., Co. v. Littell, 14 Fed. Cas. 377, holding commissioner's decision conclusive as to cause for reissue; La Baw v. Hawkins, 14 Fed. Cas. 896, refusing to consider defendant's denial that patents were surrendered for good cause; Miller, etc., Co. v. Du Brul, 17 Fed. Cas. 367, refusing to consider objections to validity of reissue; Thomas v. Shoe Mfg. Co., 23 Fed. Cas. 972, overruling objection, in suit on reissued patent, that original was still in force; Wells v. Jacques, 29 Fed. Cas. 661, holding that question as to whether reissue was for same invention was to be determined solely by comparison of old and new; Smith v. Merriam, 6 Fed. 718, 719, where decision of commissioner, upon reissue, was conclusive as to its necessity; Spaeth v. Barney, 22 Fed. 829, holding it unnecessary to aver, in infringement suit, the grounds of reissue. Approved in Flower v. Detroit, 22 Fed. 294, holding reissue invalid as an attempt to introduce new invention; American Bell Tel. Co. v. United States, 68 Fed. 568, 33 U. S. App. 236, holding commissioner's power to issue patent dependent on result of his own examination. Cited also in note in Edgarton v. Furst, 10 Biss. 418.

Distinguished in Reckendorfer v. Faber, 92 U. S. 354, 23 L. 722, reviewing authorities, and holding commissioner's decision only prima facie right as to novelty, invention and prior use; Herring v. Nelson, 14 Blatchf. 300, F. C. 6,424, holding decision of commissioner not conclusive as to question of repugnancy between old and new patent.

Patents.— Reissued letters-patent must be for same invention; and where it appears, as matter of law, on comparison of the instruments, that this is not true, reissue is invalid, p. 544.

Approved and doctrine followed in Russell v. Dodge, 93 U. S. 464, 23 L. 975, holding reissue invalid where it appeared on its face to be for another invention; Powder Co. v. Powder Works, 98 U. S. 139, 25 L. 82, citing cases, and holding reissue void on this account, under act of 1870; Ball v. Langles, 102 U. S. 130, 26 L. 105, holding void a reissue, which appeared to be intended to cover new devices; Parker, etc., Co. v. Yale C. Co., 123 U. S. 97, 31 L. 105, 8 S. Ct. 43, explaining principal case and holding void a reissue

of patent for clock movement; Giant Pow. Co. v. California Pow. Works, 3 Sawy. 467, F. C. 5,379, holding that reissued letters-patent in question were not for same invention; Carew v. Boston, etc., Co., 3 Cliff. 360, F. C. 2,397, where, upon examination, reissue was found to be for same invention; Sarven v. Hall, 9 Blatchf. 526, F. C. 12,369, holding, on comparison, that reissued patent for carriage wheel was valid; Decker v. Grote, 10 Blatchf. 343, F. C. 3,726, holding reissue of patents, for billiard tables, valid; Peoria T. Co. v. Cleveland T. Co., 47 Fed. 739, holding reissues invalid for introduction of new device. Approved in Metropolitan W. Co. v. Providence T. Co., 1 Holmes, 163, F. C. 9,507, no want of jurisdiction appearing, facts concerning surrender and reissue could not be re-examined; Goodyear, etc., Co. v. Smith, 1 Holmes, 357, F. C. 5,598, where reissued patent was examined and invention was held to be same as original. Cited also in note in Edgarton v. Furst, 10 Biss. 416.

Patents.— On application for reissue, commissioner may not open case to new parol testimony and new hearing as to nature and extent of improvement, except in cases provided in 16 Stat. at L. 206, pp. 544, 545.

Approved in concurring opinion in Giant Pow. Co. v. California Pow. Works, 3 Sawy. 468, F. C. 5,379, court holding reissue invalid as not being for same invention.

Patents.— Commissioner has power, upon reissue of letters-patent, to allow certain amendments and corrections, but no material additions, not described, suggested or substantially indicated in original specifications, drawings or patent-office model, may be made, pp. 544, 545.

Cited approvingly and relied upon as authority in Parker, etc., Co. v. Yale C. Co., 123 U. S. 97, 99, 31 L. 105, 8 S. Ct. 43, 45, explaining remarks in principal case and refusing to go beyond force of language in original specifications; Freeman v. Asmus, 145 U. S. 240, 36 L. 690, 12 S. Ct. 943, reviewing authorities, and holding invalid a reissue of patent where original specifications did not indicate the claim; Badische Anilin, etc. v. Higgin, 15 Blatchf. 291, F. C. 722, holding reissue proper, where original specification was defective and patent did not cover whole invention; Wilson v. Coon, 18 Blatchf. 538, 6 Fed. 618, reviewing authorities, and holding that reissue was not void because original patent was valid; Calkins v. Bertrand, 6 Biss. 496, F. C. 2,317, holding valid a reissue of patent for cultivators; Goodyear, etc., Co. v. Smith, 1 Holmes, 357, F. C. 5,598, holding reissue valid, though the description was more complete than in original; Kelleher v. Darling, 4 Cliff. 437, F. C. 7,653, holding reissue void where it included both the patented article and the process; Sarven v. Hall, 9 Blatchf. 526, F. C. 12,369, holding reissue of patent for wheel, within specifica-

tions of original; Atlantic, etc., Co. v. Goodyear, 2 Fed. Cas. 137, where omission, in reissue, of ambiguous word used in original, did not invalidate reissue; Kerosene, etc., Co. v. Littell, 14 Fed. Cas. 378, where additional elements were substantially indicated by original specifications; Reissner v. Anness, 20 Fed. Cas. 514, where reference to model was had, in determining validity of reissue; Seymour v. Marsh, 21 Fed. Cas. 1119, holding that claims of reissues might, in proper case, be broader than those of original patents; Swain, etc., Co. v. Ladd, 23 Fed. Cas. 487, holding that one could not widen the scope of his claim by repeated reissues; Dederick v. Cassell, 9 Fed. 308, collecting authorities, where reissue for minor combinations, embraced in original patented combination, but not claimed, was held valid; Combined Pat. Can. Co. v. Lloyd, 11 Fed. 150, where, however, patentee was estopped from claiming infringement, by his laches; Hendy v. Golden, etc., Works, 17 Fed. 516, refusing to hold that reissue embraced too much, before examining model; Holmes, etc., Co. v. Domestic, etc., Co., 42 Fed. 224, sustaining reissued patent covering parts found in original model, but not in specifications.

Criticised in Kells v. M'Kenzie, 9 Fed. 286, holding void a reissued patent for part of machine, not claimed in original specifications, though shown in original designs.

Patents.— Whether reissued patent is for same invention as that embodied in original patent, is question for court, in equity case, to be determined on comparison of the two instruments, aided by expert testimony when technical terms demand it, p. 546.

Approved and applied in Heald v. Rice, 104 U. S. 749, 26 L. 914, collecting cases, and holding that validity of reissue was question for court, and verdict for defendant should have been directed; Giant Pow. Co. v. California Pow. Works, 3 Sawy. 467, F. C. 5,379, where, upon such comparison, court held reissued patents invalid; Kerosene, etc., Co. v. Littell, 14 Fed. Cas. 378, where, on comparison, reissue held valid; Parham v. American, etc., Co., 18 Fed. Cas. 1098, holding that reference might also be had to drawings and models. Cited generally in National, etc., Co. v. John R. Williams Co., 44 Fed. 194, 12 L. R. A. 110, and n., where claim limited to mechanism shown was strictly construed; arguendo, in Hardwick v. Masland, 71 Fed. 890, where, defendant justifying under subsequent patent, court determined infringement by comparison of patents.

Patents.— Cases doubtless arise where language of specification and claim is so interspersed with technical terms and terms of art, that testimony of scientific witness is indispensable, and it would be error to reject it, p. 546.

Distinguished in Moran v. Prather, 23 Wall. 499, 23 L. 122, excluding testimony as to peculiar meaning of "steamboat debts," as used in written instrument.

Patents — Evidence.— Person suing on reissued letters-patent for infringement is not obliged to introduce surrendered patent; and if defendant does not give old patent in evidence, he cannot have benefit of defense that reissued letters are not for same invention, p. 546.

Approved and principle followed in Bates v. Coe, 98 U. S. 40, 25 L. 71, where original patent not being in, such defense was excluded; Doherty v. Haynes, 4 Cliff. 294, F. C. 3,963, refusing to consider this defense, where patent was not in evidence.

Patents.— Where claim immediately follows description of invention it may be construed in connection with explanations contained in specifications, and where it refers back to specifications, cannot be construed otherwise, p. 547.

Cited approvingly and relied upon in Mitchell v. Tilghman, 19 Wall. 391, 22 L. 135, where reference to specifications was implied; Fuller v. Yentzer, 94 U. S. 288, 24 L. 104, where, thus construed, the patent was held to be for mere combination, and not infringed; Westinghouse v. Boyden, etc., Co., 170 U. S. 558, 42 L. 1144, 18 S. Ct. 717, and Roberts v. Dickey, 20 Fed. Cas. 885, where words "substantially as set forth" imported into claim the particulars of specifications; Gottfried v. Phillip Best B. Co., 10 Fed. Cas. 854, holding words "by means substantially as described" sufficient reference to specifications; Henderson v. Cleveland, etc., Co., 11 Fed. Cas. 1081, holding words referring back to be for mechanism and not result; Westinghouse v. Gardner, etc., Co., 29 Fed. Cas. 799, where, in light of specifications referred to, ambiguity of claim was removed; Bortree v. Jackson, 43 Fed. 138, where, thus construed, complainant's patent for bustle was held not to be infringed; Rapid, etc., Co. v. Taylor, 43 Fed. 251, holding that, limited by his reference to specifications, complainant had not claimed monopoly; St. Paul P. Works v. Deere, 54 Fed. 502, where claim thus limited, and owing to prior state of art, was not infringed; Burnham, etc., Co. v. Naumkeag St. Ry. Co., 57 Fed. 651, where clerical error and other deficiencies in claim were corrected by reference to specifications; American, etc., Co. v. Howland, etc., Co., 80 Fed. 405, 50 U. S. App. 76, 77, reversing S. C., 70 Fed. 994, collecting cases, and holding it error for Circuit Court to refuse thus to construe claim; Burke v. Partridge, 58 N. H. 351, collecting cases, where inventor was entitled to benefit of use to which machine could be put, though he had not conceived the idea. Approved in Rousseau v. Peck, 78 Fed. 115, 45 U. S. App. 266, doubting validity of patent for electric apparatus in question.

Patents.— Change in construction of old machine which adapts it to new and valuable use, not known before, and produces new and useful result, is patentable, p. 548.

Cited with approval and applied in Cantrell v. Wallick, 117 U. S. 694, 29 L. 1018, 6 S. Ct. 973, holding patent for improvement was

not void because it included the old machine; McComb v. Ernst, 1 Woods, 204, F. C. 8,710, sustaining invention of cotton-bale tie; Rose v. Sibley Mach. Co., 20 Fed. Cas. 1192, relieving against infringement of patented modification of pulp engine; Pacific, etc., R. Co. v. Butte City R. Co., 52 Fed. 865, holding improved brake to be a patentable combination.

Patents.— Requirement that improvements for which patent will issue must be new and useful is satisfied if combination is new and machine is capable of being beneficially used for designed purpose, p. 549.

Approved and applied in Cantrell v. Wallick, 117 U. S. 694, 29 L. 1018, 6 S. Ct. 973, where infringer could not object that improvement on patented invention included same; Strobridge v. Lindsay, 2 Fed. 695, where, practical utility being shown, degree was immaterial; Gibbs v. Hoefner, 22 Blatchf. 36, 19 Fed. 324, holding degree of utility material only on question of damages; Britton v. White Mfg. Co., 61 Fed. 96, holding court may determine from state of art what was open to patentee.

Patents.— The Hussey harvesting machine, claimed to be a prior invention, examined and held to have been a mere experiment, never adapted to use, and not superior to complainant's machine, pp. 550, 551.

Followed in Seymour v. Marsh, 21 Fed. Cas. 1120, to same effect as principal case.

Patents.— He is first inventor and entitled to patent who first perfected and adapted invention to use; and until invention is so perfected and adapted, it is not patentable, p. 552.

Approved and doctrine applied in Kelleher v. Darling, 4 Cliff. 440, F. C. 7,653, where defendant not having pleaded prior invention, complainant's case made out, in this regard, by production of patent; Gottfried v. Phillip Best B. Co., 10 Fed. Cas. 851, where prior invention, never adapted to use, did not affect subsequently patented invention; Judson v. Bradford, 14 Fed. Cas. 9, where proof of prior invention of corset, without practical use, did not sustain defense; Moore v. Thomas, 17 Fed. Cas. 702, where two inventions, the one first perfected and used gave superior right; Lamson v. Martin, 159 Mass. 565, 35 N. E. 81, collecting authorities, and construing word "inventions," in contract, not to include mere conceptions; dissenting opinion in Brown v. Guild, 23 Wall. 245, 23 L. 177, majority sustaining patent of combination of old ingredients.

Patents.— Patented invention is not to be superseded by introduction of foreign publication containing mere vague representations; account published must be of complete and operative invention, capable of being put into practical operation, p. 555.

Approved and applied in Bates v. Coe, 98 U. S. 45, 25 L. 73, where publication was insufficient; Downton v. Yeager M. Co., 108 U. S. 471, 27 L. 791, 3 S. Ct. 13, where defense of prior publication was made out as to process for manufacturing flour; Eames v. Andrews, 122 U. S. 66, 30 L. 1073, 7 S. Ct. 1087, reviewing cases, and holding publication did not anticipate invention of driven well; Jones v. Sewall, 3 Cliff. 584, F. C. 7,495, holding that defense of prior publication was not sustained; Cahill v. Brown, 4 Fed. Cas. 1007, where specifications in other patents introduced did not comply with rule, they could not supersede plaintiff's; Goff v. Stafford, 10 Fed. Cas. 535, where English publication introduced did not support defense; Reeves v. Keystone B. Co., 20 Fed. Cas. 471, where publication of drawing was not sufficient to overcome subsequent patent; Hood v. Boston, etc., Co., 21 Fed. 69, and Cary v. Lovell Mfg. Co., 31 Fed. 347, both citing cases, where publication was held incomplete; New Process Fer. Co. v. Koch, 21 Fed. 586, where foreign publications were held uncertain; Edison E. L. Co. v. Westinghouse, 55 Fed. 505, reviewing authorities, and holding prior foreign patent did not describe invention within meaning of rule; Chase v. Fillebrown, 58 Fed. 377, reviewing cases, and holding publication in foreign patent insufficient; American, etc., Co. v. Howlands, etc., Co., 70 Fed. 994, where prior publication failed to state substance of which patent material was composed; Potts & Co. v. Creager, 77 Fed. 460, where publication was not full and clear, within rule; Heap v. Tremont, etc., Mills, 82 Fed. 453, 50 U. S. App. 219, where mere suggestion of complainant's combination, in foreign patent, was not sufficient; Hanifen v. Godshalk Co., 84 Fed. 651, 55 U. S. App. 475, holding that description in foreign patent must be so clear as to enable practice of the invention without experiment; Truman v. Carvill Mfg. Co., 87 Fed. 476, where certain magazine descriptions were held to anticipate complainant's invention of breaking cart; Badische, etc. v. Kalle, 94 Fed. 167, holding insufficient a publication requiring extrinsic evidence to make it understood; dissenting opinion in Sewall v. Jones, 91 U. S. 194, 23 L. 281, reversing S. C., 3 Cliff. 584, F. C. 7,495, majority holding patent for preserved corn void for want of novelty. Cited generally in New Process Fer. Co. v. Koch, 21 Fed. 587, holding business circulars, sent only to the trade, were not sufficient prior publication.

Patents.— Inventors of combination cannot suppress subsequent improvements which are substantially different, whether consisting in new combination of same ingredients, or substitution of newly discovered ingredient, or of some old one performing new function not known at date of letters-patent, as proper substitute, pp. 555, 556.

Approved and principle applied in Rees v. Gould, 15 Wall. 193, 21 L. 41, holding erroneous, instruction that substitution of another

ingredient will not avoid infringement of combination; Gill v. Wells, 22 Wall. 31, 22 L. 712, reviewing authorities, where rule was used as test of equivalents; Rowell v. Lindsay, 113 U. S. 102, 28 L. 907, 5 S. Ct. 510, affirming S. C., 10 Biss. 224, 6 Fed. 296, collecting cases, and holding that complainant's combination was not infringed; Electric Signal Co. v. Hall Signal Co., 114 U. S. 98, 29 L. 99, 5 S. Ct. 1076, collecting authorities, and sustaining subsequent improvement in electric signal, as substantially different; Rowell v. Lindsay, 10 Biss. 224, 6 Fed. 296, and Norton v. Jensen, 90 Fed. 429, 61 U. S. App. 369, both holding substantially different an invention which omitted parts of the combination patent; Sanford v. Merrimac Hat Co., 4 Cliff. 408, F. C. 12,313, citing cases, where, not all ingredients of combination being used in subsequent invention, there was no infringement; Travers v. Palmer, 23 Fed. 512, where combination was not infringed by subsequent invention omitting three ingredients; dissenting opinion in Brown v. Guild, 23 Wall. 245, 23 L. 177, majority sustaining patent of combination of old devices; Edison, etc., Co. v. Waring E. Co., 59 Fed. 362, holding incandescent lamp infringed by one with less perfect vacuum.

Patents.— All patentees are entitled to invoke doctrine of equivalents, to some extent, and mere formal alterations in combination in letters-patent are no defense to charge of infringement; e. g., withdrawal of ingredient and substitution of another, well known, at date of patent, as proper substitute, performing substantially same function, p. 556.

Approved and applied in Rumford Chem. Works v. Lauer, 10 Blatchf. 139, 140, F. C. 12,135, where a substitution of acids was held to be merely a colorable alteration; Phillips v. Detroit, 2 Flipp. 96, F. C. 11,101, suppressing invention of paving blocks, where change was merely colorable; Sayles v. Chicago, etc., R. Co., 8 Biss. 58, F. C. 12,415, where patentee of combination was protected against subsequent invention embodying same; Tatum v. Gregory, 14 Sawy. 379, 41 Fed. 144, holding doctrine of mechanical equivalents applicable to claim for combination; King v. Louisville C. Co., 14 Fed. Cas. 536, suppressing infringement of combination patent for improvement in baling-presses; Dederick v. Cassell, 9 Fed. 308, a case of infringement of combination patent for baling-press; Norton v. Jensen, 49 Fed. 869, 7 U. S. App. 103, reviewing authorities, where change in combination was not such as to avoid infringement. Approved in Rowell v. Lindsay, 113 U. S. 102, 28 L. 907, 5 S. Ct. 510, affirming S. C., 10 Biss. 224, 6 Fed. 296, citing cases, and holding that improvement in question, on seeding-machine, was substantially different; Hopkins, etc., Co. v. Corbin, 14 Blatchf. 401, F. C. 6,695, where patentee of combination was not entitled to pre-existing devices, under his claim; Rowell v. Lindsay, 10 Biss. 224, 6 Fed. 290, where improvement omitting certain features of combination was held substantially different; arguendo, in Ready Roofing Co. v. Taylor, 15 Blatchf. 101, F. C. 11,613.

Distinguished in Odorless, etc., Co. v. McCauley, 18 Fed. Cas. 590, where change of valve in pump did not come within rule.

Patents.— Since patents may be issued for distinct parts of thing patented, complaint joining several patents in same charge of infringement is not objectionable, where all the claims pertain to same general subject, and all inventions in question are required to constitute the complete machine made and sold by complainants, p. 559.

Approved and principle applied in Horman, etc., Co. v. Brooklyn, etc., R. Co., 15 Blatchf. 446, F. C. 6,703, sustaining bill on two patents, where both were infringed by one machine; Jones v. Sewall, 3 Cliff. 574, F. C. 7,495, holding valid a patent for process for production of previously-patented product; Nellis v. Pennock Mfg. Co., 13 Fed. 452, sustaining bill for infringement of several patents embodied in same infringing machine; Diamond Match Co. v. Ohio M. Co., 80 Fed. 118, citing cases, and sustaining demurrer to bill, where inventions were not embodied in infringing machine; Kansas City, etc., Co. v. Devol, 81 Fed. 732, 49 U. S. App. 430, where similar bill was held not to be multifarious; Wilkins, etc., Co. v. Webb, 89 Fed. 990, holding separate machines may be included in same patent; arguendo, in dissenting opinion in Sewall v. Jones, 91 U. S. 190, 23 L. 279, reversing S. C., 3 Cliff. 574, F. C. 7,495, majority holding patent for preserved green corn void.

Patents.— Where invention is embodied in machine, question of infringement is best determined by comparison of machines, p. 559.

Patents.— The Palmer, Williams and Seymour patents for improvements in reapers examined, held valid, and held to be infringed by respondent's machines, p. 560.

Cited approvingly and reaffirmed in Marsh v. Seymour, 97 U. S. 359, 24 L. 966, as to Seymour's platform and sweep-rake.

Miscellaneous.— Miscited in Washburn, etc., Co. v. Fuchs, 5 McCrary, 245, 16 Fed. 668.

11 Wall. 560-566, 20 L. 214, HALLIDAY v. HAMILTON.

Carriers.— Bill of lading for consignment of goods having been taken in name of consignee and, with draft attached, transmitted to him, under agreement that goods shall be sold, proceeds to be applied first to pay the draft and surplus on previous advances, legal title to goods passed to consignee on delivery to carrier, p. 564.

Approved and doctrine applied in Pullman Car Co. v. Metropolitan Ry., 157 U. S. 109, 39 L. 638, 15 S. Ct. 507, citing cases, where title to cars built for defendant passed on delivery to carrier; The L. J. Farwell, 8 Biss. 71, F. C. 8,426, where, consignees having received bills and paid drafts, title vested on delivery to carrier; The Steamship Idaho, 5 Ben. 282, F. C. 6,997, where holder of bill of lading,

having made advances on it, became owner upon delivery to carrier; Richardson v. Hutchinson, 20 Fla. 24, citing cases, and holding that introduction of bill in evidence raised presumption that holder owned goods; Wetzel v. Power, 5 Mont. 219, 222, 2 Pac. 341, 343, holding, under facts similar to principal case, consignee alone could sue for trespass to goods; First Nat. Bank v. McAndrews, 7 Mont. 161, 14 Pac. 768, where, under circumstances, title passed on delivery to carrier, though there was no bill of lading; Neimeyer L. Co. v. Burlington, etc., R. Co., 54 Neb. 334, 74 N. W. 674, 40 L. R. A. 540, collecting authorities, and holding delivery to carrier delivery to vendee, under the contract; dissenting opinion in Chaffe v. Heyner, 31 La. Ann. 613, 621, majority holding crop mortgage void, under the circumstances. Cited also in good notes in 35 Am. Dec. 616, and 45 Am. St. Rep. 209.

Distinguished in The John K. Shaw, 32 Fed. 495, where, vendors having reserved and exercised their jus disponendi, holder of antedated bill could not recover of carrier for non-delivery; Dickson v. Chaffe, 34 La. Ann. 1134, holding bailee of goods, who has accounted for them, not liable to adverse claimants, of whom he had not notice; First Nat. Bank v. McAndrews, 5 Mont. 331, 51 Am. Rep. 55, 5 Pac. 882, reviewing authorities, where there was no bill of lading and title did not pass on delivery to carrier.

Carriers.— Under facts of this case, consignee held to be proper party to sue for wrongful attachment of goods in hands of carrier, pp. 564, 565.

Cited in good note in 45 Am. St. Rep. 209.

Carriers.— Where goods are consigned to one, and bill of lading forwarded, under agreement that proceeds shall first be applied on draft drawn against consignment, surplus to be applied on preexisting debts, the interest of consignor in surplus is not such that his creditor can attach the consignment in hands of carrier, p. 565.

Approved and applied in Wetzel v. Power, 5 Mont. 222, 2 Pac. 343, holding consignor's interest in such goods not such that he could sue for wrongful taking.

Carriers.— Bill of lading for consignment of goods, signed before delivery to carrier, becomes operative as soon as that delivery actually occurs, p. 565.

Cited with approval and applied in The Idaho, 93 U. S. 582, 23 L. 980, affirming S. C., 11 Blatchf. 221, F. C. 6,998, holding indorsee of bill entitled to such goods from time of delivery; The L. J. Farwell, 8 Biss. 65, F. C. 8,426, where holders of bills so issued shared pro rata in subsequently-delivered goods; The Steamship Idaho, 5 Ben. 282, F. C. 6,997, where title to goods passed to holder of bill on delivery, though they were subsequently removed; The Idaho, 11 Blatchf. 221, F. C. 6,998, affirming S. C., 5 Ben. 282, F. C. 6,997, to same effect; Adone v. Sieligson & Co., 54 Tex. 604, 608, collecting

cases, where bill of lading took effect fro
order for cotton in press; dissenting opinio
31 La. Ann. 613, majority holding void a cro
Arkansas, the crop having been consigned
mortgagor in Louisiana.

Distinguished in The John K. Shaw, 32
signor's vendors having retained jus dispone
took subject to their rights.

11 Wall. 566-581, 20 L. 56, STEINBACH v. S

Deeds.— All the several parts and ceremoni
plete a conveyance are to be taken together as
from the substantial part by relation, p. 575.

Approved in Donnally v. Parker, 5 W. Va. 32
interest in land related back to date of contract

Appeal and error.— Decree of District Court,
grant in California, having expressly provided t
prejudice to, and should inure to benefit of, or
those claiming under him, is left in full forc
Supreme Court affirming said decree "so far a
original grant," p. 575.

Approved in Schmitt v. Giovanari, 43 Cal. 625,
decrees.

Public lands.— Confirmation of Mexican land g
inures to benefit of his grantees, p. 575.

Cited, arguendo, in McDonald v. McCoy, 121 Cal.
refusing to recognize, in action at law, rights unde
original grantee, made before petition filed.

Distinguished in Bouldin v. Phelps, 12 Sawy. 31
where confirmation did not inure to benefit of on
under or in privity with petitioner.

Contracts.— Construction manifestly given by the
aid that may always be called in, when meaning of
ambiguous, p. 576.

Cited with approval and rule applied in Knox Co
Nat. Bank, 147 U. S. 100, 37 L. 96, 13 S. Ct. 270, colle
ties, where tax levies, etc., were admitted to show inte
in issuing bonds; Starr v. Stark, 2 Sawy. 625, F. C. 1
cases, and considering subsequent conduct of parties i
compromise agreement; Hamm v. San Francisco, 9 S
Fed. 124, considering the subsequent acquiescence of
grantee's exercise of ownership; Pratt v. California Mi
Sawy. 359, 24 Fed. 872, where contemporaneous and
action of parties in disposing of property were conside
v. Minnesota L. Co., 58 Fed. 451, where, after many year

cence, party was not allowed to repudiate clause of deed; Brown v. Cranberry, etc., Co., 59 Fed. 437, where, in light of such construction, deed held to convey grantor's entire mineral interest; Metropolitan Nat. Bank v. Benedict Co., 74 Fed. 185, 36 U. S. App. 604, collecting cases, where interpretation put on contract by parties showed it to be bailment; Williamson v. Association, 54 S. C. 594, 32 S. E. 769, where certificate of stock and by-laws did not agree, and interpretation put on contract by parties prevailed.

Deeds.— Character and effect of instrument purporting to be a grant of land in California, made before that State was ceded to United States, must be determined by Mexican law, p. 576.

Conveyances.— Instrument executed in 1846, by one Vallejo, in favor of Hoeppener, examined and held, under all circumstances of the case, to be valid conveyance, under Mexican law, of all Vallejo's right to Agua Caliente rancho, Sonoma county, California, pp. 575-578.

Followed in Schmitt v. Giovanari, 43 Cal. 624, involving same instrument.

Deed to 300 acres of land sufficiently describes it by giving natural boundaries for two sides and adjoining proprietors upon the others, p. 579.

Deed, indefinite in point of description, held admissible, when accompanied by proof of parol identification, followed by long possession unchallenged, p. 580.

Approved and principle applied in Watriss v. Reed, 99 Cal. 137, 33 Pac. 776, sustaining grantee's title to same land; Peacher v. Strauss, 47 Miss. 363, collecting numerous authorities, and admitting parol evidence of county and State, where deed was silent.

Evidence.— Statements of grantor of lands, made after he has conveyed to others, cannot be admitted to invalidate his deeds, p. 581.

Approved in Ruckman v. Cory, 129 U. S. 390, 32 L. 730, 9 S. Ct. 318, citing cases, and holding incompetent, declarations, against interest of grantee, by grantor after conveyance.

Miscellaneous.— Miscited in Caperton v. Bowyer, 14 Wall. 236, 20 L. 884.

11 Wall. 581-590, 20 L. 216, LUDLOW v. RAMSEY.

Judicial sales.— In collateral proceeding to set aside a judicial sale, mere errors and irregularities in original proceeding will not suffice; it must be shown that court had no jurisdiction, p. 587.

Approved and applied in Hamilton v. Brown, 161 U. S. 274, 40 L. 699, 16 S. Ct. 591, holding valid certain escheat proceedings, based on publication of notice; Walker v. Sturbans, 38 Fed. 300,

collecting cases, where court refused to declare void a judicial sale, the record being valid on its face; Bush v. Glover, 47 Ala. 174, holding judgment final, in collateral proceeding, where court had jurisdiction of subject-matter and parties. Cited generally in Head v. Daniels, 38 Kan. 13, 15 Pac. 917, and De Camp v. Carnahan, 26 W. Va. 843. Cited also in extensive note in 54 Am. St. Rep. 231.

Attachments.— Though code requires affidavit for attachment to state that demand is just claim, an affidavit omitting that statement, but setting forth exact amount due and copy of note, will not vitiate subsequent proceedings, p. 588.

Approved and principle applied in Wilkins v. Tourtellott, 28 Kan. 833, holding that affidavit need only show demand to be just claim; Gutman & Co. v. Virginia I. Co., 5 W. Va. 23, holding valid an affidavit in words "plaintiffs are justly entitled to recover;" Miller v. White, — W. Va. —, 33 S. E. 333, where failure to say that claim is just did not render attachment void; Crim v. Harmon, 38 W. Va. 601, 18 S. E. 755, holding affiant must swear he is justly entitled to recover, with reference to all defendants.

Attachments.— Writ of attachment being in due form and appearing to have been regularly served on the property, court obtained full jurisdiction over the case, p. 588.

Approved in dissenting opinion in Bray v. McClury, 55 Mo. 189, majority holding judgment void, where affidavit stated non-residence of defendant on belief.

Distinguished in Nachtrieb v. Stoner, 1 Colo. 430, holding sale void where writ of attachment was irregular on its face.

Estoppel — War.— If party voluntarily leaves his country or residence, for purpose of engaging in hostilities against former, he cannot complain of legal proceedings, regularly prosecuted against him as absentee, on ground of his inability to return or hold communication with the place, p. 589.

Cited with approval and applied in Montgomery v. Samory, 99 U. S. 489, 25 L. 377, refusing to disturb title of purchaser at foreclosure sale; Jenkins v. Hannan, 26 Fed. 664, refusing to set aside judgment obtained, on publication of summons, against one having left State in rebel army; Harper v. Ely, 56 Ill. 183, citing cases, and holding valid a foreclosure sale, as against grantee of such party; Seymour v. Bailey, 66 Ill. 296, 297, Hall v. Connecticut, etc., Co., 68 Ill. 361, and Foreman v. Carter, 9 Kan. 680, all refusing relief against foreclosure on property of non-resident enemy; Deitrich v. Lang, 11 Kan. 644, holding valid a title acquired by foreclosure on property of alien enemy; Thomas v. Mahone, 9 Bush, 123, sustaining judgment to sell land of Confederate soldier, on service by publication; Dorsey v. Thompson, 37 Md. 44, holding notice by publication valid, though defendant was in Confederate service and could not receive it; Dor-

sey v. Dorsey, 37 Md. 80, 11 Am. Rep. 584, refusing to disturb decrees against Confederate soldiers as absentees; De Jarnett v. De Giverville, 56 Mo. 447, refusing such an one relief against sale under trust deed. Cited, arguendo, in Dorr v. Gibboney, 3 Hughes, 389, F. C. 4,006, holding void a publication of notice, in Virginia, as against citizen of New York, during war. Cited also in elaborate note in 96 Am. Dec. 631, 632.

Distinguished in Pennywit v. Foote, 27 Ohio St. 626, 22 Am. Rep. 357, holding court of seceding State had no jurisdiction to give judgment against resident of loyal State; Walker v. Beauchler, 27 Gratt. 521, relieving against sale under trust deed, where debtor was within Confederate lines. Criticised in McVeigh v. Bank, 26 Gratt. 811, where notice of dishonor left at house of party, in Federal lines, while party was in Confederate lines, not sufficient; Haymond v. Camden, 22 W. Va. 194, 199, 202, holding void judicial proceedings within Union lines, by publication, against parties within Confederate lines.

Distinguished in concurring opinion in McVeigh v. Bank, 26 Gratt. 846, court holding insufficient a notice of dishonor left at house of party, within Federal lines, party himself being within rebel lines.

Courts.— Ineffectual attempt at confiscation of rebel's property in Federal court, supervening upon attachment proceedings in State court, cannot deprive latter of validity, p. 590.

11 Wall. 591-609, 20 L. 220, REED v. UNITED STATES.

Shipping.— Where general owner retains possession, command and navigation of vessel, and contracts for specified voyage, the arrangement is mere affreightment sounding in contract, and charterer or freighter is not responsible as owner, p. 600.

Cited with approval and doctrine relied upon in The T. A. Goddard, 12 Fed. 178, collecting authorities, holding vessel liable in rem for injury to cargo; The Craigallion, 20 Fed. 750, where ship chartered by month was liable for negligent injury to cargo; The Nicaragua, 71 Fed. 728, collecting authorities, and holding general owners liable for captain's failure to procure proper papers; Bramble v. Culmer, 78 Fed. 502, 42 U. S. App. 303, reviewing cases, and holding appointment of pilot by charterers did not itself make them responsible as owners. Cited also in note, 3 Am. Dec. 182.

Shipping.— Courts are not inclined to regard contract of affreightment as a demise of the ship, if end in view can be accomplished without transfer of vessel to charterer, p. 601.

Followed in Swift v. Tatner, 89 Ga. 667, 32 Am. St. Rep. 106, 15 S. E. 844, reviewing authorities, holding, where that intention was not manifested by charter-party, contract was not one of demise.

Shipping.— Where vessel is demised or let to hire, and owner parts with possession, command and navigation, hirer becomes owner

during term of contract, may appoint master and crew, and is responsible for their acts, p. 601.

Approved and applied in United States v. Shea, 152 U. S. 186, 38 L. 406, 14 S. Ct. 521, reviewing authorities, holding government liable for rent while vessel was laid up for repairs.

Courts.— Jurisdiction of Court of Claims does not extend to torts, p. 603.

Cited with approval and rule applied in Morgan v. United States, 14 Wall. 534, 20 L. 739, where claimants could not recover for being compelled to put to sea by quartermaster; Reybold v. United States, 15 Wall. 207, 21 L. 58, citing cases, where, master having proceeded at quartermaster's suggestion, claimants could not recover.

Shipping.— Where owners were employed, under threat of impressment, to transport military supplies from one port to another, at stipulated per diem compensation, retaining possession and command of vessel, the relation of United States to venture was that of charterer for hire and shipper of cargo, not liable for sea risks, p. 604.

Approved in Shaw v. United States, 98 U. S. 239, 240, 23 L. 881, citing cases, and holding that such vessel was not in service of United States.

Shipping.— Carriers, unless they assume risk of all contingencies, are not liable for failure to perform what is rendered impossible by perils of sea, p. 606.

Shipping.— Neither party may abandon affreightment contract without consent of other, or legal cause not occasioned by fault of party who relies upon it, p. 606.

Cited in note, 13 Am. Dec. 405.

Shipping.— Rule that, where voyage is broken up by sea peril, neither shipper nor charterer is liable to owner beyond time when peril occurred, is particularly applicable in cases where transportation of cargo is not complete, p. 606.

Shipping.— Affreightment contract in question held to entitle owners to agreed per diem compensation from commencement of voyage until voyage was broken up, and thereafter for number of days that would have been necessary to complete return trip, p. 607.

Shipping.— Where charterer has no property interest whatever in stranded steamer, he is not liable as such for the expense of efforts to float her, p. 609.

11 Wall. 610–616, 20 L. 223, DUNPHY v. KLEINSMITH.

Territorial legislature has no power to pass law in contravention of Constitution of United States or which deprives Supreme or Dis-

trict Courts of territory of chancery as well as common-law jurisdiction, p. 614.

Approved and applied in Cast v. Cast, 1 Utah, 118, holding that territorial legislature could not confer divorce jurisdiction on Probate Courts; Enright v. Grant, 5 Utah, 340, 15 Pac. 270, holding supplementary proceedings not exclusive of equitable remedy by creditors' bill; Brereton v. Miller, 7 Utah, 430, 27 Pac. 82. collecting cases, holding that local statute as to foreclosure could not curtail jurisdiction conferred by organic act; Stevens v. Baker, 1 Wash. Ter. 322, holding invalid an act abolishing distinction between actions at law and in equity; dissenting opinion in Territory of Arizona v. Duffield, 1 Ariz. 70, 25 Pac. 479, majority holding indictment bad, as containing two distinct charges. Cited, arguendo, in Campbell v. Shivers, 1 Ariz. 169, 25 Pac. 543.

Distinguished in Salisbury v. Sands, 2 Dill. 273, F. C. 12,251, holding that territorial legislature might provide for constructive service in foreclosure suit; Palmer v. Cowdrey, 2 Colo. 3, holding that manner of serving process and publishing notice of suit is to be regulated by law of territory.

Creditors' suit.— Suit, in territorial court, in nature of creditor's bill, to reach property fraudulently conveyed, being clear case of equity, a trial by jury, verdict for damages and judgment on verdict as mere conclusion of law from facts found, held error, pp. 614, 615.

Cited as authority and relied upon in Lee v. Thompson, 3 Woods, 174, F. C. 8,202, where judgment upon verdict, in Court of Admiralty, was held error; Creighton v. Hershfield, 1 Mont. 648, reviewing cases, and holding void a deficiency judgment in equitable foreclosure.

Disapproved in Hornbuckle v. Toombs, 18 Wall. 658, 21 L. 967, holding that forms and procedures in territorial courts are matters for regulation by assemblies; Creighton v. Hershfield, 2 Mont. 387, overruling S. C., 1 Mont. 648, and holding that court might render deficiency judgment in foreclosure proceeding. Distinguished in Palmer v. Cowdrey, 2 Colo. 3, holding law of territory regulates service of process and publication. Criticised in concurring opinion in Palmer v. Cowdrey, 2 Colo. 7, court holding that law of territory regulates publication of notice of suit.

Creditors' suit.— A suit by creditor, on behalf of himself and other creditors, to reach property fraudulently transferred by debtor, in territory where both systems prevail, is one for chancery and not common-law jurisdiction, p. 614.

Cited as authority in Marsh v. Burroughs, 1 Woods, 467, F. C. 9,112, citing cases, and sustaining bill by certain creditors on their own behalf; Mann v. Appel, 31 Fed. 383, reviewing authorities, and overruling demurrer to bill of this nature; Paddock-Hawley I. Co. v.

McDonald, 61 Mo. App. 567, reviewing authorities, and sustaining creditors' bill to reach property in hands of trustee.

Equity.— In Chancery Courts the judge or chancellor is responsible for the decree; if questions be submitted to jury, its verdict is merely advisory, p. 615.

Approved and principle applied in Lee v. Thompson, 3 Woods, 174, F. C. 8,202, where judgment on verdict in Admiralty Court was held error; The Empire, 19 Fed. 560, reviewing cases, and setting aside verdict of jury in admiralty case; The City of Toledo, 73 Fed. 225, holding that jury in admiralty cases, provided for in revised statutes, section 566, is merely advisory; Evans v. Nealis, 87 Ind. 268, citing cases, and holding that in equity case judge might make findings regardless of verdict; Ketcham v. Brazil, etc., Co., 88 Ind. 527, holding that instructions to jury, in equity case, are no ground for new trial; Hulley v. Chedic, 22 Nev. 145, 58 Am. St. Rep. 736, 36 Pac. 786, holding it error to direct general verdict, and render judgment thereon, in equity case. Approved in Ramsay v. Hart, 1 Idaho, 424, where the case was held to be an action at law. Cited also in note, 1 Am. St. Rep. 801.

Fraudulent conveyances.— Decree in equitable proceeding by creditors to recover property fraudulently assigned should not be for damages but for an account, and transferee will usually be entitled to rebate for amount justly due him, p. 615.

Approved in Lippincott v. Shaw Car. Co., 34 Fed. 574, collecting cases, where mortgagees of property of insolvent corporation were entitled to share ratably in proceeds of foreclosure; Randolph v. Allen, 73 Fed. 30, 41 U. S. App. 117, holding that damages could not be recovered in creditors' suit.

Distinguished in Hinton v. Ellis, 27 W. Va. 425, where judgment for amount received in fraud of creditors, was upheld.

Territories.— Whether territorial legislature may legalize verdict rendered by three-fourths of jury, undecided, p. 616.

Cited generally in Hess v. White, 9 Utah, 68, 33 Pac. 244, 24 L. R. A. 279, holding valid an act of territorial legislature legalizing such verdict.

11 Wall. 616-624, 20 L. 227, THE CHEROKEE TOBACCO.

Indian Territory composes a part of United State, p. 619.

Approved in Tush-ho-yo-tubby v. Barr, 45 Miss. 197, holding residence in Indian Territory not "without the United States" as meant by statute of limitations.

Indian tribes, residing within territorial limits of United States, are subject to their authority, p. 619.

Approved in Stuart v. United States, 18 Wall. 87, 21 L. 817, where allegation of capture by "hostile Indians" was not equivalent to

allegation of capture "by an enemy;" dissenting opinion in Elk v. Wilkins, 112 U. S. 122, 28 L. 653, 5 S. Ct. 56, majority holding Indian who had severed tribal relations was not entitled to vote; In re Mayfield, 141 U. S. 112, 35 L. 636, 11 S. Ct. 940, holding that United States court had no jurisdiction to convict Cherokee for adultery committed in Indian country.

Internal revenue.— Section 107, revenue act of 1868, extends revenue laws as to liquor and tobacco over Indian territories, p. 620.

Limited in United States v. Forty-three Gallons Whiskey, 108 U. S. 497, 27 L. 806, 2 S. Ct. 911, enforcing forfeiture for sale of liquor in Indian country; Atlantic, etc., R. R. v. Mingus, 165 U. S. 435, 41 L. 779, 17 S. Ct. 354, holding grant of lands to railroad did not include lands of Indians in territory.

Statutes.— Where there is no ambiguity in a statute there is no room for construction, p. 620.

Approved and applied in Lewis v. United States, 92 U. S. 621, 622, 23 L. 514, holding United States entitled to priority of payment, under bankrupt act of 1867; Marine v. Packham, 52 Fed. 580, 8 U. S. App. 93, construing paragraphs 103 and 104, tariff act of 1890, as to duties on bottles.

Statutes.— Where statute is clear and imperative, reasoning ab inconvenienti is of no avail; duty of courts is to execute it, p. 620.

Approved and applied in United States v. Chong Sam, 47 Fed. 884, reviewing cases, holding, under acts of 1882, 1884 and 1888, Chinaman having domicile in Canada, should be returned there.

United States.— Constitution, laws of United States, made in pursuance thereof and treaties made under authority of United States, are supreme law of the land, p. 620.

Cited with approval and relied upon in Hauenstein v. Lynham, 100 U. S. 490, 25 L. 631, collecting cases, and holding alien might take property by inheritance, under provision of treaty; Ex parte Crow Dog, 109 U. S. 567, 27 L. 1034, 3 S. Ct. 403, citing cases, and holding that legislation of Congress could be extended to Indians by mere force of treaty; Brown v. Walker, 161 U. S. 607, 40 L. 825, 16 S. Ct. 651, reviewing authorities, and holding exemption from prosecution, provided by interstate commerce act, binding on all courts; Parrott's Chinese Case, 6 Sawy. 371, 1 Fed. 506, reviewing authorities, and holding provision of State Constitution void, as in conflict with treaty; United States v. Berry, 2 McCrary, 67, 4 Fed. 786, citing cases, and holding treaty made with Ute Indians was law of United States.

Treaty in violation of Constitution cannot be held valid, p. 620.

Treaty may supersede prior act of Congress, and act of Congress may supersede prior treaty, p. 621.

Approved and applied in Ward v. Race Horse, 163 U. S. 511, 41 L. 246, 16 S. Ct. 1078, reversing S. C., 70 Fed. 608, reviewing authorities, and holding act admitting Wyoming revoked Indians' rights to hunt, under treaty; North, etc., S. S. Co. v. Hedden, 43 Fed. 22, reviewing authorities, sustaining exaction of tonnage tax, said to violate treaty with Germany; Clark v. Bates, 1 Dak. 50, 46 N. W. 512, holding non-intercourse law of 1834 was modified by later treaties with Indians. Cited, arguendo, in Buckner v. Street, 1 Dill. 250, F. C. 2,098; also in elaborate note in 81 Am. Dec. 539.

Distinguished in United States v. Bridleman, 7 Sawy. 251, 7 Fed. 902, reviewing authorities, and holding act admitting Oregon did not repeal 4 Stat. 729, respecting punishment of crimes by whites against Indians and vice versa.

Treaties.— Repugnancy between a treaty and later act of Congress being clear, former must yield, pp. 620, 621.

Cited with approval and doctrine applied in United States v. McBratney, 104 U. S. 623, 26 L. 870, holding act admitting Colorado repealed treaties with Utes, inconsistent therewith; Head-Money Cases, 112 U. S. 597, 28 L. 803, 5 S. Ct. 253, affirming S. C., 18 Fed. 141, reviewing authorities, and sustaining head-money tax on immigrants, in violation of treaty with Russia; Botilier v. Dominguez, 130 U. S. 247, 32 L. 929, 9 S. Ct. 527, citing cases, and holding Mexican grants of land in California of no effect unless confirmed; Draper v. United States, 164 U. S. 243, 41 L. 420, 17 S. Ct. 108, holding that enabling act of Montana gave State jurisdiction over crimes by Indians; Thomas v. Gay, 169 U. S. 271, 42 L. 743, 18 S. Ct. 342, upholding tax on cattle grazed on reservation in Oklahoma; In re Chae Chan Ping, 13 Sawy. 493, 36 Fed. 436, sustaining Chinese exclusion act of 1888; Bartram v. Robertson, 21 Blatchf. 214, 15 Fed. 214, reviewing authorities, and sustaining exaction of duties imposed in violation of treaty; Edye v. Robertson, 21 Blatchf. 468, 18 Fed. 141, upholding act of 1882, imposing tax on foreign immigrants; North, etc., S. S. Co. v. Hedden, 43 Fed. 22, sustaining exaction of tonnage tax, said to violate treaty with Germany; dissenting opinion in Chew Heong v. United States, 112 U. S. 565, 28 L. 780, 5 S. Ct. 270, majority holding that Chinese restriction act of 1882 did not apply to a Chinaman who left United States in 1880. Approved in In re Race Horse, 70 Fed. 608, 613, holding admission of Wyoming did not abrogate rights of Indians to hunt, under former treaty. Cited, arguendo, in Apis v. United States, 88 Fed. 987.

Internal revenue.— Tenth article of treaty of 1866, between United States and Cherokee Indians, giving Indians certain exemptions from revenue laws, was superseded by one hundred and

seventh section of act of 1868, extending revenue laws, as to liquors and tobacco, over country of that tribe, p. 621.

Cited, in note to same case, in 1 Dill. 266, F. C. 16,528.

Limited in United States v. Forty-three Gallons Whiskey, 108 U. S. 497, 27 L. 806, 2 S. Ct. 911, enforcing forfeiture for sale of liquor in Indian country; United States v. Berry, 2 McCrary, 71, 4 Fed. 790, holding Ute reservation, in Colorado, within jurisdiction of United States courts.

Treaties.— Power to redress injury consequent upon the violation of a treaty is with Congress, not the judiciary, p. 621.

Approved in The La Ninfa, 75 Fed. 518, 44 U. S. App. 648, holding award of board of arbitration binding as law of land.

Indians.— All laws of general character, passed by Congress, will be considered as not applying to Indian Territory, unless expressly mentioned, per Bradley, J., dissenting, p. 622.

Approved in Elk v. Wilkins, 112 U. S. 100, 28 L. 645, 5 S. Ct. 44, collecting authorities, and holding Indian who had severed tribal relations not entitled to vote.

Statutes.— Express law creating certain special rights and privileges, e. g., treaty with Indians, is not repealed by implication by subsequent law, couched in general terms, which can reasonably be otherwise construed, per Bradley, J., dissenting, pp. 622, 623.

Approved in Castro v. De Uriarte, 16 Fed. 97, holding that extradition provisions of treaty with Spain were not exclusive of revised statutes, section 5270.

11 Wall. 624–632, 20 L. 82, BANK v. CARROLLTON R. R.

Partnership.— Assignment by partner dissolves partnership, but assignee does not become tenant in common with other partners in property of firm, p. 628.

Approved in Karrick v. Hannaman, 168 U. S. 334, 42 L. 489, 18 S. Ct. 138, reviewing authorities, and holding to account one who had excluded his partners from firm business.

Partnership.— A partner is only entitled to his share of what remains after payment of debts and after settlement of accounts between partners, and his successor can acquire no greater interest, p. 628.

Approved and principle applied in Beecher v. Stevens, 43 Conn. 592, 75 Fed. 127, where mortgage in question was held not to be one of partner's interest; Sanborn v. Royce, 132 Mass. 596, collecting cases, and holding seizure of firm chattels, under process, by creditor of partner, a trespass; Pratt v. McGuinness, 173 Mass. 172, 53 N. E. 380, holding that partner could not assign undivided share in specific personalty of firm; Gaines v. Coney, 51 Miss. 328, holding

accounting proper, upon winding up affairs of partnership; In re Spitz, 8 N. Mex. 631, 45 Pac. 1124, 34 L. R. A. 607, holding exemption law applied only to such amount as remained after debts paid; Rommerdahl v. Jackson, 102 Wis. 448, 78 N. W. 743, holding assignee of certificate representing partner's interest entitled to accounting. Cited also in elaborate note in 57 Am. St. Rep. 441.

Partnership.— Retiring partner cannot introduce another partner or deprive remaining partners of right to have all partnership property held for partnership purposes, p. 629.

Approved in Warren v. Taylor, 60 Ala. 224, collecting cases, where mortgage by partners, for one partner's benefit, took precedence as partnership debt.

Partnership.— Assignee of partner's interest has right to enforce a settlement of accounts to ascertain if there is a surplus, p. 629.

Approved in Churchill v. Proctor, 31 Minn. 135, 16 N. W. 697, collecting authorities, sustaining action for foreclosure and accounting, by mortgagee of partner's interest.

Partnership.— Bill for accounting of partnership property is defective where not all members of firm are made parties, for they are all directly affected by decree, p. 630.

Cited and principle relied upon in United States v. Central Pac. R. Co., 8 Sawy. 93, dismissing bill to annul patent, where present owners were not made parties; The Land Co., etc. v. Elkins, 22 Blatchf. 204, 20 Fed. 546, denying relief where indispensable party was not joined; Gray v. Larrimore, 2 Abb. (U. S.) 554, F. C. 5,721, holding partner out of State must be served or appear before suit could proceed; De Manderfield v. Field, 7 N. Mex. 25, 32 Pac. 149, where administrator of deceased party was indispensable party to bill for accounting; Heaton v. Wilson, 123 N. C. 399, 31 S. E. 671, stating method of taking advantage of non-joinder.

Distinguished in Cobb v. Fogg, 166 Mass. 477, 44 N. E. 536, where suit on partnership note was not abated by death of a partner.

Equity.— Bill in chancery will not, as a rule, be dismissed for want of proper parties, but where indispensable party, not on record, cannot be supplied without ousting jurisdiction, this will be done, p. 631.

Approved and applied in Taylor v. Holmes, 14 Fed. 515, holding, in stockholder's suit, corporation and its officers should be parties defendant; Collins Mfg. Co. v. Ferguson, 54 Fed. 722, dismissing bill to set aside and annul deed of trust; Consolidated W. Co. v. Babcock, 76 Fed. 252, refusing to allow supplemental bill.

Equity.— New parties cannot be brought into a cause by a cross-bill by defendant, p. 632.

Approved in dissenting opinion in Simmons v. Taylor, 38 Fed. 699, majority sustaining cross-bill.

11 Wall. 632-648, 20 L. 280, UNITED STATES v. LYNDE.

Public lands.— Early Florida land treaties and statutes construed, pp. 638, 642, 643.

Treaties.— Louisiana, as ceded to United States in 1803, embraced territory between Mississippi and Perdido rivers, and our government had legal right to ignore grants made by Spanish authorities after the Treaty of Ildefonso, p. 643.

Approved in Coffee v. Groover, 123 U. S. 26, 31 L. 61, 8 S. Ct. 14, holding grants by Georgia of lands not within her boundaries void.

Constitutional law.— It is the province of the political departments of the government to give effect to grants and to insist upon its own construction of treaties, p. 643.

Principle cited and applied in Jones v. United States, 137 U. S. 212, 34 L. 696, 11 S. Ct. 84, holding that executive determined the extent of jurisdiction of United States over Guano Islands; The James G. Swan, 50 Fed. 111, holding people of the United States bound by action of president and Congress in assuming jurisdiction over Behring sea; dissenting opinion in In re Gunn, 50 Kan. 231, 32 Pac. 954, 19 L. R. A. 542, majority holding official body de facto cannot oust power of a body de jure by taking partial possession of office, etc.

Public lands.— Act of 1860 validated all grants made by Spanish government to bona fide grantees in Florida while that government was in possession of disputed territory, subject to express exceptions of treaty of 1819, and supplementary declaration of king of Spain, p. 646.

Cited and followed in United States v. Watkins, 97 U. S. 220, 24 L. 952, confirming Spanish grant made in 1804; United States v. Morant, 123 U. S. 342, 31 L. 173, 8 S. Ct. 192, confirming grants made in 1818 without holding parties entitled to possession. Cited generally with approval in Scull v. United States, 98 U. S. 416, 25 L. 164.

11 Wall. 648-650, 20 L. 188, UNITED STATES v. WRIGHT.

Post-office.— Congress constituted postmaster-general sole judge to determine manner and extent of allowances to postmasters provided for in act of March 3, 1863, and it is not competent for jury to revise his decisions, p. 650.

Cited and rule approved and applied in United States v. Milwaukee, etc., R. R. Co., 5 Biss. 421, F. C. 15,779, holding location of bridge by secretary of war conclusive; Horn v. Wayne Circuit Judge, 39 Mich. 20, holding clerk's approval of bond, as provided by statute, not reviewable by judge; Sheldon v. Stewart, 43 Mich. 576, 5 N. W.

1068, court refusing to disturb commissioner's decision dissolving an attachment. Cited, arguendo, in United States v. Hodson, 26 Fed. Cas. 338, holding decision of internal revenue officer final, where party failed to comply with statute to effect appeal. Cited, without applying rule, in United States v. Myers, 3 Hughes, 245, F. C. 15,846, holding assessment of internal revenue officer not conclusive upon a jury in trial of cause.

11 Wall. 650–652, 20 L. 188, MANN v. ROCK ISLAND BANK.

Appeal and error.— Supreme Court will not undergo labor of finding truth from a mass of testimony, since it would be an obstruction to public justice, on account of delay which it interposes to hearing of other causes, p. 652.

Approved in Reed v. Reed, 114 Mass. 373, affirming decision of lower court, without going into evidence in detail, p. 651.

Trusts.— Where cashier fraudulently used money of bank, and transferred title of real estate, purchased with it, to his wife, the real estate may be subjected to the debt, p. 652.

11 Wall. 652–659, 20 L. 235, HENDERSON'S TOBACCO.

Statutes.— Enactment of provisions inconsistent with those previously existing, or plainly intended as a substitute for them, manifests a clear intent to abolish the old law, p. 657.

The following cases cite and apply this principle as settled law: Murdock v. Mayor, etc., of Memphis, 20 Wall. 617, 22 L. 438, holding second section of act of 1867 repealed twenty-fifth section of act of 1789, respecting removal of causes to Federal courts; Pana v. Bowler, 107 U. S. 538, 27 L. 428, 2 S. Ct. 712, holding act relating to township donations to railroads repealed charter provisions on subject; Henrietta, etc., Co. v. Gardner, 173 U. S. 128, 19 S. Ct. 328, holding Arizona statute, respecting attachments, repealed by implication; United States v. Cheeseman, 3 Sawy. 429, F. C. 14,790, holding section of internal revenue law of 1862 impliedly repealed by later act; In re Clerkship of Circuit Court, 90 Fed. 251, holding act relating to appointment of clerks repealed previous inconsistent act; Treadwell v. Yolo Co., 62 Cal. 564, holding that amendment to code section amounted to a complete revision and repeal; Bogardus v. Gordon, 53 N. J. Eq. 42, 30 Atl. 813, holding local usury law repealed by implication; Lane v. Commrs. Missoula Co., 6 Mont. 477, 13 Pac. 137, holding statutes repealed, though not referred to by title; Dunn v. Great Falls, 13 Mont. 63, 31 Pac. 1019, holding statute in conflict with Constitution void only to extent of repugnancy. See also Union Pac. R. R. v. Ryan, 2 Wyo. 412. Approved also, without applying rule, in Patterson v. Tatum, 3 Sawy. 169, F. C. 10,830, where revisory statute itself prescribed its operation on previous act relating to United States land office; Board of

Commrs. v. Ætna Life Ins. Co., 90 Fed. 227, 61 U. S. App. 49, holding statutes in pari materia must be construed together; Board of Commrs. v. Society for Savings, 90 Fed. 236, 61 U. S. App. 67, holding only so much of statute repealed as is repugnant; Coats v. Hill, 41 Ark. 151, holding later State revenue laws modified only to limited extent an act to quiet titles, etc.; concurring opinion in Attorney-General v. Parsell, 100 Mich. 176, 58 N. W. 841, holding act providing for certain institutions covered whole subject and repealed all prior provisions; note, 14 Am. Dec. 210.

Statutes — Internal revenue.— Where powers or directions under several acts may well subsist together, there is no implication of repeal, thus internal revenue act of 1868 did not repeal proviso of act of 1867 as to time of commencing proceedings to enforce forfeitures, p. 657.

Principle cited and applied as follows: State v. Stoll, 17 Wall. 431, 21 L. 654, holding general law did not repeal section of bank charter as to receivability of bank notes for taxes; Red Rock v. Henry, 106 U. S. 601, 27 L. 253, 1 S. Ct. 438, holding two statutes relating to county aid to railroads not repugnant, and one not intended as substitute for the other; Fussell v. Gregg, 113 U. S. 560, 28 L. 997, 5 S. Ct. 637, holding section 3 of act of March 23, 1804, not repealed by subsequent acts relating to Virginia military district; Smithmeyer v. United States, 147 U. S. 358, 37 L. 200, 13 S. Ct. 326, holding general jurisdiction of Court of Claims and additional method of adjustment provided by act of 1888 could stand together; Frost v. Weine, 157 U. S. 58, 39 L. 619, 15 S. Ct. 537, holding two statutes relating to entry on public lands reconcilable; Gowen v. Harley, 56 Fed. 979, 12 U. S. App. 574, holding special act conferring jurisdiction on Circuit Courts not repealed by acts extending same to other Federal courts; In re Race Horse, 70 Fed. 611, holding act admitting Wyoming did not, by implication, abrogate treaty provisions with Indians; Bernardin v. Worthall, 77 Fed. 852, holding statute giving appeal in patent cases to court of District of Columbia did not repeal act conferring jurisdiction on Circuit Court in interference cases; Tinsley v. Craige, 54 Ark. 352, 16 S. W. 570, holding later statute, regarding landlord's liens, repealed former acts only to extent of repugnancy; New Orleans, etc., R. R. Co. v. New Orleans, 34 La. Ann. 441, holding general law did not extend franchise of railroad as granted by special charter; Appeal Tax Court v. Western Md. R. R. Co., 50 Md. 297, holding two statutes providing for assessments of railroad property in harmony; Gaston v. Merriam, 33 Minn. 284, 22 N. W. 621, as to two statutes relating to tax sales and notice to redeem; Co-operative, etc., Assn. v. Fawick, 11 S. Dak. 594, 79 N. W. 848, reconciling two statutes relating to building and loan associations; Hogan v. Guigon, 29 Gratt. 710, holding prior act relating to commissioners of revenue, etc., not repealed by act relating to sale of wine, etc.; Fulkerson v. Bristol,

95 Va. 5, 27 S. E. 817, holding law exempting certain bonds not repealed by act providing for better assessment of personal property, etc.; Marinette, etc., R. R. Co. v. Tomahawk, 96 Wis. 86, 71 N. W. 91, holding that there was no repugnancy between general law and city charter. Cited approvingly, without applying rule, in Westfield Borough v. Tioga Co., 150 Pa. St. 160, 24 Atl. 703, holding prior road laws repealed by general act covering subject.

Distinguished in dissenting opinion in Stryker v. Board of Commrs., 77 Fed. 582, majority construing two statutes respecting collection of judgments against counties so as to give effect to both.

Internal revenue.— Provisions of act of 1867, limiting time to twenty days for commencing action to enforce forfeitures, has application only to information founded upon neglect and refusal, and not to affirmative fraudulent acts, p. 658.

11 Wall. 659-672, 20 L. 29, COOK v. BURNLEY.

Public lands.— Title derived from empresario grant to colonists in Texas, upheld, p. 667.

Pleading.— Plea in abatement will be stricken from record if put in after defendants have pleaded to merits, p. 668.

Pleading.— Plea in abatement of former suit will be overruled, where parties are not the same, p. 668.

Cited and rule approved and followed in Converse v. Michigan Dairy Co., 45 Fed. 20, holding suit by another plaintiff in State court no bar; State v. Boyce, 72 Md. 142, 20 Am. St. Rep. 459, 19 Atl. 366, 7 L. R. A. 272, holding suit against one of two joint tortfeasors no bar to suit against the other. Cited, arguendo, in Andrews v. Smith, 19 Blatchf. 102, 5 Fed. 835.

Deposition, without certificate of magistrate that he reduced testimony to writing himself, or that it was done by witness in his presence, is without merit, p. 668.

Rule approved and applied in Moller v. United States, 57 Fed. 495, 13 U. S. App. 472, holding deposition taken down by stenographer, and not reduced to writing in presence of witness, inadmissible. Cited with approval in United States v. Julian, 162 U. S. 325, 40 L. 985, 16 S. Ct. 801, holding commissioner entitled to fee for certifying deposition; In re Thomas, 35 Fed. 823, holding irregularities in taking of deposition waived by appearance and cross-examination of opposing counsel.

Distinguished in Bird v. Halsy, 87 Fed. 677, holding rule did not apply to deposition taken in foreign country.

Adverse possession.— Question of continuous possession is a mixed question of law and fact, p. 669.

Appeal and error.— Exceptions to rulings, on motions to postpone trial and for change of venue, are not available on writ of error, p. 672.

Cited and followed in Texas, etc., R. R. Co. v. Nelson, 50 Fed. 815, 2 U. S. App. 212, holding continuance of cause in Circuit Court a matter of discretion with court; Baker v. Texarkana Nat. Bank, 74 Fed. 601, 41 U. S. App. 185, holding refusal of application for continuance by intervener not reviewable on appeal.

Miscellaneous.— Cited in suit between same parties, Cook v. Burnley, 45 Tex. 114.

11 Wall. 672-677, 20 L. 84, COOK v. BURNLEY.

Appeal and error.— It is duty of lower court to execute mandate of appellate court, and writ of error or appeal lies to correct error in executing mandate of Supreme Court, and to cause it to be properly executed, p. 674.

Appeal and error.— Application to supply lost writ or pleading, accompanied by proof of loss, is addressed to discretion of court, and its decision cannot be re-examined by Supreme Court upon error, p. 676.

Cited and rule approved and applied in Wells v. McGregor, 13 Wall. 189, 20 L. 539, holding judgment on motion to set aside sheriff's return not reviewable; Crumpton v. United States, 138 U. S. 365, 34 L. 960, 11 S. Ct. 357, holding question whether trial should be delayed for production of witnesses not reviewable.

Evidence.— Secondary evidence of lost record or of any instrument is admissible after proof of loss, p. 676.

Appeal and error.— First writ of error brings up whole record, whether there is bill of exceptions or not; second writ brings up nothing for revision except proceedings subsequent to mandate, p. 677.

Cited and rule affirmed in Texas, etc., R. R. Co. v. Anderson, 149 U. S. 242, 37 L. 719, 13 S. Ct. 845, holding second writ could not be maintained where action of lower court conformed to mandate, and there were no other proceedings; Seeligson v. Transportation Co., 70 Tex. 201, 7 S. W. 709, holding mandate of Supreme Court sufficient evidence of refusal of Federal court to assume jurisdiction of cause.

11 Wall. 678-681, 20 L. 82, WHITELEY v. KIRBY.

Patents for harvesters of Platt and Churchill have no bearing upon invention of plaintiff, as his peculiar device is not found in either of their patents, p. 679.

Patents.— A machine embracing every substantial element found in construction and arrangement of a patented machine is an infringement, p. 680.

Approved in Kirby v. Dodge, etc., Mfg. Co., 10 Blatchf. 313, F. C. 7,838, holding, in this case, that defendant had not infringed upon same patent involved in principal case.

11 Wall. 682, see 20 L. 287, LEGAL-TENDER CASES.

Tender.— Act of Congress known as the legal-tender act is constitutional as to contracts made before its passage, and valid as applicable to transactions since its passage, p. 682.

Cited as authority in Wiley, Banks & Co. v. Ewing, 47 Ala. 427, holding tender of United States treasury notes sufficient; Lang v. Waters, 47 Ala. 635, holding note payable in legal-tender funds; Richmond v. Dubuque, etc., R. R. Co., 33 Iowa, 503, 504, holding plaintiff's judgment could be paid in currency; Barringer v. Fisher, 45 Miss. 202, holding treasury notes receivable in payment on contract made September 11, 1858. Cited approvingly in In re Wyllie, 2 Hughes, 453, F. C. 18,112. Cited in dissenting opinion to same case, Legal-Tender Cases, 12 Wall. 611; also in dissenting opinion in Sinking-Fund Cases, 99 U. S. 747, 25 L. 511, majority holding act of 1878, to aid Pacific railroads and to establish sinking fund, not unconstitutional.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

DECEMBER TERM, 1870.

Vol. 79.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

DECEMBER TERM, 1870,

AND REPORTED HEREIN,

VOLUME 79,

AS HAVE ALSO BEEN REPORTED IN

12 WALLACE.

12 Wall.	Title.	Here in.
1	The Collector v. Hubbard,	272
8–9	" "	274
9–12	" "	275
12–15	" "	276
15–18	" "	278
19	Sturges v. The Collector,	255
24–27	" "	257
27–30	" "	258
30	" "	259
31	The Maria Martin,	251
40	" "	252
40–42	" "	253
42–46	" "	254
46–47	" "	255
47	Railroad Company v. Dubois,	265
60–62	" "	268
62–65	" "	269
65	Railroad Company v. Harris,	354
77–80	" "	357
80–83	" "	358
83–86	" "	359
86	" "	360
96–97	French v. Shoemaker,	270
97–100	" "	271
100–102	" "	272
102	Fowler v. Rathbone,	281
114–115	" "	283
115–119	" "	284
119–121	" "	285
121	" "	286
121	Noonan v. Bradley,	279
124–127	" "	280
127–129	" "	281
130–132	Mail Company v. Flanders,	249
132–135	" "	250
135–136	" "	251
136–141	The Eutaw,	278
141–142	"	279
142–145	Rigler v. Waller,	260
145–149	" "	261
149–150	" "	262
150	Baker v. Morton,	262
153–155	" "	263
155–158	" "	264
158–159	" "	265

12 Wall.	Title.	Here in.
159–162	Miller *et al.* v. The State,	259
162	" "	260
163–164	Ward v. State of Maryland,	260
164	Insurance Co. v. Hutchberger,	364
166	" "	365
167	The Steamer Syracuse,	382
171–173	" "	384
173–175	Handlin v. Wickliffe,	365
175	United States v. Crusell,	384
176	" "	385
177–179	United States v. Alexander,	381
179–181	" "	382
181	Hoffman v. Bk. of Milwaukee,	366
186–187	" "	367
187–190	" "	368
190–193	" "	369
193	" "	370
194–197	Ins. Co. v. Transportation Co.,	378
197–200	" "	379
200–201	" "	380
201–203	Western Mass. Ins. Co. v. Same,	380
203–204	" "	381
204	State Tonnage Tax Cases,	370
209–211	" "	372
211–214	" "	373
214–217	" "	374
217–220	" "	375
220–222	" "	376
222–226	" "	377
226	" "	378
226	The Junction Railroad Company v. Bank of Ashland,	385
229	" "	386
229–232	" "	387
232	United States v. Child & Co.,	360
240–243	" "	362
243–246	" "	363
246	United States v. Burns,	388
251–252	" "	389
252–254	" "	390
254	Holladay v. Kennard,	390
257–258	" "	391
258–259	" "	392
259–261	Germain v. Mason,	392
261	" "	393

dent issued on the first day of July in the preceding year. Such property, so received or collected, may be appropriated to public use on due appraisement and certificate thereof, or may be forwarded for sale within the loyal states as the public interest may require; and the further provision is that all sales of the property shall be at auction to the highest bidder, and that the proceeds thereof shall be paid into the Treasury. 12 Stat. at L. 820.

Officers or privates in the army, and officers, sailors, or marines in the navy, are required by the 6th section of the act to turn over to an agent appointed under that act, all property taken or received from persons in such insurrectionary districts, or which they have under their control; and the same section also provides that the agent receiving such property shall give a receipt for the same to the person from whom it was received. 12 Stat. at L. 821.

Two steamboats, to wit, the Laurel Hill and the Iberville, were captured by our military **133***] and naval forces at New Orleans, *in the month of May, 1862, shortly after our military occupation of the city became complete. Carefully examined, the proofs show that the Laurel Hill was captured on the 8th of May of that year, in Bayou Jacquot, a small bayou connected with Bayou Plaquemines, situated in the parish of Iberville, on the right bank of the river Mississippi, one hundred miles above the city of New Orleans, and at that time within the military lines of the Confederate army. Our military occupation of the city became complete on the 6th of May of that year, and the proofs show the Iberville was captured on the 22d of the same month while lying at Greenville, which is situated on the left bank of the river, four and a half miles above the city, but below camp Parapet, and was at that time within our military lines.

Captured under the circumstances explained, the two steamboats remained in the custody or subject to the control of our military authorities until the 21st day of December, 1865, when the proper officer in charge of the same turned the captured steamers over to the respondent, B. F. Flanders, as the agent of the Treasury Department appointed under the 1st section of the before-mentioned act of Congress. Pursuant to authority conferred by the 2d section of the act, the respondent, Flanders, employed the other respondent as an auctioneer to sell the steamboats, and the latter, by virtue of his employment, advertised the same for sale at public auction.

Based on these facts the complainants and appellants, on the 9th of January, 1866, filed their bill of complaint in the circuit court of the United States, and alleged that they were the lawful owners of the respective steamboats; that the respondents had no right, interest, or claim in the same, and that a sale of the same as proposed would be a violation of their rights as such owners. They brought the suit to prevent the sale of the steamboats as proposed in the advertisement, and they accordingly prayed for an injunction to that effect, and they also prayed for a writ of sequestration, to be directed to the marshal, commanding him to take the steamboats into his possession and to safely **134***] keep the same *until the further order of the court. Accompanying the bill of complainant was an affidavit of merits, and the record shows that both writs were granted as prayed, the complainants giving bond to the respondents to pay all such damages as should be adjudged against them if the processes were wrongly obtained.

Service having been made the respondent, Flanders, appeared and filed an answer. He alleged that the steamers were captured by our military and naval forces, as before explained, and that he held the same as special agent of the Treasury Department. Besides pleading to the merits as aforesaid, he denied the jurisdiction of the court, and also prayed that the injunction might be dissolved and that the bill of complaint might be dismissed. Testimony was taken but further reference to it is unnecessary, as all the facts proved which are material in this investigation have already been stated. None of the other proceedings in the suit are of any importance in the present state of the controversy, except the final decree, which was to the effect as follows: (1) That the injunction in respect to the steamer Iberville be made perpetual, and that the steamer be restored to the complainants; (2) that the orders granting the writs of injunction and sequestration in respect to the steamer Laurel Hill be set aside, with costs, and that the steamer be restored to the respondent, Flanders, as the special agent of the Treasury Department.

Probably the decision in the matter of the steamer Iberville was placed upon the ground that the steamer was captured within our military lines subsequent to the publication of the proclamation issued by the commanding general at the headquarters of the army, announcing that "all the rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States." *The Venice*, 2 Wall. 276, 17 L. ed. 867; *The Circassian*, 2 Wall. 150, 17 L. ed. 799.

Much difficulty, to say the least, would have arisen in sustaining that part of the decree if the respondents had appealed *to this [***135** court, as the presiding justice held that the circuit court had no jurisdiction of the case, but inasmuch as that part of the decree was in favor of the appellants, and the respondents did not appeal, the error, if it be one, cannot be corrected. Correction of the error is not sought by the appellants, and it is well settled law that no one but an appellant can be heard in an appellate court for the reversal of a decree rendered in the subordinate court. *McDonough* v. *The Mary Ford*, 3 Dall. 198. Appellees may be heard in support of the decree, but not for reversal, as it is the privilege of both parties to appeal if they see fit to comply with the conditions prescribed by law. *The Wm. Bagaley*, 5 Wall. 412, 18 L. ed. 591; *Chittenden* v. *Brewster*, 2 Wall. 196, 17 L. ed. 841; *Harrison* v. *Nixon*, 9 Pet. 484; *Stratton* v. *Jarvis*, 8 Pet. 4; *Buckingham* v. *McLean*, 13 How. 150; *Canter* v. *Amer. Ins. Co.* 3 Pet. 318.

Captured as the steamer Laurel Hill was, within the military lines of the Confederate army, the proclamation of our commanding general, before referred to, afforded no support to that part of the claim of the complainants, but the presiding justice being of the opinion that the circuit court had no jurisdic-

THE DECISIONS

OF THE

Supreme Court of the United States

AT

DECEMBER TERM, 1870.

THE NEW ORLEANS & BAYOU SARA MAIL COMPANY, *Appt.*,
v.
ANTHONY FERNANDEZ *et al.*

(See S. C. 12 Wall. 130-136.)

Only party appealing may assign error—parties, residence of—practice, where court below is without jurisdiction.

No one but an appellant can be heard in an appellate court for the reversal of a decree rendered in the subordinate court. Appellees may be heard in support of the decree, but not for reversal.

Where it appears on the face of the pleadings, that both parties are citizens of the same state, the bill of complaint is properly dismissed for want of jurisdiction.

Where the circuit court is without jurisdiction, it is in general irregular to make any order in the cause except to dismiss the suit, but the court may set aside such orders as had been improperly made before the want of jurisdiction was discovered.

[No. 9 of Dec. Term, 1869.]

Submitted Dec. 8, 1869. Decided Jan. 24, 1870.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The petition in this case was filed in the court below by the appellants, for the recovery of the steamboats Laurel Hill and Iberville. A decree having been entered in favor of the plaintiff for the Iberville and in favor of the defendants for the Laurel Hill, the said plaintiff took an appeal to this court.

The case is fully stated by the court.

Mr. Wm. M. Evarts, for appellant, declined to present any argument in this court.

Mr. E. R. Hoar, Atty. Gen., for appellee:

The petition does not show that the case is within the jurisdiction of the circuit court.

It is familiar doctrine, that in order to maintain a suit in the circuit court the jurisdiction must appear on the record. *Sullivan* v. *Steamboat Co.* 6 Wheat. 450.

An omission to aver the citizenship of the parties, or other facts necessary to give jurisdiction, is a fatal defect on error, although no question of jurisdiction was made in the court below. *Piquignot* v. *Railroad Co.* 16 How. 104.

For aught that appears on the record, the parties were all citizens of the state of Louisiana.

We are not aware of any act of Congress by which the circuit court could entertain jurisdiction of the case, in virtue of the subject-matter.

The circuit court could not entertain jurisdiction of the cause as a case in admiralty.

Gov. of Ga. v. *Madrazo*, 1 Pet. 110; *The Hollen*, 1 Mas. 431.

The case was plainly not one for the interposition of a court of equity by injunction.

Watson v. *Sutherland*, 5 Wall. 79, 18 L. ed. 582.

There was a plain and adequate remedy at law for any injury which the plaintiff might suffer by the seizure and sale of its vessel; and there was no occasion whatever for the interference of a court of equity.

No injunction could lie against the defendant, Flanders, as a public officer, acting in the line of the duty and authority conferred upon him by the captured property acts.

Frewin v. *Lewis*, 4 Myl. & Cr. 255; Ad. Eq., 212.

The action of this court in the case of *Elgee* v. *Lovell*, decided by a divided court, December term. 1867, was practically an affirmance of the doctrine of the exclusive jurisdiction of the court of claims in this class of cases.

The court below endeavored to determine the validity of the original capture of the vessel. It held, in effect, that a vessel captured May 8, 1862, was rightfully captured; while one captured May 22, 1862, was wrongfully captured by the military.

Whether the court was right in taking cognizance of that question or not, the conclusion in the first case was clearly right, under the decision of this court in the case of *The Venice*, 2 Wall. 273, 17 L. ed. 866.

This court should reverse the judgment and remand the case, with directions to enter a judgment dismissing the case for want of jurisdiction. *Barney* v. *Baltimore*, 6 Wall. 289, 18 L. ed. 828.

Mr Justice **Clifford** delivered the opinion of the court:

Authority was conferred upon the Secretary of the Treasury, by the act of the 12th of March, 1863, to appoint special agents to receive and collect abandoned or captured property in any state or territory designated as in insurrection by the proclamation of the Presi-

dent issued on the first day of July in the preceding year. Such property, so received or collected, may be appropriated to public use on due appraisement and certificate thereof, or may be forwarded for sale within the loyal states as the public interest may require; and the further provision is that all sales of the property shall be at auction to the highest bidder, and that the proceeds thereof shall be paid into the Treasury. 12 Stat. at L. 820.

Officers or privates in the army, and officers, sailors, or marines in the navy, are required by the 6th section of the act to turn over to an agent appointed under that act, all property taken or received from persons in such insurrectionary districts, or which they have under their control; and the same section also provides that the agent receiving such property shall give a receipt for the same to the person from whom it was received. 12 Stat. at L. 821.

Two steamboats, to wit, the Laurel Hill and the Iberville, were captured by our military **133*]** and naval forces at New Orleans, *in the month of May, 1862, shortly after our military occupation of the city became complete. Carefully examined, the proofs show that the Laurel Hill was captured on the 8th of May of that year, in Bayou Jacquot, a small bayou connected with Bayou Plaquemines, situated in the parish of Iberville, on the right bank of the river Mississippi, one hundred miles above the city of New Orleans, and at that time within the military lines of the Confederate army. Our military occupation of the city became complete on the 6th of May of that year, and the proofs show the Iberville was captured on the 22d of the same month while lying at Greenville, which is situated on the left bank of the river, four and a half miles above the city, but below camp Parapet, and was at that time within our military lines.

Captured under the circumstances explained, the two steamboats remained in the custody or subject to the control of our military authorities until the 21st day of December, 1865, when the proper officer in charge of the same turned the captured steamers over to the respondent, B. F. Flanders, as the agent of the Treasury Department appointed under the 1st section of the before-mentioned act of Congress. Pursuant to authority conferred by the 2d section of the act, the respondent, Flanders, employed the other respondent as an auctioneer to sell the steamboats, and the latter, by virtue of his employment, advertised the same for sale at public auction.

Based on these facts the complainants and appellants, on the 9th of January, 1866, filed their bill of complaint in the circuit court of the United States, and alleged that they were the lawful owners of the respective steamboats; that the respondents had no right, interest, or claim in the same, and that a sale of the same as proposed would be a violation of their rights as such owners. They brought the suit to prevent the sale of the steamboats as proposed in the advertisement, and they accordingly prayed for an injunction to that effect, and they also prayed for a writ of sequestration, to be directed to the marshal, commanding him to take the steamboats into his possession and to safely **134*]** keep the same *until the further order of the court. Accompanying the bill of complainant was an affidavit of merits, and the record shows that both writs were granted as prayed, the complainants giving bond to the respondents to pay all such damages as should be adjudged against them if the processes were wrongly obtained.

Service having been made the respondent, Flanders, appeared and filed an answer. He alleged that the steamers were captured by our military and naval forces, as before explained, and that he held the same as special agent of the Treasury Department. Besides pleading to the merits as aforesaid, he denied the jurisdiction of the court, and also prayed that the injunction might be dissolved and that the bill of complaint might be dismissed. Testimony was taken but further reference to it is unnecessary, as all the facts proved which are material in this investigation have already been stated. None of the other proceedings in the suit are of any importance in the present state of the controversy, except the final decree, which was to the effect as follows: (1) That the injunction in respect to the steamer Iberville be made perpetual, and that the steamer be restored to the complainants; (2) that the orders granting the writs of injunction and sequestration in respect to the steamer Laurel Hill be set aside, with costs, and that the steamer be restored to the respondent, Flanders, as the special agent of the Treasury Department.

Probably the decision in the matter of the steamer Iberville was placed upon the ground that the steamer was captured within our military lines subsequent to the publication of the proclamation issued by the commanding general at the headquarters of the army, announcing that "all the rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States." *The Venice*, 2 Wall. 276, 17 L. ed. 867; *The Circassian*, 2 Wall. 150, 17 L. ed. 799.

Much difficulty, to say the least, would have arisen in sustaining that part of the decree if the respondents had appealed *to this [**135** court, as the presiding justice held that the circuit court had no jurisdiction of the case, but inasmuch as that part of the decree was in favor of the appellants, and the respondents did not appeal, the error, if it be one, cannot be corrected. Correction of the error is not sought by the appellants, and it is well settled law that no one but an appellant can be heard in an appellate court for the reversal of a decree rendered in the subordinate court. *McDonough* v. *The Mary Ford*, 3 Dall. 198. Appellees may be heard in support of the decree, but not for reversal, as it is the privilege of both parties to appeal if they see fit to comply with the conditions prescribed by law. *The Wm. Bagaley*, 5 Wall. 412, 18 L. ed. 591; *Chittenden* v. *Brewster*, 2 Wall. 196, 17 L. ed. 841; *Harrison* v. *Nixon*, 9 Pet. 484; *Stratton* v. *Jarvis*, 8 Pet. 4; *Buckingham* v. *McLean*, 13 How. 150; *Canter* v. *Amer. Ins. Co.* 3 Pet. 318.

Captured as the steamer Laurel Hill was, within the military lines of the Confederate army, the proclamation of our commanding general, before referred to, afforded no support to that part of the claim of the complainants, but the presiding justice being of the opinion that the circuit court had no jurisdic-

tion of the case, did not examine the merits of the controversy. Both parties, as appears on the face of the pleadings, are citizens of the same state, and upon that ground this court is of the opinion that the bill of complaint was properly dismissed for want of jurisdiction. 1 Stat. at L. 78; *Sullivan* v. *Fulton S. Boat Co.* 6 Wheat. 450; *Piquignot* v. *Penn. R.* 16 How. 104; *Hornthall* v. *Keary*, 9 Wall. 560, 19 L. ed. 560.

Where the circuit court is without jurisdiction, it is in general irregular to make any order in the cause except to dismiss the suit; but that rule does not apply to the action of the court in setting aside such orders as had been improperly made before the want of jurisdiction was discovered. Prior to that the court, on motion of the complainants, had granted an injunction and issued a writ of sequestration, on which latter writ the marshal had taken possession of the steamer and held it subject to the order of the court. Evidently those writs were improv-**136***] idently issued, and the *court having come to that conclusion set them aside and ordered the steamer restored to the custody in which it was when the writ of sequestration was served.

Decree affirmed.

JOHN MARTIN *et al.*, Claimants of the Bark Maria Martin, her Boats, etc., *Appts.*,

v.

THE NORTHERN TRANSPORTATION COMPANY OF OHIO *et al.*

(See S. C. *"The Maria Martin"* 12 Wall. 31-47.)

Only party appealing may assign error—negligence in collision.

Where each party appeals, each may assign error; but where only one party appeals, the other is bound by the decree in the court below, and he cannot assign error in the appellate court.

Where the decree of the court below, in a case of collision, found that both vessels were in fault, the one not appealing to this court cannot deny that she was in fault.

Errors committed by one of two vessels, approaching each other from opposite directions, do not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent a collision.

[No. 75.]

Argued Jan. 16, 17, 18, 1871. Decided Feb. 6, 1871.

APPEAL from the Circuit Court of the United States for the District of Wisconsin.

The libel in this case was filed in the district court of the United States for the district of Wisconsin by the appellees, to recover damages for a collision.

A decree having been entered by that court dismissing the libel, the libellants took an appeal to the circuit court, which reversed the said decree and apportioned the said damages between the parties.

Whereupon the claimants of The Maria Martin took an appeal to this court.

The case is fully stated by the court.

Messrs. **George B. Hibbard** and *N. J. Emmons*, for appellants:

That the bark was in no sense liable for the acts or omissions of the tug is now settled beyond all possible question.

The Quickstep, 9 Wall. 665, 670, 671, 19 L. ed. 767-769; *Sturgis* v. *Boyer*, 24 How. 110, 122, 123, 16 L. ed. 591, 594, 595; *The Express*, 1 Blatchf. 365; *The James Gray* v. *The John Fisher*, 21 How. 184, 191-194, 16 L. ed. 106-110; *The Hector*, 4 Blatchf. 199; *Sproul* v. *Hemmingway*, 14 Pick. 1.

No fault upon the part of the tug is charged in the libel, and none can be claimed here.

McKinlay v. *Morrish*, 21 How. 343, 16 L. ed. 100.

The consequence is, as a matter of fact (as the propeller claims that the bark did not sheer until the propeller was abreast of the tug, and when both propeller and bark at combined speed had only the length of the tow-line—about 250 feet to run; and the propeller claims this for the reason that, if the bank had sheered before, the propeller should sooner have run off in her clear half mile of channel toward the Canada shore) that it is an impossibility for the bank to be in any fault, even if she did sheer when either the tug (for whose fault the bark was not liable) or the propeller had really brought bark and propeller within about 250 feet in space, and say thirteen seconds in time, of each other; for the combined speed of the vessels past the land was about twelve miles an hour, and the two would run the 250 feet in about thirteen seconds. It was impossible for the bark to commit any other fault than sheer, within that thirteen seconds, and in running at most 125 feet; for down to that time she had followed the tug, and had no other duty to perform.

In the opinion of the circuit court, it appears, or is found and decided:

1. That the propeller did not change her course soon enough, and that she ran for a distance of over a mile and a half, entering a crowded river, where the greatest watchfulness was required, directly down upon the tug and bark, without change of course.

2. That when she did change, although she had a wide and unobstructed channel towards the Canada shore, she did not change enough in the change she did make; and that if she had changed even a point further there would have been no collision. "Common vigilance," says Judge Davis, "required that when they changed the course of the propeller, they should make a more decided change."

3. That to run even within 100 feet of the tug, when she could so easily have gone further to the eastward, was a fault in the propeller.

4. That to enter Detroit river, under the circumstances, required great watchfulness and care on the part of the propeller; that the propeller entered the river, with all the lights then visible before her, substantially without any care and without even change of course, until the signal was heard from the approaching tug, and ran right down upon the tug and tow, up-

NOTE.—*Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting*—see notes, 13 L. ed. U. S. 537; 25 L. ed. U. S. 168; 28 C. C. A. 532; 29 C. C. A. 368.

Rules for avoiding collision; steamer meeting steamer—see notes, 14 L. ed. U. S. 68; 35 L. ed. U. S. 453; 30 C. C. A. 630.

Measure of damages in case of collision—see note 11 L. ed. U. S. 35.

on a course on which the propeller had been running for more than a mile and a half.

5. That the propeller was in distinct fault, for the reason that she ran into the river, under all the circumstances, at her usual speed. She should have materially slackened her speed.

In *The Carroll*, 8 Wall. 302, 19 L. ed. 392, the case was sufficiently like this to depend upon the same principles. In the opinion delivered by Mr. Justice Davis, the following language is employed: "As the steamer did not keep out of the way, and as the collision did occur, the steamer is prima facie liable, and can only relieve herself by showing that the accident was inevitable, or caused by the culpable negligence of the schooner. . . . The fact that the vessels did collide, explodes the theory that there was no risk of collision. . . . The possibility of it is all that is required to charge the steamer, unless she can establish that she was without fault."

"The steamer is, therefore, to blame for suffering this peril to occur; for if it be conceded that the schooner was wrong in starboarding her helm, this cannot affect her right to recover, as she was in other respects without fault, because the steamer, having the right of way, put her in this predicament and must answer for the consequences."

"If there was a fault on the part of the schooner, the steamer committed a far greater, in suffering the vessels to get into such dangerous proximity." There needs but to add to this opinion, citations of *Bentley* v. *Coyne*, 4 Wall. 512, 18 L. ed. 459; *The Fairbanks*, 9 Wall. 420, 19 L. ed. 708; *The Nichols*, 7 Wall. 656, 666, 19 L. ed. 157, 160.

The last case states the rule and holds that, under such circumstances, it will not impair the right of a vessel to recover, although she was bound to keep her course, even if she did change it, "for the reason that those who put the vessel in that peril, are chargeable with the error, and must answer for the consequences it occasioned;" holding, to employ the language of Mr. Justice Clifford, with respect to an alleged change of course, that such an error, committed in emergency and peril, which is justly chargeable to the other vessel, is not a fault; and that "mistakes continued in such moments of peril and excitement, when produced by the mismanagement of those in charge of the other vessel, are not of a character to relieve" the vessel bringing about such peril and excitement, from full responsibility.

See, also, *The Genesee Chief*, 12 How. 443; *The City of Paris*, 9 Wall. 634, 638, 19 L. ed. 751, 753; *The Scranton*, 5 Blatchf. 400; *The Western Metropolis*, 6 Blatchf. 210.

Without considering too much in detail the case as placed by the findings in the circuit court, it is most respectfully claimed that, by absolute decision made in this court, in repeated cases, since that opinion was pronounced, it is settled, aside from the rule and precise point last above referred to, that this decree should be reversed. And these cases arose under circumstances which settle the very principles which govern this case.

See, especially, besides the cases last above cited, *The Alleghany*, 9 Wall. 522, 19 L. ed. 781; *The Corsica*, 9 Wall. 630, 19 L. ed. 804; *The City of Paris*, 9 Wall. 634, 19 L. ed. 751; *The Syracuse*, 9 Wall 673, 19 L. ed. 783.

The propeller, upon her most unqualified evidence, ran down from about two miles off, straight on to the tug and bark, until she was within less than a quarter of a mile.

After such a fault as this alone, it is impossible for her to charge any fault upon the bark.

The probabilities are against the supposition that the bark sheered. "That she voluntarily and unnecessarily sheered," says Mr. Justice Swayne, speaking of a similar case in *The City of Paris*, *supra*, "and put herself in the way of the steamer as charged, is most improbable."

Upon the tug, upon the monitor and upon the bark, the order "hard a-port" was heard again and again. It is most improbable that the very competent wheel man of the bark, even in the exigencies of that moment, should have disobeyed that order, and put the wheel a-starboard, and he most positively swears that he did not, as the others of the crew swear he did not, for they swear they saw him put the wheel a-port.

But the evidence on the part of the propeller shows conclusively that the bark could not have sheered. That evidence shows that the propeller passed very close to the bark, much nearer than one hundred feet off.

If the propeller passed so near, the bark could not have sheered to any extent. Had she done so, she would have thrown herself across the bows of the propeller.

It was physically impossible that the bark should have sheered, and the collision happen as it did.

Messrs. **R. P. Spalding** and *Dickman*, for appellees:

There can be no room for doubt that the bark, for some cause, took a wild sheer to the eastward and out of the line of her course after the tug, at about the instant of time when the propeller passed the tug. If so, she brought about the collision and was emphatically in fault.

The bark was in fault in this: that she had not a special lookout stationed forward, to keep watch for vessels and to give timely notice of their approach.

In *Sproul* v. *Hemmingway*, 14 Pick. 1, Mr. Chief Justice Shaw says: "On board the ship towed astern by means of a cable, something may and ought to be done by the master and crew, in steering, keeping watch, observing and obeying orders and signs; and if there be any want of care and skill in the performance of these duties, and damage ensue, the damage is attributable to the master and crew of the towed ship, and they and their owners must sustain it."

See, also, *The Express*, Olcott, 258, 1 Blatchf. 369.

Mr. Justice **Clifford** delivered the opinion of the court:

Appeals under the additional act "to amend the judicial system" are subject to the same rules, regulations, and restrictions as are prescribed in case of writs of error. 2 Stat. at L. 244. Both parties in a civil action may sue out a writ of error, to a final judgment, but where one party only exercises the right the

other cannot assign error in the appellate court; and the same right to remove the cause from the subordinate to the appellate court for re-examination is secured to both parties by the act of Congress allowing appeals, instead of writs of error, in cases of equity or of admiralty and maritime jurisdiction, or of prize or no prize, as provided in the 2d section of the act allowing such appeals. 1 Stat. at L. 84; 2 Stat. at L. 244. Subject to the same rules and regulations as in case of writs of error, both parties may appeal, in an equity, admiralty or prize suit, from the final decree of the subordinate court, but the appeal, when entered in the appellate court, is also subject to the same restrictions as are prescribed in case of writs of error. Where each party appeals, each may assign error; but where only one party appeals, the other is bound by the decree in the court below, and he cannot assign error in the appellate 41*] *court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken. *The William Bagaley*, 5 Wall. 412, 18 L. ed. 591; *The Quickstep*, 9 Wall. 665, 19 L. ed. 767; *Bush* v. *The Alonzo*, 2 Cliff. 550. Apply that rule to the present case and it is clear that the appellees cannot be heard in opposition to the decree of the circuit court, as they did not appeal from that decree.

They were owners and freighters of the steam propeller Cleveland, and they filed the libel in the district court in a cause of collision, civil and maritime, against the bark Maria Martin, to recover damages for the loss of the steamer and her cargo on the 22d of June, 1867, occasioned by a collision between the bark and the steamer, near the mouth of the Detroit river, whereby the steamer, with all her cargo on board, consisting of sugar and other merchandise of great value, was sunk in five fathoms of water and became a total loss.

Four days before the disaster the steamer started from Ogdensburg, in the state of New York, and she was bound on a voyage from that port to the port of Chicago, in the state of Illinois, laden as aforesaid, and having fifty persons on board as passengers. None of these facts are denied by the claimants, but the libelants also allege that the collision was occasioned without any fault on the part of the steamer, and by the negligence, inattention and want of proper care and skill on the part of those in charge of the bark, which is expressly denied in the answer.

Heavily laden with a cargo of grain, the bark was proceeding down the river, and was bound on a voyage from Chicago to Buffalo, in the state of New York, both the colliding vessels being duly enrolled and licensed for the coasting trade on those waters. Propelled by her own motive power the steamer had complete and effective command of her own movements. On the other hand, the principal motive power of the bark was the engine of the tug, with which she was connected by means of a hawser 42*] paid out *from the forward part of the vessel, three hundred feet or more in length, and made fast to the samson post of the tug, being what is called in such navigation a stern line, as the design was that the vessel without motive power should follow the tug which had her in tow, but the bark on this occasion had unfurled, or "pretty well made," her mainsail, and her mainstaysail, as she had nearly reached the place in the river where vessels in tow usually cast off from the tug, and her master and other officers were in charge of her deck.

Prior to rounding Bar Point, on her Canada shore, the course of the steamer had been west by north, but shortly after passing that point she changed her course to north by east, and headed for Bois Blanc light, as alleged by the libelants. In coming round, or immediately after she was put upon her new course, she made the lights of the tug and tow descending the river towards the lake, heading south-southwest, at the distance, as supposed, of two miles, and not far from two o'clock in the morning.

Attempt is made in argument to show that the lookout of the steamer was incompetent, but the objection is without any legal importance, as the lights of the tug and tow were seasonably seen by all those in charge of the deck of the steamer. They first made the red signal light of the tug and of the tow half a point over their starboard bow, and the evidence shows that the tug having the bark in tow made the green signal light of the steamer one fourth of a point over her port bow.

Mutual fault is charged; that is, each charges the other with fault, and it is quite evident that one or both must be guilty of the charge, as neither imputes any fault to the tug, and the evidence fully satisfies the court that it was good weather, a bright starlight night, a moderate wind, and smooth water.

Where negligence or fault is shown to have been committed by either party, the rule that the loss must rest where it fell, as in case of inevitable accident, can have no application, for if the fault was one committed by the claimant's vessel *alone, then the libelant is en- [*43 titled to recover; or if by the libelant's vessel alone, then the libel must be dismissed; or if both vessels were in fault, then the settled rule of law is that the damages must be apportioned between the offending vessels. *The Morning Light*, 2 Wall. 557, 17 L. ed. 863; *Union Steamship Co.* v. *N. Y. & Va. S. S. Co.* 24 How. 313, 16 L. ed. 701; *The Catharine* v. *Dickinson*, 17 How. 170, 15 L. ed. 233.

Doubtless the district judge applied the second rule, as he entered a decree dismissing the libel, but the circuit court came to the conclusion from the evidence that both of the colliding vessels were in fault, and reversed the decree of the district court, and entered a decree that each should pay a moiety of the damages and their own costs, and from that decree the claimants of the bark appealed to this court, but the libelants did not appeal, and of course they cannot assign error nor can they be heard in opposition to the last-named decree. On the contrary, the decree is conclusive as against the libelants, that the steamer was in fault, and the only question presented by the appeal of the claimants is whether the circuit court erred in determining that the bark also was in fault, for if she was, then the decree of the circuit court must be affirmed, but if she was not, then the decree of the circuit court must be reversed, and the cause remanded with directions to enter a decree affirming the decree of the district court.

Vessels engaged in commerce are held liable

for damage occasioned by collision on account of the complicity, direct or indirect, of their owners, or the negligence, want of care or skill on the part of those employed in their navigation. Owners appoint the master and employ the crew, and consequently, are held responsible for their conduct in the management of the vessel.

Allusion was frequently made in the course of the argument to the fact that the bark was in charge of a tug, which renders it necessary to make one or two remarks upon that subject before proceeding to examine the real question presented for decision.

44*] *Whenever the tug is under the charge of her own master and crew, and in the usual and ordinary course of her employment undertakes to transport another vessel, which for the time being has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary, or usually employed, she is legally responsible for the navigation of both vessels. Cases arise, undoubtedly, where both the tug and the tow are jointly liable for the consequences of a collision, as when those in charge of the respective vessels jointly participate in their control and management, and the master and crew of each vessel are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Where the officers and crew of the tow, as well as the officers and crew of the tug, participate in the navigation of the vessels, and a collision with another vessel ensues, the tug alone, or the tow alone, or both jointly, may be liable for the consequences according to the circumstances, as the one or the other, or both jointly, were either deficient in skill or were culpably inattentive or negligent in the performance of their duties. *Sturgis* v. *Boyer*, 24 How. 121, 16 L. ed. 594; *Sproul* v. *Hemmingway*, 14 Pick. 5. Much examination of that subject, however, is unnecessary in this case, as neither party imputes any fault to the tug, and it is clear from the evidence that the imputation, if made, could not be sustained, as it fully appears that she seasonably ported her helm and allowed the steamer to pass her in safety.

All three of the vessels—that is, the tug, the tow, and the steamer—had their signal lights properly displayed, and the respective lights were burning brightly and were easily distinguishable. Suggestion is made that the lookout of the steamer was incompetent, but the suggestion is entitled to no weight, even if it be well founded in fact, as the proof is entirely satisfactory that the two colliding vessels were seen by each other in season to have taken every precaution to avoid a collision. They were approaching each other from nearly opposite di-

45*] rections, which clearly rendered it *proper, as between the tug and the steamer, that each should port their helms and pass to the right. Seasonable attention to that rule would certainly have prevented a collision if the tow had followed the movement of the tug, as she was bound to do, without unnecessary delay.

Although the bark was larger than the steamer, yet her headway was about the same as that of the steamer, as she was somewhat aided by the current in addition to the motive power of the tug. Larger in size and of greater length than the steamer, she probably would not obey her helm quite as quick as the tug or the steamer, but the evidence in the case fails to satisfy the court that the difference in that respect contributed in any degree to the collision.

Probably those in charge of the steamer hesitated for a time as to which side of the tug they would pass, as they proceeded on their course, heading nearly stem on, until the tug and steamer approached within half a mile or less of each other, when the tug sounded one whistle and in half a minute repeated the same, as a signal that she wished the steamer to pass on her port side. To that signal the steamer responded, giving one whistle to signify her assent to that request, and immediately ported her helm, and the tug at the same time ported her own helm, turning the vessel half a point to starboard, and became steady on her course, the tug and steamer passing each other port to port, leaving a berth between the vessels of about one hundred feet, as appears by the weight of the testimony.

Undisputed proof is exhibited that the steamer ported her helm, and that she turned to the right half a point and then steadied and continued her course, and it is quite clear that there would have been no collision if the bark had ported her helm and followed the tug, and it is highly probable that the disaster would not have happened if she had kept her course without changing her helm; but she neither ported her helm nor kept her course, as is fully shown by the evidence. Instead of turning to the right, as she should have done, she starboarded her helm when the steamer was alongside the tug and sheered to port, shutting out from the steamer *the view of her red light and [*46 showing only her green light, and continued on that course till she struck the steamer. Orders were given by those in charge of the steamer to put her helm hard a-port, but it was too late, and the collision took place.

Many theories have been advanced by the claimants as showing that the bark did not sheer, but it is not possible to adopt any one of them without rejecting conceded facts or facts fully proved, or without coming to the conclusion that the two vessels did not collide, which would be in direct conflict both with the libel and answer and the testimony of every witness in the case who was present when the steamer sunk in the river.

Ingenious efforts are also made in argument to show that the berth between the steamer and the tug when they passed each other was not so great as that represented by the libelants. Suppose that theory be admitted, still it cannot benefit the claimants, so long as it is conceded that the distance between them at the time was sufficient to enable them to pass in safety, and that the steamer, while they were abreast, ported her helm and turned to the right, which is as satisfactorily proved as it is that the steamer and tug passed each other in safety.

Proved as these facts are beyond doubt, it is vain to suppose that any theory can be adopted by the court which will make it necessary for the court to shut their eyes to the evidence by which those facts are established. Suffice it to say, the collision did occur, and the court is satisfied that the wheel man of the bark misunderstood the order to port and supposed it was an order to starboard preparatory to cast-

ing off from the tug. He knew that the bark, while she continued in tow, ought to follow the tug, but they had reached the place where vessels in tow usually cast off from the tug, and the master was engaged in adjusting the towage account, and all on deck were looking for the order to cast off, and under those circumstances it is less strange than it otherwise might have been that the wheel man should have made such a mistake. Undoubtedly, it was a great mis-
47*] take, *but it has been fully proved, and it is clear that the collision would not have occurred if it had not been made.

Whether the steamer was or was not also in fault is not a question in this case, as that question was conclusively settled in the circuit court, but it may not be improper to remark that if she was so it was because she did not put her helm hard a-port before she passed the tug, and the moment those in cnarge of her navigation noticed that the bark had shut in her red light and began to display her green light, showing that she had starboarded her helm and was turning to the left.

Errors committed by one of two vessels approaching each other from opposite directions do not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent a collision, as the act of Congress provides that in obeying and construing the prescribed rules of navigation due regard must be had to the special circumstances rendering a departure from them necessary in order to avoid immediate danger. 13 Stat. at L. 61.

Viewed in the light of that exceptional rule, the better opinion, perhaps, is, that the entire decree of the circuit court was correct.

Decree affirmed.

JONATHAN STURGES *et al., Plffs. in Err.*,
v.
JOHN H. DRAPER and Henry Draper, Exr., etc., of Simeon Draper, Deceased, late Collector of the Port of New York.

(See S. C. "*Sturges* v. *The Collector*," 12 Wall. 19-30.)

Duties on imports—construction of act.

The act of the 14th of July, 1862, levied on all goods, wares, and merchandise of the growth or produce of countries beyond the Cape of Good Hope, a duty of ten per cent ad valorem in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production, leaving all other articles embraced in the first clause or the body of the section subject to the new duty therein prescribed.

[No. 300.]

Argued Jan. 16, 1871. Decided Feb. 20, 1871.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case are fully stated by the court.

Messrs. Andrew R. Culver and **Geo. T. Curtis**, for plaintiffs in error:

The ten per cent provided to be collected and paid is to be in addition to the duties imposed, etc., etc., and the act assumes that there are some duties imposed, to which the ten per cent shall be in addition; a condition precedent, to give the statute any life or operation whatever, is, that there are some duties imposed to which the ten per cent shall be in addition.

There being no duty imposed by law upon the article of indigo, the ten per cent discriminating duty provided by the act of 1865, cannot be applied; as, by the express language of the statute, the ten per cent to be collected and paid is to be in addition to the duties imposed.

Should it be said, that if Congress intended to exempt indigo from the ten per cent additional duty imposed by the acts of 1864 and 1865; why not have enumerated it when specially exempting raw cotton and raw silk in those acts? The answer is that, at the time of the passage of the acts of 1864 and 1865, raw cotton and the raw silk which is specially exempted in those acts, were liable to a duty.

Congress, wishing to exempt the two articles of merchandise, *viz.:* "raw silk not more advanced in manufacture than singles, tram, thrown, or organzine" and "raw cotton," from the additional duty of ten per cent, found it necessary to specially exempt them by name, as they were liable to a duty at the time of the passage of the acts imposing the additional duty of ten per cent. Had either or both of these articles been free of duty, such special exemption would not have been necessary.

To foster commerce, no less than to obtain revenue and encourage, incidentally, manufactures, is plainly the policy of our tariff laws.

By an examination of the tariff acts in force, it will be seen that the only articles of merchandise, the growth and production of countries east of the Cape of Good Hope, which are admitted to entry in the United States free of duty (except raw silk not being double, twisted, or advanced in manufacture in any way) are crude articles used for tanning or dyeing.

Those articles are indigo, tumeric, red sanders-wood, and sapan-wood. None of these articles are or can be produced in the United States, with the exception of indigo, which, before the late Rebellion, was produced in the state of South Carolina, but only in very limited quantities and during and since the war, it is believed that the production of the article in that state has entirely ceased The articles enumerated, not only being absolutely required by manufacturing establishments in the United States, who are obliged to compete with manufactories of other countries, and it being impossible to produce them or a substitute therefor in the United States, it is submitted that it was not only the policy but the design of Congress, in the interest of commerce, to exempt those articles from the payment of any custom duties.

As Congress wishes to foster an honest and honorable commerce by its laws, no less than to obtain revenue, it is neither the true policy nor the right of departments nor of the courts nor is it presumed to be tneir desire, to thwart the views of Congress or embarrass mercantile business when not attended by equivocation and fraud, or to throw doubts or difficulties over the liberal course proper to be pursued generally towards the community in any branch of trade.

Marriott v. *Brune*, 9 How. 633.

In case of doubt (and it must be admitted that, in the most favorable view that can be taken, it is a question of great doubt whether the duties charged and exacted in this case are legally collectible) between the authority and the individual, the benefit of the doubt, all other reasons being equal, ought to be given to the individual, and not to the authority.

Lieber, 17; rule of Con. of Stat.; Sedgw. Stat. Law. 289.

"If he who could and ought to have explained himself clearly and fully, has not done it, it is the worse for him." This is a maxim of the Roman law.

Vattel's Rule of Con. of Stat.; Sedgw. Stat. L. 266.

"Statutes levying duties on citizens or subjects, are to be construed most strongly against the government and in favor of the citizen or subject, and their provisions are not to be extended, by implication, beyond the clear import of the language used.

U. S. v. *Wigglesworth*, 2 Story, 369; *U. S.* v. *Morse*, 3 Story, 87.

"Laws imposing duties are never construed beyond the natural import of the language used, and duties are never imposed upon the citizens upon doubtful interpretations; for every duty imposes a burden upon the public at large and is construed strictly, and must be made out in a clear and determinate manner from the language of the statute."

Adams v. *Bancroft*, 3 Sumn. 387; *Powers* v. *Barney*, 5 Blatchf. 202.

"The reason of the law or of the treaty, that is to say, of the motive which led to the making of it, is the most certain clue to lead us to the discovery of its true meaning."

Vattel's Rule of Con. of Stat.; Sedgw. Stat. Laws, 272.

"When a statute is revised, some parts being omitted, the parts omitted are to be considered as annulled."

Pingree v. *Snell*, 42 Me. 53.

"A statute revising the whole subject-matter of a former statute, and evidently intended as a substitute for it, will operate as a repeal of the former statute, although it contains no express words to that effect."

Farr v. *Brackett*, 30 Vt. 344.

If a subsequent statute professes or manifestly intends to regulate the whole subject to which it relates, it repeals all former statutes, so far as it differs from them.

Gorham v. *Luckett*, 6 B. Mon. 146; *Daviess* v. *Fairbairn*, 3 How. 636; *Plank Road Co.* v. *Allen*, 16 Barb. 15; *Canal* v. *Chicago*, 14 Ill. 334.

"While it is the duty of the courts, in construing statutes, to give effect to the intent of the law making power, and to seek for that intent in every legitimate way; yet, it is to be sought, first of all, in the words and language employed, and if the words are free from ambiguity and express clearly the sense of the framers, there is no occasion to resort to other means of interpretation."

The natural and obvious meaning should be taken without resorting to subtle and forced construction.

Lieber, Leg. and Pol. Herm. 87; 2 Ruth Inst. ch. 7, § 2; Story, Const. § 292; 4 Hill, 328; 20 Wend. 561; Court of Appeals, 1854; *McClusky* v. *Cromwell*, 11 N. Y. 593.

Revenue and duty acts are to be construed according to the true import and meaning of their terms, and when the legislative intention is ascertained, that, and that only, is to be our guide interpreting them.

U. S. v. *Breed*, 1 Sumn. 160.

Messrs. **Amos T. Akerman,** *Atty. Gen.*, and *C. H. Hill, Asst. Atty. Gen.*, **B. H. Bristow,** *Solicitor Gen.*, for defendants in error:

By § 14 of the act of July 14, 1862, 12 Stat. at L. 557, 558, it was enacted that, from and after August 1, 1862, "there shall be levied, collected, and paid on all goods, wares and merchandise, of the growth and produce of countries beyond the Cape of Good Hope, when imported from places this side of the Cape of Good Hope, a duty of ten per cent ad valorem, and in addition to the duties imposed on any such articles, when imported directly from the place or places of their growth or production."

This court, affirming the decision of Mr. Justice Nelson in the circuit court, held that the above section imposed a duty on articles otherwise included within its provisions, although at the time of its passage they were exempt from duty.

Hadden v. *The Collector*, 5 Wall. 107, 18 L. ed. 518.

The interpretation put upon the act of July 14, 1862, became a part of the statute itself, and when Congress, in subsequent statutes, used the same or substantially the same language, the legal presumption is, that it intended that the language should bear the judicial construction previously given to it.

Kirkpatrick v. *Gibson*, 2 Brock. 388; *Com.* v. *Hartnett*, 3 Gray, 450.

Section 14 of the act of July 14, 1862, was repealed by § 18 of the act of June 30, 1864, 13 Stat. at L. 216, which enacted "that, on and after the day and year this act shall take effect, there shall be levied, collected, and paid on all goods, wares, and merchandise, of the growth or produce of countries east of the Cape of Good Hope, except raw cotton, when imported from places west of the Cape of Good Hope, a duty of ten per cent ad valorem, in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production."

It is clear that the same construction must be put upon this act as was put upon the act of 1862; a construction strengthened by the special exception of raw cotton.

This section was substantially re-enacted in § 6 of the act of Mar. 3, 1865, 13 Stat. at L. 493, which was in force when these goods were imported; the only difference being that the exception is extended to raw silk.

Vague theories as to the supposed policy of the government are not entitled to much weight in considering the construction to be placed on acts of Congress.

Hadden v. *The Collector*, *ubi supra*.

The object of these additional duties was clearly to increase the revenue, which the exigencies of the government rendered necessary. In distributing this additional burden, it would seem to be proper that those favored articles, which had heretofore been admitted free of duty, should bear some portion of it.

Laws imposing duties and taxes are not to be construed strictly against the government, but liberally, so as to effectuate the purpose of the legislature.

Taylor v. *The U. S.* 3 How. 197; *Cliquot's Champagne*, 3 Wall. 114–145, 18 L. ed. 116–121; *U. S.* v. *Hodson*, 10 Wall. 395, 19 L. ed. 937.

Mr. Justice **Clifford** delivered the opinion of the court:

Moneys paid for import duties, when illegally levied, may be recovered back by the owner, importer, or consignee in an action of assumpsit against the collector by whom the same were exacted, if the payment was made under written protest, as required by law, and the party making the payment failed to obtain redress by appeal seasonably taken to the Secretary of the Treasury. 13 Stat. at L. 215.

Forty-one chests of indigo, the product of India, were on the 7th of July, 1865, imported by the plaintiffs from London, England, into the port of New York, and the agreed statement shows that the late collector of that port levied and exacted as duties thereon ten per cent ad valorem; that the plaintiffs paid the same under written protest, and that the decision of the collector levying the duties, on appeal duly taken to reverse the same, was affirmed by the Treasury Department.

They protested that the assessment was illegal upon the ground that the goods were entitled to be admitted to entry free of duty, and having failed to obtain redress from the Secretary of the Treasury for what they regarded as *25] an illegal *exaction, they brought an action of assumpsit against the executors of the late collector to recover back the amount so exacted and paid.

Process having been issued and served, the defendants appeared and the parties went to trial, but they ultimately submitted the case to the decision of the court upon an agreed statement of facts. Before the case was finally submitted, however, the parties were heard, and the court subsequently rendered judgment for the defendants, and the plaintiffs sued out a writ of error and removed the cause into this court.

Whether the goods imported in this case were dutiable or not depends upon the construction to be given to the 6th section of the act of the 3d of March, 1865, which provides that there shall be hereafter collected and paid on all goods, wares, and merchandise, of the growth or produce of countries east of the Cape of Good Hope (except raw cotton and raw silk as reeled from the cocoon, or not further advanced than tram, thrown or organzine) when imported from places west of the Cape of Good Hope, a duty of ten per cent ad valorem, in addition to the duties imposed on any such article when imported directly from the place or places of their growth or production. 13 Stat. at L. 493.

Strike out the last clause, commencing with the words "in addition," and the body of the section would be as clear as any enactment can be that all goods, wares, and merchandise (save the two excepted articles) imported from places west of the Cape of Good Hope, if grown or produced in any country east of the Cape of Good Hope, are by that provision subject to a duty of ten per cent ad valorem.

Argument upon that subject is unnecessary, as the proposition is as plain as anything in legislation can be, but if that clause had been omitted, goods imported from London, the growth or production of India, would not have been subject to any higher rate of duty than goods of like kind imported directly here from India, the place of their growth or production, unless the goods were, by antecedent laws, subjected *to a rate of duty higher than that [*26 imposed in the section under consideration, which would have defeated wholly or partially both purposes which Congress had in view in enacting the new provision.

Congress desired to raise more revenue from importations consisting of articles grown or produced in countries east of the Cape of Good Hope, and at the same time to preserve and continue the discrimination established by existing laws in favor of importations made directly from the countries where the articles imported were grown or produced.

Had the last clause of the section been omitted, the new provision, in any view of the subject, would not have augmented the revenue to any considerable extent, and if construed as repealing the prior laws upon the same subject its effect would have been very largely the other way, and it would have operated as a discrimination against the direct trade and in favor of the importation of such articles from countries west of the Cape of Good Hope, or in other words, it would have reversed the policy of the government by encouraging the indirect instead of the direct trade in the articles of commerce grown or produced in those distant countries. Evidently, therefore, the clause providing that the duty levied by the section was in addition to the duty imposed on any such article when imported directly from the place or places of their growth or production, was an indispensable provision to carry into effect the purposes intended to be accomplished by the enactment.

All articles of the growth or product of countries east of the Cape of Good Hope, except the two named as exempted, when imported from places west of the Cape are declared to be subject to the rate of duty therein prescribed, and to prevent any misconception as to the intention of Congress and to close the door against any suggestion that the new provision repealed or modified the prior law, it was provided that the new duty was in addition to the duties previously "imposed on any such article" when imported directly from the place or places of their growth or production. Ten per cent ad valorem is imposed on all such goods, wares, and *merchandise, except the two articles [*27 named as exempted, whether they were or were not subject to duty as articles of direct trade under any antecedent law, if they fell within the conditions specified in the 6th section of the act imposing the duty.

Certain articles of growth or production of countries east of the Cape of Good Hope were subject to duty, even when imported here directly from the place of their growth or production, while other articles, when so imported, were entitled to be admitted to entry free of duty. Articles of the kind described in the section, not dutiable as articles of the direct trade under any antecedent law, were to pay only the ten per cent ad valorem specified in the section.

but all articles previously dutiable as articles of the direct trade, save the two exempted in the body of the section, were to be subject, in case they were imported here as articles of the indirect trade, to a duty of ten per cent ad valorem in addition to the duty imposed under any prior law, in case the articles were imported here directly from the place or places of their growth or production. Construed in that way, both of the purposes which Congress had in view were accomplished, as the provision had the effect to augment the revenue, and at the same time to preserve and continue the discrimination created by antecedent laws in favor of the direct trade, which is in accordance with the policy of our external revenue system as exhibited in all our laws upon the subject.

Raw cotton and raw silk as reeled from the cocoon, or not further advanced than tram, thrown or organzine, were exempted from the new duty, or any other, by an exception inserted in the body of the section, and it is a reasonable conclusion that if Congress had intended to exempt any other articles of growth or production of those countries, the articles would have been enumerated and included in that exception. *Expressio unius est exclusio alterius.*

Such an exception as that inserted in the body of the section was indispensable to exempt any such article from the new duty, as the introductory words of the section include, in express terms, all goods, wares and merchandise, of 28*] the *described character, when imported from places west of the Cape of Good Hope. Unless it can be assumed that the words "all goods, wares, and merchandise" are not used in their ordinary sense, it must be understood that they include all such articles of importation not specifically exempted, as the exception proves the rule, and shows to a demonstration that all such articles, except those two, are subject to the prescribed duty, and that the last clause was not superadded to exempt any other articles from the operation of the introductory words of the section, but to prevent the entire provision from being misunderstood and misapplied, so as to defeat one or both of the purposes which Congress had in view in passing the law. Confirmation of this view is derived from the antecedent legislation of Congress upon the same subject.

Duties on imports were temporarily increased by the act of the 14th of July, 1862, the 14th section of which levied "on all goods, wares, and merchandise of the growth or produce of countries beyond the Cape of Good Hope a duty of ten per cent ad valorem, and in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production."

Attention need only be called to the last clause of that enactment, as it is not controverted that the legal effect of the body of the section, under which the duties in this case were levied and collected, is substantially the same as the corresponding portion of that provision, but the suggestion is that the last clause in the last act is materially different from that of the former, as it does not contain the word "and" before the words "in addition," as employed in the prior act. Drop the word "and" before the words "in addition," as employed in the former law, and the language of the respective clauses is the same without the variation of a single letter. 12 Stat. at L. 557; 13 Stat. at L. 493.

Congress, having subsequently repealed that provision, found it necessary at a later period, to re-enact it, and in reproducing *the [*29 provision the word "and" before the words "in addition," as employed in the prior law, was dropped evidently because it was a redundant word wholly unnecessary to give expression to the meaning and intention of the law makers. When the act was transcribed for official publication the word "and" was italicized by the compiler of the acts of Congress as expressive of his opinion that it was a redundant word, as it plainly appears to be to everyone acquainted with the revenue laws and the subject-matter to which the particular provision relates. 13 Stat. at L. 216; Stat. at L. 493.

Importations of raw silk, soon after the passage of that act, were made from Liverpool, England, into the Port of New York, and it was agreed in the statement of the case that the articles imported were the products of Persia and China. Ten per cent duty was exacted, and the merchant paid the same under protest and brought assumpsit against the collector to recover back the amount paid. He was defeated in the circuit court and he removed the cause into this court, where the judgment of the circuit court was affirmed by the unanimous opinion of this court. In disposing of the case the court say that the latter clause does not qualify the general language, "on all goods, wares, and merchandise" employed in the body of the section, so as to exclude from it the articles exempted from duty under prior acts of Congress. Instead of that, the court proceeds to say that it only provides that the duty laid by the body of the section "shall be in addition to existing duties on such articles when imported directly from their places of growth or production;" that such articles as already pay a duty when imported directly from those places shall pay a further duty, as therein prescribed, if imported from countries west of the cape, the object being to increase the duty upon the articles when not imported directly from their places of growth or production. *Hadden* v. *Collector*, 5 Wall. 112, 18 L. ed. 520.

Based as that opinion is upon the proposition that the *latter clause of the section does [*30 not qualify the first clause imposing the new duty, it is decisive of the question before the court, as it is clear that the word "and" before the words "in addition" was not regarded as of any importance or as contributing in any degree to that conclusion. On the contrary, the court decided on that occasion, what undoubtedly is correct, that the words "any such articles," in the last clause of the section, "do not mean all the articles embraced in the first clause, but only such of them as were already subject to duty," to which we add, leaving all the rest subject to the new duty imposed by the first clause or the body of the section.

Support to that conclusion was also drawn, in that opinion, from the 2d section of the act of the 3d of March, 1863, modifying the 14th section of the prior act, and providing that cotton and raw silk, as reeled from the cocoon, of the growth or produce of countries beyond the Cape of Good Hope, should be exempted from

any additional duty when imported from places this side of the Cape for two years from and after the passage of the act. 12 Stat. at L. 557; 12 Stat. at L. 742.

Unaided by one or two remarks of the circuit judge in disposing of that controversy in the circuit court, the defense here would be entirely without support, but it is a sufficient answer to those remarks to say that the decision of the case, when removed here by writ of error, was not placed upon that ground; that the ground assumed in this court was that the last clause of the section, when properly construed, did not qualify the body of the section in respect to the articles not previously dutiable; that it merely provided that the new duty was an additional one in respect to articles subject to duty under prior laws, leaving all other articles embraced in the first clause or the body of the section subject to the new duty therein prescribed; and the court, as now constituted, is clearly of the same opinion.

Judgment affirmed.

CHARLES G. MILLER *et al.*, *Plffs. in Err.*, *v.* THE PEOPLE OF THE STATE OF NEW YORK.

(See S. C. "*Miller* v. *The State*," 12 Wall. 159-162.)

Priority of causes—action in name of state, on relation of another.

Motions to advance a cause on the calendar are not granted as of course, even when both parties concur.

A suit in the name of the state, or on the relation of an individual, is not within the act of Congress requiring that causes wherein a state is a party shall have a priority over other causes.

[No. 454.]

Argued Feb. 24, 1871. Decided Feb. 27, 1871.

IN ERROR to the Court of Appeals of the State of New York.

On motion to advance.

Suit in the nature of quo warranto was brought in the supreme court of New York, in Monroe county, by the defendants in error, and seven persons claiming to be directors of the Rochester & Genesee Valley R. Co., to try the title of the plaintiffs in error, also claiming to be such directors. Judgment having been given at a special term for the plaintiffs, the defendants took an appeal to the general term of said court. In that court the seven persons, joined as plaintiffs below, were dropped from the case, and the people of the state of New York alone were made respondents. The judgment of the special term having been affirmed, the defendants took a further appeal to the court of appeals, by which the said judgment was again affirmed; whereupon the said defendants sued out this writ of error.

The case is sufficiently stated by the court.

Mr. **Theodore Bacon** for plaintiffs in error.

Messrs. B. M. Champlain and **J. C. Cochrane** for defendants in error.

Mr. Justice **Clifford** delivered the opinion of the court:

The motion is that the cause be advanced, and that it be heard at such time as the court shall direct, in preference to civil causes between private parties.

Founded, as the motion is, upon the act of Congress of the *30th of June, 1870, it [***161** becomes necessary to inquire and determine whether the case is within the terms of that act, as if it is, the motion should be granted, and the cause set for hearing as there directed.

Provision is there made to the effect that in all suits and actions now pending or which may hereafter be brought in a Federal court, whether the suit is original or brought into said courts by appeal or writ of error or by removal from a state court, wherein a state is a party, or where the execution of the revenue laws of any state may be enjoined or stayed by judicial order or process, it shall be the duty of any court in which such case may be pending, on sufficient reason shown, to give such cause the preference and priority over all other civil causes pending in such court between private parties.

Reliance, however, is placed, in support of the motion, upon the next clause of the act, which provides that the state or the party claiming under the laws of the state, the execution of whose revenue laws is enjoined or suspended, shall have a right to have such cause heard at any time after such cause is docketed in such court in preference to any other civil cause pending in such court between private parties, as provided in the last phrase of the preceding clause. 16 Stat. at L. 176.

No objection to the motion is made by the defendants. Instead of that they have filed one to the same effect, but such motions are not granted as of course, even when both parties concur, as such an order, if improperly made, would prejudice the rights of other parties on the calendar, and in view of that consideration it becomes necessary to determine whether the case is one where the parties, or either of them, are entitled to such preference, and to enable us to determine that point we have examined the record, and are satisfied that the motion must be denied.

The action was one in the nature of a quo warranto to try the title of the defendants, as directors of the Rochester & Genesee Valley Railroad, a corporation created by the laws *of the state of New York, and doing [***162** business in that state, and the real controversy is between two sets of directors as to which set is entitled to manage and control the affairs of the corporation.

Both parties assume in argument that the suit is in the name of the state, or the people of the state alone, and it is upon that ground that it is claimed that the motion ought to be granted; and if the fact was so it may be conceded that the cause ought to be advanced. Such, however, is not the fact. On the contrary, the suit was brought not only in the name of the people of the state of New York, but also in the name of seven persons claiming to be directors of the railroad company, and that they, as such, are entitled to manage and control its affairs or to participate in such management and control; and they charge that

the defendants, without any legal authority, right or warrant whatsoever, have usurped and entered upon said offices of directors of the said corporation, and that they still unlawfully hold and exercise those rights and franchises. Subsequently, when the cause was transferred to the general term, the names of the seven directors joined as plaintiffs in the court of original jurisdiction were dropped in the title of the case, but the whole proceedings in the case in all the courts of the state where the case was litigated were upon the declaration as originally filed, without any amendment in that behalf. Evidently the suit is one in the name of the state, in the relation of the seven persons who charge that the defendants have unlawfully usurped the office of directors from which they have been unlawfully ousted, or to which they are justly entitled by a legal election. Suggestion may be made that the state is the only party plaintiff named in the writ of error, but it is the duty of the court in such a case to open the record and ascertain whether the case, in point of fact, is one where the parties are entitled to be heard in preference to other civil causes between party and party pending on the calendar.

Such a case is not within the act of Congress, and the motion is denied.

163*] *ELIAS WARD, *Plff. in Err.*,
v.
STATE OF MARYLAND.

(See S. C. 12 Wall. 163, 164.)

Advancing causes on the calendar—criminal causes.

Motion to advance a cause on the calendar is not within the act of June 30, 1870, where it is not filed by the state, nor by a party claiming under the laws of the state.

Under rule 30 of the court, which provides that criminal cases may be advanced by leave of the court on motion of either party; the motion is addressed to the discretion of the court, and where the defendant is not in jail, the motion will be denied.

[No. 204.]

Motion filed Mar. 3, 1871. Decided Mar. 6, 1871.

IN ERROR to the Court of Appeals of the State of Maryland.

On motion to advance.

This case arose upon an indictment in the criminal court of Baltimore, state of Maryland, against plaintiff in error, for selling certain merchandise without the license required by the laws of the state. Judgment having been given against the defendant and confirmed upon appeal by the court of appeals of that state, he sued out this writ of error. Now, by counsel, the plaintiff in error moves to advance the cause upon the calendar.

The case is further stated by the court.

Messrs. **Wm. M. Evarts** and **J. H. Ashton** for plaintiff in error.

Mr. Isaac D. Jones for defendant in error.

Mr. Justice **Clifford** delivered the opinion of the court:

Motion to advance the cause filed by the plaintiff in error. Indictment. The parties agreed that the defendant on the day and at the place named in the indictment did sell the articles of merchandise therein named without obtaining a license, as required by the laws of the state. Plea not guilty. Issue tried by court. Finding for the state. He moves the court to advance the cause.

Clearly the motion is not within the act of Congress of the 30th of June, 1870, as the motion is not filed by the state, nor by a party claiming under the laws of the state. 16 Stat. at L. 176.

Probably it is made under the 30th rule of the court, which provides that criminal cases may be advanced by leave of the court on motion of either party. Under that rule the motion is addressed to the discretion of the court, and inasmuch as it appears that the defendant is not in jail, the court fails to see any reason for granting the motion.

Motion denied.

JAMES BIGLER, *Appt.*,
v.
WILLIAM WALLER and Robert Saunders.

(See S. C. 12 Wall. 142-150.)

Waiver by admission of service—when appeal is a supersedeas—filing new bond.

The attorney of record may waive service and acknowledge notice on the citation.

A mere formal objection to a citation is waived by a full admission of service, signed by counsel.

To make the appeal a supersedeas, the security must be given within ten days from the rendering of the decree.

Defects in the bond may be obviated by granting leave to the appellant or plaintiff in error to file a new bond within a reasonable time, to be fixed by the court.

[No. 352.]

Argued Mar. 24, 1871. Decided Mar. 27, 1871.

APPEAL from the Circuit Court of the United States for the District of Virginia.

On motion to dismiss.

The history and facts of the case fully appear in the opinion of the court.

Mr. **C. Robinson** for appellees.

Messrs. E. L. Fancher and **W. F. Mattingly** for appellant.

Mr. Justice **Clifford** delivered the opinion of the court:

The record shows that the appellant, on the 14th of June, 1866, instituted a suit in equity in the circuit court against William Waller and Robert Saunders, for the cause of action set forth in the bill of complaint. Among other things he alleged that he entered into an agreement in writing with William Waller for the purchase of certain real estate lying in the county of York and state of Virginia; that the said respondent, on the 10th of May, 1853, executed to the complainant a deed of the said real estate, and that the complainant, on the same day, made the cash payment as stipulated in the agreement, and gave to the respondent, at

the same time, his obligation to pay the balance of the purchase money at the times therein specified; that on the 22d of June, in the same 146*] year, the complainant *executed to the other respondent a trust deed of the premises to secure the balance of the consideration which he agreed to pay for the real estate, as stipulated in that obligation; that he went into possession, made valuable improvements and continued to make the stipulated payments until April, 1861, when the war broke out, and he was compelled to leave the state; that, after he left the state, Waller authorized the other respondent, as such trustee, to make sale of the real estate, and the complainant alleges that the trustee effected the sale without publishing the notice required by the terms of the deed of trust, and that he satisfied the said obligation out of the proceeds of the sale, and has failed to account to the complainant for the balance of the proceeds; that Waller became the purchaser of the real estate at that sale; that he immediately took possession of the same, together with certain personal property of great value belonging to the complainant; that he sold the same and converted the proceeds to his own use, and applied the same to the payment of the balance due on the said obligation; that he also rented the real estate and received large sums of money as rents; that he, the complainant, subsequently succeeded, through the aid of our military authorities, in recovering possession of the real estate, but that he found it in a ruinous condition; that since that time, to wit, on the 11th of November, 1865, Waller instituted a suit against him on the said obligation in the supreme court of the city and county of New York, to recover what he claims to be due thereon; that subsequently the other respondent posted up, in the county where the real estate is situated, a notice "that he would, at the request of said Waller, in a few weeks, sell said real estate."

Based on these and other similar allegations, the charge is made that Waller may induce the trustee so to act in regard to the sale of the premises, as to cheat and defraud the complainant; therefore he prays that the trustee may be enjoined from selling the said real estate, and that the said Waller may be enjoined from assigning his interest in the said obligation until the suit in the supreme court of the city and 147*] *county of New York is determined, and for an account; and that the respondents may be required to deliver up all deeds and papers in their possession concerning said sale.

Suffice it to say, without entering into details, that such proceedings were had that a decree was entered that the appellant should pay to William G. Waller, administrator of William Waller, deceased, the sum of $17,377 in coin, and costs, to the defendants.

Dissatisfied with that decree, the complainant appealed to this court, which is the case involved in the motion.

Pending the suit here the appellees have appeared specially and filed a motion to dismiss the appeal upon two grounds: (1) Because the citation is addressed to the original parties, one or both of whom deceased before the final decree; (2) because the bond given to prosecute the appeal is executed to a deceased respondent and not to the administrator in whose favor the decree was entered.

Undoubtedly, the citation is irregular, as it should be addressed to the actual parties to the suit at the time the appeal was allowed and prosecuted. Where a party dies before the appeal is allowed and prosecuted the suit should be revived in the subordinate court, and the citation, as matter of course, should be addressed to the proper party in the record at that time.

Notice is required by law, and where none is given, and the failure to comply with the requirement is not waived, the appeal or writ of error must be dismissed, but the defect may be waived in various ways, as by consent or appearance or the fraud of the other party. Service of the citation may be made upon the attorney of record of the proper party. *Bacon* v. *Hart*, 1 Black, 38, 17 L. ed. 52.

Unquestionably, the attorney of record may also waive service, and acknowledge notice on the citation, as in that behalf he represents the party. *Grosvenor* v. *Danforth*, 16 Mass. 74; *Adams* v. *Robinson*, 1 Pick. 461.

On the citation in this case is the following indorsement: *"I hereby acknowledge [*148 service of the within citation. James Alfred Jones, counsel for the defendants in this cause in the circuit court of the United States for the district of Virginia."

Viewed in any reasonable light, it seems to the court that the attorney knew that the appeal was allowed by the court and was prosecuted by the appellant, which is the only purpose intended to be effected by the citation. Having been counsel in the cause, the party signing that certificate must have known that the suit had been revived, as that proceeding took place before the final decree was entered. Such a service would be sufficient, beyond all doubt, if there had been no error in the form of the citation; and as that objection is merely a formal one, we are all of the opinion that it must be considered as waived by the circumstantial language of the certificate signed without objection by the attorney of record in the circuit court.

2. Appeals, from decrees of the circuit court to this court, are allowed where the matter in dispute, exclusive of costs, exceeds the sum or value of $2,000, and the provision is that such appeals shall be subject to the same rules, regulations and restrictions as are prescribed in law in case of writs of error. 2 Stat. at L. 244.

Good and sufficient security must be taken by every justice or judge who signs the citation, that the plaintiff in error shall prosecute his writ to effect and answer all damages and costs if he fail to make his plea good, and in order that the writ of error may operate as a supersedeas and stay execution the writ must be served by a copy thereof being lodged for the adverse party, in the clerk's office where the record remains, within ten days, Sundays exclusive, after the judgment was rendered or the decree was passed. 1 Stat. at L. 85. Such a service is not required in an appeal, but the requirement is that the appeal must be taken and allowed, in cases where it is required to be allowed, within the same period of time, and in *both cases, that is, whether the [*149

cause is removed by writ of error or by appeal, the plaintiff in error or the appellant must give the required security within the ten days, Sundays exclusive, in order that the writ of error or appeal may operate as a supersedeas. "What is necessary is that the security be sufficient, and when it is desired to make the appeal a supersedeas, the security must be given within ten days from the rendering of the decree." *Rubber Co.* v. *Goodyear*, 6 Wall. 156, 18 L. ed. 763; *Catlett* v. *Brodie*, 9 Wheat. 553. Unless taken within the ten days, an appeal cannot be made to operate as a supersedeas, but a party appealing within that time may not desire that the appeal shall have that effect, and in that event all that can be required of him is that he shall give good and sufficient security for costs, including "just damages for delay." Rule 32; 1 Stat. at L. 404.

Argument to show that the bond in this case is irregular and defective is unnecessary, as it is clear that it should be given to the opposite party or parties in the suit, but it does not follow, by any means, that the appeal must be dismissed. On the contrary, it is the constant practice of the court to allow such defects to be obviated by granting leave to the appellant or plaintiff in error to file a new bond within a reasonable time, to be fixed by the court, in view of all the circumstances when the application is made. *The Dos Hermanos*, 10 Wheat. 306; *Brobst* v. *Brobst*, 2 Wall. 96, 17 L. ed. 905.

Even if the appeal is not dismissed, it is suggested by the appellees that it should not be allowed to continue to operate as a supersedeas, because the appeal bond or the required "good and sufficient security" was not given within the ten days from the date of the decree, but it is a sufficient answer to that suggestion at this time to say that no such question is before the court. Such a question may arise hereafter, but the decision of the court at present is that the motion to dismiss must be granted unless the appellant file a sufficient appeal bond in the usual form within ten days in the same sum as that required by the Chief Justice who allowed the appeal.

150*] *Leave is granted to the appellees to file such a bond, but the court does not decide what the effect will be nor that it is or is not competent for this court in such a case to grant a supersedeas, as no such application is before the court.

ALEXANDER H. BAKER, *Appt.*,
v.
WILLIAM S. T. MORTON.

(See S. C. 12 Wall. 150-159.)

Deed void for duress—lien of Federal judgments—on lands obtained by duress.

A deed or other written obligation or contract, procured by means of threats to take the life of the person executing it, is inoperative and void.

Judgments recovered in the Federal courts are liens in all cases where they are so by the laws of the states.

The lien constitutes no property or right in the land itself, as it is merely a general lien securing a preference over subsequently acquired interests in the property, and is not valid on lands obtained by duress, as against the real owner.

[No. 117.]

Argued Mar. 24, 1871. Decided Apr. 3, 1871.

APPEAL from the Circuit Court of the United States for the District of Nebraska.

The bill in this case was filed by the appellant in the district court for Douglas county, in the territory of Nebraska. A decree having been entered in favor of the appellee, the complainant took an appeal to the supreme court of Nebraska. The case being undetermined at the time of the admission of said territory as a state, it was transferred to the court below. A decree having been entered in that court dismissing the bill, the complainant took an appeal to this court.

Messrs. **J. J. Redick** and *Briggs*, for appellant:

In the case of *Pierce* v. *Brown*, 7 Wall. 205, 19 L. ed. 134, decided by this court in 1868 term, the law on this subject is clearly and forcibly declared. The court says, Mr. Justice Clifford, delivering the opinion, that "moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient in law to destroy free agency, without which there can be no contract, because, in that state of the case, there is no consent.

The case under consideration is, in almost every particular and in all its facts, like the case above cited. The tracts of land are adjoining. The deeds were coerced at the same time and through the same instrumentality,—the Omaha Claim Clubs, led on by Pierce.

Pars. Cont. 319; Willard, Eq. 208; Chit. Cont. 217; 2 Wis. 261; 2 Greenl. Ev. 283; 5 Hill, 154; 15 Johns. 154; 2 Wend. 243; 6 Mass. 506; 3 N. H. 508.

It may be claimed that Morton's judgment is a lien on the land, from the fact that the legal title to the same was standing in the name of Pierce at the time the judgment was rendered. But the law is otherwise.

The general lien of a judgment creditor upon the lands of his debtor, is subject to all equities which existed against said lands in favor of a third person, at the time of the recovery of the judgment.

Buchan v. *Sumner*, 2 Barb. Ch. 165; *Ells* v. *Tousley*, 1 Paige, 280; *White* v. *Carpenter*, 2 Paige, 217; *Keirsted* v. *Avery*, 4 Paige, 9; 6 Barb. 19; 11 Barb. 490.

Morton only claims as a judgment creditor, and his lien, if any, is general, not specific. For aught that appears, Morton can make the amount of his judgment out of other property of the judgment debtor; for it is not shown that execution has been issued and returned unsatisfied. It was Morton's duty to first exhaust his legal remedies.

But there is no proof in the record showing that Morton has a judgment at all, or the amount or condition of the same. All that appears is from the allegations of the pleadings.

NOTE.—*Deed, when void for fraud, insanity, drunkenness, duress, undue influence, imbecility, infancy, or fraud on marriage, from ward to guardian, from cestui que trust to trustee, from heir to executor*—see note, 6 L. ed. U. S. 429.

Lien of judgment of Federal court—see note, 47 L. R. A. 469.

Morton claims that he loaned this money to Pierce in August, 1857, about the time the deed was coerced by Pierce from Baker, and the record shows that Baker was then, and ever since has been, in the actual possession of the land. Morton stands charged with notice.

See 2 Johns. Ch. 38; 2 Paige, Ch. 300; 3 Paige, Ch. 421.

Mr. **J. M. Woolworth,** for appellee:

The questions raised upon this record are exclusively questions of fact. Two courts, upon a consideration of this testimony, have decided that Baker did not make the deed while in duress.

This deed, which was made Aug. 10, 1857, stood unquestioned until Sep. 7, 1860, a period of three years. And what is further significant is that Baker worked for Pierce and afterwards settled with him, taking his note, which he traded off to Pierce's agent.

It is quite clear, notwithstanding the conflict of testimony which the record presents, that the deed was made after a negotiation and amicable settlement of the matter between the parties, and upon a consideration paid by Pierce at the time.

Admitting that the threats were addressed to Baker, they did not excite any fear on his part. He says himself that his uniform answer to them was one of resolution and defiance.

He says that he did not make the deed until advised by counsel; so that it appears not to have been so much fear, as an expectation of recovering the lands, which induced him to convey them.

It is not reasonable to suppose that these threats of an injury which might or might not be inflicted, and which it might or might not be in the power of Pierce to inflict, excited such fear in Baker as induced him to make the deed.

It is as far as possible from the fact, to claim that Baker was in such danger, threatened and impending, as was sufficient, in severity or apprehension, to overcome the mind or will of a person of ordinary firmness.

Pierce v. *Brown*, 7 Wall. 205, 19 L. ed. 134.

Mr. Justice Clifford delivered the opinion of the court:

Territorial courts are created by an act of Congress, and they usually possess jurisdiction of controversies of a civil nature, without regard to the inquiry whether the controversies, if they had arisen in a state, would have been cognizable in the tribunals of the state or in the Federal courts. 1 Stat. at L. 77; 9 Stat. at L. 209; *Benner* v. *Porter*, 9 How. 235.

By the organic act creating the territory of Nebraska the judicial power of the territory was vested in a supreme court and certain district courts, and the provision was that the jurisdiction of those courts should be as prescribed and limited by law. 10 Stat. at L. 280.

Whenever a territory is admitted into the Union as a state, the cases pending in the territorial courts of a Federal character or jurisdiction are transferred to the proper Federal court, but all such as are not cognizable in the Federal courts are transferred to the tribunals of the new state. Pending cases, where the Federal and state courts have concurrent jurisdiction, may be transferred either to the state or Federal courts by either party possessing that option under the existing laws.

On the 7th of September, 1860, the appellant filed his bill of complaint in one of the district courts of the territory against Roswell G. Pierce and the appellee, in which he alleged that he, the appellant, under the laws of the United States, settled, improved, and entered as a pre-emptor the southwest quarter of section eight, township fifteen north, *range [*154 thirteen east, in the county of Douglas; that the first-named respondent claimed to own the tract so settled, improved, and entered as a pre-emption right by the complainant; that the said respondent made claim to the same, not by virtue of any law of the United States, but by virtue of the rules and regulations of what was known at the time as the Omaha Claim Club, an organization composed of one or two hundred men, the object of which was to protect every claimant, whether resident or non-resident, in holding three hundred and twenty acres of land as a claim upon the public lands of the United States; that a few days before he, the complainant, entered the land, the said Pierce and his agent and a few other persons, members of the said club, came to the house of the complainant, and that the said Pierce, as the leader of the party, assured the complainant that unless he would agree to deed the tract, in case he pre-empted the same, to the said Pierce, that he, the said Pierce, with the assistance of the said claim club, would take his life by hanging or drowning him, or in such other manner as the agents of the club might think fit and proper to employ; that on the 10th of August, 1857, he entered the tract under the pre-emption laws of the United States, when the said Pierce, his agents, and certain members of that club again came to him and repeated the threats before used, and assured him that unless he immediately conveyed the tract to the said Pierce they would carry their threats into execution, and that he, by means of those threats and through fear that the threats would be carried into effect if he refused to convey the land, on the same day conveyed the tract to the said Pierce by deed in the usual form, which was duly acknowledged.

Based upon these allegations the complainant charges that the conveyance made by him was procured by threats and through fear of death and without consideration. Morton, the appellee, was also made a party to the bill of complaint, because he was a judgment creditor of the other respondent, and claimed an interest in the land by virtue, as he alleged, of a lien created by his judgment. Wherefore the complainant *prayed that the convey- [*155 ance of the tract he made to the said Pierce may be decreed to be inoperative and void and that the said Pierce may be decreed to reconvey the premises to the complainant.

Service was made by publication, as the respondents were non-residents, and the respondents failing to appear and plead, answer or demur to the bill of complainant, they were duly defaulted, and a decree was entered that the bill of complaint be taken as confessed.

Testimony was taken and the cause was submitted to the court, and the court found that the conveyance was obtained by the said Pierce

from the complainant through threats of personal violence made by the said Pierce and his agents, and without consideration, and a decree was entered ordering that the conveyance should be canceled, and requiring the respondent to reconvey the premises to the complainant, as prayed in the bill of complaint.

Pursuant to a motion, however, subsequently filed by the appellee, it was ordered by the court that the decree as to him should be vacated, and that he have leave to appear and make defense. He accordingly filed an answer, in which he admitted that the complainant entered the land as alleged in the bill of complaint and that he, the complainant, had been in the possession of the same from that time to the present, but alleged that the complainant occupied the same as tenant of the other respondent. Responsive to the charge made that the deed was procured from the complainant by threats, the appellee alleged that the had no knowledge upon the subject, that he could not answer to the charge as to his belief or otherwise, but upon information he denied the same and alleged the fact to be that the deed was the free and voluntary act of the complainant, and that the other respondent was the true and lawful owner in fee of the premises, devested of all the claims set forth in the bill of complaint; that he, the appellee, loaned to the other respondent the sum of $5,000, and that the borrower failing to make payment as stipulated he brought suit against him and recovered judgment for the amount, of which **156*]** $2,500 *remained due and unpaid, and that his judgment was a lien on the land described in the pleadings. Wherefore he insisted that his judgment ought in equity to be held a better claim on the land than the claim made by the complainant.

Defects exist in the record, arising from the loss of some portion of the minutes and files of the clerk, but it is conceded that the usual replication was filed, and the record shows that proofs having been taken by both parties the cause was heard and the district court of the territory entered a decree dismissing the bill of complaint and awarded costs to the respondent. From which decree the complainant appealed to the supreme court of the territory.

Pending the appeal in the supreme court of the territory, to wit, on the 9th day of February, 1867, Nebraska was admitted into the Union upon an equal footing with the original states. 14 Stat. at L. 392.

Undetermined as the appeal was at that date, and it appearing in due form that the parties were citizens of different states, the cause was transferred to the circuit court of the United States for the district of Nebraska, and the parties having been again heard, the circuit court determined that the deed made by the complainant to the other respondent was not made while he, the complainant, was in duress, and that the appellee, by reason of his judgment, has a better equity in the premises than the complainant, and entered a decree dismissing the bill of complaint. Whereupon the complainant appealed to this court, and now insists that the decree of the circuit court ought to be reversed.

Much examination of the evidence or of the law applicable in the decision of the case is unnecessary, as the facts are substantially the same as in a case between the same parties which was recently heard and determined by the court after mature deliberation. *Pierce* v. *Brown*, 7 Wall. 214, 19 L. ed. 134.

By the bill of complaint a complete title is set up by the *complainant to the land [***157** under the pre-emption laws of the United States, and the answer admits that he held such a title at the date of the deed he made to the other respondent. Argument upon that topic, therefore, is unnecessary, and the complainant charges that he was induced to execute the deed by threats and from fear of death or great bodily harm, and the respondent concedes that he is not able to deny that allegation from any personal knowledge upon the subject, and he even goes further and says that he cannot answer concerning the same, because he has no information or belief upon the subject. Such an answer does not make it necessary for the complainant to introduce more than one witness to overcome the defense, but the court is not inclined to place the decision upon any technical ground, as the proofs in the case show, to the entire satisfaction of the court, that all the matters alleged in the bill of complaint are true, and that the same are fully established, even if the allegations of the answer be regarded as denials made by a respondent in respect to matters within his own knowledge. Some conflict, undoubtedly, exists in the proofs, but the weight of the evidence is so decidedly with the complainant that the court feels no hesitation in saying that the allegations of the bill of complaint are fully proved.

Complete incipient title was acquired by the complainant under the pre-emption laws of the United States, and on the same day the defaulted respondent, through threats to take his life if he refused, compelled him to convey the same to that party, and the settled law of this court is that such acts amount to legal duress, and that a deed, or other written obligation or contract, procured by such means, is inoperative and void, and that rule is applied in all jurisdictions where the principles of the common law prevail. *Pierce* v. *Brown*, *supra*.

Actual violence is not necessary to constitute duress even at common law, as understood in the parent country, because consent is the very essence of a contract, and if there be compulsion there is no consent, and it is well-settled law *that moral compulsion, such as [***158** that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is sufficient to destroy free agency, without which there can be no contract, as in that state of the case there is no consent. Chit. Cont. 192; 2 Greenl. Ev. 283; 2 Inst. 482; 2 Roll. Abr. 124; *Richardson* v. *Duncan*, 3 N. H. 508; *Watkins* v. *Baird*, 6 Mass. 511.

Where a party enters into a contract for fear of loss of life, or for fear of loss of limb, or fear of mayhem, or for fear of imprisonment, the contract is as clearly void as when it was procured by duress of imprisonment, which is where there is an arrest for an improper purpose without just cause, or where there is an arrest for a just cause but without lawful authority, or for a just cause but for an unlawful purpose; and the rule is that in either of those

events the party arrested, if he was thereby induced to enter into a contract, may avoid it as one procured by duress.

2. Judgments were not liens at common law, but Congress, in adopting the modes of process prevailing in the states at the time the judicial system of the United States was organized, made judgments recovered in the Federal courts liens in all cases where they were so by the laws of the states, and a later act of Congress has provided that judgments shall cease to have that operation in the same manner and at the same periods in the respective Federal districts as like processes do when issued from the state courts. *Williams* v. *Benedict*, 8 How. 111; *Riggs* v. *Johnson Co.* 6 Wall. 166, 18 L. ed. 768.

Such a lien confers a right to levy on the land to the exclusion of other adverse interests acquired subsequently to the judgment, but the lien constitutes no property or right in the land itself, as it is merely a general lien securing a preference over subsequently acquired interests in the property. *Conard* v. *Atlantic Ins. Co.* 1 Pet. 443; *Massingill* v. *Downs*, 7 How. 767; *Buchan* v. *Sumner*, 2 Barb. Ch. 165; *Ells* v. *Tousley*, 1 Paige, 280; *White* v. *Carpenter*, 2 Paige, 217.

159*] *For these reasons we are of opinion that the circuit court erred in entering a decree for the appellee.

Decree reversed, with costs, and the cause remanded, with directions to enter a decree for the appellant, in conformity with the opinion of this court.

THE PHILADELPHIA, WILMINGTON & BALTIMORE RAILROAD COMPANY, *Plff. in Err.*,

v.

JOHN DUBOIS.

(See S. C. 12 Wall. 47–65.)

For building piers—patent—estoppel by silence—evidence of state of art.

The first claim in Dubois's patent for building piers is not for a process, but for a device or instrument to be employed in a process, the instrument being a floating coffer-dam.

The second claim of the patent is for the use of the tube, whether longer or shorter, no matter what its shape or material, or of how many parts consisting.

A party is not estopped by his silence, unless it has misled another to his hurt.

Evidence in regard to the state of the art had no legitimate bearing upon the question whether the patentee was the first inventor.

[No. 94.]

Argued Mar. 1, 1871. Decided Apr. 3, 1871.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

Suit was brought in the court below, by the defendant in error, to recover for the alleged infringement of a certain patent. Judgment having been given for the plaintiff, the defendant sued out this writ of error.

The case is sufficiently stated in the opinion of the court.

Messrs. J. H. B. Latrobe, **William Schley**, and **Thomas Donaldson**, for plaintiff in error:

The first claim of the plaintiff is for the specified means of effecting the result; of placing a pier in a river or stream, in a condition of preparedness for the reception of the bridge, intended to be thrown over such river or stream. Those means embraced a floating coffer-dam constructed, used and guided as described in the specification; and also embraced the specified devices and contrivances for constructing, using and guiding the said coffer-dam, up to the point of the completeness of the pier.

That this comprehensive interpretation is true, is shown by the language of the claim itself. It is for building and setting piers. It is not for the coffer-dam nor for the use of the coffer-dam separately; but for the use of the coffer-dam described in the specification, constructed as therein mentioned, gradually lowered by the weight of the masonry, and guided in its descent by guide piles, in the manner mentioned in the specification, all co-operating to produce the result to be accomplished, namely: building and setting a finished pier in a river or stream.

The correctness of this interpretation is further shown by the language used in the first paragraph of the specification, where he claims to have invented a new and useful improvement in building piers for bridges and other structures, and setting the same. His first claim is for this improvement, and was intended to cover the whole.

In another part of the specification, after mentioning certain preparatory steps, he proceeds to show how the platform was to be constructed; the first section of the hollow tube to be bolted thereon, etc., for the building and setting of the pier; and then follows a description of the whole process of building and lowering the pier in its gradually guided descent until, in his own language, "the pier rests down and becomes set upon the foundation."

A further argument in support of the construction that, in his claim, he meant to include the entirety of his alleged improvement, is furnished by the second claim, which is "for the use of the tube which constitutes the dam, for encasing and strengthening the pier, substantially as set forth." This second claim being for the tube, substantially as set forth, shows that the like words "substantially as set forth," used in the first claim, refer not to the floating coffer-dam, which is another name for the tube mentioned in the second claim, but refers to the process of building and setting the pier, as described in the specification in its entirety. A claim for a process must, of necessity, be definite, precise and comprehensive. It must be for an entirety; not for separate parts of the means described as necessary to produce the result.

The first claim is for a process. A process may, undoubtedly, be the basis of the patent where no part of the means employed, separately considered, is new or claimed as new. The combination of co-operating constituent elements, so combined and operating as to produce a new and useful result, or a known result in a new and useful way, is patentable. In

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NOTE.—*Distinction between inventions and processes; when latter patented*—see note, 14 L. ed. U. S. 683.

Estoppel by silence; by laches or acquiescence—see note, 38 L. ed. U. S. 478.

such a case, the patent stands upon the combination or process.

Prouty v. *Draper*, 1 Story, 568; *Prouty* v. *Ruggles*, 16 Pet. 336; *Davis* v. *Palmer*, 2 Brock. 298; *McCormick* v. *Talcott*, 20 How. 405, 15 L. ed. 930; *Vance* v. *Campbell*, 1 Black, 427, 17 L. ed. 168; *Burr* v. *Duryee*, 1 Wall. 572, 17 L. ed. 658; *Eames* v. *Godfrey*, 1 Wall. 79, 17 L. ed. 548; *Turrill* v. *R. Co.* 1 Wall. 491, 17 L. ed. 668; *Case* v. *Brown*, 2 Wall. 320, 17 L. ed. 817; *Palmer* v. *Wagstaffe*, 25 Eng. L. & E. 537; *Unwin* v. *Heath*, 32 Eng. L. & E. 35.

In the construction given, as to the first claim, it is limited to so much of the process as is necessary to building the pier. It ignores the idea of a process for building and setting. It does not regard the guide pile as embraced by the first claim, nor the holes in the platform as part of the means employed in the mode of accomplishing what he claims as his invention in this first claim.

This first claim is for designated means to produce a specified result, which result embraces the setting of the pier; and the means designated for the accomplishment of this result, comprehend the apparatus, devices and contrivances plainly set forth in the specification as the means employed, in connection with the buoyancy of the water, to produce the result; said means combined and co-operating substantially as set forth in the specification. And second, when the same or a like result has been produced by other and different means, such result would be attained without any infringement of the plaintiff's first claim.

It becomes a question of identity. The doctrine as to "mechanical equivalents" and as to "fraudulent evasion" can have no rightful application in a question of this kind.

We used a platform but not a platform perforated with holes for the insertion of guide piles. We used an iron tube of boiler plate metal; but not a hollow tube, with a bolting flange on its lower edge, so as to be bolted horizontally to the platform. We used no calk, pitch or cement; our tube had an iron bottom, part of the tube itself. We used the buoyancy of the water; but not in combination with plaintiff's apparatus. The buoyancy of water is a property of nature which no one can appropriate.

Now, it was very material that the jury should have been properly instructed as to this first claim. Pier No. 3, the pier in the deepest water, was guided by screws alone, without the use even of a shaping frame. Pier No. 2 was partly lowered by screws and subsequently by fall and block; and was guided by furring, constituting a shaping frame. Piles were not used at all to guide the platform.

The second claim of the plaintiffs is "for the use of the tube, which constitutes the dam for encasing and strengthening the pier, substantially as set forth."

The words "substantially as set forth," require that we should recur to the specification. to see what sort of a tube is there described. And it seems to be plain that he claims a sectional caisson. His direction is, to bolt to the upper side of the platform one section of a hollow rectangular box or tube. He speaks again of the first and several other sections, and of additional sections.

But the court construes this claim as embracing the use of the tube, "whether it be first placed in position entire, or be built in sections as the masonry progresses." Now, there was evidence that one at least of the caissons was constructed entire, on shore, and then floated to its place, and set on its foundation before any masonry was put in. But the court's instruction declares the building of a pier, in such tube, to be an infringement of the second claim. In this ruling, the court, we think, was in error.

The defendant's first prayer ought to have been granted, in terms as propounded. It embodied a true interpretation of the principle of operation, as it is denominated in the specification, and which, in fact, is a process for building and setting piers in rivers and streams. We use the word "process" because it is generally used in cases of this character. The word "method," "mode," "plan," or other like term, would equally well express the idea. The distinction between a patent for a process and a patent for a machine, is shown in the various cases cited in *Corning* v. *Burden*, 15 How. 259, and in the opinion in that case, p. 267.

The eighth prayer of the defendant ought to have been granted.

Fraud and imposition in obtaining the patent were directly charged. Strong evidence was given tending to show the alleged fraud.

In the conversation between them, Dubois did not disclose the fact, if such was the fact, nor even pretend that he was the inventor of the mode of building and setting bridges, which Mr. Parker, as the engineer of defendant, intended to follow in constructing and setting the piers. It is a strong case for the application of the doctrine of estoppel *in pais*. His silence was justification to Mr. Parker, in pursuing the course which he had explained to Dubois he intended to pursue. The following cases are cited on this point:

Doe v. *Oliver*, 2 Sm. Lead. Cas. 7th ed. 605; 5 M. & R. 202, and notes; *Dezell* v. *Odell*, 3 Hill, 219; *Stephens* v. *Baird*, 9 Cow. 277; *Hatch* v. *Kimball*, 16 Me. 146; *Rangeley* v. *Spring*, 21 Me. 137; *Tongue* v. *Nutwell*, 17 Md. 212; *Alexander* v. *Walter*, 8 Gill, 247; *McClellan* v. *Kennedy*, 8 Md. 230; *Bk.* v. *Lee*, 13 Pet. 119; *Pickard* v. *Sears*, 6 Ad. & El. 469.

The ninth prayer was framed on the theory that the evidence in relation to the state of the art of building and setting piers, known at the date of plaintiff's patent, was proper to be considered by the jury on the question whether the plaintiff was the first and original inventor of what he claimed as new. The court, in its sixth instruction, limited the consideration of the state of art, to the question of damages alone. See *Vance* v. *Campbell*, 1 Black, 427, 17 L. ed. 168.

Messrs. William H. Armstrong, **Samuel Linn**, and *L. M. Reynolds*, for defendant in error:

It was competent for Mr. Dubois to claim and to obtain a patent for a combination, and also for such of the elemental parts of the combination as were new and useful.

Curt. Pat. 3d ed. §§ 110, 249, 332; *Wyeth* v. *Stone*, 1 Story, 273; *Hogg* v. *Emerson*, 6 How. 437, 11 How. 587; *Moody* v. *Fiske*, 2

Mas. 117; *Pitt* v. *Whitman*, 2 Story, 609; *Parker* v. *Haworth*, 4 McLean, 370.

The proper construction of the patent to Dubois, is that given to it by the court below, in instructions to the jury, and that it is not for a process for setting and building piers, as contended for by defendant, but for certain devices or apparatus to be used in building or setting piers; that it is for a platform and water-tight tube or caisson attached thereto, as described as an improvement upon the coffer-dams formerly used for such purpose; for the use of the tube as a protection to the pier after it has been erected, and for a combination of the coffer-dam with guide piles, as described, for the purpose of guiding and directing the pier to its foundation at the bottom of the river, and staying it against lateral motion, by means of the guide piles to be cut off above the platform. The patent is for the structures, apparatus or devices, described in the specifications, and which are to be used in the process of building and setting piers. It is for the devices employed, by whatever name they should be called, and not for the process in which they are used.

The plaintiff, after describing one mode of carrying out this invention, proceeds to specify his several claims for letters patent, thus:

1. Building and setting piers by means of a floating coffer-dam, substantially as set forth; and thereupon the defendant's counsel argue, that the words "substantially as set forth" refer to the preceding description, and include the entire means used as described for building and setting a pier. We contend that they mean the employment of a coffer-dam, substantially like that set forth in the building and setting of piers.

The patent granted to plaintiff is for three distinct things, *viz.*: a coffer-dam, such as described for building and setting piers; the tube, constituting the coffer-dam, for encasing the pier; and the coffer-dam in combination with the guide piles. Each of these constitutes a distinct claim, and is susceptible of a separate infringement.

The first claim is not for a process, but for the use of certain specified apparatus in the building and setting of piers, which may be infringed without the use of certain other elements which, in combination therewith, are made the subject of the third claim. In support of this proposition we refer to *Corning* v. *Burden*, 15 How. 252.

The tube or caisson which, with the platform, constitutes the coffer-dam, is not necessarily to be built in sections, but may consist of one entire tube, and after one section has been bolted or fastened to the platform, in the manner described in the specification, other sections are to be added, only as the same may be required by the depth of the water in which the pier is to be set.

Dubois was under no obligation to disclose to Mr. Parker his invention and, therefore, no estoppel can result from his alleged silence; and even if under certain circumstances silence would estop him, the case as presented lacks one essential element of an estoppel *in pais*, in that there is no evidence that anything of value was expended by Mr. Parker or the defendant in ignorance of Dubois' right. The defendant was not influenced to act by the silence of Dubois. On this point the following cases are cited:

Com. v. *Moltz*, 10 Pa. 530; *Wallis* v. *Truesdell*, 6 Pick. 455; *Whitney* v. *Holmes*, 15 Mass. 152; *Miller* v. *Cresson*, 5 Watts & S. 284; *Can. Co.* v. *Hathaway*, 8 Wend. 480; *Hill* v. *Epley*, 31 Pa. 334; *Ream* v. *Harnish*, 45 Pa. 379; *Millinger* v. *Sorg*, 55 Pa. 225; *Chapman* v. *Chapman*, 59 Pa. 214.

The facts necessary to establish an estoppel *in pais*, must appear affirmatively and, therefore, there being no evidence in the case showing that defendant or Mr. Parker was misled to their hurt, there can be no estoppel, even assuming the fact of Dubois' silence.

Com. v. *Moltz*, 10 Pa. 530; *Hill* v. *Epley*, 31 Pa. 334.

Mr. Justice **Strong** delivered the opinion of the court:

The merits of the controversy between the parties in this case, relate mainly to the inquiry whether the circuit court correctly construed the patent, for an alleged infringement of which the suit was brought. At the trial, it became a material question, for what invention the patent was granted, and especially what the first claim of the patentee was intended to cover. Was it a device, a structure or an instrument designed for use in a process; or was it a process itself? The defendants, now plaintiffs in error, contended that the patent, so far as it covered the first claim, was for a process of building and setting piers, which process consisted of driving temporary piles in the bed of a stream outside of a given space; then preparing a suitable accommodation for a pier; then making a strong timber or other suitable character of platform and bolting upon its upper surface a section of a hollow rectangular, or other desirable form of box, to be made of boiler plate metal or other suitable material, strengthened laterally and longitudinally, from sides and ends, by means of strong rods, and fitted to slide down and over the guides piles first driven, by cutting vertical holes through the platform; then laying the masonry of this pier in this box made water-tight, adding sections from time to time, as the increasing weight of the masonry required, and as the box with its contents sunk, until the platform, and pier, encased by the different sections of the box, rested and became set upon the foundation prepared, when the guide piles are sawed off just above the top of the timber or other platform, so that their stumps, in connection with the weight of the pier, may serve to prevent lateral movement of the platform and pier on the foundation. Holding such opinions of the nature of the invention, the defendants asked the court thus to construe the patent and to instruct the jury that the words "substantially as described" in the specification, when speaking of the "principle of operation," which the patentee desired to have protected, and the words "substantially as set forth," in the first claim, refer to that process; and hence, that unless the defendants use that process as detailed, as well as the platform composing, in part, the floating coffer-dam fitted to slide down the guide piles referred to, by cutting vertical holes through it and sawing off the stumps of the piles just above the top of the platform when the pier is

completed, as also the other parts of the process claimed in the first claim, the plaintiff could not recover for an infringement of that claim. This instruction the court refused to give, construing the claim to be, not for a process, but for a device or instrument to be employed in a process, the instrument being a floating coffer-dam, constructed as described in the specifications, in which the masonry of the pier might be laid and sunk to the foundation by its own gravity.

In this, it is now insisted the court erred. We are of opinion, however, that the construction given to this claim was correct, and that the defendants were not entitled to an affirmative response to their prayer. Undoubtedly, a patentee may claim and obtain a patent for an entire combination or process, and also for such parts of the combination or process as are new and useful, or he may claim and obtain a patent for both. That this patentee did not intend by his first claim to appropriate the process of building and setting piers which he had previously described in his specification is made evident by several considerations. The words by which the claim is immediately preceded tend strongly to show this. The patentee had described the common method of building and setting piers, by a stationary coffer-dam built up from the bottom, out of which the water was pumped. The inconvenience and expense of this, he proposed to obviate. He then added, "to enable others to perform with my invention, I will proceed to describe its construction and operation." Did he mean construction of a process? Following this was a description of a floating caisson, or coffer-dam, with all the details of its construction, and also of guide piles, with a mode for their use in directing the coffer-dam in its descent with the pier to the foundation. He then added, "I have given a minute description of means for carrying out my invention, but I do not wish to be confined to those means (by which he plainly meant process), but desire to be protected in the principle of operation embodied in a floating coffer-dam, substantially as described, for building and setting piers for bridges and other structures." This can hardly mean anything else than a claim for the principle of operating in building and setting piers through the instrumentality of a floating coffer-dam, substantially such 61*] as he had previously *described. The language is awkward, but it is reasonably intelligible. It was not the principle of operating by what was embodied in a process, such as had been described, that he desired to be protected in, but that embodied or wholly contained in a coffer-dam. This he had described as an improved substitute for a stationary dam. If it was not the method or process that he sought protection for, it is incredible that he would have described it as embodied (that is, collected into a whole) in one of the devices used in the process. Now, reading the first claim in connection with this language of the specification that immediately precedes it, we cannot doubt that the claim is for the instrument or device denominated a floating coffer-dam, substantially such as described in the specification, to be used in building and setting piers. It is clear the invention was regarded by the patentee as a different thing from the mode of using it. "Having," said he, "described one mode of carrying out my invention, what I claim and desire to secure by letters patent is: 1. Building and setting piers by means of a floating coffer-dam, substantially as set forth; 2. the use of the tube which constitutes the dam for incasing and strengthening the pier, substantially as set forth; 3. the guide piles, AA, in combination with a floating coffer-dam, substantially as and for the purpose set forth." If his intention was to claim the process, or a process substantially such as described in the specification, it was easy to say so, and it was worse than useless to mention only one of the means or instruments by which the process was conducted. Looking, also, at the third claim, which is plainly for a combination of devices, a combination of a floating coffer-dam with guide piles, substantially as described, and for the purposes described, to wit: building and setting piers, it is evident the first claim was for the caisson or coffer-dam. Why claim such a combination if the first claim was for a process of which the guide piles and the floating dam were essential component parts?

At the argument much importance was attached, on behalf of the plaintiffs in error, to the fact that the language *of the claim is, [*62 "building and setting" piers by means of a floating coffer-dam, and it was urged that, in the construction given to it by the court, the idea of "setting" the pier is ignored. But the setting of a pier by means of a floating dam is inseparable from the construction of a pier. It is a part of the process of building. The building consists in laying the masonry of the pier within the dam, causing it to descend by its own gravity towards the bottom until it reaches the foundation. This descent is the setting. The floating coffer is, therefore, an instrument not only for building, but for setting piers. Hence, if the claim was, as we think, for the floating dam alone, when used for the purpose designated, and not for its use in combination with the other devices, and with the process described in the specification (what the inventor called "one mode of carrying out his invention") it was well described as a means for building and setting piers.

The plaintiffs in error also complain that the court construed the second claim of the patent to be for the use of the tube, or material of which the dam is made, for incasing and strengthening the pier, no matter whether it be first placed in position entire or be built in sections as the masonry progresses. It is argued the claim embraced only an iron sectional tube or caisson. It is very manifest, however, that the construction given to it was right. The specification expressly describes the tube as "composed of boiler plate metal or other suitable material;" and, again, it states "that a floating water-tight coffer-dam, operating on the principle described, might be made of wood or other material than boiler plate metal." It is equally plain that a tube composed of sections was not exclusively meant. The claim refers to the specification, and that explains both its construction and its possible use in strengthening the piers. By reference to it, it will be seen that the tube is not necessarily constituted of

several sections. Its formation is described to be, constructing a strong timber or other suitable character of platform, and bolting to its upper side one section of a hollow rectangular, or other desirable form of box or tube, which 63*] *is used to incase or strengthen the pier, the tube being composed of boiler plate metal or other suitable material. This platform and section of the tube are then calked and pitched, or cemented, so as to be water tight at bottom and on all sides, except at top, and strengthened, laterally and longitudinally, by means of strong rods. It is then complete and ready for all the uses for which it is designed. Sections are added only when required by the depth of the water, and when the tube has sunk in consequence of the masonry laid in it nearly to a level of the water surface, although, if desired, they may be continued to the top of the pier. There is nothing that would justify our holding that the claim demands a tube composed of more than one section. It is the use of the tube, whether longer or shorter, no matter what its shape or material, or of how many parts consisting, that the claim sought to cover.

What has been said is sufficient to show that, in our opinion, the circuit court did not misinterpret the first, the second or the third claim of the patentee.

The next assignment of error, not disposed of by the observations we have already made, is, that the court refused to charge the jury as requested by the defendants' eighth prayer. That prayer was: "That if the jury should find that the plaintiff, in the spring of 1861, explained his invention to the witnesses who testified upon the subject, by verbal statements only, but without reducing the same to practice by making a drawing, model, or written specification thereof; and that, prior to the application of the plaintiff for a patent, Parker, the engineer of the defendants, superintending the construction of their bridge across the Susquehanna, had devised and perfected the plan afterwards pursued for building and setting the piers of the said bridge, and was actually engaged in preparing for the work of actual construction when, as testified by the said Parker, the plaintiff called on him and heard the plan described without making any claim thereto, but afterwards applied for and obtained the patent on which the present action is founded, then the plaintiff was not entitled to recover." The theory of this prayer was twofold. The defendants had pleaded that the letters patent of the plaintiff were obtained by fraud and imposition on the Patent Office, and the prayer assumed that his not claiming the invention when Parker described his plan for building and setting the piers of the bridge established the fraud pleaded. The prayer also assumed that the plaintiff's silence, when Parker's plans were revealed, coupled with the facts that Parker was, at the time, preparing for the work of actual construction, that he subsequently proceeded with his plan, and that the plaintiff's patent was afterwards applied for and obtained, amounted to an estoppel *in pais*. It is impossible, however, to discover how the plaintiff's silence on the occasion mentioned tended at all to show a fraud upon the Patent Office, *much less that it constituted a [*64 fraud in law, so as to justify the court in ruling that he could not maintain his action. And the defendants, when sued for an infringement, were not at liberty to set up as a defense that the patent had been fraudulently obtained, no fraud appearing upon its face. *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 19 L. ed. 566.

Nor was there any case presented by the prayer that amounted to an estoppel. No principle is better settled than that a party is not estopped by his silence unless it has misled another to his hurt. *Hill* v. *Epley*, 31 Pa. 334. There was no evidence of any such misleading stated in the prayer or found in the case. The patent was granted September 23, 1862. It nowhere appears that before that day the defendants had expended one dollar in building their piers. Moreover, the point does not negative knowledge by Parker of the plaintiff's invention before the conversation of which it speaks took place; and there is some reason found in the evidence for believing that the plaintiff's plans had been revealed to Parker by Crossman, to whom the plaintiff had partially explained them, before that conversation. The court could not, therefore, have given the instruction asked, even if the plaintiff was under obligation to disclose his invention to Mr. Parker, which we are not prepared to assert.

The only remaining assignment of error is that the court declined instructing the jury as requested, that in considering the question whether the plaintiff was or was not the first and original inventor of the improvement described in his patent, they might and ought to consider the evidence in the cause in relation to the state of the art of building and setting piers known at the time of the alleged invention of the plaintiff. Upon this subject the court did charge the jury that they had a right to take into consideration the knowledge which they might find to have been possessed, prior to the date of the plaintiff's patent, by the several witnesses whose names were given in the notice of defense, and who had been examined; and also the description of such constructions in Mahan's Civil Engineering, and *the patent of [*65 George A. Parker, and also all description of his invention made by the plaintiff to any one prior to the date of his patent in 1861 or 1862, and also the conversation (whatever they might find it to have been) between the plaintiff and the engineer of the defendants in 1862, prior to the date of the plaintiff's application for a patent. This was all the defendants had a right to ask. They had given notice of nothing more. They had not apprised the plaintiff that the novelty of his invention would be assailed by any other evidence than such as they had particularized in their notice of defense. While, therefore, evidence in regard to the state of the art was proper to be considered by the court in construing the patent and determining what invention was claimed, it had no legitimate bearing upon the question whether the patentee was the first inventor.

The decree of the Circuit Court is affirmed.

JAMES S. FRENCH, *Appt.*,
v.
SAMUEL M. SHOEMAKER.

(See S. C. 12 Wall. 86-102.)

Final decree, what is—presumption of sufficient appeal bond—supersedeas, when not issued—to restrain punishment for contempt.

A decree in favor of complainant for a perpetual injunction with costs, is a final decree, although it does not in terms dismiss a cross-bill.

Where nothing appears in the record to show that the indemnity given by a bond on appeal is insufficient, it must be presumed that the amount is sufficient.

Authority to issue a supersedeas does not exist in this court except in cases where it is necessary to the exercise of its appellate jurisdiction.

Where a party has been perpetually enjoined, and the case is appealed, this court will not issue a supersedeas to restrain the court below from punishing him for violating such injunction.

[No. 368.]

Argued Mar. 31, 1871. Decided Apr. 10, 1871.

APPEAL from the Circuit Court of the United States for the District of Virginia.

On motions to dismiss and for supersedeas.

The history and facts of the case are fully stated in the opinion of the court.

Messrs. **R. T. Merrick** and **Geo. W. Brent** for appellee.

Messrs. **Fred P. Stanton** and *H. O. Claughton* for appellant.

Mr. Justice **Clifford** delivered the opinion of the court:

Accurate conclusions in motions like the present, involving important questions of practice, are essential to the correct administration of justice in all judicial tribunals exercising appellate powers, but they are especially so in this court, whether the case is brought here from a state court or a circuit court, as the jurisdiction of the court is special and must in every case be tested by the Constitution and the laws of Congress.

Considerable importance is attached in this case to the motion for a supersedeas as well as to the motion to dismiss the appeal; but the court, in view of the circumstances, will first examine the motion to dismiss, as it is in its nature preliminary, and if granted will render it unnecessary to examine the other motion.

On the 16th of November, 1868, the appellee filed a bill of complaint against the appellant in the circuit court of the United States for the **96*]** district of Virginia, setting up *two written agreements therein described, and to which special reference is made as exhibited in the record. They are both of the same date. Without entering much into details, suffice it to say that one purports to be an assignment by the appellant to the appellee of all his right, title, interest, claim and demand whatsoever in and to the property, stock, road, roadbed, franchise, and charter of the Alexandria & Washington Railroad Company, for two specific purposes: (1) To secure the payment to the appellee of the sum of $5,000 advanced by the appellee to the appellant; (2) to carry into effect the purposes and objects set forth in the other written agreement. Both agreements are signed by the appellant, and upon the back of the one given to secure the payment of the money advanced is the following agreement and consent: "We, the undersigned, do hereby agree and consent to the terms and conditions of the within assignment" which expressly recites that it was executed to accomplish the two purposes already described. Reference to the record will show that the assignment is signed by the appellant and that the indorsement is signed by all the other parties supposed by him to have an interest in the assigned property.

Special reference is made in the instrument of assignment to the purposes and objects set forth in the other written agreement, in which it is stipulated, in substance and effect, as follows: (1) That the appellant and Walter Lenox will convey all their right, title, and interest in that railroad company to a new corporation, to be formed as therein specified, or to devote all of that interest to the common benefit of the parties to the instrument, in the proportions therein specified, in case the old company should be revived. (2) That they agree to assign to the new company, when the parties shall actually organize the same, all their interest as lessees of the Washington, Alexandria & Georgetown Railroad, or to hold the same for the exclusive use of the parties to the agreement, according to their respective interests. (3) That the appellee, for himself and the Adams Express Company, covenants to aid the new company, with *money and credits, to pay, [*97 settle or compromise certain specified liabilities, as set forth in the agreement. Certain other important conditions are also inserted in the instrument, but they are not material in this investigation.

Process was duly issued and served, and the appellant appeared and filed an answer setting up various defenses to the merits of the claim made by the appellee. Subsequent to the filing of the answer the appellee filed the general replication, and the cause being at issue proofs were taken by both parties. Before the final hearing, however, the appellant filed a cross-bill, in which he insisted upon the defenses set up in the answer, and also alleged that the other parties to the agreements were necessary parties to the bill of complaint. Due answer was made by the appellee, to the cross-bill, and the appellant filed to the same the general replication.

Such being the state of the pleadings, the cause, on the 21st of June last, came on for final hearing "upon the bill, answer, and replication, and upon the cross-bill, answer, and replication, and upon the proofs," and the statement in the decree is that "the court is of the opinion that the equity of the case is with the complainant," and that the court "thereupon do order, adjudge, and decree that James S. French, the defendant in the original bill, be perpetually enjoined and restrained from any use of the name or title of the president of the Washington & Alexandria Railroad Company, under any election to that office heretofore held, and from any action by himself or any attorney or agent to interfere with any proceeding for the re-organization of the said company under the contract mentioned in said bill, etc., and from any proceeding whatever not in accordance with the said contracts, without

NOTE.—*What is "final decree" or judgment of state or other court from which appeal lies*—see notes, 5 L. ed. U. S. 302; 17 C. C. A. 238; 28 C. C. A. 482; 32 C. C. A. 475.

prejudice," as therein recited. Omitting the qualifications stated in the recitals, the decree continues as follows: "It is further ordered, adjudged, and decreed that the said defendant, French, pay the costs in this cause."

Final decrees in suits in equity passed in a 98*] circuit court, *where the matter in dispute exceeds the sum or value of $2,000, exclusive of costs, may be re-examined in this court, but the act of Congress does not define what is meant by the phrase "final decree." Objection is made that the decree is not final because it does not in terms dismiss the cross-bill; but the court is of the opinion that the statement contained in the decree, that the equity of the case is with the complainant, by necessary implication disposes of the cross-bill as effectually as it does of the answer filed by the appellant to the original bill of complaint. Leave, it is true, is given to either party to apply, at the foot of the decree, for such further order as may be necessary to the due execution of the same, or as may be required in relation to any matter not finally determined by it, but it is quite apparent that that reservation was superadded to the decree as a precaution, and not because the court did not regard the whole issue between the parties as determined by the decree. Such was, doubtless, the view of the Chief Justice who passed the decree, as the application for the appeal was made to him at the same term and was immediately granted without objection.

Several cases might be referred to where it is held that a decree of foreclosure and sale of mortgaged premises is a final decree, and that the defendant is entitled to his appeal without waiting for the return and confirmation of the sale by a decretal order, upon the ground that the decree of foreclosure and sale is final as to the merits, and that the ulterior proceedings are but a mode of executing the original decree. *Whiting* v. *Bank U. S.* 13 Pet. 15; *Bronson* v. *Railroad Co.* 2 Black, 524, 17 L. ed. 359.

Unquestionably, the whole law of the case before the court was settled by the Chief Justice in that decree, and as nothing remains to be done, unless a new application shall be made at the foot of the decree, the court is of the opinion that the decree is a final one, as it has conclusively settled all the legal rights of the parties involved in the pleadings. *Forgay* v. *Conrad*, 6 How. 202; *Thomson* v. *Dean*, 7 Wall. 342, 19 L. ed. 94; Curt. Com. § 188; *Beebe* v. *Russell*, 19 How. 283, 15 L. ed. 686.

99*] 2. *Beyond all doubt the appeal of the respondent in this case was allowed within ten days from the date of the decree, and the record shows that the bond to prosecute the writ to effect and answer all damages and costs if he fail to make his plea good was filed and duly approved within the same period, but it is denied by the appellee that the appeal operates as a supersedeas, because it is insisted that the bond given in the case is not in a sum sufficient to constitute indemnity for the whole amount of the decree.

Where the judgment or decree is for the recovery of money, not otherwise secured, the indemnity must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal. *Catlett* v. *Brodie*, 9 Wheat. 553; *Stafford* v. *Union Bank of La.* 16 How. 135; *Same* v. *Same*, 17 How. 275, 15 L. ed. 101.

But in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, indemnity is only required in an amount sufficient to secure the sum recovered for the use of detention of the property and the other incidental items, as in cases where the judgment or decree is for money. What is necessary is that it be sufficient, and when it is desired to make the appeal a supersedeas, that it be filed within ten days from the rendering of the decree, and the question of sufficiency must be determined in the first instance by the judge who signs the citation, but after the allowance of the appeal that question as well as every other in the cause becomes cognizable here. It is, therefore, matter of discretion with the court to increase or diminish the amount of the bond, and to require additional sureties or otherwise as justice may require. *Rubber Co.* v. *Goodyear*, 6 Wall. 156, 18 L. ed. 763, rule 32; *Slaughter House Cases*, 10 Wall. 273, 19 L. ed. 915; 1 Stat. at L. 404.

All that is required in a case where the writ of error is not a supersedeas is that the bond shall be in an amount sufficient to answer the costs in case the judgment or decree is affirmed.

Nothing appears in the record to show that the indemnity given is insufficient, and inasmuch as nothing appears *to the con- [*100 trary the court is of the opinion that it must be presumed that the amount is sufficient.

Appeals and writs of error are constituted a supersedeas in certain cases by virtue of the 23d section of the judiciary act, when the conditions there prescribed are fulfilled. Where those conditions are complied with the act of Congress operates to suspend the jurisdiction of the subordinate court and stay execution pending the writ of error or appeal, and until the case is determined or remanded. *Hogan* v. *Ross*, 11 How. 295.

Power to issue a supersedeas to a decree in a subordinate court does not exist in this court where the appeal was not taken and the proper bond given within ten days from the date of the order, except where an appeal was duly taken within ten days, and the aggrieved party is obliged to take a second appeal in consequence of the clerk below having neglected to send up the record in season, or where the granting of such a writ becomes necessary to the exercise of the appellate jurisdiction of the court, as where the subordinate court improperly rejected the sureties to the bond because they were not residents of the districts. *Hogan* v. *Ross*, 11 How. 296; *Ex parte Milwaukee R. Co.* 5 Wall. 188, 18 L. ed. 676; *Stockton* v. *Bishop*, 2 How. 74; *Hardeman* v. *Anderson*, 4 How. 640; *Wallen* v. *Williams*, 7 Cranch, 279; *Saltmarsh* v. *Tuthill*, 12 How. 389.

Appellate power in the controversy under consideration is conferred upon this court, and it is clear that this court may issue a supersedeas in such a case whenever it becomes necessary to the exercise of its appropriate jurisdiction. 1 Stat. at L. 81; *Stockton* v. *Bishop*, 2 How. 75.

Attention will now be called to the grounds of the motion for a supersedeas, as shown in

the affidavit of the appellant. He states that he filed a bill in equity in the supreme court of this district against Oscar A. Stevens, Geo. W. Brent, W. Jackson Phelps, Richard T. Merrick, J. Dean Smith, and Walter Lenox; that the respondents demurred to the bill on the ground that the appellee before the court was a necessary party respondent in the case, and **101***] that the court *where the bill was pending sustained the demurrer. Wherefore the appellant here amended his bill, and made the appellee a party respondent.

Consequent upon those proceedings, as the affiant states, the circuit court for the district of Virginia laid a rule on him requiring him to appear in that court, on a day named in the rule, to show cause why he should not be fined and attached for the acts set forth in the petition, and charged therein to be in violation of the aforesaid order and decree of the court below in this case; that he appeared and showed cause as required, but that the court there being of opinion that he had violated the decree in the case before the court by filing his bill in equity in the supreme court of this district, ordered that he forthwith dismiss the same and cease all proceedings under the same on pain of imprisonment, and that he, having no alternative but to go to jail or to submit to the order of the court, chose the latter and dismissed his bill of complaint. His views are that the circuit court erred in passing that order, and that that court gave an erroneous construction to the decree entered by the Chief Justice in the case, making it more comprehensive than its language will warrant, and he moves this court to issue a supersedeas or other suitable order to correct those errors.

Suppose the theory of the appellant is correct that the circuit judge in construing the decree gave it a scope beyond its legitimate meaning; very grave doubts are entertained whether this court, under the present motion, could afford the appellant any remedy, as the facts supposed would not show that anything had been done to defeat or impair the appellate jurisdiction of this court. Acts void in themselves may be done by the circuit court outside of the jurisdiction of the circuit court which this court cannot re-examine. Authority does not exist in this court to issue a supersedeas, except in cases where it is necessary to the exercise of its appellate jurisdiction, but the court is not inclined to rest its decision in this case upon that ground, as we are all of the opinion that the circuit judge did not err in his construction of the order and decree enjoining **102***] the appellant in that decree. *He is perpetually enjoined and restrained from any use of the name or title of the president of the company under any election to that office heretofore held, and from any action, by himself or any attorney or agent, to interfere with any proceeding for the re-organization of the company under the contracts, or from any proceeding whatever not in accordance with the said contracts. More comprehensive language could hardly be employed, and argument can hardly make it plainer or add anything to its force or effect.

Motion for supersedeas denied.

*CORNELIUS BRAINARD, Collector of [*1
Internal Revenue, *Plff. in Err.*,
v.
HENRY G. HUBBARD.

(See S. C. *"The Collector* v. *Hubbard,"* 12 Wall. 1-18.)

Suits to recover back duties illegally exacted —where brought—when officer not liable—appeal to commissioner—vested right, manufacturing companies.

Suits to recover back moneys illegally exacted, as internal revenue duties, cannot be commenced in the circuit courts, except where the tax payer and the defendant, whether the assessor or collector, are citizens of different states.

Where the parties are citizens of the same state, the action must be brought in the state court, but the defendant may remove the case into the circuit court for trial.

The law will not imply a promise by a public officer to twice pay money in his hands as such officer, nor to pay it to a private party, where the law requires him to pay it into the public treasury, and he has complied with that requirement.

Suits for such causes of action in state or Federal courts, are absolutely prohibited until the tax payer shall appeal to the commissioner of internal revenue.

A party cannot have any vested right in a remedy conferred by an act of Congress to prevent Congress from modifying it or adding new conditions to its exercise.

The policy of Congress in the act of June 30, 1866, was to tax all gains and profits, whether divided or undivided, of manufacturing companies.

[No. 122.]

Argued Mar. 30, 1871. Decided Apr. 10, 1871.

IN ERROR to the Supreme Court of Errors of the State of Connecticut.

Suit was brought by the defendant in error, in the supreme court of Middlesex county, Connecticut, to recover a certain sum of money paid as taxes. The said court having made, without a jury, a special finding of facts, gave judgment thereupon for the plaintiff. The defendant sued out a writ of error to the supreme court of errors, by which said judgment was affirmed. Thereupon the said defendant sued out this writ of error.

The case is fully stated by the court.

Messrs. Amos T. Akerman, Atty. Gen., and **B. H. Bristow**, *Solicitor Gen.*, for plaintiff in error:

Two questions are raised by the record:

1. Whether the maintenance of the suit by the defendant in error was prohibited by the 19th section of the act of July 13, 1866, 14 Stat. at L. 152.

2. Whether, under the provisions of § 117 of the act of June 30, 1864 (13 Stat. at L. 281), the undivided annual profits of a manufacturing corporation should be assessed, and estimated as income of the stockholders of such corporation.

I. Section 19 of the act of 1866 declares:

"That no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof,

NOTE.—*Return of duties paid under protest; action to recover back; protest, how made, and its effect*—see note to Greely v. Thompson, 13 L. ed. U. S. 397.

and a decision of said commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect: Provided, that if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal."

The particular provision of § 117 of the act of 1864, applicable to this case, is the following:

"All notes, bonds, and mortgages, or other forms of indebtedness, bearing interest, whether due and paid or not, if good and collectible, shall be included and assessed as part of the income of such person for each year, and the gains and profits of all companies, whether incorporated or partnership, other than the companies specified in this section, shall be included in estimating the annual gains, profits or income of any person entitled to the same, whether divided or otherwise."

The prosecution of the suit by the defendant in error was barred by the 19th section of the act of July 13, 1866, quoted above.

The action, in this case, was not commenced until Aug. 9, 1867, and no appeal had been previously taken by the plaintiff to the commissioner.

This court, in *Nichols* v. *U. S.* 7 Wall. 130, 131, 19 L. ed. 128, remarks as follows: "The party aggrieved can test the question of the illegality of an assessment or collection of taxes by suit; but he cannot do this until he has taken an appeal to the commissioner of internal revenue."

In the case of *Braun* v. *Sauerwein*, 10 Wall. 218, 19 L. ed. 895, it was observed in reference to the same provision: "The act, speaking from August 1, 1866, prohibited a suit until he, the claimant, should appeal to the commissioner of internal revenue, and until his appeal should be decided, unless the decision should be postponed longer than six months; in which case he was at liberty to sue within a year from the time when his appeal was taken."

It would appear that, conceding the illegality of the assessment, the plaintiff never had a right to recover the same back by suit in any court, derived simply from the principles of the common law, and founded upon what is termed an implied promise. The money claimed was not paid to the collector until Aug. 19, 1865; and by the 3d section of the act of Mar. 3, 1865 (13 Stat. at L. 483), collectors were required, from and after June 30, 1865, to pay daily into the Treasury the gross amount of all duties, taxes, and revenue received and collected in virtue of the internal revenue acts, without any abatement or reduction on account of compensation, etc., or claims of any description whatever. Now, according to *Cary* v. *Curtis*, 3 How. 236, and *Curtis* v. *Fiedler*, 2 Black, 461, 17 L. ed. 273, the effect of that provision was to bar any action to recover back duties paid subsequent to its passage, which rested merely upon the assumption of an alleged implied obligation on the part of the defendant; because, as was observed by the court in the case last cited, "the law never implies a promise to pay, unless some duty creates such an obligation, and. more especially, it never implies a promise to do an act contrary to duty or contrary to law." Such remedy as the plaintiff possessed, then, depended entirely upon statute, and remedy by suit existed only by necessary implication from the provisions of the internal revenue laws.

See, *Philadelphia* v. *Collector*, 5 Wall. 731, 18 L. ed. 616.

The authority to sue, conferred by those provisions, Congress could at any time modify, as might be deemed expedient; or impose conditions and limitations upon its exercise; or take it away altogether.

The statute, which is the supreme law of the land, extends to "any court," and necessarily includes by its terms all courts, state and national.

In *Cary* v. *Curtis*, 3 How. 254, Judge Story, referring to § 2 of the act of Mar. 3, 1839, then under consideration, remarked: "If it is a good bar in one court, it is good in all courts, under the provisions of that act.

II. It seems to have been the general design of Congress to tax the undivided gains and profits made by all corporations, as well as those which are divided among the stockholders. The corporations mentioned in § 120 are banks, trust companies, and insurance companies, and the tax is made thereby to cover not only "dividends," but also "all undistributed sums, or sums made or added during the year to their surplus or contingent funds." Those mentioned in § 122 are railroad, canal, turnpike, canal navigation, and slack water companies; and the tax is thereby made to cover not only gains and profits divided, but, in addition, "all profits of such company carried to the account of any funds, or used for construction." All other corporations not specified in those sections are covered by § 117, which expressly declares that the gains and profits thereof shall be included in estimating the annual gains, profits, or income of any person entitled to the same, whether divided or otherwise.

In all cases, the entire annual gains and profits of every corporation, divided or undivided, seem to be within the aim or purview of the statute, as objects of taxation.

To leave no doubt as to the object of the law Congress has, in subsequent acts, adopted phraseology differing in some respects from that employed in the act under consideration, but without essentially differing from its general scope and meaning.

Act of 1864, 13 Stat. at L. 282; act 1865, 13 Stat. at L. 480; act 1867, 14 Stat. at L. 478; act 1870, § 7, 16 Stat. at L. 258.

Mr. **Chas. E. Perkins,** for defendant in error:

1. Were these amounts gains and profits of these companies, within the fair construction of the act?

The 2d and 8th sections of the finding must be taken together, and from them it appears that, though these amounts were earned by the companies during the year, yet they were, during the same year, paid out again in the regular course of business, and were not profits in any usual sense of the term.

It is not found that their balance sheet in January, 1865, showed larger assets than that made in 1864. On the whole business of the year 1864, their net profits were only what was

in fact divided. They did not extend their business or works in any way, and the companies, after making their dividends, were worth no more in Jan., 1865, than in Jan., 1864.

If a company begins the year with $50,000 in debt for cotton on hand, and during the year works up and sells the cotton, from the proceeds pays its debts, and has $10,000 left over, has it made $60,000 or $10,000?

The object of these clauses of the internal revenue law was to tax dividends actually made, or money which ought to be divided, but was held back, either as a surplus or as an undistributed fund.

This clearly appears from the 120th, 121st, and 122d sections, relating to the taxes to be paid by the companies themselves.

Section 120 says, that they shall pay five per cent on "all undistributed sum or sums, made or added during the year to their surplus or contingent funds;" and § 122 says, on "all profits of such company carried to the account of any fund, or used for construction."

There can be no pretense that, in any such companies, the amount of earnings used in paying their debts or replacing worn out machinery, should be taxed.

The department has held in accordance with this view: "In determining the amount of taxable gains, such losses as have been ascertained and settled during the return should be deducted."

Bump, Int. Rev. Laws, p. 302, 5 I. R. 74.

In no possible sense of the word is a stockholder entitled, as income, to moneys spent by the corporation during the year in paying its debts, and preparing for its future business.

This is a Connecticut corporation, and the right of a stockholder to his property should be and is fixed by Connecticut law.

In *Phelps* v. *Bk.* 26 Conn. 269, the court says, p. 272: "The profits of a bank, no matter when made, until separated from the stock by declaring a dividend, are mere increment and augmentation of the stock. They are properly stock themselves, composing a part of the stock of the bank, and will pass with the stock under that name, either by contract, bequest or levy of execution."

See, also, *Spencer* v. *Higgins*, 22 Conn. 521; *Pratt* v. *Pratt*, 33 Conn. 446.

The rule is the same in other states.

Minot v. *Paine*, 99 Mass. 101; *Goodwin* v. *Hardy*, 57 Me. 143.

A person who would be entitled to a share in profits, if divided, should return the same as income, whether divided or not.

Bump, Int. Rev. Laws, 288; 1 Int. Rev. Rec. 157; 7 Int. Rev. Rec. 50.

It is claimed, however, that even if this money was improperly taken from us, we have no remedy because the act of 1866 says, no suit shall be maintained until after appeal to the commissioner.

1. This act was only prospective. It was not intended to affect the rights of parties already vested.

"Courts refuse to give statutes a retroactive construction, unless the intention is so clear and positive as, by no possibility, to admit of any other construction."

Sedgw. Stat. L. 193; *Plumb* v. *Sawyer*, 21 Conn. 351; *McEwen* v. *Den*, 24 How. 242, 16 L. ed. 672.

It would be grossly unjust for us to apply this rule. At the time this act was passed, we had a suit pending in the United States circuit court. It was not reached for trial until June 1, 1867, more than six months after the act took effect. Judge Nelson then dismissed the case, because the act took away his jurisdiction, and we were deprived of any redress.

A construction which would bring about any such result should be avoided.

2. The act only refers to proceedings in the courts of the United States.

Carpenter v. *Snelling*, 97 Mass. 452; *Griffin* v. *Ranney*, 35 Conn. 239.

3. It is a kind of statute of limitations for state courts. Congress has no power to pass acts relating to actions in state courts arising at common law.

4. It does not appear in the case that any regulations have ever been made by the Secretary of the Treasury, providing for any appeal, or for any hearing or decision by the commissioner.

Mr. Justice **Clifford** delivered the opinion of the court:

Suits to recover back moneys illegally exacted as internal revenue duties cannot, under existing laws, be commenced in the circuit courts, except in cases where the taxpayer and the defendant, whether the assessor or collector, are citizens of different states. *Phila.* v. *The Collector*, 5 Wall. 728, 18 L. ed. 615. Such suits under any other circumstances must be commenced in the state courts, as the circuit courts have no jurisdiction to hear and determine the same, except when they are removed from a state court into the circuit court for the same district, on motion of the defendant. *Hornthall* v. *The Collector*, 9 Wall. 564, 19 L. ed. 561. Where the parties are citizens of the same state the action must be brought in the state court, but the defendant, if he sees fit, and seasonably takes the proper steps, may remove the case into the circuit court for trial. *The Assessors* v. *Osborne*, 9 Wall. 572, 19 L. ed. 750. *Both parties in this case were citizens of [*9 the same state, and the action was accordingly commenced by the plaintiff in the state court, and the collector, as the defendant, not having taken any steps to remove the suit into the circuit court, the same was heard and determined in the state court in which it was commenced.

Taxes were assessed against the plaintiff, under the internal revenue laws, in the sum of $1,597, and the findings of the court show that the assessor duly returned his assessment list to the collector; that the collector demanded of the plaintiff the amount of the tax assessed, and that he threatened if the plaintiff refused to pay the same that he would coerce the collection of the whole amount; that the assessor gave due notice to the plaintiff when and where appeals from the assessment would be heard, but that the plaintiff did not appeal from the same, either to the assessor or to the commissioner of internal revenue, and that he paid the whole amount of the assessment under protest.

Pursuant to the practice in that jurisdiction,

the superior court reserved the questions of law arising upon the facts found, and the question what judgment ought to be rendered in the case, for the opinion and advice of the supreme court of errors; and the record shows that the supreme court of errors advised the superior court to render judgment for the plaintiff, as exhibited in the transcript of the record removed here by the writ of error for re-examination.

1. Remarks respecting the jurisdiction of the court to re-examine the judgment rendered by the state court may well be omitted, as the claim of the plaintiff as set forth in the declaration necessarily draws in question the acts of Congress imposing internal revenue duties and the authority exercised by the defendant in collecting the same, and the decision of the state court was against the validity of both, if the acts of Congress be construed as authorizing the assessment and collection of the duties.

2. Tried as the case was by the judge of the superior court, as a substitute for a jury, the 10*] supreme court of *errors was bound to take the facts as found by that court, and this court, in re-examining the judgment, must proceed upon the same basis, as the finding of facts is made a part of the record. *Tancred* v. *Christy*, 12 Mees. & W. 323.

By the finding, it appears that at the time of the assessment the plaintiff owned a majority of the stock in two certain manufacturing corporations, whose affairs respectively were managed by three or more directors, of which the plaintiff was one; that the profits realized by the respective companies the year preceding the assessment were greater than the dividends which they made within the same period; that the profits at the time of the assessment had not been divided nor had they been in any way set apart from the general assets of the respective corporations, nor had they been appropriated for the use of the stockholders, otherwise than the law will imply from the fact of the existence of such profits; that the profits made by the respective corporations during that year were to such an amount that if the interest of the plaintiff therein was legally subject to the assessment the amount assessed and collected was the proper amount: that the plaintiff delivered, under oath, his list to the assistant assessor on the day of its date, omitting the amount now in controversy from the list; that the assessor required him to add the same to the list, which he declined to do, and that the same was then added to the list by the assessor; and the court also found that the assessment was legally made, if such profits were in law liable to such an assessment.

3. Such an amount of profits was made by the two corporations during that year that if the interest of the plaintiff therein was legally subject to any assessment it is conceded that the amount assessed and collected was correct, but the proposition is that the interest of the plaintiff in such profits was not legally subject to any such assessment, as it appears that the corporations invested the profits in part in real estate, machinery and raw material proper for 11*] carrying on their *business, and in part for the payment of debts incurred in previous years, and that the same remained so invested at the time the duties were assessed and collected. Part only of the profits of that year was so invested, and it was that part of the same which was not included in the dividends of the year, and which the plaintiff refused to add to the list he delivered to the assistant assessor, and which is now the subject of controversy.

4. Intention to defraud the government is not imputed, either to the corporations or to the plaintiff, unless the investment, in view of the circumstances, and the refusal of the plaintiff to add the proportional amount of the same to his list of annual gains and profits, constitute such fraud by implication of law; but the defendant contends that the plaintiff was required by law to pay the regular income tax on such proportion of the entire net profits made by the two companies as his stock bore to the whole stock of the corporations.

Apart from the defense to the merits of the claim, that the tax was lawfully assessed and collected, the defendant also set up in his notice of special matters to be given in evidence under the general issue, that he paid over the amount to the Treasury of the United States before the suit was brought, and that the suit was barred by the 19th section of the act of Congress, entitled "An Act to Reduce Internal Taxation," which provides, among other things, that no suit except under certain conditions not existing in the case before the court, shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue, and a decision shall be had thereon, except in certain cases not material to be noticed in this investigation, as the case, if affected at all by the provision, falls within the rule and not within either of the exceptions. 14 Stat. at L. 152; *Braun* v. *Sauerwein*, 10 Wall. 218, 19 L. ed. 895.

5. Payment of the amount into the public treasury before *the suit was brought, [*12 would be a good defense to the action if the right of the plaintiff depended solely upon an implied promise at common law, as the payment was made in pursuance of the requirement of an act of Congress, and the rule is well settled that the law will not imply a promise by a public officer to pay money in his hands as such officer twice, nor to pay it to a private party in a case where the law requires him to pay it into the public treasury, and he has complied with that requirement. 13 Stat. at L. 236; 13 Stat. at L. 485; *Cary* v. *Curtis*, 3 How. 250. Indebitatus assumpsit is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfill that obligation. Such a promise to pay, however, will never be implied unless some duty creates such an obligation, nor will the law ever imply a promise to do an act contrary to law or in violation of a public duty. *Curtis* v. *Fiedler*, 2 Black, 478, 17 L. ed. 276. Collectors of internal revenue, as well as collectors of import duties, are required to pay all moneys by them collected into the Treasury of the United States, and

where such moneys have been collected and the payment has been made into the Treasury as required by the act of Congress, the law, in the absence of any other statutory regulations upon the subject, would not imply any promise on the part of the collector to pay back the amount to the tax payer, even if it appeared that the assessment was erroneous or illegal, as he could not, in such a case, be under any obligation to pay the money twice, and to have paid it back to the tax payer in the first place would have been contrary to his official duty as prescribed by an act of Congress. But the right of the plaintiff to recover in such a case, if the tax is illegal and he is not otherwise in fault, does not depend alone upon an implied promise as at common law, as the same act of Congress which requires the collector to collect the tax and pay the money into the pub-
13*] lic Treasury, contains *other provisions from which the implication necessarily arises that the taxpayer in such a case, if the tax is illegal, may maintain an action against the collector to recover back the amount. Much examination of that question, however, is unnecessary at this time, as the rule upon the subject is definitely settled by prior decisions of this court. *Phila.* v. *Collector*, 5 Wall. 731, 18 L. ed. 616; *Curtis* v. *Fiedler*, 2 Black, 479, 17 L. ed. 276, 13 Stat. at L. 236, 239.

Such a defense, therefore, cannot avail the defendant in this cause, as the right of action, though in form an action of assumpsit, is grounded upon the act of Congress providing for the assessment and collection of taxes, which will sufficiently appear from a single suggestion. None of the internal revenue acts contemplate that the collectors shall re-imburse themselves for the amount of any judgment recovered against them on account of duties illegally or erroneously assessed and collected. On the contrary, the act of Congress expressly provides that the commissioner of internal revenue shall repay to collectors or deputy-collectors the full amount of such sums of money as shall or may be recovered against them in any court for any internal duties or licenses collected by them, with the costs and expenses of suit. 13 Stat. at L. 239.

6. Prior to the passage of the act of the 13th of July, 1866, it is quite clear that the tax payer, if he was illegally assessed, might maintain an action of assumpsit against a collector to recover back the amount if he paid it under protest, although he had not taken any appeal to the commissioner of internal revenue. *Phila.* v. *Collector, supra;* 14 Stat. at L. 152. Such were the views of this court in that case, and no doubt is entertained that the decision was entirely correct, but it is a great mistake to suppose that the right to maintain the action, as there conceded, was founded in the theory that the collector held money in his hands belonging to the plaintiff which he was
14*] bound to refund, as the *decision was placed expressly upon the ground that the several provisions in the internal revenue acts, before referred to, warranted the conclusion as a necessary implication that Congress intended to give the tax payer such remedy.

Remedies of the kind, given by Congress, may be changed or modified, or they may be withdrawn altogether at the pleasure of the law maker, as the tax payer cannot have any vested right in the remedy granted by Congress for the correction of an error in taxation. *Curtis* v. *Fiedler*, 2 Black, 479, 17 L. ed. 276.

Suits for such causes of action are absolutely prohibited until the tax payer shall appeal to the commissioner of internal revenue, and until the appeal has been decided, unless the decision is postponed longer than six months, in which case he is at liberty to sue within one year from the time when his appeal was taken. *Nichols* v. *U. S.* 7 Wall. 130, 19 L. ed. 128; *Braun* v. *Sauerwein, supra.*

Three answers are made by the plaintiff to that defense, as presented in the record: (1) He contends that the provision is prospective, and that Congress did not intend that it should retroact so as to affect a vested right; (2) that the act of Congress in question, even if it is a bar to such a suit in a Federal court, is inoperative, as such, in a state court; (3) that the money paid for the taxes, inasmuch as it was paid under protest, must be considered as money in the hands of the defendant belonging to the plaintiff, and that the plaintiff in that view of the case has a vested right at common law to his remedy to recover it back.

Pending suits, it may be conceded, are not affected by that provision, but it is impossible to say that any suit subsequently commenced for such a cause of action is not embraced within its scope and meaning, as the language is: "No suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue," etc., as more fully set forth in the section. Authority was vested in the commissioner *by the [*15 prior act to remit, refund, and pay back, "on appeal to him made," all duties erroneously or illegally assessed or collected, and all duties that appeared to be unjustly assessed or excessive in amount. 13 Stat. at L. 239.

Appeals were permitted by that act, though not required as a condition to a right of action; but inasmuch as the right of appeal and the right of action were conferred by the same act, the court is of the opinion that it was entirely competent for Congress to add new conditions to the exercise of that right whenever in its discretion the public interest might require such additional regulation. Unless the meaning of the section can be restrained by construction, it is quite clear that it includes the state courts as well as the Federal courts, as the language is that no suit shall be maintained in any court to recover any tax alleged to have been erroneously or illegally assessed or collected, and there is not a word in the section tending to show that the words "in any court" are not used in their ordinary sense. Unquestionably, if the provision is a good bar in the Federal courts, it is a good bar in all courts acting under the same act of Congress, and furnishes the rule of decision for all. *Cary* v. *Curtis*, 3 How. 254.

Special reference is made to the fact that a prior suit was commenced by the plaintiff, which was pending in the circuit court at the time the act was passed taking away the orig-

inal jurisdiction of the circuit court in all such cases, except where the parties are citizens of different states, but the only answer which need be made to that suggestion is that the present suit is wholly unaffected by that circumstance.

Regulations exist in some of the states that where the first suit is abated and a second suit is brought within a prescribed time the statute of limitations shall cease to run from the date of the first suit, but Congress has not passed any law to that effect, and it is conceded that none such exists in the state where the suit was commenced.

Sufficient has already been remarked to show 16*] that the *third proposition of the plaintiff cannot be sustained, as a party cannot have any vested right in a remedy conferred by an act of Congress to prevent Congress from modifying it or adding new conditions to its exercise.

7. Suppose, however, that the rule is otherwise; that the provision in question is not a bar to the present suit; still the court is of the opinion that the addition made to the list rendered by the plaintiff was proper; that the tax was lawfully assessed, and that the plaintiff is not entitled to recover in this case.

Assessed as the duties in this case were under the act of the 30th of June, 1864, attention will be called chiefly to the provisions of that act. Congress evidently intended by that act, as appears by the 116th and the six following sections, to tax all the annual gains, profits, and income of every person residing here, and of every citizen residing abroad, whether derived from any kind of property, rents, interests, dividends, salaries, or from any profession, trade, employment, or vocation, or from any other source whatever, except as therein mentioned, if such annual gains, profits, or income exceed $600. Section 117 declares what shall be included in estimating the annual gains, profits, or income of any person and, among other things, expressly provides that the gains and profits of all companies, whether incorporated or partnership, other than the companies specified in that section, shall be included in estimating the annual gains, profits or income of any person entitled to the same, whether divided or otherwise. 13 Stat. at L. 282.

Manufacturing companies are not mentioned in that section and, of course, they fall within that clause of the section which in terms applies to all companies, whether incorporated or partnership, not specified in that section. Lists or returns of the amount of income are required by § 118, and § 119 prescribes the time of payment and defines the penalty in case of neglect and refusal.

17*] *Support to the view, that the list of an individual should include undivided as well as divided profits, is derived from the requirements of the 120th section, which levies a duty of five per cent on all dividends in scrip or money thereafter declared due, whenever the same shall be payable to stockholders, policy holders, or depositors, as part of the earnings, income, or gains of certain described companies, not including manufacturing companies, and on all undistributed sums, or sums made or added during the year, to their surplus or contingent funds. Strong confirmation of that view is also derived from § 121 of the same act, which requires banks of circulation, if they neglect to made dividends, or additions to their surplus or contingent fund, as often as once in six months, to make a list or return in duplicate of the amount of profits which have accrued or been earned within that period, and to present the list or return to the collector of the district and pay to him five per cent on such profits. 13 Stat. at L. 284.

Substantially the same requirement is made of every railroad, canal, turnpike, canal navigation, and slack water company, and the provision is that all profits of such a company, carried to the account of any fund or used for construction shall be subject to and pay a duty of five per cent on the amount of all such profits. 13 Stat. at L. 284, § 122. Other references to the same effect might be made, but it is believed that these are sufficient to show that the policy of Congress in that act was to tax all gains and profits, whether divided or undivided, and that the construction that the undivided gains and profits of manufacturing companies are properly included in that rule is just and reasonable.

Decided cases are referred to in which it is held that a stockholder has no title for certain purposes to the earnings, net or otherwise, of a railroad prior to the dividend being *declared, and it cannot be doubted that [*18 those decisions are correct as applied to the respective subject-matters involved in the controversies. *Minot* v. *Payne*, 99 Mass. 106; *Goodwin* v. *Hardy*, 57 Me. 145. Grant all that; still it is true that the owner of a share of stock in a corporation holds the share with all its incidents, and that among those incidents is the right to receive all future dividends, that is, his proportional share of all profits not then divided. Profits are incident to the share to which the owner at once becomes entitled provided he remains a member of the corporation until a dividend is made. *March* v. *Railroad*, 43 N. H. 520. Regarded as an incident to the shares, undivided profits are property of the shareholder, and as such are the proper subject of sale, gift, or devise. Undivided profits invested in real estate, machinery, or raw material, for the purpose of being manufactured, are investments in which the stockholders are interested, and when such profits are actually appropriated to the payment of the debts of the corporation, they serve to increase the market value of the shares, whether held by the original subscribers or by assignees. But the decisive answer to the proposition is that Congress possesses the power to lay and collect taxes, duties, imposts and excises, and it is as competent for Congress to tax annual gains and profits before they are divided among the holders of the stock as afterwards; and it is clear that Congress did direct that all such gains and profits, whether divided or otherwise, should be included in estimating the annual gains, profits or income liable to taxation under the provisions of that act. Annual gains and profits, whether divided or not, are property and, therefore, are taxable.

Judgment reversed, with costs, and the cause remanded for further proceedings in conformity to the opinion of this court.

SAMUEL G. WHEELER, JR., *Appt.*,
v.
GEORGE HARRIS *et al.*

(See S. C. *"The Eutaw,"* 12 Wall. 136-142.)

Appeals subject to same rules as writs of error —dismissal.

Appeals are subject to the same rules, regulations and restrictions as are prescribed in law in case of writs of error, and if the record does not present any question of law for the revision of this court, the judgment of the circuit court must be affirmed, but the cause cannot be dismissed.

[No. 403.]

Submitted Mar. 24, and Apr. 14, 1871. Decided Apr. 17, 1871.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

On motion to dismiss.

The libel in this case was filed in the district court of the United States for the southern district of New York, by the appellees, to recover for supplies, etc., furnished to the steamer Eutaw. A decree having been entered in their favor in that court, and confirmed by the circuit court, the claimants took a further appeal to this court.

The case is fully stated by the court.

Mr. **C. Donohue** for appellees.

Messrs. **T. M. Wheeler** and **W. W. Goodrich** for appellant.

Mr. Justice **Clifford** delivered the opinion of the court:

Cases regularly on the calendar, whether brought here by writ of error or appeal, if within the jurisdiction of the court, are required to be heard when reached in the regular call of the docket, and they cannot be heard before they are reached except when they are advanced by the order of the court.

Where the case is one not within the jurisdiction of the court, the writ of error or appeal may be dismissed on motion, and certain defects in removing the cause from the subordinate court into this court entitle the party who prevailed in the court below to the same remedy.

Motions to dismiss are non-enumerated motions, and they may be filed by leave of court in any case on the calendar before the case is reached in the regular call of the docket, and they are entitled to preference on Friday in each week during the sitting of the court, as pro- **140*]** vided in the twenty-seventh *rule, but they do not give either party any right to be heard upon the merits of the controversy.

On the 9th of March, 1867, the appellees filed the libel in the district court against the appellants, as the owners of the steamer Eutaw, her engine, tackle, apparel, etc., in a cause of action founded upon contract civil and maritime. By the second article of the libel it is alleged that the steamer belonged to the Port of New York; that she was engaged in the coasting trade; that in the months of November and December prior to the filing of the libel she was in the Port of Wilmington, North Carolina, and that she was in need of supplies, repairs, advances, and necessaries for her voyage; that the master of the steamer applied to the libelants to make such repairs and to furnish such supplies and advances, and that they, the libelants, complied with the request; and that there is due to them for such repairs, supplies, and advances the sum of $4,000. They also alleged that the repairs, supplies, and advances were necessary and proper to render the steamer seaworthy and fit to perform her intended voyage, and that the same were furnished on the credit of the steamer as well as of the master and owners.

Process was served and the first-named respondent appeared and filed an answer, in his own behalf and in behalf of the other respondent with whom he was impleaded, denying all the allegations of the libel. Subsequent to the filing of the answer an order was passed referring the cause to a master to ascertain and report the amount due to the libelants. Testimony was taken on both sides and the parties were heard and the master reported that there was due to the libelants the sum of $4,140.94 for the repairs, supplies, and advances made and furnished, as alleged in the libel. No exceptions were taken by either party, to the report of the master, and on the 9th of May, 1868, the district court confirmed the report and entered a final decree in favor of the libelants for that amount.

*Dissatisfied with the decree, the re- [***141** spondent appealed to the circuit court, where the parties were again heard upon the same testimony. Apparently, they were heard without any new reference of the cause and upon the general allegation of the appellant that the decree was erroneous and that the libelants were not entitled to the damages claimed in the libel and decree. Different conclusions, however, were formed by the circuit judge, as he adjudged that the decree of the district court should be affirmed with costs, and it is from that decree that the original respondent appealed to this court.

Referring to the record, it appears that the decree in the circuit court was entered on the 19th of March, 1870, and the appeal was taken to this court on the 19th of May following. Such an appeal is not a supersedeas, but it cannot be dismissed, because no question is raised or presented in the record for the decision of this court.

Appeals are subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error, and it is well-settled law that it is no sufficient cause to dismiss a writ of error that the record does not present any question of law for the revision of this court, as the writ of error when sued out under the 22d section of the judiciary act brings up the whole record, and it is the right of the plaintiff in error to be heard and have an opportunity to show, if he can, that there is error in any part of the record. *Minor* v. *Tillotson*, 1 How. 288; 2 Stat. at L. 244.

When a cause is brought here upon a writ of error sued out under that section, and all the proceedings are regular and correct, the judgment of the circuit court must be affirmed, but the cause cannot be dismissed although there is no question presented in the record for revision. *Taylor* v. *Morton*, 2 Black, 484, 17 L. ed. 278; *Suydam* v. *Williamson*, 20 How. 440, 15 L. ed. 983.

Apply that rule to the case before the court, and it is clear that the motion must be denied, 142*] and it is equally *clear that appeals in that respect are subject to the same rules, regulations and restrictions as are prescribed in law in case of writs of error. Appeals of the kind are usually regarded as brought for delay, and it may become necessary to amend the second article of the 23d rule so that ten per cent damages shall be allowed in addition to the interest provided for in the first article of that rule.

Motion denied.

JOSIAH A. NOONAN, *Plff. in Err.*,
v.
ALFRED R. BRADLEY, Administrator of J. B. Lee, Deceased, Use of Orson Towsley, Exr.

(See S. C. 10 Wall. 121-129.)

Foreign administrator may be substituted as appellee—power of this court to review its own judgments.

Where the appellant dies after an appeal is taken the administrator of the domicil where the intestate resided at his decease, may be admitted as the appellee in this court, although appointed in a different state from that in which the action was commenced.

This court, subsequent to the term when a final judgment or decree is rendered, possesses no power to review such judgment or decree, and has no power to review its decision in a case at law or in equity.

[No. 112.]

Argued Apr. 14, 1871. Decided Apr. 17, 1871.

MOTION to admit Thomas L. Ogden as administrator of John B. Lee, deceased, and that the clerk be directed to certify to the court below that the suit had abated under rule 15 of this court.

A bill for a mortgage foreclosure was filed by one Lee in the United States district court (with circuit powers) in Wisconsin in 1859. A decree was entered ordering a sale upon the mortgage and a personal judgment against the mortgagor, Noonan, for the deficiency, if any. Noonan took an appeal to this court. Upon the hearing in this court, Lee having died in the meantime, and Bradley having appeared as administrator, that part of the decree which gave personal judgment for the deficiency was reversed. 17 L. ed. 279.

Bradley's appointment as administrator was made in New York, where Lee resided at his decease. Suit having been subsequently brought in Wisconsin by Bradley, in a proper action for that purpose upon the bond, to recover the deficiency which this court had considered improper to be allowed in the foreclosure suit, the case came to this court upon appeal, where it was decided that Bradley was not authorized to sue as administrator in the state of Wisconsin, not having been appointed in that state. 19 L. ed. 759.

Upon the strength of that decision this motion was now made to annul the decision of this court in the first-mentioned case, and declare the appeal therein abated upon the death of Lee, thus leaving in full force the decision of the court below decreeing personal judgment for the deficiency.

Messrs. **J. S. Brown** and *N. J. Emmons*, for motion:

The bond and mortgage were assessed in Wisconsin, to which Bradley, as administrator in New York, had no right.

The letters of administration to Ogden made him the sole legal representative of the deceased in this case. *Noonan* v. *Bradley, supra.*

Ogden, although a citizen of the same state with Noonan, had a right to prosecute the suit in this court. *Clarke* v. *Mathewson*, 12 Pet. 164.

Rule 15 directs: First, that the legal representative of the deceased party may voluntarily appear, and the case progress; second, that the opposing party may, by order of court, and publication, compel the appearance or proceed as if he had appeared, if the appellee is dead; and third, that in case the legal representative of the appellee does not appear and the appellant neglect for a certain term to take the order and notice under the rule, then his appeal abates.

This does not mean that any stranger may intrude himself into the case, and the opposite party may avail himself of such appearance to avoid adopting the steps provided by the rule for bringing in the legal representative. But the appellant is bound to know that the real representative does appear, or to obtain the order and advertise. *Wilson* v. *Codman*, 3 Cranch, 207.

This appeal has abated under the rule, unless there is something in the relations between the administrator in New York and the one in Wisconsin to prevent the operation of the rule. *Barribeau* v. *Brant*, 17 How. 43, 15 L. ed. 34; *Phillips* v. *Preston*, 11 How. 294.

We suppose we need hardly cite authorities to the effect that the adjudication of a court, no matter how high its authority, in a personal or real action, can be binding only upon parties and privies.

It is evident that had Bradley not appeared, or appearing, had Noonan successfully contested his right to the order of substitution, Ogden would now be owner, as administrator, of the decree *in personam* against Noonan, and also that the appeal would have abated under rule 15.

The Supreme Court of the United States, in *Stacy* v. *Thrasher*, 6 How. 44, decided that the administrators appointed under the authority of different states hold by different and independent titles.

The cases referred to establish the fact that Ogden could not be the successor of Bradley nor avail himself of any judgment or proceeding in Bradley's favor; and also that he could not be injured by any proceeding against Bradley.

He, therefore, is now owner of the decree *in personam* by Noonan, affected only by rule 15 of this court abating the appeal. We are satisfied to rely upon the decisions of this court, but will, notwithstanding, cite the following authorities:

Brodie v. *Bickley*, 2 Rawle, 431; Story, Confl. L. par. 522; *Borden* v. *Borden*, 5 Mass. 67; *Chapman* v. *Fish*, 6 Hill, 554.

That Ogden, although not named in the record, has the right to make the motion, as a matter of practice, we cite *Cleveland* v. *Chamberlain*, 1 Black, 419, 17 L. ed. 93.

Messrs. **Matt. H. Carpenter** and *J. P. Walker*, for Noonan, opposed.

Mr. Justice **Clifford** delivered the opinion of the court:

Particular reference to the nature of the controversy and the prior adjudications in respect to the same are indispensable in order that the motion and the effect of it, if granted, may be properly understood.

Noonan, on the first day of October, 1855, purchased of Lee certain real estate, situated in Wisconsin, by deed of warranty, and gave his bond for the purchase money, conditioned to pay $4,000 in four equal annual instalments, with interest, and gave a mortgage on the premises to secure the payments as specified in the bond; and the mortgage also contained a stipulation that upon any default on the part of the mortgagor in making the payments, including the interest and taxes as well as the principal, the whole of the mortgage debt, with interest, should, at the option of the mortgagee, become due, and should be collectible on demand.

At the time the conveyances were executed, the premises were in the possession of one John J. Orton, holding the same adversely to the grantor, in consequence of which the grantee required from the grantor an agreement to the effect that if the title failed the bond should not be enforced, and that if any encumbrances existed on the premises the amount of the same should be deducted from the stipulated consideration.

On the 4th of March, 1859, Lee filed a bill in **125*]** equity in *the district court of the United States for that district, exercising circuit court powers, setting forth that the grantee and mortgagor had not paid either principal or interest of the mortgage debt; that he, the complainant, had notified the party that he claimed that the whole debt had become due, and praying for a sale of the mortgaged premises, the payment of the mortgage debt, and for general relief.

Such proceedings were had in the cause that the court rendered a final decree in the same, the court finding that the sum of $5,267.20 was due to the grantor and mortgagee of the said premises, and the decree also directed the sale of the premises, the payment of the mortgage debt, and that the surplus, if any, should be brought into court; that. if the moneys arising from the sale were insufficient to pay the mortgage debt, interest and costs, the marshal, in his report of the sale, should specify the amount of the deficiency, and that the respondent should pay the deficiency with interest, "and that the complainant may have execution therefor."

From that decree the respondent appealed to this court, and at the December term, 1866, the appeal was duly entered here on the calendar. When the cause was reached the parties were heard, and this court decided that the complainant, upon the proofs exhibited, was entitled to a decree for the whole amount of the mortgage debt by virtue of the special stipulation in the mortgage, although one of the instalments, according to the terms of the bond, was not due when the bill was filed. Pursuant to that decision the court affirmed that part of the decree; but the court also decided that in the absence of a rule of the court conferring such authority the court below could not enter a decree in such a case, that the complainant should have execution for the balance found to be due to him over and above the proceeds of the sale, and reversed that part of the decree. *Noonan* v. *Lee*, 2 Black, 501, 17 L. ed. 279; rule 94.

Pending the appeal, however, and before the parties were heard in this court, to wit, on the 7th of February, 1862, *the death of the [*126 respondent, John B. Lee, was suggested, and on motion leave was granted that the appearance of Alfred F. R. Bradley might be entered as administrator of the estate of the deceased, and he was admitted as appellee in the case. Doubts arising as to the validity of the title acquired by Noonan from his grantor, he commenced an action of ejectment in the state court against John J. Orton, the party in possession at the date of the conveyances, and gave notice to his grantor that he might appear and defend the title to the premises. Lee accordingly employed counsel, but the decision of the state court, rendered in January, 1863, was that the party in possession was seised in fee of the premises.

Both parties concede that Lee, when he died, was domiciled in New York, and that Bradley was duly appointed administrator by the proper tribunal in that state. When Lee died he also had effects of value in Wisconsin; and in February, 1865, the party who filed the motion, Thomas L. Ogden, was duly appointed administrator of those effects by the proper tribunal having jurisdiction of the matter in that state. On the 6th day of September, 1866, Bradley, as administrator of the estate of John B. Lee, deceased, commenced an action of debt against Josiah A. Noonan, counting on the before mentioned bond given by the latter to the decedent, for the purchase money of the said real estate, as more fully set forth in the record. *Noonan* v. *Bradley*, 9 Wall. 399, 19 L. ed. 759.

Three defenses were set up by the defendant to the suit: (1) That the plaintiff was not and never had been administrator of the estate of the deceased; (2) that the deceased, at the time of his death, had effects in that state, among which was the bond in suit, and that the defendant was duly appointed administrator of those effects, and that the letters issued to the plaintiff, as applied to the cause of action in the declaration mentioned, were void and of no effect; (3) that the title to the premises had failed, the plea setting up the judgment in the ejectment suit rendered in the state court.

*To the several pleas the plaintiff de- [*127 murred, and judgment was rendered against the defendant for the sum of $7,589.75, and the defendant appealed to this court, where the judgment of the circuit court was reversed, the court holding that an administrator appointed in one state cannot, by virtue of such an appointment, maintain an action in another state, in the absence of a statute of the latter state giving effect to that appointment, to enforce an obligation due his intestate.

Based on the conclusion announced in that case, the proposition of the party submitting the motion is, that all the proceedings in the case first mentioned, subsequent to the time when the death of the respondent in that suit

was suggested, were irregular; that the administrator appointed by the tribunal of the jurisdiction where the intestate had his domicil at his decease was improperly admitted as appellee, and that the final decree in the case should be set aside, and that a decree or order should be entered that the suit abated at the death of the appellee in the appeal, and that the clerk here should be directed to transmit a certificate to that effect to the court below.

Apart from the novel character of the motion and the grave doubts which arise whether the proposed certificate, even if the party is entitled to a remedy, is an appropriate process to be sent from an appellate to a subordinate tribunal, the court is of the opinion that the relief sought in the case cannot be granted, and that the motion must be denied upon three grounds, either of which is a complete and satisfactory answer to the application. They are as follows:

1. That the administrator of the domicil where the intestate resided at his decease was properly admitted as the appellee in the case, because, at that time, no ancillary administration had been granted in the state of Wisconsin.

Admitted, as he was, without objection from the appellant, it may well be doubted whether 128*] the appellant in this case, *inasmuch as his appointment bears date subsequent to those proceedings, can be permitted to intervene, in the absence of fraud, for the purpose of setting aside what had passed *in rem judicatam* before he was appointed, but the court is not inclined to rest its decision upon that ground, as the statute of the state authorizes foreign executors and administrators to sue in the courts of the state, in cases where no executor or administrator of the estate of the decedent has been appointed in the state. Sess. Acts 1860, p. 24.

Responsive to that, it may be suggested that the right so conceded is subject to the condition that such representative party has filed in the probate court an authenticated copy of his appointment, but it is a sufficient answer to that suggestion in this case to say that nothing appears in the record to show that the condition, if it be one, was not fulfilled, and the court is of the opinion that a compliance, under the circumstances of this case, must be presumed, as the record shows that this court passed an order that the appearance of the administrator be entered and "that the said administrator be and hereby is made the appellee in this case."

2. Grant that an administrator appointed in one state cannot, by virtue of such an appointment, maintain an action in another state unless so authorized by statute, still it does not follow that the proceedings in this case were irregular, as the suit was commenced by the appellee in his lifetime and was prosecuted by him in the court below to a final decree, and from that decree the respondent appealed to this court. All these proceedings took place while the intestate was in full life, and it appears that the appeal was pending in this court at the time that his death was suggested, and that the administrator appointed in the jurisdiction of the decedent's domicil was admitted as the appellee by the order of the court, as before explained. He did not commence the suit, and as he was the only administrator appointed, the court is of the opinion that he was a competent party to appear and support the decree.

*3. Suppose, however, that neither of [*129 those propositions is correct, still the court is of the opinion that the motion must be denied, as this court, subsequent to the term when a judgment or decree is rendered, possesses no power to review its own final judgments or decrees. Where the merits of a case are decided in the circuit court and the decree, on appeal, is reversed in this court, and the mandate of the court is sent down, directing the court below to execute the decree, it is well settled law that it is too late to call in question the jurisdiction of the subordinate court. *Skillern* v. *May*, 6 Cranch, 267. Repeated decisions of this court have established the rule that a final judgment or decree of this court is conclusive upon the parties, and that it cannot be re-examined at a subsequent term, as there is no act of Congress which confers any such authority. *Martin* v. *Hunter*, 1 Wheat. 355. Second appeals or writs of error are allowed, but the rule is universal that they bring up only the proceedings subsequent to the mandate, and do not authorize an inquiry into the merits of the original judgment or decree. Rehearings are never granted where a final decree has been entered and the mandate sent down, unless the application is made at the same term, except in cases of fraud. *Browder* v. *McArthur*, 7 Wheat. 58; *The Santa Maria*, 10 Wheat. 442. Appellate power is exercised over the proceedings of subordinate courts, and not on those of the appellate court, and the express decision of this court in several cases is that the court has no power to review its decisions, whether in a case at law or in equity, and that a final decree in equity is as conclusive as a judgment at law. *Wash. Bridge Co.* v. *Stewart*, 3 How. 424; *Ex parte Sibbald* v. *U. S.* 12 Pet. 492; *Peck* v. *Sanderson*, 18 How. 42, 15 L. ed. 262. Other cases to the same effect might be referred to, but it does not seem to be necessary, as the views of the court from its organization to the present time appear to have been uniform and consistent, as is sufficiently exemplified by the cases to which reference is made.

Motion denied.

FREDERICK R. FOWLER *et al.*, *Plffs. in Err.*,
v.
WILLIAM RATHBONE *et al.*

(See S. C. 12 Wall. 102-121.)

General average, by stranding vessel—voluntary stranding—fact for jury.

Where a ship is voluntarily run ashore to avoid capture, foundering, or shipwreck, and she is afterwards recovered so as to be able to perform her voyage, the loss resulting from the stranding is to be made good by general average contribution.

NOTE.—*General average*—see notes to 10 L. ed. U. S. 186; 20 C. C. A. 357.

Loss by voluntary stranding of vessel in peril is subject of general average.

Stranding is where a ship takes ground, not in the ordinary sense of navigation, but by accident,

Where a ship and cargo were becoming submerged in deep water, and the master stranded the ship in shoal water, to save it and the cargo from increased expenses, this was a voluntary stranding within the meaning of the commercial law.

Facts found by a jury cannot be re-examined in this court.

Whether the cargo was damaged by the stranding or by the antecedent peril of the sea was a question of fact for the jury.

[No. 141.]

Argued Apr. 11, 1871. Decided May 1, 1871.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case are sufficiently stated by the court.

Mr. **James C. Carter,** for plaintiffs in error:

If the actual sinking or stranding of the ship Oneiza was, under the particular circumstances, the direct result of voluntary agency, rather than of the action of the elements, and was other and different from the one impending at the time the voluntary resolution was taken, the case is one for general average. But, if it was substantially the same stranding as the one impending, and modified by the voluntary act only in some incidental and immaterial respects, then it is a case for particular average. Phil. Ins., § 1313.

It is simply ascertaining which is the predominating and principal cause of the loss.

Phil. Ins. §§ 1132–1136; 2 Pars. Ins. 620.

The question thus stated is, undoubtedly, in its nature, one of fact, and not of doctrine; but where, as in the present case, there is no dispute about the facts, the question becomes practically one of law. When, from uncontradicted evidence, there is but one inference which can properly be drawn, the court is to draw that inference.

Chandler v. *Von Roeder*, 24 How. 224, 16 L. ed. 633.

The decisions in the following cases were, in effect, that the strandings were not substantially the same but different; and that the respects in which they differed were such as to give to the losses the character of general average.

Sims v. *Gurney*, 4 Binn. 513; *Barnard* v. *Adams*, 10 How. 270.

The ship had received her death wound from the direct action of the ice, and was actually on her way to the bottom at the time the resolution was taken to run her upon the flats. Everything that followed the cutting through her bows by the ice, was the immediate consequence of that accidental disaster.

In this operation she was exposed to no new peril whatever.

The ordinary duty of the ship-owner, represented by the master, is to navigate the ship; not to run her ashore. It is to prosecute the adventure, not to put a premature end to it. A claim for a general contribution cannot be founded upon any act of the master in the course of this ordinary duty. Shippers of goods have the right to all this. It is in the bargain and they pay for it. The presence of an overwhelming peril may make it best for the interests of all, treated as a unit, to depart from mere navigation and strand the ship. This is something beyond what any one of the interests has a right to require of the ship, and is, therefore, outside the ordinary duty of the master. The true foundation of the doctrine of a general contribution, in cases of voluntary stranding lies in these considerations. But when, as in the case at bar, the actual operation of an accidental cause has, of itself, already put an end to the business of navigating the ship, all the master's ordinary duties are not at an end. It is still his duty to do all in his power to save what he may of the interests confided to his charge; and will it be pretended that when his ship is sinking, and it is in his power to mitigate the consequences of such sinking by working his ship into shallower water, it is not his duty to do so?

Conceding for the moment, and for the sake of the argument, that there was some evidence to go to the jury upon the point whether the actual submersion was different from the one impending, and in consequences of the injuries from the ice, the learned judge did not submit, but refused to submit, that question to the jury; and that issue, therefore, which is the material one in the case, has never been tried.

The learned judge made the question of liability for a general contribution turn entirely upon these three points:

First. Whether the master ran the ship upon the flats for the purpose of diminishing the

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or the force of the wind or sea, and remains stationary for some time. It is not stranding to strike a rock or stump which occasions only an instantaneous stoppage. Lake v. Columbus Ins. Co. 13 Ohio, 48, 42 Am. Dec. 188; Bishop v. Pentland, 7 Barn. & C. 219; Wells v. Hopwood, 3 Barn. & Ad. 20.

Where a vessel is voluntarily run ashore with the intent to preserve the ship and cargo, as far as possible, and the vessel is in consequence lost, the loss is to be repaired by general average. Gray v. Waln, 2 Serg. & R. 229, 7 Am. Dec. 642; Mut. Safety Ins. Co. v. Cargo of Brig George, Olcott, 89; 2 Browne, 199; 6 Mass. 125; 4 Binn. 513; O'Connor v. Ocean Star, 1 Holmes, 248.

There is no difference between a partial and a total loss, occasioned by a voluntary stranding, both being equally cases of general average. Columbian Ins. Co. v. Ashley, 38 U. S. (13 Pet.) 343; Sims v. Gurney, 4 Binn. 573; Caze v. Reilly, 3 Wash. 298; O'Connor v. Ocean Star, 1 Holmes, 248.

It is the settled law that the case is one for general average although the ship was totally lost, if the stranding was voluntary and was designed for the common safety and resulted in saving the cargo. The Star of Hope, 9 Wall. 232, 19 L. ed. 638; Barnard v. Adams, 10 How. 270, 13 L. ed. 417; Patten v. Darling, 1 Cliff. 254; Bales of Cotton, 8 Blatchf. 221.

General average covers a loss by a voluntary cutting of the cables of a vessel at anchor and running her ashore as the best means of saving life and property. Reynolds v. Ocean Ins. Co. 22 Pick. 191; Greeley v. Tremont Ins. Co. 9 Cush. 419; 33 Am. Dec. 727.

Where the vessel is accidentally stranded in the course of her voyage, and is got off and completes her voyage, the expense of getting her off is one to be borne by general average. Bedford Com. Ins. Co. v. Parker, 2 Pick. 1, 13 Am. Dec. 388; McAndrews v. Thatcher, 3 Wall. 347, 373, 18 L. ed. 155; Giles v. Eagle Ins. Co. 2 Met. 143; Gage v. Libby, 14 Allen, 269.

A vessel chased by an enemy's frigate, and capture deemed inevitable, was run ashore and thereby a large part of the cargo saved, after which the enemy burned her, held a case for general average. Caze v. Reilly, 3 Wash. 298.

If a vessel at anchor is dragging towards the shore in a gale, in imminent danger of beating to pieces on rocks before reaching shore, and the master slips the cable and allows her to be thrown on the beach, thereby saving the cargo, this is a general average loss. Sturgis v. Cary, 2 Curt. 59.

damages and expenses of raising and saving ship and cargo.

Second. Whether, in so doing, the peril to the ship was increased.

Third. Whether, by so doing, the damages and expenses of saving and raising the ship and cargo were diminished.

This was a total failure to present the true question. These three inquiries might each be answered in the affirmative, and yet the actual stranding or submersion be only an unsubstantial, inconsiderable and immaterial modification of the stranding or submersion originally impending.

But even if the proposition itself, of the learned judge, had been sound as a general principle of law, it was error to submit it to the jury. There was no evidence in the case warranting the submission of such a proposition to the jury.

1. The learned judge himself recognized the necessity of the condition that the peril to the ship should have been increased by the master's voluntary action. He made that a turning point with the jury. But there was not only no evidence of such increase of peril, but the contrary was distinctly proved by the plaintiff's own witnesses.

The only suggestion of any increase of peril was the claim by the plaintiffs below, that the bottom where the ship actually took the ground was different from the bottom where it lay at anchor, it being uneven in the former place. But the only evidence of this is the conjecture of the witnesses Westervelt, Story, and Mackie, neither of whom had seen or knew anything about the locality of the disaster.

Messrs. **S. P. Nash** and E. H. Owen, for defendants in error:

The question whether the facts showed a case of voluntary stranding which entitled the vessel to claim contribution for the damages thereby caused, is presented by the charge of the court below, that if the jury "should find that the ship and cargo were exposed to a common peril of sinking and becoming submerged in deep water; and that the expenses of raising and saving them from such place would have been greater than if stranded in shoal water; and that the master, to save the ship and cargo from such increased expenses, ran the ship on the flats, and so stranded her in shoal water, and thereby increased the peril to the ship and diminished the damages and expenses of saving the ship and cargo," then there was a voluntary stranding, which entitled the ship to recover in general average.

This instruction was in accordance with the law, as well settled in the Federal courts.

Ins. Co. v. *Ashby*, 13 Pet. 331; *Barnard* v. *Adams*, 10 How. 270; *The Star of Hope*, 9 Wall. 203, 19 L. ed. 638; *Patten* v. *Darling*, 1 Cliff. 254; *Rea* v. *Cutler*, 1 Spr. 135; *Sturgess* v. *Cary*, 2 Curt. 59; *Caze* v. *Reilly*, 3 Wash. (C. C.) 298; *Sims* v. *Gurney*, 4 Binn. 513.

It is sufficient to make the act of sacrifice voluntary, that it is adopted as a matter of judgment, which upon deliberation the will decides. It is none the less voluntary, that no other way of escape seems open. This is held in all the cases.

The idea of sacrifice, in the law of general average, is not that the property shall be doomed to certain loss. The goods overboard may have a fair chance of being recovered, or the vessel, which it is determined to run ashore, of being saved. It is the selection of one particular interest, of either vessel or cargo, to take a special, though it may be no greater or even a less risk for the benefit of the whole, that makes the special loss or damage consequent upon the act, vicarious.

It is true in this case that, but for the stranding, the vessel would have gone down with the cargo. It is true that, by stranding her, the master may possibly have not subjected the vessel to any greater peril than she was in before; but the fact that he changed the peril from one to ship and cargo in common, to a peril to the ship alone, constituted sacrifice in the legal sense. If any damage was in fact caused to the vessel by stranding, it is no answer to her claim for contribution, to say that she would have been equally damaged by sinking.

That the act of stranding was a benefit to the cargo is undisputed; and that it was also a benefit to the ship only makes her claim less in amount than it would have been had she been lost by the act of stranding. She could only claim and has only been allowed the damages caused specially by the stranding, which was the voluntary and vicarious act which saved the cargo from a heavier damage and expense.

Mr. Justice **Clifford** delivered the opinion of the court:

Losses in a sea risk which give a claim to general average are usually divided into two great classes: (1) Those which arise from a sacrifice of part of the ship, or part of the cargo, purposely made to save the whole adventure from perishing; (2) such as arise out of extraordinary expenses incurred, by one of the parties, in the course of the voyage, for the joint benefit of the ship and cargo.

Where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger, or incurs extraordinary expenses to promote the safety of all the associated interests, common justice requires that the sacrifice so made, or the extraordinary expenses so incurred, shall be assessed upon all the interests which were so exposed to the impending peril, and which were saved, by those means, from the threatened danger in proportion to the share of each in the joint adventure. *The Star of Hope*, 9 Wall. 228, 19 L. ed. 645.

1. Bound on a voyage from Calcutta to New York, the ship Oneiza, with a valuable cargo of linseed, gunny cloth, and other merchandise on board, on the 16th of January, 1867, arrived off the latter port in a heavy gale, and in the evening of that day came to anchor inside the lower bay, being unable to proceed to the upper harbor in consequence of ice. Securely anchored, she remained there until the twenty-first of the same month, surrounded by ice and unable to proceed to her port of destination, when those in charge of her procured two steam tugs and caused her to be towed up through the Narrows into the inner harbor, and at seven o'clock in the evening of that day she came to anchor *near the quarantine ground, [*115 abreast of Staten Island, in ten fathoms of water, where she remained during the night.

Throughout the night the watch were ordered to sound the pumps every hour, and the record shows that they found no more water in the ship than is usual under the circumstances, until the steam tugs made fast to her for the purpose of towing her up to the harbor, when it was ascertained that she had twenty-six inches of water in the well, and it was observed, within half an hour from that time, that the head of the ship was settling. Report of that fact was made to the master and he immediately directed that the pumps should be tried, and it was soon found that the ship had six feet of water in the hold, and that she was in imminent danger of sinking.

Efforts were made to keep her free, but it was found to be impossible to do so by her own pumps, or by any other means at command. Holes had been cut in the hull by the ice, and the master, finding that he could not stop the leaks, decided to run the ship ashore, as the best means of saving life and property, and as the only means of preventing the ship from sinking in deep water. Directions to that effect were, accordingly, given to those in charge of the steam tugs, and with their assistance the ship was stranded on Staten Island Flats, and it appears that when she grounded she had ten feet of water in her hold, the tide still rising, and that at high tide the water in the hold increased in depth to twenty feet.

Prompt assistance was procured and the ship was lightened by discharging part of her cargo into lighters furnished by the wrecking company, and on the first day of February following they succeeded in making the ship float, and she was immediately towed to her port of destination and the residue of her cargo was discharged.

2. Much of the cargo was saved, and the owners of the ship insisted that the owners of the cargo were bound to contribute for the sacrifices made by the ship and the expenses incurred by her owners in saving the associated interests from the dangers of the impending 116*] peril. Investigations *became necessary before the parties could adjust the claim, and with that view the owners, shippers and consignees of the cargo executed to the agent of the ship an average bond in which they designated the persons to be employed as adjusters, and covenanted and agreed to pay their respective shares of such proportion of the losses and expenses incurred as constitute, by the usage of the port, a general average, provided such losses and expenses were stated and apportioned by the average adjusters therein specified in accordance with the established usage and laws of that state in similar cases.

Pursuant to the terms of that bond the persons therein named were designated as the average adjusters, and they, after having heard the parties, charged to the cargo belonging to the defendants the sum of $11,380.78 as a general average contribution in favor of the owners of the ship.

Unquestionably, they proceeded upon the ground that the stranding of the ship was voluntary, but the defendants denied that the fact was so, and refused to pay the amount. Whereupon the plaintiffs brought an action of assumpsit against them in the circuit court to recover the amount as adjusted, and the jury, under the instructions of the court, found a verdict in their favor for the whole amount charged by the adjusters to the owners of the cargo, with interest from the date of the adjustment. Exceptions were filed by the defendants to the refusals of the court to instruct the jury as requested, and also to the instructions given by the court to the jury, and the defendants sued out the writ of error and removed the cause into this court.

3. Complaint is made by the defendants that the question whether the evidence introduced in the case showed such a state of facts as entitled the owners of the vessel to claim a general average contribution from them, as the owners of the cargo, was not subjected to the jury under proper instructions.

Injuries, it is conceded by the defendants, had been received *by the ship before [*117 the master determined to run her upon the flats, and it is equally clear that those injuries, or some of them, were plainly attributable to the direct action of the ice, as contended by the defendants. Certain portions of her sheathing about the bows had been torn off and several holes had been cut through her planking—two or more on her port bow and one on her starboard bow—which caused the ship to leak. Doubtless these injuries preceded the stranding of the ship, but she received many more, and such as were of a more serious character, by that act or as a necessary consequence of it, as is fully proved by the survey and the other evidence exhibited in the record.

Courts, as well as text writers, at the present day, agree that where the ship is voluntarily run ashore to avoid capture, foundering or shipwreck and she is afterwards recovered so as to be able to perform her voyage, the loss resulting from the stranding is to be made good by general average contribution, as such a claim is clearly within the rule that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests exposed to the common peril which were saved from the common danger by the sacrifice. *McAndrews* v. *Thatcher*, 3 Wall. 365, 18 L. ed. 159; *Barnard* v. *Adams*, 10 How. 270; 2 Arn. Ins. 784; 2 Pars. Ins. 241, 263; 2 Phil. Ins. 5th ed. 1313; *Nelson* v. *Belmont*, 21 N. Y. 38.

Authorities may be cited where it is held that if the ship is not saved an action for the claims cannot be maintained, but it is settled law in this court that the case is one for general average, although the ship was totally lost, if the stranding was designed for the common benefit and was voluntary, and it appears that the act of stranding resulted in saving the cargo. *Star of Hope, supra; Columbian Ins. Co.* v. *Ashby*, 13 Pet. 331.

Repairs rendered necessary to the vessel by the ordinary perils of navigation, to enable her to prosecute her voyage to her port of destination, it is admitted, must be borne by the owners of the vessel, but the question whether the sacrifice made by the ship in a case where the ship, cargo, and *all on board were in [*118 imminent peril, and the ship was voluntarily stranded to save the whole adventure, constitutes a valid claim for a general average contribution, is not an open one in this court, if the cargo is saved by the sacrifice, and it is equally

well settled that extraordinary expenses incurred in getting the ship off, if the effort is successful, fall within the same rule. Necessary repairs to complete the voyage are not within the rule as applied in this court, except to the extent that such repairs are required to replace such parts of the ship as were sacrificed to save the associated interests.

Viewed in that light, the claim of the owners of the ship rests upon the same foundation of justice and reason as that of the owner of the cargo, in a case where part of the cargo is thrown overboard to save the ship, cargo and all on board. Decided cases may be referred to where the rule established by this court is questioned, but the rule, it is submitted, is both just and reasonable if it be correctly understood and properly applied. *Walthew* v. *Mavrojani*, 5 Exch. 119; *Moran* v. *Jones*, 7 Ell. & Bl. 532.

4. Special reference must be made to the charge of the court, as it is insisted that several of the instructions given to the jury are erroneous.

Speaking to the principal question in the case, the judge told the jury that if they found that the ship and cargo were exposed to a common peril of sinking, and becoming submerged in deep water, and that the expense of raising and saving the ship and cargo from that place would have been greater than if stranded in shoal water, and that the master, to save the ship and cargo from such increased expenses, ran the ship on the flats and stranded her in shoal water, and thereby increased the peril to the ship and diminished the damages and expenses of saving the ship and cargo, then there was a voluntary stranding within the meaning of the commercial law, and the plaintiffs were entitled to recover, as general average, their just proportion of such damages and expenses.

Tested by the principles already explained, it 119*] is quite obvious *that the instruction is correct, and that the defendants have no just ground of complaint. They think otherwise, however, and insist that the ship was actually sinking at her anchorage from the direct effect of the accidental injuries she had received by the ice, and that her condition was such that there was no power to save her within the meaning of the law of general average.

Suppose that her condition was such that she would have sunk if she had remained where she was, still it is clear that her buoyancy was not overcome, as it appears that she still floated, that her position was changed, and that she was successfully stranded in much shoaler water; and the jury have found that the stranding was voluntary, and that the effect was to increase the peril to the ship and to diminish the damages and expenses of saving the ship and cargo.

Assume that the facts were as the jury have found them to be, and it is clear that the case is one for general average contribution, as appears by the repeated decisions of this court. Such being the finding of the jury, the defendants are without any remedy in this court. Their remedy, if any, was by a motion for a new trial in the court below.

Minute description of the circumstances attending the disaster is given in the protest, and there was other evidence in the case upon the subject sufficient to have made it the duty of the court to submit the whole question to the jury in the form in which it was submitted in the instruction under consideration.

Facts found by a jury cannot be re-examined in this court, and of course it must be assumed, in the further examination of the case that the ship and cargo, as the ship lay at her anchorage, were exposed to a common peril of sinking in deep water; that the expenses of raising and saving them, if the ship had sunk there, would have been greater than if stranded in shoal water; that the master, to save the ship and cargo from such increased expenses, ran the ship on the flats, and stranded her in shoal water, and that the effect of that act was to increase the peril of the ship and to diminish the damages and expenses of saving the ship and cargo.

*5. Evidently this view of the finding [*120 of the jury disposes of the main question in the case and leaves nothing open for decision except the question whether the instructions in respect to the extent of the liability and the principles of the adjustment were correct.

Extensive damage was done to the ship, but the defendants insist that it was not wholly done by the stranding; that it was partly caused by the swelling of the flaxseed, consequent upon its being wet; that the effect of the water upon the article was to swell it, causing a vertical strain upon the ship, pressing her decks and beams upwards and separating the beams from the stanchions. They accordingly requested the court to instruct the jury that there was no evidence in the case from which the jury could determine what repairs were rendered necessary by the stranding and that, inasmuch as it appeared that both of those causes concurred in producing the injuries to the ship, they should assume that one half was occasioned by each, which the court very properly declined to give, as there was not sufficient evidence in the case to warrant the jury in finding that the estimate made by the adjusters was incorrect.

Whether the cargo was damaged by the stranding or by the antecedent peril of the sea, was certainly a question of fact for the jury, and upon that subject the jury were told that if they found that no water entered the ship, which reached and damaged the cargo, except what came through the holes cut in the bows by the ice, then the defendants were not entitled to be allowed anything as general average for the damage to their cargo by water, as in that state of the case the damage to the cargo was the result of the prior peril and not of the act of stranding. Such damages, it is conceded, are not the subject of general average, and as the jury found for the plaintiff, further examination of that exception is unnecessary.

Objection was also taken by the defendants to the adjustment submitted by the persons designated in the average bond, and upon that subject the jury were told that if they found that the adjustment in respect to the contributive *value of the freight, as made out [*121 by the adjusters, was according to the usage and custom of the port, and if they found that

no more had been allowed for damages to the ship than was attributable to the stranding, then the plaintiffs were entitled to their verdict for the amount stated in the average adjustment, with interest from its date.

Framed as that instruction was in precise conformity with the stipulations of the average bond it is impossible to regard it as erroneous, which is a sufficient answer to the exception.

Suffice it to say, without giving a separate examination to each one of the numerous exceptions, that we are all of the opinion that there is no error in the record.

Judgment affirmed.

THE STEAMER OCEAN SPRAY, etc., George Kentfield, Claimant, *Appt.*,

v.

N. C. ERLANDSON *et al.*

(See S. C. *"The Spray,"* 12 Wall. 366–368.)

Question of fact in a collision case—when schooner liable for collision.

Where the question presented by the record in a collision case is purely one of fact, and it is clear that the lower courts have done the appellants no wrong, this court will not make any extended comment on the testimony, but merely state its conclusions.

Where a schooner, in haste to reach a harbor to obtain the first load, ventured on dangerous ground in order to cut across another schooner, the former must pay for injury caused by its own recklessness.

[No. 145.]

Argued Apr. 14, 1871. Decided May 1, 1871.

APPEAL from the Circuit Court of the United States for the District of California.

The libel in this case was filed in the district court of the United States in and for the district of California, by the appellees, to recover for damages resulting from a certain collision. A decree having been entered in said court in favor of the libelants, the claimant of the Ocean Spray took an appeal to the circuit court, by which a decree was entered also in favor of the libelants, but for a smaller sum than was allowed by the district court; whereupon the said claimant of the Ocean Spray took a further appeal to this court.

The case is fully stated in the opinion of the court.

Messrs. W. W. Cope and **T. T. Crittenden** for appellant.

Messrs. H. McAllister and **C. E. Whitehead** for appellees.

Mr. Justice **Davis** delivered the opinion of the court:

This is a case of collision between two schooners, which occurred on the coast of California, in March, 1868, in the attempt to enter a small harbor called Little River, and has been twice adjudged against the appellants.

The question presented by the record is purely one of fact, and it is not only clear that the lower courts have done the appellants no wrong, but that the weight and effect of the evidence does not admit of controversy. In such a state of the case we do not feel called upon, in order to vindicate our judgment, to make any extended comment on the testimony, nor would it serve any useful purpose to do so. We shall, therefore, content ourselves with stating the

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this change of course, he continued in the same track he was pursuing, regardless of his own safety or the rights of others. It is a little singular that he should have been in such a hurry to reach the harbor if in good faith he believed the Lane was bound further down the coast. But the theory that he thought the schooner ahead was not going into the Little River is an afterthought. It is clear from the evidence that he supposed this vessel was the Ellen Adelia, and that he knew she was bound for the same port as himself. And it is equally clear that he wanted to get there in advance of her, if he could, so as to obtain the first load. It seems that the principal objects of the boats engaged in the Little River trade is to obtain lumber, and that they are often detained there a considerable length of time for want of proper facilities for loading. Indeed, so limited are these facilities that only one vessel can be loaded at a time and, necessarily, the one which arrives first is served first. With knowledge of this condition of things, and for the purpose of securing the prior right, the master of the Spray ventured upon dangerous ground in order to cut across the schooner, and must suffer the consequences of his own recklessness.

The judgment of the Circuit Court is affirmed.

JOHN S. KNOX, Jr., and Robert F. Knox, late Copartners as Knox & Brother, and John S. Knox, *Plffs. in Err.*,

v.

THE EXCHANGE BANK OF VIRGINIA, Use of George W. Camp, Trustee.

(See S. C. 12 Wall. 379-384.)

A person discharged in bankruptcy cannot bring writ of error on judgment against him —the assignee is the proper party.

Where a defendant is discharged in bankruptcy from a judgment obtained against him, and the court thereupon order that no execution shall issue on the judgment without an order of the court and notice to him, he has no further interest in the suit, and cannot bring a writ of error thereon.

The assignee in bankruptcy alone can bring the writ of error.

[No. 500.]

Submitted Apr. 21, 1871. Decided May, 1, 1871.

IN ERROR to the Circuit Court of the United States for the District of Virginia.

On motion to dismiss. (See this case on merits, *post.*)

Suit was brought in the circuit court of Alexandria Co., Virginia, by the defendant in error, assignee of an insolvent bank, upon a certain promissory note. The defendants tendered notes of the insolvent bank as an off set, they being, by the bank's charter, a valid tender in payment of debts to the bank. Judgment being given for the defendant, the plaintiff took the case, upon a bill of exceptions, to the supreme court of appeals of the state, by which the said judgment was reversed. Said court, however, ordered, on consideration that said defendant had become bankrupt; that no execution be issued on said judgment without a previous order to that effect, made upon notice. Whereupon said defendants sued out this writ of error.

The case is further stated by the court.

Mr. **H. O. Claughton** for defendant in error.

Messrs. **Brent & Wattles** for plaintiffs in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the court of appeals of the state of Virginia, and a motion is made to dismiss it because the record does not show that any one of the questions, which give jurisdiction to this court over judgments rendered in the state courts, was involved in the judgment of the court of appeals.

In examining the record to see if there was such a question, we find that the plaintiffs in error have no interest in the matter in suit, and are not proper parties to bring a writ of error to this court.

In the same entry which records the judgment of the court of appeals against plaintiffs in error, it is recited that they produced in court their certificates of discharge by a court of bankruptcy, obtained after the suit we are now considering was instituted, and thereupon the court received such certificates and made an order that no execution should issue on the judgment without a previous order of the court to that effect, made after reasonable notice to plaintiffs in error to appear and show cause against it.

1. It is clear from this that the plaintiffs in error have no further interest in the suit. They are by law discharged from the judgment. If it be said that they are subject to be brought in by notice, and have an execution issued against them, we answer that the record shows that they are not now liable, and if such a judgment should be rendered against them, it is from that judgment, and not the present one, which is not final, that the writ of error should be taken.

2. It is quite clear that the assignee in bankruptcy of the plaintiffs in error is the proper party to bring the writ of error, and he alone can do it. He would not be bound by the decision against the bankrupts in this court, nor would the defendant in error be prevented from filing his claim against the assignee in bankruptcy.

*The case of *Herndon* v. *Howard*, 9 [*382 Wall. 664, 19 L. ed. 809, settles this question.

For these reasons the writ of error is dismissed.

LEGAL TENDER CASES.

WILLIAM B. KNOX, *Plff. in Err.*,

v.

PHŒBE G. LEE and Hugh Lee, her Husband, and

THOMAS H. PARKER, *Plff. in Err.*,

v.

GEORGE DAVIS.

(See S. C. 12 Wall. 457-681.)

Legal Tender Acts constitutional—as to contracts made before their passage—Hepburn v. *Griswold, overruled.*

The acts of Congress, known as the Legal Tender

Acts, are constitutional when applied to contracts made before their passage.

They are also valid as applicable to debts contracted since their passage.

Hepburn v. Griswold, 8 Wall. 603, 19 L. ed. 513, so far as it held the Legal Tender Acts unwarranted by the Constitution so far as they apply to contracts made before their enactment, overruled.

A confiscation sale of property had under the authority of the so-called Confederate States, in aid of the Rebellion, conveyed no title. Texas v. White, 7 Wall. 700, 19 L. ed. 227.

[Nos. 10, 17.]

No. 10, Argued Nov. 17, 1869. Re-argued, Feb. 23, 1871, and further, Apr. 18 and 19, 1871. No. 17, Argued Apr. 18 and 19, 1871. Both Decided May 1, 1871.

IN ERROR to the Circuit Court of the United States for the Western District of Texas; and in error to the Supreme Judicial Court of the Commonwealth of Massachusetts.

In the case of *Knox* v. *Lee*, suit was brought in the court below by the defendants in error, to recover the value of certain sheep, which defendant had bought at a confiscation sale, had under authority of the so-called Confederate States. Judgment having been given for the plaintiffs, the defendant sued out this writ of error. Upon the trial, the judge charged the jury as follows:

"It appears from the evidence that these sheep were confiscated as the property of an alien enemy, and sold under the authority of the so-called Confederate government, March 7, 1863, and that the defendant, Knox, in connection with others, perhaps, became the purchaser thereof.

"I have to say to the jury that such sale conferred no title whatsoever upon the purchaser, or upon anyone, knowing that title was derived from this source."

During the progress of the trial, and before the above instructions were given, and before the plaintiffs had closed their case, the plaintiff offered to prove what was the difference in value between specie (gold and silver) and United States currency, generally known as greenbacks, for the purpose of showing that gold and silver had a greater value than greenbacks, and for the purpose of allowing the jury to estimate the difference between the two, to which evidence the defendant, at the time it was offered, objected, on the ground that United States currency was made a legal tender by law, and that there was no difference in value, in law, between the two; and the court sustained the objection and excluded all evidence as to the difference in value between specie and legal tender notes in the United States, and no evidence was allowed to go to the jury on this point. The court, after having ruled as above and given the instructions above set forth after evidence was closed, on its own motion, in the final paragraph of its charge to the jury, gave them the following instructions:

"In assessing damages, the jury will recollect that whatever amount they may give by their verdict, can be discharged by the payment of such amount in legal tender notes of the United States."

Judgment having been given for the plaintiffs the defendant sued out this writ of error.

Messrs. **George W. Paschal** and **George W. Paschal, Jr.,** for plaintiff in error:

I believe this is the first time the question has been before this court. I am aware of its great importance, and of some preconceived opinions upon the subject; but duty requires us to follow facts to their legitimate conclusions. It is very easy to say that the organization of the Confederate States was not a government; that its officers were not officers; its courts not courts; their judgments not judgments, and, in the fashionable cant, that their every official act was void *ab initio;* but to those of us who knew it, and were compelled to submit to its operations, it was a fearful reality. It worked by the strong arm of power; and now the question is: how far will that power be recognized in the transmission of property? In its constitution it organized courts, with powers and jurisdiction much after the model of our own. These courts took possession of the records of our Federal courts, and, so far as the jurisdiction had not been ousted, they adjudicated upon precisely the same laws which governed their predecessors upon the same Benches. As a government, it declared war against the United States, or that part of it where our civil and criminal jurisdiction was still in operation. As one of the consequences of this recognized war, it passed laws to sequester and appropriate the property of those who adhered to the Union cause.

Fortunately, our case does not rest upon the ability to prove that these acts were legal and valid, when tested by the Constitution and laws of the United States; nor does it rest upon our ability to prove that Texas was out of the Union; for the contrary has been settled in the great case of *Texas* v. *White*, 7 Wall, 700, 19 L. ed. 227, 25 Tex. Supp. 465; nor yet upon the fact that this law of Congress, this sequestration and sale, were not acts in aid of the Rebellion; for the proceeds of such sequestrations were, by the terms of the law, to be appropriated as indemnity for like confiscations by the United States; but our case rests upon the question of whether the Confederate States was or not a *de facto* government. And here any language of mine would but weaken that of Mr. Justice Nelson, in *Mauran* v. *Ins. Co.* 6 Wall. 13, 18 L. ed. 842.

He says: "A *de facto* government is defined to be one in possession of supreme or sovereign power, but without right, a government of usurpation founded, perhaps, on crime, and in violation of every principle of international law and of right and justice; yet, while it is thus organized and in control of the sovereign authority, there can be no question between the insurer and insured as to the lawlessness of the government under whose commission the capture has been made." And upon this point the court cited the case of *Nesbitt* v. *Lushington*, 4 T. R. 783.

The cases cited by the learned judge, as rendering further investigation unnecessary, greatly strengthen and give force to this view. See, also, *Dole* v. *Ins. Co.* 6 Allen, 373; *The Prize Cases*, 2 Black, 687, 17 L. ed. 483; *Mrs. Alexander's Cotton*, 2 Wall. 419, 17 L. ed. 919; *The Venice*, 2 Wall. 274, 17 L. ed. 866; *Ga.* v.

Brailsford, 2 Dall. 402; *Ware* v. *Hylton*, 3 Dall. 199.

Perhaps the impregnable rule was never better defined than in the quotation from Vattel, by Mr. Justice Chase.

Vattel, lib. 4, § 22; S. P. Lee, Captures, ch. 8, p. 118; 3 Dall. p. 226.

As Lee and Vattel quote the passage from Bynkershoek, lib. 1, ch. 7, p. 117, and as this text was solemnly approved by this court, and supported by many authorities, I need not pursue the principle further.

A more liberal translation of the text of Bynkershoek, will be found in De Ponceau's Treatise on the Law of War, p. 56; and see S. P., Lee's Treatise on War, ch. 8, p. 111.

The plaintiff, for the purpose of enhancing the damages, offered to prove the difference in value between coin and paper currency. While this court might hesitate to set aside a verdict upon the mere question of excessive damages, yet where, as in this case, the verdict must have been influenced by an erroneous instruction, a new trial will be granted.

Bailey v. *Mills*, 27 Tex. 434, 438; *Blanchet* v. *Davis*, 3 Tex. 142; *Rogers* v. *Broadnax*, 24 Tex. 543; *Herrington* v. *Holman*, 25 Tex. Supp. 256. And the same rule has been adopted in Texas cases in this court. *Chandler* v. *Von Roeder*, 24 How. 224, 16 L. ed. 633.

Mr. **J. A. Wills**, for defendant in error:

It is argued that the Confederate States were a government *de facto*, and that, therefore, these laws, passed in aid of the Rebellion, were valid, and that the plaintiff in error took a good title under them. This argument, if sound, when carried out to its logical consequences, would validate all acts of a rebel government.

But it is not necessary to argue this question on original grounds, as it has already been decided by this court, at the present term, in the case of *Texas* v. *White*, 7 Wall. 700, 19 L. ed. 227. See, also, *Thorington* v. *Smith*, 8 Wall. 1, 19 L. ed. 361.

In drawing the distinction between those laws and acts of the Confederate States, which the United States and its courts will recognize as valid, and those which they will not, the Chief Justice, in *Texas* v. *White*, says:

"It may be said, perhaps, with sufficient accuracy, that acts, necessary to peace and good order among citizens, . . . which would be valid if emanating from a lawful government, must be regarded, in general, as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must in general be regarded as invalid and void."

In a still more recent case, tried by Chief Justice Chase, at Charleston, during the last summer, in illustration of the same principle, he held a confiscation by the Confederate authorities of shares of stock in the Charleston Gas Light Company, to be void. See *Perdicaris* v. *Charleston Gas Light Co.* reported in the Law Times, U. S. Court R. for Aug. 1869, vol. 2, p. 117. In that case the Chief Justice says:

"It is not claimed that the transfer of shares sequestered and sold under authority of the Confederate government, or the government of a state hostile to the United States, and prejudicial to the rights of citizens of states adhering to the Union, are void, and convey no title."

"In modern times, all states have adopted, as a principle, the application within their territories of foreign laws, subject, however, to the restrictions which the rights of sovereignty and the interests of their own subjects require. This is the doctrine professed by all the publicists who have written on the subject." Wheat. Int. L. 8th ed. by Dana, §§ 78, 79, pp. 133–135.

There is no ground for the allegation that the jury were misled, or that the damages were exaggerated, to the injury of the defendant.

"The witnesses all testified that the sheep would not bring, in March, 1863, the price that they would have brought in 1860 or 1861, though one witness testified, that at the sale one party remarked that if he could get a good title to the sheep he would give $10 or $12 a head for them." Accepting, therefore, this estimate of their average value, with a good title, the six hundred eight sheep, at $10 per head, would be worth $6,080 in specie. Adding four and one third years' interest, that is, from March, 1863, till June, 1867, at eight per cent, say 33⅓ per cent, $2,026.66⅔, and we have the aggregate amount of $8,106.66⅔, an amount larger than the verdict complained of, saying nothing, according to the ruling of the judge, about the difference between the value of the sheep, when estimated in gold and silver and when estimated in legal tender notes of the United States.

The case of *Parker* v. *Davis* arose in the court below, upon a bill of equity filed by the defendant in error, to compel the specific performance of a contract to convey a lot of wood land, upon the payment of a given sum of money. This contract was dated and the suit brought upon it before the act of Congress of Feb. 25, 1862, which raises the legal questions in issue. The supreme court of the state decreed specific performance Feb., 1867, to wit: that the plaintiff should pay into court, a certain sum of money, and the defendant should thereupon execute a deed to the defendant in error of the wood land in question.

In pursuance of that decree the plaintiff paid into court the decreed sum in legal-tender notes of the United States. The defendant refused to execute the deed required by the decree of the court upon the ground that he was entitled to have the sum set forth in the decree paid into the court in coin, and that the payment into court of legal tender notes was not a compliance with the order of the court; whereupon the court, upon hearing of the parties, changed the decree, and ordered that the defendant should execute the deed required by his contract upon payment into court by the plaintiff of a specific sum in Treasury notes of the United States.

From this decree the defendant in that court sued out this writ of error.

Mr. **Benj. F. Thomas**, for plaintiff in error:

I. The claim of the plaintiff in error is that the consideration or sum of money to be paid by defendant in error to the plaintiff in error, for the conveyance of the land, did not constitute a debt, within the meaning and intent of the act of Congress of July 11, 1862, known as the Legal Tender Law.

II. That if a deed, it was contracted before

the passage of the tender laws, and not affected by them.

III. That the defendant in error having neglected and refused to perform the agreement on his part, no decree for the specific performance can now be made.

Messrs. **Benj. F. Butler,** *Geo. S. Boutwell, D. S. & Geo. F. Richardson,* for defendant in error:

First. Whether this decree of the court, ordering money to be paid into court, is a debt due to the plaintiff in error within the meaning of the act of February 25, 1862.

Second. When did the sum decreed by the court become due, or a debt to the plaintiff in error? The defendant in error says, not until the judgment of the court, which was in 1867, subsequent to the Legal Tender Act.

The plaintiff in error having refused to perform his contract, there was no debt due him from defendant in error until he performed the judgment of the court by the execution of the deed mentioned in the decree; then and not until then had he a claim upon or debt due from the defendant in error.

Third. It is submitted that this case is relieved of all difficulty of the change of the decree of the state court ordering the plaintiff specifically to perform his contract, upon payment into court of certain legal tender notes described in the decree.

Whether it was competent for the state court sitting in equity, to decree specific performance of the contract between the parties, on such terms as they deemed equitable and just, is not in issue upon this writ of error.

That court has decided that it was equitable and just that the plaintiff in error should execute his deed in performance of his contract, upon receiving a given sum in United States Treasury notes. This, surely, it was competent for the court to do; and that determination is not within the jurisdiction of this court to review, no law or statute of the United States being therein involved. It is submitted by the defendant in error, that *quacunque via*, the case is not affected by the question whether the Legal Tender Act applies to debts due before its passage. If the decree of the court created a debt, in consideration of the conveyance of the land between the parties, that debt was not *in esse* until after the passage of the Legal Tender Act. But the final decree of the court created an obligation upon the defendant in error only *sub modo*, that is, according to its terms, to pay into court a certain amount in a specific currency or notes, and therefore created only that specific liability upon the defendant in error.

These cases having been submitted to the court on April 10, 1871, Mr. Justice **Clifford** announced that the majority of the court make the following order in these cases.

Ordered, That Mr. Potter and the Attorney General be heard in these cases on the 12th inst. upon the following questions:

1. Is the act of Congress, known as the Legal Tender Act, constitutional as to contracts made before its passage?

2. Is it valid, as applicable to transactions since its passage?

Mr. Potter will open, the Attorney General will reply, and Mr. Potter will close.

Mr. Justice **Clifford,** dissenting:

I dissent from the order of the court in these cases, especially from that part of it which opens for reargument the question whether the act of Congress known as the Legal Tender Act, is constitutional as to contracts made before its passage; as I hold that that question is conclusively settled by the case of *Hepburn* v. *Griswold,* 8 Wall. 603, 19 L. ed. 513, in which the opinion was given by the Chief Justice. And I am requested to say that Mr. Justice **Nelson** and Mr. Justice **Field** concur in this dissent.

April 12, 1871—Mr. Justice **Clifford** informed the Bar that Mr. Justice Nelson was too ill to attend court to-day; that, in consequence of his absence, the hearing in these cases, assigned for argument this morning, would be further postponed, adding that notice would hereafter be given to the counsel when they could be heard.

After the announcement of the above order, Mr. Justice **Swayne** made the following remarks:

The further argument of this case having been again postponed on account of the indisposition and absence of Mr. Justice Nelson, it is deemed proper by the court that a few remarks by it should be submitted. The case is one of those before us involving what is known as "the legal tender question."

The other case, *Parker* v. *Davis,* was submitted upon the printed briefs on the 13th of February last, and calls for no observation, except that it was reached in the regular order of the docket, is before us and ought to be disposed of as soon as may be, consistently with the due administration of justice. In the other case, Phœbe G. Lee and her husband recovered a judgment against Knox the plaintiff in error, in the circuit court of the United States for the district of Texas, at the June term, 1867; the writ of error by which the case was brought into this court bears date Oct. 1, 1869. April 30, 1870, it was continued and ordered to be re-argued on the first Tuesday of the ensuing December term, 1870. Nov. 17, 1870, during the fall session of this court, it having been ascertained that neither the Chief Justice nor Mr. Justice Nelson could be present at the time designated, the hearing was postponed to the first Tuesday of February, 1871. On the 23d of that month the case was argued by the counsel of the parties. All the judges were present by the Chief Justice. The counsel on both sides admitted the validity of the Legal Tender Acts. At the close of the argument, Hon. Clarkson N. Potter asked to be heard upon the constitutional question involved in the cases. The Attorney General expressed a desire to be heard also, if Mr. Porter were heard. These requests were taken into conference, and both promptly acceded to. Several times have since been fixed for the hearing, but not publicly announced, for the reason that it was uncertain whether some of the judges would not be necessarily absent. On Monday last the announcement designating to-day was made. We were advised that it would suit the convenience of Mr. Justice Nelson to be present. The counsel to be heard were duly notified in advance, and both had expressed themselves satisfied with the time. If the plaintiffs in the court below are entitled to the fruit of their

judgment, they ought not to be further delayed. Long delay involves, to that extent, a denial of justice.

It is due to this court and to the public, that both of these cases shall be decided, and the important question which they present be put at rest as speedily as can be done with propriety. It is to be hoped that the early restoration of the health of Mr. Justice Nelson will enable us to hear the further argument and announce our conclusion within the residue of the term.

In accordance with the foregoing the cases were argued:

Argument against the power of Congress to make United States Treasury notes a legal tender.

Mr. **Clarkson N. Potter,** against the constitutionality of the act:

Whatever differences may exist as regards the true construction of the Constitution, as a lawyer addressing this Supreme Tribunal, I cannot but be mindful that certain general rules for its construction have been established here; and that, here at least, it must be treated as settled, that:

First. This government has no powers whatever except those derived from the Constitution.

Second. By the Constitution, it has all the powers thereby expressly delegated to it.

Third. And also all those powers which are necessary and proper for carrying into execution any of the delegated powers.

Fourth. And "when the end is legitimate, when it is within the scope of the Constitution, all the means which are appropriate, plainly adapted to the end, not prohibited, but consistent with the letter and spirit of the Constitution, are taken to be necessary and proper, and. therefore, constitutional.

Fifth. Within the sphere of the authority thus delegated, this government is supreme.

Bearing in mind these principles, we have now to inquire: how far was Congress authorized to make the Treasury notes of the government a legal tender?

Now, that the Constitution has not expressly delegated any authority to Congress to make these Treasury notes adequate to discharge the debts of private individuals, at their nominal value, must be conceded.

Can such a power then be implied from the authority "to coin money, and regulate the value thereof?" Or, can it be regarded as one of the measures necessary and proper to carry into effect either the power to borrow money, to "regulate commerce, to raise and support armies, to provide and maintain a navy, to suppress insurrection, to repel invasion, or any other of the powers delegated to Congress?

First Position. This power is not embraced in the authority given Congress to coin money.

"Money" as Used in the Constitution.

Money is used in the Constitution in two senses. In the 2d subdivision of the section relating to the powers of Congress, the Constitution speaks of the power to borrow money; and there the word must be used in the larger sense, of strict money, or of any thing received instead. But in the 5th subdivision of that section, which gives Congress power to coin money and regulate the value thereof and of foreign coins, it must be evident that Congress referred only to metallic money. From time immemorial, in all countries, in all ages of the world, the precious metals have been the medium of exchanges, and the strict moneys. We read that, some four thousand years ago, Abraham purchased the cave of Machpelah with shekels of silver, current money with the merchants.

The value of these metals has been designated by a stamp upon them indicating their fineness and weight, that is, indicating the value at which the coins were rated. When the coins have possessed the value indicated, they have passed from hand to hand as of that value. When they have been found not to possess that value, they have (except within very narrow limits) failed to so pass.

It is true that, at certain periods in the history of some of the states, the skins of the beaver passing by tale; strings of shells, known as wampum, passing by measure; and packages of tobacco by defined weights, were, in the absence of the precious metals, used as money, and were made the medium of exchanges.

But none of these was a "legal tender" as money (2 Duv. 63), or ever had anything but a local and limited circulation, or ever was used as a substitute for money, after money was introduced.

While in all ages of the world, in all countries, the precious metals, when stamped with a designated value, have been known as moneys; and (with representatives of such moneys), have always been the great and universal medium of exchanges.

Money of the Framers of the Constitution.

Not only has "money" meant metallic money, but, upon looking at the public history of the times (which this court has established as a proper guide to its construction, 8 How. 24, 11 Pet. 332), we find that in the history of the country, there was no period in which money was more distinctly understood and meant to be hard money, than at the period when the Constitution was framed and adopted.

"Its framers had just passed through all the horrors of an unredeemed paper currency." "The history of that currency had been within the view of those who staked their property on the public faith, always freely given, and grossly violated." 11 Pet. 348.

"The mischiefs of the experiments which had been made were fresh in the public mind; and had excited general disgust." Madison's Papers, p. 1345.

With the bills of the government unredeemed, indeed, become at last so hopelessly beyond redemption as to be entirely given up as worthless—the country had returned for circulation to a specie currency; to absolute money having an intrinsic value; and neither had nor wished any other currency. Story, Com. § 1354.

But the context, as well as the word itself, shows that—

Power is Confined to Metals.

This grant is not a grant to create money, but simply to coin money; a power that can be exercised only on money that admits of being coined; that is, a bare power "to strike coin," which was the phrase used in the Articles of Confederation, as the equivalent of "to coin money." It was from those Articles that the words "to coin money and regulate the value thereof" were transferred to the existing

stitution; while the power to regulate money is simply a power to regulate the value thereof, that is, of the money coined, and of foreign coins—a power consistent, when applied to coined money; absurd, when applied to foreign paper promises to pay; for how could Congress regulate the value of the promises put out by nations beyond its control?

If, however, Congress could take the power of stamping leather or paper under this clause, and the leather or paper so stamped be considered as coined money, the value whereof could be regulated by Congress; even that would not support the legal tender provision of the Treasury notes.

With such a power, Congress might, indeed, stamp a lump of leather or a ream of paper, so that they should circulate as current money; that, however, would not make these notes such stamped paper, nor current money.

Treasury Notes Have no Intrinsic Value.

For your Honors will observe that these notes have, as substance, no appreciable value whatever. They are not declared to be, and do not purport to be, of any value as substance. They are not stamped with any intrinsic value. They are not, so far as they possess value, things at all, but only things in action. The material holds the evidence of the promise; but it is the promise and the promise alone, which is, and which purports to be, of value. One dash of the pen across the signature of F. E. Spinner, and this is not a Treasury note; not a thing in action, not a matter which bears the government stamp of value; not $10 at all, but a worthless rag of paper, once used to hold a promise, now canceled.

If, therefore, money, in the phrase "to coin money," could be considered as embracing other substances besides those precious metals, alone throughout all the world as coin, none the less would it remain, that to utter promises to pay money would not be "coining," or "to coin money."

Concurrence of Opinions.

I cannot find that, before the passage of this Legal Tender Act, it had ever been supposed by any court or by any judge of any court, or by any commentator or statesman, that this power "to coin money" had reference to anything but a metallic currency. Indeed, of all the judges that have given opinions, as well as in support of, as against the legality of this law, I find but one, the learned judge who dissented in this case below, who does not concede that to "coin money" was a grant of power relating to the coining of the precious metals.

Nevertheless, although the power to coin money has not sufficed to support the right to make these Treasury notes a legal tender, the power to "regulate the value thereof," that is, of coined money, has been taken as one of the most effective arguments to support this law.

If, under this power to regulate the value of coined moneys, Congress may debase the coinage, if it may put upon the coined moneys any other than their true intrinsic value; if it may declare that one half or three fourths of a dollar, when stamped by it as a dollar, shall be taken to be equal to a whole dollar, or may thus impair the obligation of contracts, and transfer one man's property to another; why, it is asked, under the constitutional power to borrow money, and other delegated powers, and the powers necessary and proper to enable it to exercise the delegated powers, may Congress not do a like thing to produce a better result with these Treasury notes. To this we answer:

Second Position. This power cannot be implied from the power to regulate the value of money, for, first, Congress has no power given it to regulate the value of the money it borrows; but only of the money it coins, and of foreign coins. The analogy claimed would exist if the Constitution gave Congress power to borrow money and regulate the value thereof. But that it does not give, and, second, Congress has no power even to materially debase the coin. A power to regulate is not a power to destroy.

I quite agree that "an uniform course of action involving the right to the exercise of an important power for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightfully exercised." *Briscoe* v. *Bank*, 11 Pet. 318.

But your Honors will find, I think, from a careful review of the legislation of Congress on this subject, not only that Congress has not (as the court of appeals in New York, and the other tribunals which have affirmed the validity of this law, seem to have assumed) exercised plenary power over the subject of currency and the legal tender laws (27 N. Y. 425, 426); but that, on the contrary, the legislation of Congress, from first to last, has been strictly confined to designating the value of coined money and to discriminating with reference to its real value.

Legislation on Coinage.

From the establishment of the government to the passage of the act authorizing Treasury notes, the legal tender coin has been three times debased, and three times only. Once in June, 1834, when the gold coinage was reduced about six per cent in value; once in 1851, when the three cent pieces were first coined; and once in 1853, when the fractional silver coinage was reduced some six per cent in value. But the pieces of these latter coinages were restricted as legal tender within such very narrow limits and for such fractional and special uses, that, practically these laws did not operate as debasements of the coin at all.

From the first issue of coin by this government to this time, the unit of calculation and of coinage, the silver dollar, equal in value to the Spanish milled dollar, has remained the same. It remains still of the same weight and fineness as when first coined; whatever changes have been made, have been made to bring the other coin into more actual and just relation to it.

Standard first Adopted.

When the subject of coinage was first considered by the Confederation, it was proposed to have a unit of account and of coinage much smaller than the dollar, and to employ the decimal system. Jefferson, while recommending the adoption of the decimal system, suggested a coin equal to the then existing Mexican dollar, as the unit of value. His recommendation was adopted, and the dollar has ever since remained the same.

1. Randolph's Jefferson, 3956, Jefferson's paper on coinage, in appendix to his works.

The first coinage was under the act of Apr. 2, 1792; and that act provided that the coinage should be both gold and silver, and that the relative value of the two metals should be as fifteen to one (§11); that is, that one ounce of gold should be taken as the equal of fifteen ounces of silver. By that rate, one gold eagle would contain two thirds as much gold of standard fineness as there was silver in one silver dollar, and one silver dollar would equal in weight three half eagles.

Both of these precious metals were, after that, coined as money; both became lawful money, and, therefore, *ex necessitate*, a tender in payment of debts due in money, even if not so declared by law; just as coal of the specified kind is a lawful tender in discharge of a contract for coal; and cotton, of a contract calling for cotton.

But, in the lapse of years, the relation in value existing or established by Congress in this act of 1792, between the two precious metals, was lost. Owing to the increased produce of silver, and perhaps to the increased demand by the commerce of the world for gold, their relative value had so materially altered, that by 1823 the Secretary of the Treasury called the attention of Congress to the fact that gold had relatively appreciated in value, so that their true relation was then as sixteen to one; and to the evils resulting from the erroneous standard maintained.

Cong. Debates, Feb. 6, 1823, p. 859.

For as soon as gold had advanced, or silver declined in relative value, so that they really bore to each other the relation of sixteen to one in value, instead of fifteen to one, as they were valued by the law, every person who could secure an ounce of our gold coinage for fifteen ounces of silver, secured what was intrinsically worth sixteen silver ounces; that is, made a profit of about six per cent. It followed, of course, that all the gold was taken up as fast as coined, and sent out of the country to be recoined, and that the country retained, instead, only silver and the gold coins of those countries whose gold coinage bore a true relation to the existing value of gold and silver.

In fact, our gold coin went regularly, directly from the mint, as fast as coined, to the foreign pocket; and, out of some $12,000,000 of gold which had been coined, it was computed there was hardly a gold piece to be found in the whole United States. As was said in Congress: "Hitherto, like the tracks to the lion's den, the coins have gone all one way—to Europe; and not one solitary eagle has ever made good its cis-Atlantic flight."

Cong. Debates, June 1834, p. 4654.

Standard Corrected.

This evil led at last to the introduction into Congress of a bill to regulate the value of the gold coinage of the country, by adjusting the rate for gold coin to its true relation to the existing and continuing silver coin.

The debate upon the bill (Cong. Debates, June 21, 1834) shows how anxious Congress was to get at the true relative value of the two precious metals and to fix the coinage accordingly. Opinions as to the relative values of gold and silver ranged from 15.60 to 1, to 16 to 1. The majority of those best calculated from their pursuits to understand the subject, including the New York banks, regarded the true ratio to be as 15.62 to 1; although, for the previous few years, it had averaged 15.80 to 1. But Congress, at the instance of the friends of metallic money, determined to adopt 16 to 1 as the relative values. Partly, because that seemed to be the ratio which had proved practically the most correct in the nations which had adopted it; partly, because it was believed that the relative appreciation of gold, which had been so long going on, would continue, and that the slight overvalution of it, if any there was, would be thus in time corrected.

1 Benton's Thirty Years, 469.

But, so far from Congress assuming any power to materially depreciate the coinage, or impair the rights of creditors, the power of Congress to make depreciated coin a legal tender was expressly disclaimed in the debate.

Cong. Debates, June 21, 1834, pp. 4650, 4652, 4653.

And the statesman, at whose instance and by whose will this bill was mainly carried through, was, of all men who ever had part in the government of this country, the very last one to be quoted on the side of the power of Congress to make promissory notes legal tenders in payments of private debts.—Thomas Hart Benton.

Effect of Change in Gold Coinage.

Your Honors will see that, while Congress did, indeed, reduce the standard and value of the gold coinage, so that $100 of the new gold coins were hardly equal in intrinsic value to ninety-four of the former gold coinage; yet that, in fact, Congress did absolutely nothing to impair the obligation of contracts, or to destroy the rights of the creditors.

For, from the beginning, the debtor had the right to pay in the coinage of either of the precious metals. At first, these were of equal value, and payment in either was indifferent. Gradually the gold appreciated, or the silver depreciated, and then, of course, the debtor, as he had the option, paid in silver. So that, in 1834, the debtor who owed $1,000 and had $940 of the then gold coinage, could exchange his gold for $1,000 in silver coin, and discharge with these his debt of $1,000.

Therefore, although Congress did reduce the value of the gold coinage in 1834, the debtor, after 1834, could no more pay his $1,000 with money of less intrinsic value than he could before. True, he could take $940 in gold of the old coinage, and get with it $1,000 in gold of the new, with which to pay his debt. But so, before the law, he could take this same $940 of gold coinage, and purchase $1,000 of the then, and still, equivalent silver coinage, with which to pay the debt. Indeed, that law, so far from taking one sixteenth of the debt from the creditor and giving it to the debtor, as at first appears, actually gave the debtor no new privilege, and deprived the creditor of no property. It remained optional with the debtor, after the law as before, to pay in the gold pieces of the old coinage. True, it became possible, after the law, for the debtor to pay in the new gold coinage, but it had been optional with him before the law to pay in the constant silver coinage equivalent in value to the new gold coinage.

The law was, in fact, but an adjustment and recognition of the true relation between the values of the two metals, the selection between which had always remained optional to both debtors and creditors; and, so far from being an attempt by Congress to create a legal tender without reference to or differing from the intrinsic value of the thing to be tendered, it was, on the contrary, a most careful and earnest effort to bring the recognizable value of the thing to be tendered more closely to its intrinsic value.

Cong. Debates, June, 1834, pp. 4643-4671.

Following this act of June 28, 1834, Congress passed an act on the same day, conforming the value at which foreign coins were to be rated to their true intrinsic value.

Change of the Silver Coinage.

For nearly twenty years after the passage of these laws of 1834, the relations between the precious metals remained undisturbed, so that no action by Congress was required. But the unlooked for discoveries of gold in California disturbed again, and in a reverse direction, the relation between the two metals, and thereafter silver advanced, and gold declined, in relative values; so that, by 1853, a scarcity in silver coin had been felt. Congress, however, did not thereupon generally depreciate the silver coinage. It was, indeed, urged upon Congress, and I think wisely, to appreciate the gold coinage.

Vide New York Tribune, and other journals.

Instead, however, of doing this—thinking probably, that this gold harvest was to be of short duration and its disturbance of the relation then so long subsisting between the two metals not likely to continue; and striving to meet the evil of shin-plasters and paper tokens for change then pressing—Congress did depreciate the silver coin, for parts of dollars about six per cent (so that two half dollars or four quarter dollars are no longer equal to one dollar piece). But these depreciated coins were restricted from being legal tender for any sum greater than $5 in all, although the smaller silver coin of earlier coinage remained a tender for any amount.

Prior to this, in 1851, Congress had directed the coinage of three cent pieces, of a fineness and weight which gave them a value of only eighty cents on the nominal dollar of these pieces (*i. e.*, thirty-three pieces of three cent coinage were worth intrinsically only 88/100 of one silver dollar); but these pieces were only made tender to the extent of thirty cents in the aggregate; and their issue was shortly stopped, and by the act of 1853 their intrinsic value was raised to the standard of that of the other fractions of the dollar.

Edelman's Bullion Dealers' Guide, pp. 14, 15; ch. XX., 31st Cong. Sess. 11; ch. LXXIX.; 32 Cong. Sess. 11.

Change in the Copper Coinage.

Congress also, in 1793 and 1796, reduced the weight and the intrinsic value of the cent to accord with the increased value of copper, the planchets for which government had to import. Report as to the Mint, Cong. Debates, July, 1823, 804.

These cents, however, were not made a legal tender.

The interference by government with the rights of creditors by regulations of the coin have, therefore, been:

1. By the acts of 1834, a possible but disputed and doubtful depreciation, if of anything, of less than one per cent.

2. By the act of 1851, a depreciation of fractional silver coin (the three cent piece) to an extent which could not, in the largest tender, exceed six cents; shortly, however, altered so that it could not exceed in the aggregate two cents.

3. By the act of 1853, a depreciation of fractional silver to an extent which could not exceed in the largest tender thirty cents.

Debasement too Trifling to be Regarded.

Now, if these debasements of fractional coin be deemed merely such, nevertheless from their minute and fractional nature they would form no precedent for future material debasements of the coinage, or indicate any acquiescence by the people and the courts in an assumption by Congress of the right to put a false or arbitrary value upon its coined moneys. *De minimis non curat lex.*

Practically there Has Been no Debasement of the Coin.

But, indeed, these acts of 1851 and 1853 were practically not at all infringements upon the rights of creditors or debasements of the coinage below its value. I remarked that when coins were struck with a value which they did not possess, they have, "except within very narrow limits," failed to pass at more than their true intrinsic worth. But there are limits within which coins somewhat depreciated below their true value will circulate as well as if they had not been depreciated. Those limits are when the payment is so small that the difference between the nominal and intrinsic values does not leave it worth while to regard the difference; or when some particular convenience about the coin, such as its portability or denomination, overbalances the intrinsic depreciation. That is, the peculiar fitness for the fractional purpose required will in such cases actually make good the depreciation, and carry the small coin, for all purposes of use, up to the stamped value.

Your Honors will recollect how often, in the days of the Spanish piece for 12½ cents, we accepted 12 cents instead and took Spanish quarters with holes drilled through them equally with perfect coin. And I am informed by Mr. Ruggles, delegate to the International Coin Congress, that the sovereign has so depreciated by wear that a large majority of the coins in circulation in Great Britain are intrinsically worth two pence per sovereign less than the standard value; and yet, for all minor payments, they pass from hand to hand by tale equally as of full weight; while in large transactions they are always paid out by weight and not by tale. So with the depreciated three cent pieces of 1851; within the limit at which they were legal tender, their portability and convenience made up what they wanted in intrinsic silver value.

And so, too, with the depreciated coinage of 1853. It was confined to fractions of a dollar, which were so slightly depreciated, and the convenience of which was such, that the trifling intrinsic loss was not to be regarded. But the depreciated coins were made a legal tender

only to twice the amount of the lowest tenderable gold coin, Congress still keeping up to its idea of a double money standard and still holding to its unchanged unit of value, the silver dollar.

Regulation not Debasement.

Now, I submit that all these exercises of the powers of Congress to "coin money and regulate the value thereof," were within the letter and spirit of the Constitution. Congress has, indeed, established the value of certain foreign coins at one time and changed it at another; made them a tender and deprived them of that quality; and changed from time to time the standard of value of coin struck at its mint. But how has it done this?

Without regard to the intrinsic value of the coin struck? By fixing upon it any arbitrary value, and making it a tender at anything but its true value, as all the courts which have supported the constitutionality of the provision we are considering have assumed? Not at all; but, on the contrary, by uniformly seeking to conform the stamp upon its coin to its true value, and by scrupulously limiting the departures from intrinsic value for special purposes, within limits so narrow that the special usefulness of the coin within those limits has actually made good the trifling deficiency in weight.

In the same spirit Congress has provided that its coin shall be a legal tender at its stamped valuation only when of full weight; if of lighter weight, only proportionately, according to its weight.

In fine, Congress, under a power to coin money and regulate the value thereof, has done only and exactly what those words in their plain signification imply; has struck metallic coins and has regulated the value thereof and of foreign coins; and has done this on every occasion with careful regard to their true intrinsic value; manifesting, as well by the particular purposes and narrow limits within which they have departed from intrinsic value, as by their general strict regard for such values (not their belief that they could strike any metal and stamp it with an arbitrary value) but that they could rightfully regulate the value of money only by truly declaring the value thereof. Not that they possessed a magic power, as thought the learned judge (Williams) who dissented below, to give by their omnipotent *fiat* a precious value to inanimate and valueless things; but that they possessed only power to regulate the coin stamped by declaring its value according to the fact—according to the value stamped upon it when of full weight, and of only proportionate value when of light weight.

Misapprehension as to the Action of Congress.

In the opinions of these legal tender cases, nothing has seemed to go so far towards supporting the authority of Congress to make Treasury notes a legal tender as the assumption that Congress had been left by the Constitution at liberty to impair private rights and the obligation of contracts by debasing the specie coinage, and that it had actually debased that coinage and impaired those rights to the extent of one sixteenth without question or challenge.

Had this been the action of Congress, it would not, indeed, have established its power or right to do this. One permitted invasion of an established right does not do away with the right. That Congress had debased the coinage one sixteenth would not establish the right to further debase it; would, at most, indicate that the power to regulate it extended up to that limit; and would, of itself, furnish no justification for a more general or further invasion. Nevertheless, the assertion, in all the opinions that government had assumed to debase the coinage to the extent of one sixteenth, impairing to that degree the recovery of all creditors, and that this action had been submitted to without question, has seemed to me the strongest argument for the power of government to exercise plenary control over coined money. Indeed, it was the inquiry as to how it was possible that creditors could have submitted to so serious an infringement of their rights without contest in the courts, which showed me that, in fact, nothing of the kind really took place.

No Plenary Power Over Tender Asserted.

On the contrary, we see that, so far from "Congress having claimed and exercised unlimited power over legal tender," as Judge Williams believes; so far from having assumed the power to make even coin a legal tender without regard to its real intrinsic value, as all the decisions supporting this law assume; its legislation shows that for seventy-five years, from the beginning of the government down to the act authorizing these legal tender notes, through all the most pressing exigencies of peace and war, Congress—not only by its direct efforts to regulate the coinage from time to time, according to its intrinsic value, but also by the narrow limitation it imposed on the right of legal tender when diverging slightly from intrinsic value for special and temporary purposes—has shown a determination, as uniform as just, to keep the stamp upon the government coins a true index to their value, and to so regulate these coins as that they should have and express their actual values. Nay, by reference to the debates in Congress, it will be seen that the right of Congress to debase the coin and make the debased coin a legal tender, in such wise as to materially affect the rights of the creditor or debtor, was not only never professed or asserted, but that, so far as the question has arisen, the right has been directly repudiated.

Difficulty of the New York Court.

So, therefore, the difficulty the court of appeals of New York declares it has in perceiving why, if Congress, under this power to coin money, could coin any metallic substance and stamp it with an arbitrary value (which it says, was not denied in that case, 27 N. Y., 430) it would not have equally the power to declare its Treasury notes a legal tender, without reference to their intrinsic value—it is a difficulty that your Honors are freed from, and that should never have existed.

Indeed, I look in vain to-day for the production of the declaration prior to these legal tender days, of one judge, one statesman, one commentator, that Congress, by the power "to coin money and regulate the value thereof," possessed the right of striking coined metals with false and arbitrary values.

The right, therefore, to make a promise to pay—a promise not expected to be kept at the

time for which it was made, nor at any other certain or definite time—the substitute for the thing promised; and to oblige every creditor to accept this of his debtor, instead of the thing promised, is not only not within the provisions of this grant to Congress "to coin money and regulate the value thereof," but we have seen that no kindred power in fixing the value of even coined moneys, has ever been claimed or attempted under that grant.

We are driven, therefore to seek in other parts of the Constitution this power to make Treasury notes a legal tender between private parties at their nominal value for pre-existing debts.

Third Position. The assumption, by Congress, of the right to exercise this power in a time of public danger, is not conclusive of the right.

But it is claimed that the power of thus making the bills of the government legal tenders is a power "necessary and proper" in the sense in which these words are settled to have been used, to carry into effect some one or more of the powers delegated to Congress by the Constitution. For we are told that by "necessary" and "proper" is meant no more than useful or conducive; and that Congress is the judge of what is useful or conducive. So that, if only the means may be useful or conducive to the end, and the end legitimate; if there may be any possible relation of the means to the end; then, whether it is or is not really such a means, is for Congress to decide, and that its decision is not open for your Honors' review. 27 N. Y. 475, 476.

If this be so, then your Honors, instead of holding a supreme tribunal, to pass upon the rights of the other departments of government, and to determine how far their action is warranted by the fundamental law from which all powers of government are drawn: are nothing but a court to settle questions of private right and property between individuals.

Why, it has been regarded as the special and distinct characteristic of this august tribunal, that it sits in judgment upon the rights of states and the powers of legislatures. As Chief Justice Marshall well said, in *Madison* v. *Marbury:* "To what purpose is that limitation committed to writing, if these limits may be at any time passed by those intended to be restrained. The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed;" but all powers, under the discretion of a choice of means, are left open to them.

"The public safety, and the general welfare to be determined by the discretion of Congress, destroy all limits to Congressional power. Their discretion only is thus made the measure of their authority." Peckham, J.

Of course, if your Honors please, no such doctrine as that just suggested can be maintained. It would suppose a despotism of the most absolute character.

"To a certain extent, the necessity and propriety of an enactment must rest in the discretion of the legislature. But to hold that the exercise of that discretion is final, and not subject to the examination of the judiciary, would be to break down all limitations upon the government. Accordingly, I think that no judge has ever intimated the existence of any such extreme doctrines."

Judge Denio, 27 N. Y. 536.

"If it be asked," said Hamilton, "what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution, and exercise powers not warranted by its true meaning, I answer: The same as if they should misconstrue or enlarge any other power vested in them; as if the general power had been reduced to particulars, and any one of these were to be violated. The success of the usurpation will depend upon the executive and judiciary departments, which are to expound and give effect to the legislative acts."

Hamilton, Federalist, No. XLIII.

The Doctrine of this Court.

The utmost that has been said at any time by your Honors' court, or, indeed, by any judicial tribunal or authority speaking to this subject, has been the rule given by that great Chief Justice who extended the Federal authority to the farthest limits which your Honors' court has sanctioned.

"Let the end be legitimate; let it be within the scope of the Constitution; and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

McCulloch v. *Md.* 4 Wheat. 421.

We must inquire, therefore, to the exercise of which one of the powers delegated to government it is "necessary and proper," it is even "appropriate and plainly adapted," that Treasury notes should be made a legal tender for antecedent debts.

It is appropriate and plainly adapted to the power to borrow money, to regulate commerce, to raise and support armies, to provide and maintain a navy, to suppress insurrections or repel invasions, or even to any of these powers united? For it is true that Congress had occasion to exercise every one of these powers, at the time when these notes were issued.

Fourth Position. The exercise of this legal tender power was not necessary, or appropriate and plainly adapted, to carry into execution any of the powers expressly delegated.

Your Honors cannot read the opinions of any of the courts which have held this law to be constitutional, without finding their decisions distinctly put upon the necessity of this provision to enable government to borrow money and carry on the war, and to maintain its very existence.

No Advantage in the Legal Tender Provision.

But it is respectfully submitted, especially after the experience of the past six years, that no such necessity existed, and that no such advantage was gained by the provision. On the contrary, at no time before, since the establishment of the government, was the national wealth so great; at no time were private debts, in proportion to the means of the country so reduced. The panic and suspension of 1857 had led to very general liquidation. The agitations of succeeding years has tended to check men in forming new engagements, or entering upon speculative undertakings. At no time had so few new schemes for capitalists been

proposed; had so few bubble corporations been projected; had so little general speculation prevailed. At no time were our traders so little extended, or had our people so few debts (excluding debts maturing at the end of long terms of years). The banks and the government had already suspended specie payment for months before the issue of these notes. The entire business of the country was being done in unredeemed bank paper, which was not a legal tender in payment of debts, but which, nevertheless, circulated everywhere and never fell, at the great centers of trade, to any considerable depreciation. To supply its immediate wants, the government determined, in February, 1862, upon an issue of Treasury notes to the extent of $150,000,000, expecting at the time that it would need to borrow further larger sums.

Security of the Notes not Increased.

Had these notes been issued without the legal tender clause, they would have been equally secure. That clause, of course, added nothing to their security. Without it, they still had, as fully as with it, whatever security the faith and credit of the government could give them.

So, too, without that clause, they would have been equally as available and valuable as now, in all payments for taxes, public lands, or other dues to the government.

The only value that clause did give the notes, was the power it gave debtors to discharge preexisting debts with them, equally as with real dollars. I say pre-existing debts, because as to subsequently contracted debts, the dealings of the country would have been in these notes, whether or not they had been a legal tender. The country was, at the time of their issue, carrying on its dealings in the unredeemed paper money of the banks, styled "currency," in which all ordinary transactions were measured and payments made. This currency had not, at that time, depreciated more than three per cent below the specie standard, and yet Treasury notes, as soon as issued, at once fell to the same depreciated value. Their legal tender character never seems at any time to have made them better than the bills of any other solvent but suspended debtors not contained in that clause.

No Danger of General Insolvency.

I know that it has been urged that general insolvency and ruin would have followed, had not debtors been authorized to meet their demands with these notes. But what really would have been the effect had these notes not been made a legal tender for debts like my client's? Necessarily they would have been as well secured and as useful for payments of taxes and public dues, as now. They would have been as valuable as now for the purchasing of goods and service and labor. True, the debtor could not have discharged his debts of long standing in them, but what of that? In great part, the debts of the country consisted of commercial paper, even then payable in what was styled "currency." As to the debts of the country not already specially payable in "currency" the great bulk of the residue matured within a short time, so that, had the debtors not been able to be benefited by the slight depreciation in Treasury notes which took place during such times, it would have caused no widespread disaster. Specie payments have been suspended by the banks and the Treasury in 1837 and 1857 and 1861, without producing any great ruin. Irredeemable paper circulated after the suspension of the banks in 1857 and 1861, as well as before. Indeed, the crisis was before the suspension of the banks, not afterwards.

Experience of the Rebel States.

Upon this point no illustration could be more instructive than the history of the paper of the (rebel) Confederate government. Treasury notes were authorized by that Congress (acts No. 58, Mar. 9, 1861; No. 311, Dec. 19, 1861) were made receivable for taxes and public dues (except export and import duties) and were the general circulation of those states from their first issue till the final subjugation of the authority by which they were issued; always declining in value, but always receivable at a value fully proportionate to their chances at ultimate redemption. And this, though never made a legal tender.

Nay, although by law the right to insist upon payments in gold and silver remained, it was very rare for anyone to assert the right. New contracts were made in these notes; their gradual depreciation alleviated the losses to creditors by distributing that depreciation through a series of creditors. Now and then a creditor refused to take them and discharge the security for some specific debt, and was left to hold his security. But these cases were few. Sheriffs received these notes upon execution; damages were assessed in them upon trials; and, execept in rare and unusual instances, they performed every service they could have performed had they made a legal tender. They fluctuated in a ratio with the success of the Confederate arms, as did our notes. And they are a standing illustration for all time, of how a people can put their last man into the field and sacrifice their last dollar, without issuing indulgences to one man to appropriate the property of another without consideration.

Effect of this Provision.

But if we were to concede that this quality of legal tender gave to these notes a material advantage, which they would not have possessed without it, how can it be said that this provision was "necessary and proper" or "appropriate and plainly adapted" to the exercise of any of the powers expressly delegated to Congress?

What is the effect of this provision but to take the property of the creditor and transfer it to the debtor, to the extent to which these notes may be depreciated below their nominal value? And to which one of the delegated powers is such a wrong "appropriate and plainly adapted?" If government chooses to pay its own debts or raise its moneys by the issue of Treasury notes, there is a relation between the means employed and the power to borrow money. But how can relieving my debtor, more or less, from his obligations to me, be a means toward enabling the government to borrow money?

How is "commerce regulated" by the taking of my debt and the giving of it to my debtor? How can "armies and navies be raised and maintained," how can "insurrections be suppressed," by doing the same thing?

But it is said, to get the right to do this

with government notes, your debtor will give more for these notes than he otherwise would.

Sale of Indulgences to Commit Wrong.

Can it be that in a just and constitutional government, a forced loan, nay, worse than a forced loan, for the government did not get the advantages from these notes the creditors lost, that a sale of indulgences to one man to appropriate the property of another, is a "fit and plainly adapted" means to the borrowing of money, or any other of the delegated powers?

Can it be said that, in a government "ordained to establish justice" the permission to let me wrong you follows" by necessary implication" (1 Wheat. 304), from any of these delegated powers? To the exercise of which one does it properly belong? To the exercise of which one is it conducive, or plainly adapted? Why, to all, as much as to one. For if it can be maintained that, to further the exercise of any of the enumerated powers, Congress has authority to do any unjust thing, having no other relation to the exercise of those powers than that by that means government is made richer, any wrong may be called the exercise of some one of the enumerated powers; so that Congress may do this or do anything whatever, without check from your Honors' court, and be as absolute, for every purpose of wrong, as the Czar or the Sultan.

For your Honors will observe that no relation is suggested between borrowing money, or other enumerated power of Congress, and the legal tender provision of the Treasury notes, which operates to transfer the creditor's property to the debtor, except that the government gets paid more for its notes, with this provision than without. But government would, doubtless, save all the cost of carrying its mails and raise revenue beside, if it would let the carrier levy a percentage on the contents of the letters. So, too, if it were to stamp short measures—eleven inches for one foot, eleven ounces for one pound, and the like—and ordain that all who used stamped measures might discharge pre-existing contracts with them, as if of full measure, it would surely get large revenues from such stamped measures. But I submit that such outrages would bear no relation to the delegated power "to establish postoffices," or to "fix the standard of weights and measures;" even though the government was thus made the richer. No more, it seems to me, can the power to deprive the creditor of his property for the benefit of the debtor, be said to be "appropriate" or "plainly adapted" to the carrying into execution of any of the enumerated powers.

Uniform Currency.

But it has been claimed to be a proper regulation of commerce, for Congress to provide a uniform national currency: and that these legal tender notes were, in effect, a mortgage on the whole property of the nation and, therefore, the best secured and most uniform currency the nation could have. Although, in truth, the security for this or any national debt is exactly the extent to which the people will consent to contribute through taxation to its payment.

But, however great the security the uniform currency Congress should provide is a currency of unchanging value—not a currency the depreciation of which is uniformly felt. But these Treasury notes were not unchanging; they fluctuated in value from day to day, with every pulse of news that flashed along the wires of the telegraph. They advanced and retreated in value with the march of armies; and there were days when their variations were so violent as to cause all traffic conducted in them to be suspended, and purchasers and sellers to stop dealing, except where they could carry on their transactions in coin. Our currency was uniform in nothing but the uncertainty it produced in all business.

The result has shown that the injustice the legal tender provision did to pre-existing creditors, was a quality which added nothing to the uniformity of these notes. On that ground, therefore, these notes cannot, I submit, be regarded as a regulation of commerce. But if they had proved a uniform currency, none the less it remains, that to establish injustice is not a necessary and proper means of carrying into effect a power to regulate commerce, in a government ordained to "establish justice."

Fifth Position. This power cannot be assumed as a necessary inherent sovereign right.

But it is claimed that the right to declare what shall be a legal tender for private debts is a necessary sovereign right, inherent in every sovereignty. That, within the scope of their respective authorities, the Federal and state governments are sovereign; and that, consequently, this power must be lodged with one or the other authority. And that since it is prohibited to the states, and not prohibited to Congress, it must therefore be taken to dwell with Congress.

But upon what principle is it a necessary sovereign right? True, it is a right which has been exercised by absolute sovereigns. So has every other form of power and plunder. But that does not make it a necessary sovereign right, in a limited constitutional government "ordained to establish justice." It is by no means clear that this right exists in England. Blackstone says that "The coining of money is the act of the sovereign power, that its value may be known on inspection." "Every nation fixes on it its own impression, that the weight and standard wherein consist the intrinsic value, may be known by inspection only."

"Of this sterling metal all the coin of the kingdom must be made; so that the King's prerogative seemeth not to extend to the debasing or enhancing the value of the coin, below or above the sterling value." 1 Bl. Com. 277, 278.

Indeed, there are many prerogatives and many sovereign powers that cannot be exercised here at all, either by the state or Federal governments. The amendments to the Constitutions are mainly restrictive of such powers.

Upon what principle, then, can it be contended, that because a power has been an attribute of sovereigns, it must belong to the Federal government, simply because it is forbidden to the states?

Surely this is a government of delegated powers. Surely, it has not only the powers expressly delegated, but the further powers necessary and proper to the exercise of the enumerated powers; for these are expressly delegated also. But this tender power is not one of the enumerated powers; it is not, as we have

seen, one of the powers necessary and proper to carry into effect any of the enumerated powers. How, then, could the Federal government have acquired it? That it is forbidden by the Constitution to the states, to whom it always theretofore belonged, and is not delegated to Congress, argues, I submit, that the exercise of it was not meant to be permitted at all.

Weights and Measures.

With the clause giving it power to coin money and regulate the value thereof, Congress received also power to fix the standard of weights and measures. But can Congress alter the standard, reducing a pound to eight ounces, a foot to six inches, an acre to two roods, and thus provide that no man shall collect upon the contracts, and that no one need pay more than one half of what was bargained for? And if Congress cannot do this arbitrarily and by itself can it regulate the standard of weights and measures, by making sales of licenses which would give to the holder, for every dollar paid, a right to abate or increase an ounce or an inch or a rood in every contract of sale he had made? And yet the right to fix weights and measures is a sovereign right and prerogative, as well as the right to coin money and regulate the value thereof.

Legal Tender a Substantive Power.

If your Honors please, this most sovereign right of legal tender, this power to take a man's rights and property, and transfer them without consideration, is a most substantive right; and it is well settled that a substantive right cannot be implied as a means to exercise one of the delegated powers.

Notes Receivable for Government Dues.

But it is suggested that, since the bills of credit of the government have been held to be a tender for dues to the government, they should also be held to be a sufficient tender for private debts. But what analogy between the cases is there? True, Congress holds its powers as a trustee. None the less, however, can it forgive its debtors, release them, and compound with them. It can, too, agree with them to take its own paper in payment of debts due to itself. Creditors usually do this. Upon principles of justice they generally should do so. But because a man takes his own protested paper in payment of a debt to himself, that is no reason why he should make other men take it for debts due them.

Sixth position. The history of the Constitution and of the country indicates that this power was not intended to be exercised at all, but was reserved to the people.

The Confederation never Claimed the Power.

Looking to the history of the Constitution, how natural and probable it is that the power in respect to legal tender, now claimed by the Federal government, was not intended to be granted to it.

The Union of the Confederation was established for the same purpose as the present Union. It was equally to be "perpetual." By the Articles of Confederation, the Confederation had the identical powers given it in respect to money, *viz.:* "To coin money and regulate the value thereof" which the Constitution gives to our Federal government. And yet, when during the sore needs of the Revolution, it did issue Treasury notes and wish to make them legal tender, it found itself powerless to do so, and appealed to the states to make them tenderable. Story, Com. Const. 135.

Effect of Exercise of this Power by the States.

The states, in their unlimited sovereignty, did so; and with the result, Judge Story says, of prostrating all private credit and all private morals "entailing the most enormous evils on the country; and introducing a system of fraud, chicanery and profligacy, which destroyed all private confidence and all industry and enterprise." Story, Com. Const. § 1365.

Indeed, the framers of the Constitution had not only experienced the mischief of these experiments, which were in the convention declared "to have excited the disgust of all the respectable part of America" but they realized also that whatever "paper currency is not directly and immediately, at the mere will of the holder, redeemable in gold and silver, is, and forever must be, liable to constant depreciation." 11 Pet. 339.

Action of the Convention.

Accordingly, when the Convention came to consider the provision of the Constitution relating to borrowing money, which in the original draft read, "To borrow money and emit bills on the credit of the United States," Mr. Gouverneur Morris moved to strike out the words "and emit bills on the credit of the United States." Mr. Madison objected to this, that it would be "sufficient to prohibit making them a tender, as promissory notes in that shape might in some emergencies be best." Others thought that power, so far as it was safe, was involved in the power of borrowing, and, finally, the words were stricken out by a vote of nine to two: Virginia acquiescing because Mr. Madison "was satisfied that striking out the words would not disable the government from the use of public notes, as far as they would be safe and proper, and would only cut off the pretext for a paper currency, and particularly for making the bills a tender." Madison's Papers, vol. 3, p. 1346.

Action of Congress.

From that time until the enactment of this bill, who has ever asserted that Congress had the right to create a legal tender at all, except under the power "to coin money and regulate the value thereof, and of foreign coins?" Within what narrow limits that power has been exercised by Congress, and how restricted to regulating according to intrinsic value, we have already seen.

Not only was this power never before asserted, nor even, as we have seen, the power to materially debase the coin; but incidentally, when it has been referred to, it has been repudiated or condemned.

Opinion of Supreme Court.

This court, in *U. S.* v. *Marigold*, 9 How. 567, referred to certain legislation by Congress, as "appertaining to the execution of the trust and the duty of creating and maintaining a uniform and pure metallic standard of value throughout the Union. The power of coining money and regulating its value was delegated to Congress by the Constitution for the very purpose, as assigned by the framers of that instrument, of creating and preserving the uniformity and purity of such a standard value."

And Chief Justice Marshall, in *Craig* v. *Mo.* 4 Pet. 410:

"The history of paper money has been referred to, for the purpose of showing that its great mischief consists in being made a tender. But we do not think the history of our country proves, either that being made a tender in payment of debts, is an essential quality of bills of credit, or the only mischief resulting from them. It may, indeed, be the most pernicious. The history of Massachusetts abounds with proofs of the evils with which paper money is fraught, whether it be or be not a legal tender. Paper money was also issued in other colonies, both in the north and south, and whether made a legal tender or not, was productive of evils in proportion to the quantity emitted.

Opinion of Mr. Webster.

And that great statesman, who was called by his contemporaries the Expounder of the Constitution, who himself belonged to the side of those who claimed the most sovereign powers of this government, declared: "Most unquestionably, there is and there can be no legal tender in this country, under the authority of this government or any other, but gold and silver. This is a constitutional principle, perfectly plain and of the very highest importance. The states are expressly prohibited from making anything but gold and silver a tender in payment of debts; and although there is no express prohibition, as applied to Congress, yet, as Congress has no power granted to it but to coin money and to regulate the value of foreign coins, it clearly has no power to substitute paper or anything else for coin, as a tender in payment of debts and to discharge contracts. The constitutional tender is a thing to be preserved, and it ought to be preserved sacredly and under all circumstances."

And he again says: "I am of the opinion, then, that gold and silver, at rates fixed by Congress, constitute the legal standard of value in this country; and that neither Congress nor any state has authority to establish any other standard, or to displace this. Webster's Works, 4th vol. pp. 271, 280.

Other Opinions.

And it is significant to notice, that in two of the most important speeches made in our late political canvass upon the side of a party in power, both speakers indicated their belief in the unconstitutionality of this provision, and its danger to the just payment of the public debt.

One of the speakers, that distinguished scholar, our late minister at Vienna, said:

"I leave to the Supreme Court the responsibility of deciding whether Congress has the right to make anything but gold and silver a legal tender for any debts. I am not a constitutional lawyer or judge; but this I do know, that the only justification of that proceeding in the form of conscience was necessity. It is one thing to palter with a right because of necessity; quite another thing for convenience. Necessity is a fury who knows no law."

The other, an eminent judge second in weight to no judge of his party in New York, Mr. Justice Davis, said:

"All through the war it was a part of the Democratic creed, that the legal tender act affecting the present greenbacks, was unconstitutional and void. So all their judges held. So held Chief Justice Denio. So Justice Woodward of Pennsylvania. So held the court of appeals of Kentucky. Our courts sustained the act upon the imperious necessities of war. But not yet has it been upheld by the Supreme Court of the United States; and now, when there is no necessity except to anticipate debts not due in fifteen years, and thus defraud its creditors, it is proposed that the government shall issue millions of greenbacks and declare them legal tender. There is not a court in America that would not hold such a law void.

To recapitulate: The Articles of Confederation gave the same power to the Confederation that the Constitution gives to Congress,—"to coin money and regulate the value thereof." Nevertheless, the Confederation never assumed to make Treasury notes a legal tender, but applied to the states to do it.

The states did make these notes a legal tender, and with results which disgusted the people.

Accordingly, when the Convention met, that framed the existing Constitution, they struck out of the draft the power to emit bills on the credit of the United States, in order, as Mr. Madison says, that it might not be a pretext for declaring such bills a tender.

For several years, in the direst needs of the country, Congress not only never asserted any right to make Treasury notes a legal tender, but, by the nature of its legislation, has indicated that it had no power to even materially debase the coin of the Republic, or stamp it with false and arbitrary values.

During these years this court has spoken of the legal tender as pernicious, and has pronounced the money power a trust delegated to Congress to maintain a pure metallic standard.

Not only Mr. Madison thought Congress had no power to make paper a tender, but Mr. Webster thought so, and the power has been frequently denied in Congress, and prior to the law in question, never contended for.

No framer of the Constitution, no judge, no commentator, is found prior to this law, who claimed any such power for Congress.

Seventh Position. The assumption of this power cannot now be justified here, on the ground of supreme necessity.

It has been insisted, in justification of this law, that it was a supreme necessity, and one to be upheld for the safety of the Republic, whether authorized by the Constitution or not.

I for one believe in the doctrine of the higher law. I believe that the Constitution was made for man, and not man for the Constitution. I can conceive that there may be exigencies when the object for which the Constitution was made could not be secured by the Constitution, but only *dehors* the Constitution; not by constitutional means, but only by extra-constitutional means. When such a crisis should arrive, I can well understand how anyone connected with the executive branch of the government, might not hesitate as to the course duty urged him to pursue. The end is better than the means.

Extra-constitutional Action.

But action *dehors* the Constitution, an action extra-constitutional, is not and cannot be constitutional action. It is action to be justified, if at all, not because of the Constitution, but

because of a necessity higher than the Constitution; not by that supreme law, but by the yet higher law of the *salis populi*, which the Constitution itself was intended to preserve. It is action to be justified to the people for whose benefit it was taken, and by the people whom it served. It rightly depends for its justification upon the exigency which required it.

So treated, such extra-constitutional action can never be dangerous. Each instance must stand by itself, resting upon the nature of the exigency which called it forth, and no instance be a precedent for another; and no such action can be protected by the Constitution which it has overstepped and violated.

Duty of this Department.

Whatever other branches of the government may do in such an exigency, this department can consider only the law. For the judge who undertakes to pass upon such questions at all, there is but one path; and that is the path of duty.

But that this provision was supreme necessity to be adopted for the preservation of the Union, whether authorized by the Constitution or not, was a consideration to be addressed to Congress, was the consideration perhaps which controlled Congress, but is not a consideration to be addressed to your Honors.

Necessity has Ceased.

But if the validity of this provision of the law is to be justified by the necessity for its adoption, that necessity has long since passed by. No insurgent flag now floats within sight from the steps of the building. No hostile armies maneuver along yonder river. The report of rifle cannon no more breaks upon the deliberations of the congressional bodies. All this has happily passed away, not from this neighborhood alone, but passed from this whole land; and everywhere we have submission and peace.

Now, if this law is to be justified by the extraordinary necessities at the time of its passage, how can it be justified after these necessities have ceased? If the safety of the nation alone justified measures so extra-constitutional in the time of its peril, how are they to be supported, now that the peril is passed? If the necessity has ceased, which could alone legalize them, has not their validity then ceased also?

But, in considering the legality of a measure to be justified by the necessity of securing the purposes for which the Constitution was formed, we must remember what those purposes were.

Now, for what purpose was the Constitution formed? "For a more perfect Union." Yes, but that was not all; it was ordained, also, to "establish justice."

How, then, can an act which establishes injustice, even if it aided in preserving the Union, be deemed a necessity for the preservation of the Constitution?

Eighth Position. This law impairs the obligation of contracts.

Assumption that Rights Are not Impaired.

It has been contended that this law does not impair the obligation of contracts: since the contract is simply to pay "dollars" and must, therefore, be satisfied by anything that is a lawful dollar. But that begs the very question at issue, which is, whether this promise to pay must be received by pre-existing private creditors, instead of and as the equivalent of, the thing promised. Giving to the promise the name of the thing promised cannot make it the thing promised.

I know that it has been thought that this provision of the law does not really take anything from the creditor, and does not, therefore, impair the obligation of contracts. Indeed, the court of appeals in New York seems to have put its decision largely on that ground. It regarded these notes as if their purchasing power was as great as if they were shortly to be redeemed, as if they possessed the same value as the coin they represented, except for exchanges and speculation among brokers. An exception arising, as that court thought, from wicked speculations aimed at depreciation of the government credit, is not to be recognized or commended. I do not exaggerate. Pray let me refer your Honors to the opinions at pages 459, 471, 482, of the case in 27 N. Y.

The results of the last six years have, doubtless, brought these learned justices to other views of the facts; and I submit that the misapprehension in this respect, under which they seem to have determined that clause, detracts largely from its weight as authority.

Assumption that Congress may Impair the Obligation of Contracts.

But, we are told, Congress may constitutionally impair the obligation of contracts. Doubtless it may, where the Constitution directly delegates the power, as in the case of bankrupt laws; but in what other case? Why, it has been asserted in one case to my surprise, that it could take back its own grants and was not bound to observe its own contracts. I do not believe that to be the law. Can it be, that under a Constitution framed to establish justice, the government created should not be bound by its contracts? But the question here is not whether it has the power to violate its own contracts, but whether it has the right to interfere and destroy the obligations of contracts existing between private citizens of one of the states, in defiance of the laws of that state, subverting the law of the state and the effect of a contract, according to those laws. Is there any authority to be found for that? No. Nor, as it seems to me, is any ground advanced for it, except this claim, that Congress, in order to execute the enumerated powers, can use any measure not prohibited, which it may select as a means. Congress has, indeed, a choice of means. It may select from any means "appropriate, plainly adapted to the end, and not prohibited;" but Congress does not make the power that it may see fit to select "appropriate means" merely by selecting it.

To hold this, would be to construe this Congress into a government of absolute, despotic, unlimited authority, except only as to the powers which are expressly forbidden.

"No one ought to complain of the weakness of the government whose powers can be reasoned up like this," as was said in *Wilkinson* v. *Leland*, 2 Pet. 647. "Though there may be no prohibition in the Constitution, the legislature is restrained from committing flagrant acts, from acts subverting the great principles of Republican liberty, and of the social contract, such as giving the property of A to B."

"That government can scarcely be deemed to be free, where the rights of property are left

solely dependent upon the will of the legislative body without any restraints. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred; at least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them, a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention."

2 Pet. 657.

Rule Most Liberal to Federal Power.

But if your honors please, no such rule has been established. On the contrary, the rule most liberal to Federal power and authority of Congress yet asserted is, that the implied power must be, not only "appropriate and plainly adapted to the end" but also, "within the scope of the Constitution, not prohibited, and consistent with its letter and spirit."

Ninth Position. This legal tender power was not proper, nor consistent with the letter or spirit of the Constitution; and was prohibited. It was the fear of "misconstruction of the Constitution and abuse of its powers" by this doctrine, that Congress was the sole judge of what powers were necessary and proper to be exercised, to carry into effect the delegated powers, that induced the people to add to the Constitution their Amendments.

Amendments to the Constitution.

What do these Amendments provide? Not particularly that Congress shall not impair the obligations of contract. Not particularly that it shall not intervene to declare what shall be a legal tender in discharge of pre-existing debts between citizens of any state. But they do provide that private property shall not be taken for public use without just compensation, nor any person be deprived of property without due process of law.

But this legal tender clause takes my client's property to the extent of one third of his right of action. Takes it, to be sure, not directly to the public use; but, as the other side claims, takes it because of the public necessities, and gives it to the debtor. Equally takes it from my client, and takes it from him without any compensation. So, too, this legal tender clause deprives my client of his property to the extent of one third his debt—of his chose in action without due, or any, process of law. By what authority is this done? Not by the express authority of the Constitution; for that is not pretended. Not, surely, by its implied authority; for authority to be implied must be "not prohibited, within the scope of the Constitution; consistent with its letter and spirit;" But this act which thus strips my client of his property without process of law, is absolutely prohibited. It establishes injustice, and cannot, therefore, be consistent with the letter of the Constitution; establishes injustice, and, therefore, is fatally opposed to its whole scope and purpose and cannot, therefore, possibly be implied.

Tenth Position. No danger to the community would follow from holding this provision of the law unconstitutional, but the contrary.

We were warned by one of the judges below (2 Duv. 74) that to hold these notes not a legal tender, would be to produce another commercial and financial revolution, wreck private fortunes, disturb private rights and wantonly tamper with the great interests of society, and that, before courts should be expected to pronounce judgments producing such momentous and sad results, a stern, unrelenting necessity to preserve the Constitution should be clearly demonstrated.

To these admonitions I might answer, in the noble words of this court uttered long ago: "That if the exercise of the jurisdiction imposed on the court by the Constitution of the United States be calculated to bring on the dangers indicated, these are considerations which address themselves to those departments which may with perfect propriety be influenced by them. This department can listen only to the mandates of the law."

Craig v. *Missouri*, 4 Pet. 410, Marshall, J.

But I take leave, also, to answer by a most emphatic and confident denial of the assertion.

Pray let us consider for a moment what would be the effect of a declaration by your Honors, that the legal tender provision of this law, as applied to pre-existing debts, was invalid.

Effect, if this Provision be Held Invalid.

As to outstanding debts contracted before its passage, the debtor would have to pay full consideration received, instead of getting off by paying three fourths or more (should gold continue to decline) of the consideration. But it is now six years since this law was passed: six years which debtors would have had to prepare for this result; and very few debts contracted prior to 1862 are now left unpaid, except only those long loans of the great corporations, which, maturing at remote periods, are in effect always renewed; and which, as a whole, only come due at periods so remote that we all look, by those times, for a practical equalization of the two currencies. Whatever your Honors' decision may be, who is there to be evilly affected by the decision I contend for? Not the great mass of debtors throughout the country, the banks, the merchants, the traders, the lenders and borrowers who have dealt on the theory that these notes were legal tender.

I know that a general opinion prevails, that if the legal tender provision of this law be here declared unconstitutional, every man who has borrowed Treasury notes must pay in coin, returning in value four, where he got three or less; and, if this were so, such a result might be disastrous to debtors, especially if the decision were to come suddenly. But this cannot be so; and I should hope, if your Honors should arrive at our conclusion as to the invalidity of this law, you would, in view of the public importance of correcting that error, express your views in respect of it.

The Debtor is Not without Remedy.

From the time these Treasury-note dollars were found to be not a legal tender in the districts where they have been considered such for the past six years, what would follow? A man has borrowed $10,000 in Treasury notes; he has given his obligation for it, expressed gen-

erally in "dollars." The day of payment comes, and he tenders ten thousand Treasury-note dollars. The payment is a good payment; it is all the consideration that was received; it was all the "dollars" that was intended in the contract; it was all that was really purposed to be paid. The creditor, however, we will suppose, declines the tender and proceeds upon the contract; the debtor has promised, to be sure, to pay "dollars" which, in the contingency I am supposing, will then be taken to mean coined dollars. But, upon the trial of that action, the debtor can prove that the dollar of the contract meant, not the coin dollar of larger value; but the Treasury note, so called dollar, of one fourth less value; and the creditor will have judgment according to that value.

8 Pet. 198; 3 Conn. 273; 10 S. & R. 93; 12 Ill. 185, 9, 190, and cases cited; 14 Ill. 105; 4 Ark. 175; 16 Iowa, 243; 1 Tex. 373; 7 Humph. 33.

This obvious and simple justice might not follow upon the simple repeal of the law, since, assuming the law to be constitutional, that repeal would operate as an absolute appreciation of the existing dollar, one fourth in amount.

To this obvious and simple justice, however, it may be objected that, a dollar being defined by law, evidence that the contract meant something else than the coin dollar, could not be received. But it should be remembered that this rule is a technical rule of evidence, made to prevent a party varying the higher evidence of a writing, by the lower evidence of parol testimony, as to some secret fact or meaning, and has no application, in principle or reason, to the general, notorious, public designation of a thing by an improper name. And that in such case, not only should evidence of the special use and meaning of the word be admitted, but, when that use is sufficiently defined and public, it should in such localities be presumed.

23 Wend. 76, and cases cited.

But were this otherwise, the debtor would not be remediless. He could always have his contract reformed in equity, and made to express, in the case I assume, its true meaning of ten thousand Treasury-note dollars; just as a man in New York, who contracted to receive two thousand tons of coal—meaning gross tons of 2,240 pounds, whereas the statutes of that state had fixed the ton at 2,000 pounds—had leave to reform his contract, so that it expressed gross tons.

9 Paige, 195; 8 Wheat. 215.

But now, in New York and most of the northern and western states, no such bill would be necessary. The application to reform might be made part of the defense, and the whole merits would be disposed of in one trial.

These causes established that, in case your Honors should hold the legal tender provision of the Treasury notes to be unwarranted by the Constitution, debtors would not be at the mercy of creditors, or compelled to repay in coin more than the equivalent in value of the Treasury-note dollars they received.

Return to Specie Payment.

It would, then, naturally follow from such a decision here, that we should have a gradual return to specie standards and payments. The first effect, indeed, of such a decision would be, that coin dollars would become our standard of value, as now in California: rating our Treasury notes truly, according to their real depreciation. This, though a mere matter of expression and account, would have, it seems to me, the effect of introducing juster views of real value, more caution, more economy and less willingness for speculation and extravagance.

Advantage to the Public Credit.

And, if your Honors please, whatever dangers there may be to the public debt of this great country, will come, not from the unwillingness of the people to pay; not from their want of ability to pay; but will come, if it shall come at all, from the recklessness of a people carrying out their schemes upon the waves of an inflated currency, and from the demoralization which such speculation produces.

If your Honors lived in that great city in which I have my office: if your Honors realized, as I realize, how this flood of paper money, continued since the war without restriction or redemption—itself an uncertain and a fluctuating unit—has affected with those qualities all calculations based upon it, in arithmetical proportion to their magnitude; how the facilities for getting wealth, the uncertainty attending it, and the fluctuation in prices, to which the war has accustomed men, have induced the frightful heights to which extravagance and speculation have mounted; and, above all, the mania to make haste to be rich, which prevails; your Honors might well pray for some check on the reckless propensities of this people.

Demoralization from Legal Tender Notes.

I tell your Honors that a whole community is being demoralized. Men will do what they would have shrunk from years ago. When the wicked prosper, other men make haste to do likewise; and now, not from the cities only, but from every part, men seek the great marts, to try their fortune in the ventures of the hour, hoping to gather where they have not toiled. Gambling in stocks with the dangerous combinations it invites and the corruption it encourages, has become general; so that it is deemed venial to artificially inflate or depress prices, to create fictitious values by forced scarceness, or undue depression by combined attacks. Nay, public journals and men of influence, and even actions at law, are made part of the machinery to these ends.

Checks to these Evils.

To check this evil, no influence can be more salutary, no restraint more gentle or more useful, than for the community to feel that it must return to dealing, to receiving, to borrowing, and to paying in real dollars; dollars that are what they purport to be.

Importance of Enforcing Limitations of the Constitution.

Nor is this all. For greater even than this public benefit, or than any question of commercial prosperity, well being or policy involved in this matter, your Honors have now to determine the constitutional limits to the powers of Congress. Let your Honors, by your judgment here, decide that Congress, in the exercise of its great powers to borrow money, regulate commerce, maintain armies and navies and the like, can adopt any measures it may think fit in order to carry out those

powers; and, as it seems to me, the last barrier to consolidated government will be broken down, and this nation will be delivered over, bound, to an absolute Congress; and instead of the limited and localized system of government established by our fathers, we shall have passed irretrievably into a consolidated, absolute, centralized government.

Let your Honors hold, as your predecessor has held, that Congress has no choice of means but means plainly adapted to the end; means "within the scope of the Constitution," not prohibited, but consistent with its letter and spirit, as to all which you are to be the judges; and that, therefore, this power of declaring Treasury notes a legal tender for pre-existing debts is not granted to Congress; and then this wave of centralization will be rolled back; and to a sound and permanent, because moderate and legitimate, prosperity, you will have added the rescue of that system of localized and limited government, in which alone true liberty can be found.

Mr. **A. Akerman**, *Atty. Gen.*, in support of constitutionality of the act.

(*a*) The court has now held, with substantial unanimity, that the Statutes of 1862 and 1863, which make United States notes a legal tender in payment of debts, public and private, apply to debts contracted before, as well as to debts contracted after, their enactment. The majority of the court, in *Hepburn* v. *Griswold*, has held, that in their application to debts contracted before the enactment, they were unconstitutional and void. The decision is put, in the first place, upon the ground that there is in the Constitution no express grant of legislative power to make any description of paper currency a legal tender in payment of debts, and that while, as a means of carrying into execution powers expressly granted by the Constitution, Congress has the right, in passing a statute, to choose any means appropriate and plainly adapted to the end proposed, not inconsistent with the spirit of the Constitution, nor prohibited by its terms, that the making of notes or bills of credit a legal tender in payment of pre-existing debts, is not a means appropriate, plainly adapted or really calculated to carry into effect any express power vested in Congress, and is inconsistent with the spirit of the Constitution, because it conflicts with the establishment of justice; first, by impairing the obligation of contracts; second, by taking private property for public use without compensation; and thirdly by depriving persons of property without due process of law.

Against this decision we ask respectfully to submit that where the object contemplated by Congress is a lawful one, and its manifest intention is to select means adapted, in their judgment, to exercise a power conferred by the Constitution, the means which it selects are constitutional; whatever may be the opinion of the court of its practical wisdom, because the decision, whether practically conducive to the end proposed, is a political and administrative question, and not a judicial one; the province of the court being to determine if the means adopted, if not prohibited by the Constitution, are really adopted with the object and design of executing a constitutional power, and not to ascertain whether, as a practical measure, it was, in the opinion of the judges, likely to prove, or has in fact proved, useful and successful.

George v. *School Dist. in Mendon*, 6 Met. 510.

(*b*) The opinion of the majority of the court, that making Treasury notes a legal tender for pre-existing debts was not a means appropriate and plainly adapted to execute the express powers of Congress, was an erroneous opinion.

(*c*) The decision in *Hepburn* v. *Griswold*, 8 Wall. 603, 19 L. ed. 513, abandons and substantially invalidates the grounds of the decision in *Bronson* v. *Rodes*, 7 Wall. 229, 19 L. ed. 141, and in *Butler* v. *Horwitz*, 7 Wall. 258, 19 L. ed. 149.

Those cases were put upon the ground that the parties had elected between two currencies, when, in fact, such an election was impossible, there being but one currency in existence at the time the contracts were made, and it being held in *Hepburn* v. *Griswold*, *supra*, that no other currency could be constitutionally made applicable to satisfy them. The intimation in *Butler* v. *Horwitz*, *supra*, that "the absence of any express stipulation as to description in contracts for payment in money generally, warrants the opposite inference of an understanding between parties that such contracts may be satisfied, before or after judgment, by the tender of any lawful money," is thus plainly controverted by *Hepburn* v. *Griswold*, in its application to contracts made before the Legal Tender Act was passed, which was the only contract under consideration in *Butler* v. *Horwitz*.

(*d*) One view of the Legal Tender Act, which it may be well to press upon the attention of the court, is this:

Congress, having the undoubted power to declare and carry on war; to provide for raising, equipping and supporting armies and navies; to borrow money to provide for the payment of the debts of the United States; and as has been recently decided by this court, in furtherance of these objects, to issue bills of credit in time of war, being called upon to furnish means for a national expenditure unexampled and enormous, with a power of taxation unlimited in its extent, was obliged to subject to its use, in some form, sums of money greatly exceeding the gold and silver coin of the United States. Is it to be held that it was not within their constitutional power to declare that the national bills of credit were of the same value with the money that those bills pledged the faith of the government to pay? And is it competent for any court to determine and declare that they were of another and less value? The right to interest on money in the collection of a debt, is a subject of governmental regulation. It was in the power of the government to seize the property of a citizen, and to allow his officers to give him for it a certificate of indebtedness. If the government needed gold, and it was in the possession of A, it could take it from him, as they could take his personal service, against his will, or could batter down his house, if it stood in the way of military operations. If A had said, "I owe this gold to B, and am on my way to pay him my debt," the officers of the government could accompany him to his creditor, and when the payment was made, seize it from him. What difference does it make

whether that was the form in which it was done, or whether it was taken from A, and there was furnished him a certificate that the money belonging to B, and intended for him, was taken by the government, which would be responsible to B for its repayment? Can any citizen rightfully say or ask this court to decide that the promise of the government does not import and possess the full value of that which it promises, in any case in which he is invoking the aid of the government to enforce his rights?

(*e*) In the Declaration of Independence it was solemnly announced "that these united colonies are, and of right ought to be, free and independent states. . . . That as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do."

Chief Justice Marshall said you should never forget that, in interpreting the Constitution of the United States, it is a Constitution which you are called upon to construe; and the power to determine what shall be a legal tender being a function of government which cannot, therefore, be reserved to the people, which is denied to the states, and nowhere expressly prohibited to the national government, if it be true that in times of public necessity the quality of legal tender has been imparted to notes issued by governments in every civilized nation, is it to be held that the power to impart to bills of credit the quality of a legal tender for debts, can be denied to the government of the United States by a judicial decision.

(The Attorney General also filed in this case the argument of Attorney General Evarts in the case of *Hepburn* v. *Griswold, supra;* reference is here made to that case, where that argument is reported in full.)

Mr. Justice **Strong** delivered the opinion of the court:

The controlling questions in these cases are the following: Are the acts of Congress, known as the Legal Tender Acts, constitutional when applied to contracts made before their passage? And, secondly, are they valid as applicable to debts contracted since their enactment? These questions have been elaborately argued, and they have received from the court that consideration which their great importance demands. It would be difficult to overestimate the consequences which must follow our decision. They will affect the entire business of the country, and take hold of the possible continued existence of the government. If it be held by this court that Congress has no constitutional power, under any circumstances, or in any emergency, to make Treasury notes a legal tender for the payment of all debts (a power confessedly possessed by every independent sovereignty other than the United States), the government is without those means of self-preservation which, all must admit, may, in certain contingencies, become indispensable, even if they were not when the acts of Congress now called in question were enacted. It is also clear that if we hold the acts invalid as applicable to debts incurred, or transactions which have taken place since their enactment, our decision must cause, throughout the country, great business derangement, widespread distress, and the rankest injustice. The debts which have been contracted since February 25, 1862, constitute, doubtless, by far the greatest portion of the existing indebtedness of the country. They have been contracted in view of the acts of Congress declaring Treasury *notes a legal tender, and in reliance [*530 upon that declaration. Men have bought and sold, borrowed and lent, and assumed every variety of obligations contemplating that payment might be made with such notes. Indeed, legal tender Treasury notes have become the universal measure of values. If now, by our decision, it be established that these debts and obligations can be discharged only by gold coin; if, contrary to the expectation of all parties to these contracts, legal tender notes are rendered unavailable, the government has become an instrument of the grossest injustice; all debtors are loaded with an obligation it was never contemplated they should assume; a large percentage is added to every debt, and such must become the demand for gold to satisfy contracts, that ruinous sacrifices, general distress, and bankruptcy may be expected. These. consequences are too obvious to admit of question. and there is no well founded distinction to be made between the constitutional validity of an act of Congress declaring Treasury notes a legal tender for the payment of debts contracted after its passage, and that of an act making them a legal tender for the discharge of all debts, as well those incurred before as those made after its enactment. There may be a difference in the effects produced by the acts, and in the hardship of their operation, but in both cases the fundamental question, that which tests the validity of the legislation, is, can Congress constitutionally give to Treasury notes the character and qualities of money? Can such notes be constituted a legitimate circulating medium, having a defined legal value? If they can, then such notes must be available to fulfil all contracts (not expressly excepted) solvable in money, without reference to the time when the contracts were made. Hence it is not strange that those who hold the Legal Tender Acts unconstitutional when applied to contracts made before February 1862, find themselves compelled also to hold that the acts are invalid as to debts created after that time, and to hold that both classes of debts alike can be discharged only by gold and silver coin.

The consequences of which we have spoken, serious as *they are, must be accepted, [*531 if there is a clear incompatibility between the Constitution and the Legal Tender Acts. But we are unwilling to precipitate them upon the country unless such an incompatibility plainly appears. A decent respect for a co-ordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress—all the members of which act under the obligation of an oath of fidelity to the Constitution. Such has always been the rule. In *Commonwealth* v. *Smith*, 4 Binn. 123, the language of the court was: "It must be remembered that, for weighty reasons, it has been assumed as a principle, in construing constitutions, by the Supreme Court of the United States, by this court, and by every other court of reputation in

the United States, that an act of the legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt;" and, in *Fletcher* v. *Peck*, 6 Cranch, 87, Chief Justice Marshall said: "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility, with each other." It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt.

Nor can it be questioned that, when investigating the nature and extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the objects for which those powers were granted. This is a universal rule of construction applied alike to statutes, wills, contracts and constitutions. If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose and so **532***] as to subserve *it. In no other way can the intent of the framers of the instrument be discovered. And there are more urgent reasons for looking to the ultimate purpose in examining the powers conferred by a constitution than there are in construing a statute, a will, or a contract. We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines. In *Martin* v. *Hunter*, 1 Wheat. 326, it was said: "The Constitution unavoidably deals in general language. It did not suit the purpose of the people in framing this great charter of our liberties to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution." And with singular clearness was it said by Chief Justice Marshall, in *McCulloch* v. *Maryland*, 4 Wheat. 405: "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which it may be carried into execution, would partake of the prolixity of a political code, and would scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." If these are correct principles, if they are proper views of the manner in which the Constitution is to be understood, the powers conferred upon Congress must be regarded as related to each other, and all means for a common end. Each is but part of a system, a constituent of one whole. No single power is the ultimate end for which the Constitution was adopted. It may, in a very proper sense, be treated as a means for the accomplishment of a subordinate object, but that object is itself a means designated for an ulterior purpose. Thus the power to levy and collect taxes, to coin money and regulate its value, to raise and support armies, or to provide for and maintain *a navy, are instruments for the para- [***533** mount object, which was to establish a government, sovereign within its sphere, with capability of self-preservation, thereby forming a union more perfect than that which existed under the old Confederacy.

The same may be asserted also of all the non-enumerated powers included in the authority expressly given "to make all laws which shall be necessary and proper for carrying into execution the specified powers vested in Congress, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof." It is impossible to know what those non-enumerated powers are, and what is their nature and extent, without considering the purposes they were intended to subserve. Those purposes, it must be noted, reach beyond the mere execution of all powers definitely intrusted to Congress and mentioned in detail. They embrace the execution of all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. It certainly was intended to confer upon the government the power of self-preservation. Said Chief Justice Marshall, in *Cohens* v. *Virginia*, 6 Wheat. 414: "America has chosen to be, in many respects and to many purposes, a nation, and for all these purposes her government is complete; for all these objects it is supreme. It can then, in effecting these objects, legitimately control all individuals or governments within the American territory." He added, in the same case: "A constitution is framed for ages to come, and is designed to approach immortality as near as mortality can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it is sure to encounter." That would appear, then, to be a most unreasonable construction of the Constitution which denies to the government created by it the right to *employ freely every [***534** means, not prohibited, necessary for its preservation, and for the fulfilment of its acknowledged duties. Such a right, we hold, was given by the last clause of the 8th section of its first article. The means or instrumentalities referred to in that clause, and authorized, are not enumerated or defined. In the nature of things enumeration and specification were impossible. But they were left to the discretion of Congress, subject only to the restrictions that they be not prohibited, and be necessary and proper for carrying into execution the enumerated powers given to Congress, and all other powers vested in the government of the United States, or in any department or officer thereof.

And here it is to be observed it is not indispensable to the existence of any power claimed for the Federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that

the power claimed has been conferred. Such a treatment of the Constitution is recognized by its own provisions. This is well illustrated in its language respecting the writ of habeas corpus. The power to suspend the privilege of that writ is not expressly given, nor can it be deduced from any one of the particularized grants of power. Yet it is provided that the privileges of the writ shall not be suspended except in certain defined contingencies. This is no express grant of power. It is a restriction. But it shows irresistibly that somewhere in the Constitution power to suspend the privilege of the writ was granted, either by some one or more of the specifications of power, or by them all combined. And, that important powers were understood by the people who adopted the Constitution to have been created by it, powers not enumerated, and not included incidentally in any one of those enumerated, is shown by the amendments. The first ten of these were sug-
535*] gested in the conventions of *the states, and proposed at the first session of the first Congress, before any complaint was made of a disposition to assume doubtful powers. The preamble to the resolution submitting them for adoption recited that the "conventions of a number of the states had, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added." This was the origin of the amendments, and they are significant. They tend plainly to show that, in the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted. Most of these amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.

And it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given or ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story, in his Commentaries on the Constitution, resulting powers, arising from the aggregate powers of the government. He instances the right to sue and make contracts. Many others might be given. The oath required by law from officers of the government is one. So is building a capitol or a presidential mansion, and so also is the Penal Code. This last is worthy of brief notice. Congress is expressly authorized "to provide for the punishment of counterfeiting the securities and current coin of the United States, and to define and punish piracies and felonies committed on the high seas and offenses against the laws of nations." It is also empowered to declare the punishment of treason, and provision is made for impeachments. This is the extent of power to punish
536*] crime *expressly conferred. It might be argued that the expression of these limited powers implies an exclusion of all other subjects of criminal legislation. Such is the argument in the present cases. It is said because Congress is authorized to coin money and regulate its value, it cannot declare anything other than gold and silver to be money or make it a legal tender. Yet Congress, by the act of April 30, 1790, entitled "An Act More Effectually to Provide for the Punishment of Certain Crimes against the United States," and the supplementary act of March 3d, 1825, defined and provided for the punishment of a large class of crimes other than those mentioned in the Constitution, and some of the punishments prescribed are manifestly not in aid of any single substantive power. No one doubts that this was rightfully done, and the power thus exercised has been affirmed by this court in *United States* v. *Marigold*, 9 How. 560. This case shows that a power may exist as an aid to the execution of an express power, or an aggregate of such powers, though there is another express power given relating in part to the same subject but less extensive. Another illustration of this may be found in connection with the provisions respecting a census. The Constitution orders an enumeration of free persons in the different states every ten years. The direction extends no further. Yet Congress has repeatedly directed an enumeration not only of free persons in the states but of free persons in the territories, and not only an enumeration of persons, but the collection of statistics respecting age, sex, and production. Who questions the power to do this?

Indeed the whole history of the government and of congressional legislation has exhibited the use of a very wide discretion, even in times of peace and in the absence of any trying emergency, in the selection of the necessary and proper means to carry into effect the great objects for which the government was framed, and this discretion has generally been unquestioned, or, if questioned, sanctioned by this court. This is true not only when an attempt has been *made to execute a single [*537 power specifically given, but equally true when the means adopted have been appropriate to the execution, not of a single authority, but of all the powers created by the Constitution. Under the power to establish postoffices and post-roads Congress has provided for carrying the mails, punishing theft of letters and mail robberies, and even for transporting the mails to foreign countries. Under the power to regulate commerce, provision has been made by law for the improvement of harbors, the establishment of observatories, the erection of lighthouses, breakwaters, and buoys, the registry, enrollment, and construction of ships, and a code has been enacted for the government of seamen. Under the same power and other powers over the revenue and the currency of the country, for the convenience of the treasury and internal commerce, a corporation known as the United States Bank was early created. To its capital the government subscribed one fifth of the stock. But the corporation was a private one, doing business for its own profit. Its incorporation was a constitutional exercise of congressional power for no other reason than that it was deemed to be a convenient instrument or means for accomplishing one or more of the ends for which the government was established, or, in the language of the 1st article, already quoted, "necessary and proper" for carrying into execution some or all the powers

vested in the government. Clearly this necessity, if any existed, was not a direct and obvious one. Yet this court, in *McCulloch* v. *Maryland*, 4 Wheat. 416, unanimously ruled that in authorizing the bank, Congress had not transcended its powers. So debts due to the United States have been declared by acts of Congress entitled to priority of payment over debts due to other creditors, and this court has held such acts warranted by the Constitution. *Fisher* v. *Blight*, 2 Cranch, 358.

This is enough to show how, from the earliest period of our existence as a nation, the powers conferred by the Constitution have been construed by Congress and by this court whenever such action by Congress has been called in 538*] question. *Happily, the true meaning of the clause authorizing the enactment of all laws necessary and proper for carrying into execution the express powers conferred upon Congress, and all other powers vested in the government of the United States, or in any of its departments or officers, has long since been settled. In *Fisher* v. *Blight*, above cited, this court, speaking by Chief Justice Marshall, said that in construing it "it would be incorrect and would produce endless difficulties if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose it might be said with respect to each that it was not necessary because the end might be obtained by other means." "Congress" said this court "must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution. The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe." It was in this case, as we have already remarked, that a law giving priority to debts due to the United States was ruled to be constitutional for the reason that it appeared to Congress to be an eligible means to enable the government to pay the debts of the Union.

It was, however, in *McCulloch* v. *Maryland* that the fullest consideration was given to this clause of the Constitution granting auxiliary powers, and a construction adopted that has ever since been accepted as determining its true meaning. We shall not now go over the ground there trodden. It is familiar to the legal profession and, indeed, to the whole country. Suffice it to say, in that case it was finally settled that in the gift by the Constitution to Congress of authority to enact laws "necessary and proper" for the execution of all the powers 539*] created by it, the necessity spoken *of is not to be understood as an absolute one. On the contrary, this court then held that the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Said Chief Justice Marshall, in delivering the opinion of the court: "Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." The case also marks out with admirable precision the province of this court. It declares that "when the law (enacted by Congress) is not prohibited and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court (it was said) disclaims all pretensions to such a power." It is hardly necessary to say that these principles are received with universal assent. Even in *Hepburn* v. *Griswold*, 8 Wall. 603, 19 L. ed. 513, both the majority and minority of the court concurred in accepting the doctrines of *McCulloch* v. *Maryland* as sound expositions of the Constitution, though disagreeing in their application.

With these rules of constitutional construction before us, settled at an early period in the history of the government, hitherto universally accepted, and not even now doubted, we have a safe guide to a right decision of the questions before us. Before we can hold the Legal Tender Acts unconstitutional, we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the government, not appropriate in any degree (for we are not judges of the degree of appropriateness), or we must hold that they were prohibited. *This brings us to the inquiry whether [*540 they were, when enacted, appropriate instrumentalities for carrying into effect, or executing any of the known powers of Congress, or of any department of the government. Plainly to this inquiry, a consideration of the time when they were enacted, and of the circumstances in which the government then stood, is important. It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times.

We do not propose to dilate at length upon the circumstances in which the country was placed when Congress attempted to make Treasury notes a legal tender. They are of too recent occurrence to justify enlarged description. Suffice it to say that a civil war was then raging which seriously threatened the overthrow of the government and the destruction of the Constitution itself. It demanded the equipment and support of large armies and navies, and the employment of money to an extent beyond the capacity of all ordinary sources of supply. Meanwhile the public Treasury was nearly empty, and the credit of the government, if not stretched to its utmost tension, had become nearly exhausted. Moneyed institutions had advanced largely of their means, and more could not be expected of them. They had been compelled to suspend specie payments. Taxation was inadequate to pay even the interest on the debt already incurred, and it was impossible to await the income of additional taxes. The necessity was immediate and pressing. The army was unpaid. There was then due to the soldiers in the field nearly a score of millions of dollars. The requisitions from the War and Navy Departments for supplies exceeded fifty

the advocates of a strict literal construction of the phrase "to coin money and regulate the 547*]value thereof," *while insisting that it defines the material to be coined as metal, are compelled to concede to Congress large discretion in all other particulars. The Constitution does not ordain what metals may be coined, or prescribe that the legal value of the metals, when coined, shall correspond at all with their intrinsic value in the market. Nor does it even affirm that Congress may declare anything to be a legal tender for the payment of debts. Confessedly the power to regulate the value of money coined, and of foreign coins, is not exhausted by the first regulation. More than once in our history has the regulation been changed without any denial of the power of Congress to exchange it, and it seems to have been left to Congress to determine alike what metal shall be coined, its purity, and how far its statutory value, as money, shall correspond, from time to time, with the market value of the same metal as bullion. How, then, can the grant of a power to coin money and regulate its value, made in terms so liberal and unrestrained, coupled also with a denial to the states of all power over the currency, be regarded as an implied prohibition to Congress against declaring Treasury notes a legal tender, if such declaration is appropriate, and adapted to carrying into execution the admitted powers of the government?

We do not, however, rest our assertion of the power of Congress to enact legal tender laws upon this grant. We assert only that the grant can, in no just sense, be regarded as containing an implied prohibition against their enactment, and that, if it raises any implications, they are of complete power over the currency, rather than restraining.

We come next to the argument much used, and, indeed, the main reliance of those who assert the unconstitutionality of the Legal Tender Acts. It is that they are prohibited by the spirit of the Constitution because they indirectly impair the obligation of contracts. The argument, of course, relates only to those contracts which were made before February, 1862, when the first act was passed, and it has no bearing upon the question whether the acts are valid 548*] when *applied to contracts made after their passage. The argument assumes two things—first, that the acts do, in effect, impair the obligation of contracts; and, second, that Congress is prohibited from taking any action which may indirectly have that effect. Neither of these assumptions can be accepted. It is true that under the acts, a debtor, who became such before they were passed, may discharge his debt with the notes authorized by them, and the creditor is compellable to receive such notes in discharge of his claim. But whether the obligation of the contract is thereby weakened can be determined only after considering what was the contract obligation. It was not a duty to pay gold or silver, or the kind of money recognized by law at the time when the contract was made, nor was it a duty to pay money of equal intrinsic value in the market. (We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money.) The expectation of the creditor and the anticipation of the debtor may have been that the contract would be discharged by the payment of coined metals, but neither the expectation of one party to the contract, respecting its fruits, nor the anticipation of the other constitutes its obligation. There is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed by it. *Aspdin* v. *Austin*, 5 Ad. & El. (N. S.) 671; *Dunn* v. *Sayles*, *Ibid.* 685; *Coffin* v. *Landis*, 46 Pa. 426. Were it not so, the expectation of results would be always equivalent to a binding engagement that they should follow. But the obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made. It there is anything settled by decision it is this, and we do not understand it to be controverted. Davies Reps. 28; *Barrington* v. *Potter*, Dyer, 81, b. (fol. 67); *Faw* v. *Marsteller*, 2 Cranch. 29. No one ever doubted that a debt of $1,000, contracted before 1834, could be paid by one hundred eagles coined after that year, though they contained no more gold than ninety-four eagles such as were coined when the contract was made, and this, *not because of the [*549 intrinsic value of the coin, but because of its legal value. The eagles coined after 1834 were not money until they were authorized by law, and had they been coined before, without a law fixing their legal value, they could no more have paid a debt than uncoined bullion, or cotton, or wheat. Every contract for the payment of money simply is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power. Nor is this singular. A covenant for quiet enjoyment is not broken, nor is its obligation impaired by the government's taking the land granted in virtue of its right of eminent domain. The expectation of the covenantee may be disappointed. He may not enjoy all he anticipated, but the grant was made and the covenant undertaken in subordination to the paramount right of the government. *Dobbins* v. *Brown*, 12 Pa. 75; *Workman* v. *Mifflin*, 30 Pa. 362. We have been asked whether Congress can declare that a contract to deliver a quantity of grain may be satisfied by the tender of a less quantity. Undoubtedly not. But this is a false analogy. There is a wide distinction between a tender of quantities, or of specific articles, and a tender of legal values. Contracts for the delivery of specific articles belong exclusively to the domain of state legislation, while contracts for the payment of money are subject to the authority of Congress, at least so far as relates to the means of payment. They are engagements to pay with lawful money of the United States, and Congress is empowered to regulate that money. It cannot, therefore, be maintained that the Legal Tender Acts impaired the obligation of contracts.

Nor can it be truly asserted that Congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless, or partially fruitless. Directly it may, confessedly, by passing a bankrupt act, embracing past as well as future transactions. *This is obliterating [*550 contracts entirely. So it may relieve parties from their apparent obligations indirectly in a

ment. There, this court, speaking through the Chief Justice, avowed that it is the constitutional right of Congress to provide a currency for the whole country; that this might be done 544*] by coin, or United States *notes, or notes of national banks; and that it cannot be questioned Congress may constitutionally secure the benefit of such a currency to the people by appropriate legislation. It was said there can be no question of the power of this government to emit bills of credit; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to make them a currency uniform in value and description, and convenient and useful for circulation. Here the substantive power to tax was allowed to be employed for improving the currency. It is not easy to see why, if state bank-notes can be taxed out of existence for the purposes of indirectly making United States notes more convenient and useful for commercial purposes, the same end may not be secured directly by making them a legal tender.

Concluding, then, that the provision which made Treasury notes a legal tender for the payment of all debts other than those expressly excepted, was not an inappropriate means for carrying into execution the legitimate powers of the government, we proceed to inquire whether it was forbidden by the letter or spirit of the Constitution. It is not claimed that any express prohibition exists, but it is insisted that the spirit of the Constitution was violated by the enactment. Here those who assert the unconstitutionality of the acts mainly rest their argument. They claim that the clause which conferred upon Congress power "to coin money, regulate the value thereof, and of foreign coin," contains an implication that nothing but that which is the subject of coinage, nothing but the precious metals can ever be declared by law to be money, or to have the uses of money. If by this is meant that because certain powers over the currency are expressly given to Congress, all other powers relating to the same subject are impliedly forbidden, we need only remark that such is not the manner in which the Constitution has always been construed. On the contray, it has been ruled that power over a particular subject may be exercised as auxiliary to an express power, though there is another express power relating 545*] *to the same subject, less comprehensive. *United States* v. *Marigold*, 9 How. 560. There an express power to punish a certain class of crimes (the only direct reference to criminal legislation contained in the Constitution), was not regarded as an objection to deducing authority to punish other crimes from another substantive and defined grant of power. There are other decisions to the same effect. To assert, then, that the clause enabling Congress to coin money and regulate its value tacitly implies a denial of all other power over the currency of the nation, is an attempt to introduce a new rule of construction against the solemn decisions of this court. So far from its containing a lurking prohibition, many have thought it was intended to confer upon Congress that general power over the currency which has always been an acknowledged attribute of sovereignty in every other civilized nation than our own, especially when considered in connection with the other clause which denies to the states the power to coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts. We do not assert this now, but there are some considerations touching these clauses which tend to show that if any implications are to be deduced from them, they are of an enlarging rather than a restraining character. The Constitution was intended to frame a government as distinguished from a league or compact, a government supreme in some particulars over states and people. It was designed to provide the same currency, having a uniform legal value in all the states. It was for this reason the power to coin money and regulate its value was conferred upon the Federal government, while the same power as well as the power to emit bills of credit was withdrawn from the states. The states can no longer declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in Congress. If the power to declare what is money is not in Congress, it is annihilated. This may, indeed, have been intended. Some powers that usually belong to sovereignties were extinguished, *but their extinguishment was not left [*546 to inference. In most cases, if not in all, when it was intended that governmental powers, commonly acknowledged as such, should cease to exist, both in the states and in the Federal government, it was expressly denied to both, as well to the United States as to the individual states. And generally, when one of such powers was expressly denied to the states only, it was for the purpose of rendering the Federal power more complete and exclusive. Why, then, it may be asked, if the design was to prohibit to the new government, as well as to the states, that general power over the currency which the states had when the Constitution was framed, was such denial not expressly extended to the new government, as it was to the states? In view of this it might be argued with much force that when it is considered in what brief and comprehensive terms the Constitution speaks, how sensible its framers must have been that emergencies might arise when the precious metals (then more scarce than now) might prove inadequate to the necessities of the government and the demands of the people—when it is remembered that paper money was almost exclusively in use in the states as the medium of exchange, and when the great evil sought to be remedied was the want of uniformity in the current value of money, it might be argued, we say, that the gift of power to coin money and regulate the value thereof, was understood as conveying general power over the currency, the power which had belonged to the states, and which they surrendered. Such a construction, it might be said, would be in close analogy to the mode of construing other substantive powers granted to Congress. They have never been construed literally, and the government could not exist if they were. Thus the power to carry on war is conferred by the power to "declare war." The whole system of the transportation of the mails is built upon the power to establish postoffices and post roads. The power to regulate commerce has also been extended far beyond the letter of the grant. Even

the advocates of a strict literal construction of the phrase "to coin money and regulate the 547*]value thereof," *while insisting that it defines the material to be coined as metal, are compelled to concede to Congress large discretion in all other particulars. The Constitution does not ordain what metals may be coined, or prescribe that the legal value of the metals, when coined, shall correspond at all with their intrinsic value in the market. Nor does it even affirm that Congress may declare anything to be a legal tender for the payment of debts. Confessedly the power to regulate the value of money coined, and of foreign coins, is not exhausted by the first regulation. More than once in our history has the regulation been changed without any denial of the power of Congress to exchange it, and it seems to have been left to Congress to determine alike what metal shall be coined, its purity, and how far its statutory value, as money, shall correspond, from time to time, with the market value of the same metal as bullion. How, then, can the grant of a power to coin money and regulate its value, made in terms so liberal and unrestrained, coupled also with a denial to the states of all power over the currency, be regarded as an implied prohibition to Congress against declaring Treasury notes a legal tender, if such declaration is appropriate, and adapted to carrying into execution the admitted powers of the government?

We do not, however, rest our assertion of the power of Congress to enact legal tender laws upon this grant. We assert only that the grant can, in no just sense, be regarded as containing an implied prohibition against their enactment, and that, if it raises any implications, they are of complete power over the currency, rather than restraining.

We come next to the argument much used, and, indeed, the main reliance of those who assert the unconstitutionality of the Legal Tender Acts. It is that they are prohibited by the spirit of the Constitution because they indirectly impair the obligation of contracts. The argument, of course, relates only to those contracts which were made before February, 1862, when the first act was passed, and it has no bearing upon the question whether the acts are valid 548*] when *applied to contracts made after their passage. The argument assumes two things—first, that the acts do, in effect, impair the obligation of contracts; and, second, that Congress is prohibited from taking any action which may indirectly have that effect. Neither of these assumptions can be accepted. It is true that under the acts, a debtor, who became such before they were passed, may discharge his debt with the notes authorized by them, and the creditor is compellable to receive such notes in discharge of his claim. But whether the obligation of the contract is thereby weakened can be determined only after considering what was the contract obligation. It was not a duty to pay gold or silver, or the kind of money recognized by law at the time when the contract was made, nor was it a duty to pay money of equal intrinsic value in the market. (We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money.) The expectation of the creditor and the anticipation of the debtor may have been that the contract would be discharged by the payment of coined metals, but neither the expectation of one party to the contract, respecting its fruits, nor the anticipation of the other constitutes its obligation. There is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed by it. *Aspdin* v. *Austin*, 5 Ad. & El. (N. S.) 671; *Dunn* v. *Sayles*, *Ibid.* 685; *Coffin* v. *Landis*, 46 Pa. 426. Were it not so, the expectation of results would be always equivalent to a binding engagement that they should follow. But the obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made. If there is anything settled by decision it is this, and we do not understand it to be controverted. Davies Reps. 28; *Barrington* v. *Potter*, Dyer. 81, b. (fol. 67); *Faw* v. *Marsteller*, 2 Cranch. 29. No one ever doubted that a debt of $1,000, contracted before 1834, could be paid by one hundred eagles coined after that year, though they contained no more gold than ninety-four eagles such as were coined when the contract was made, and this, *not because of the [*549 intrinsic value of the coin, but because of its legal value. The eagles coined after 1834 were not money until they were authorized by law, and had they been coined before, without a law fixing their legal value, they could no more have paid a debt than uncoined bullion, or cotton, or wheat. Every contract for the payment of money simply is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power. Nor is this singular. A covenant for quiet enjoyment is not broken, nor is its obligation impaired by the government's taking the land granted in virtue of its right of eminent domain. The expectation of the covenantee may be disappointed. He may not enjoy all he anticipated, but the grant was made and the covenant undertaken in subordination to the paramount right of the government. *Dobbins* v. *Brown*, 12 Pa. 75; *Workman* v. *Mifflin*, 30 Pa. 362. We have been asked whether Congress can declare that a contract to deliver a quantity of grain may be satisfied by the tender of a less quantity. Undoubtedly not. But this is a false analogy. There is a wide distinction between a tender of quantities, or of specific articles, and a tender of legal values. Contracts for the delivery of specific articles belong exclusively to the domain of state legislation, while contracts for the payment of money are subject to the authority of Congress, at least so far as relates to the means of payment. They are engagements to pay with lawful money of the United States, and Congress is empowered to regulate that money. It cannot, therefore, be maintained that the Legal Tender Acts impaired the obligation of contracts.

Nor can it be truly asserted that Congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless, or partially fruitless. Directly it may, confessedly, by passing a bankrupt act, embracing past as well as future transactions. *This is obliterating [*550 contracts entirely. So it may relieve parties from their apparent obligations indirectly in a

multitude of ways. It may declare war, or, even in peace, pass non-intercourse acts, or direct an embargo. All such measures may, and must, operate seriously upon existing contracts, and may not merely hinder, but relieve the parties to such contracts entirely from performance. It is, then, clear that the powers of Congress may be exerted, though the effect of such exertion may be in one case to annul, and in other cases to impair the obligation of contracts. And it is no sufficient answer to this to say it is true only when the powers exerted were expressly granted. There is no ground for any such distinction. It has no warrant in the Constitution, or in any of the decisions of this court. We are accustomed to speak for mere convenience of the express and implied powers conferred upon Congress. But in fact the auxiliary powers, those necessary and appropriate to the execution of other powers singly described, are as expressly given as is the power to declare war, or to establish uniform laws on the subject of bankruptcy. They are not catalogued, no list of them is made, but they are grouped in the last clause of § 8 of the 1st article, and granted in the same words in which all other powers are granted to Congress. And this court has recognized no such distinction as is now attempted. An embargo suspends many contracts and renders performance of others impossible, yet the power to enforce it has been declared constitutional. *Gibbons* v. *Ogden*, 9 Wheat. 1. The power to enact a law directing an embargo is one of the auxiliary powers, existing only because appropriate in time of peace to regulate commerce, or appropriate to carrying on war. Though not conferred as a substantive power, it has not been thought to be in conflict with the Constitution, because it impairs indirectly the obligation of contracts. That discovery calls for a new reading of the Constitution.

If, then, the Legal Tender Acts were justly chargeable with impairing contract obligations, 551*] they would not, for that *reason, be forbidden, unless a different rule is to be applied to them from that which has hitherto prevailed in the construction of other powers granted by the fundamental law. But, as already intimated, the objection misapprehends the nature and extent of the contract obligation spoken of in the Constitution. As in a state of civil society, property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority.

Closely allied to the objection we have just been considering, is the argument pressed upon us that the Legal Tender Acts were prohibited by the spirit of the Fifth Amendment, which forbids taking private property for public use without just compensation or due process of law. That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But who ever supposed that because of this a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared? By the act of June 28, 1834, a new regulation of the weight and value of gold coin was adopted, and about six per cent was taken from the weight of each dollar. The effect of this was that all creditors were subjected to a corresponding loss. The debts then due became solvable with six per cent less gold than was required to pay them before. The result was thus precisely what it is contended the Legal Tender Acts worked. But was it ever imagined this was taking private property without compensation or without due proces of law? Was the idea ever advanced that the new regulation of gold coin was against the spirt of the Fifth Amendment? And has anyone, *in good faith, [*552 avowed his belief that even a law debasing the current coin by increasing the alloy would be taking private property? It might be impolitic and unjust, but could its constitutionality be doubted? Other statutes have from time to time reduced the quantity of silver in silver coin without any question of their constitutionality. It is said, however, now, that the act of 1834 only brought the legal value of gold more nearly into correspondence with its actual value in the market, or its relative value to silver. But we do not perceive that this varies the case or diminishes its force as an illustration. The creditor who had a thousand dollars due him on the 31st day of July, 1834 (the day before the act took effect), was entitled to a thousand dollars of coined gold of the weight and fineness of the then existing coinage. The day after, he was entitled only to a sum six per cent less in weight and in market value, or to a smaller number of silver dollars. Yet he would have been a bold man who has asserted that because of this the obligation of the contract was impaired, or that private property was taken without compensation or without due process of law. No such assertion, so far as we know, was ever made. Admit it was a hardship, but it is not every hardship that is unjust, much less that is unconstitutional; and certainly it would be an anomaly for us to hold an act of Congress invalid merely because we might think its provisions harsh and unjust.

We are not aware of anything else which has been advanced in support of the proposition that the Legal Tender Acts were forbidden by either the letter or the spirit of the Constitution. If, therefore, they were, what we have endeavored to show, appropriate means for legitimate ends, they were not transgressive of the authority vested in Congress.

Here we might stop; but we will notice briefly an argument presented in support of the position that the unit of money value must possess intrinsic value. The argument is derived from assimilating the constitutional provision respecting a standard of weights and measures to that conferring *the power to coin [*553 money and regulate its value. It is said there can be no uniform standard of weights without weight, or of measure without length or space, and we are asked how anything can be made a

uniform standard of value which has itself no value? This is a question foreign to the subject before us. The Legal Tender Acts do not attempt to make paper a standard of value. We do not rest their validity upon the assertion that their omission is coinage, or any regulation of the value of money; nor do we assert that Congress may make anything which has no value—money. What we do assert is that Congress has power to enact that the government's promises to pay money shall be for the time being equivalent in value to the representative of value, determined by the coinage acts or to multiples thereof. It is hardly correct to speak of a standard of value. The Constitution does not speak of it. It contemplates a standard for that which has gravity or extension; but value is an ideal thing. The coinage acts fix its unit as a dollar; but the gold or silver thing we call a dollar is in no sense a standard of a dollar. It is a representative of it. There might never have been a piece of money of the denomination of a dollar. There never was a pound sterling coined until 1815, if we except a few coins struck in the reign of Henry VIII. almost immediately debased, yet it has been the unit of British currency for many generations. It is, then, a mistake to regard the Legal Tender Acts as either fixing a standard of value or regulating money values, or making that money which has no intrinsic value.

But, without extending our remarks further, it will be seen that we hold the acts of Congress constitutional as applied to contracts made either before or after their passage. In so holding, we overrule so much of what was decided in *Hepburn* v. *Griswold*, 8 Wall. 603, 19 L. ed. 513, as ruled the acts unwarranted by the Constitution so far as they apply to contracts made before their enactment. That case was decided by a divided court, and by a court having a less number of judges than the law 554*] *then in existence provided this court shall have. These cases have been heard before a full court, and they have received our most careful consideration. The questions involved are constitutional questions of the most vital importance to the government and to the public at large. We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right. *Briscoe* v. *Bank of Ky.* 8 Pet. 118. We are not accustomed to hear them in the absence of a full court, if it can be avoided. Even in cases involving only private rights if convinced we had made a mistake, we would hear another argument and correct our error. And it is no unprecedented thing in courts of last resort, both in this country and in England, to overrule decisions previously made. We agree this should not be done inconsiderately, but in case of such far reaching consequences as the present, thoroughly convinced as we are that Congress has not transgressed its powers, we regard it as our duty so to decide, and to affirm both these judgments.

The other questions raised in the case of *Knox* v. *Lee* were substantially decided in *Texas* v. *White*, 7 Wall. 700, 19 L. ed. 227.

The judgment in each case is affirmed.

Mr. Justice **Bradley:**

I concur in the opinion just read, and should feel that it was out of place to add anything further on the subject were it not for its great importance. On a constitutional question involving the powers of the government, it is proper that every aspect of it and every consideration bearing upon it should be presented, and that no member of the court should hesitate to express his views. I do not propose, however, to go into the subject at large, but only to make such additional observations as appear to me proper for consideration, at the risk of some inadvertent repetition.

The Constitution of the United States established a government, *and not a league, [*555 compact or partnership. It was constituted by the people. It is called a government. In the 8th section of article I. it is declared that Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof. As a government, it was invested with all the attributes of sovereignty. It is expressly declared in article VI. that the Constitution and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, shall be the supreme law of the land.

The doctrine so long contended for, that the Federal Union was a mere compact of states, and that the states, if they chose, might annul or disregard the acts of the national legislature, or might secede from the Union at their pleasure, and that the general government had no power to coerce them into submission to the Constitution, should be regarded as definitely and forever overthrown. This has been finally effected by the national power, as it had often been before, by overwhelming argument.

The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all which are forbidden to the state governments. It has jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike, and which require uniformity of regulations and laws, such as the coinage, weights and measures, bankruptcies, the postal system, patent and copyright laws, the public lands, and interstate commerce; all which subjects are expressly or impliedly prohibited to the state governments. It has power to suppress insurrections, as well as to repel invasions, and to organize, arm, discipline and call into service the militia of the whole country. The president *is [*556 charged with the duty and invested with the power to take care that the laws be faithfully executed. The judiciary has jurisdiction to decide controversies between the states, and between their respective citizens, as well as questions of national concern; and the government is clothed with power to guarantee to every state a republican form of government, and to

protect each of them against invasion and domestic violence. For the purpose of carrying into effect and executing these and the other powers conferred, and of providing for the common defense and general welfare. Congress is further invested with the taxing power in all its forms, except that of laying duties on exports, with the power to borrow money on the national credit, to punish crimes against the laws of the United States and of nations, to constitute courts, and to make all laws necessary and proper for carrying into execution the various powers vested in the government or any department or officer thereof.

Such being the character of the general government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions. If this proposition be not true, it certainly is true that the government of the United States has express authority, in the clause last quoted, to make all such laws (usually regarded as inherent and implied) as may be necessary and proper for carrying on the government as constituted and vindicating its authority and existence.

Another proposition equally clear is, that at the time the Constitution was adopted, it was, and had for a long time been, the practice of most, if not all, civilized governments, to employ the public credit as a means of anticipating the national revenues for the purpose of enabling them to exercise their governmental functions, and to meet the various exigencies to which all nations are subject; and that the mode of employing the public credit was various in different countries, and at different 557*] periods—sometimes by the agency *of a national bank, sometimes by the issue of exchequer bills or bills of credit, and sometimes by pledges of the public domain. In this country, the habit had prevailed from the commencement of the eighteenth century, of issuing bills of credit; and the revolution of independence had just been achieved, in great degree, by the means of similar bills issued by the Continental Congress. These bills were generally made a legal tender for the payment of all debts, public and private, until, by the influence of the English merchants at home, Parliament prohibited the issue of bills with that quality. This prohibition was first exercised in 1751, against the New England colonies; and subsequently, in 1763, against all the colonies. It was one of the causes of discontent which finally culminated in the Revolution. Dr. Franklin endeavored to obtain a repeal of the prohibitory acts, but only succeeded in obtaining from Parliament, in 1773, an act authorizing the colonies to make their bills receivable for taxes and debts due to the colony that issued them. At the breaking out of the war, the Continental Congress commenced the issue of bills of credit, and the war was carried on without other resources for three or four years. It may be said, with truth, that we owe our national independence to the use of this fiscal agency. Dr. Franklin, in a letter to a friend, dated from Paris, in April, 1779, after deploring the depreciation which the continental currency had undergone, said: "The only consolation under the evil is that the public debt is proportionately diminished by the depreciation; and this by a kind of imperceptible tax, every one having paid a part of it in the fall of value that took place between the receiving and paying such sums as passed through his hands." He adds: "This effect of paper currency is not understood this side the water. And, indeed, the whole is a mystery even to the politicians, how we have been able to continue a war four years without money, and how we could pay with paper, that had no previously fixed fund appropriated specially to redeem it. This currency, as we manage it, is a wonderful machine. It performs its office when we issue it; it pays and clothes troops, and provides *victuals and ammunition." [*558 Franklin's Works, vol. 8, p. 329. In a subsequent letter of 9th October, 1780, he says: "They (the Congress) issued an immense quantity of paper bills, to pay, clothe, arm, and feed their troops, and fit out ships; and with this paper, without taxes for the first three years, they fought and battled one of the most powerful nations of Europe." F. Works, vol. 8, p. 507. The continental bills were not made legal tenders at first, but in January, 1777, the Congress passed resolutions declaring that they ought to pass current in all payments, and be deemed in value equal to the same nominal sums in Spanish dollars, and that anyone refusing so to receive them ought to be deemed an enemy to the liberties of the United States; and recommending to the legislature of the several states to pass laws to that effect. Jour. of Cong. vol. 3, pp. 19, 20; Pitkin's Hist. vol. 2, p. 155.

Massachusetts and other colonies, on the breaking out of the war, disregarded the prohibition of Parliament, and again conferred upon their bills the quality of legal tender. Bancroft's Hist. vol. 7, p. 324.

These precedents are cited without reference to the policy or impolicy of the several measures in the particular cases, that is always a question for the legislative discretion. They establish the historical fact that when the Constitution was adopted, the employment of bills of credit was deemed a legitimate means of meeting the exigencies of a regularly constituted government, and that the affixing to them of the quality of a legal tender was regarded as entirely discretionary with the legislature. Such a quality was a mere incident that might or might not be annexed. The Continental Congress not being a regular government, and not having the power to make laws for the regulation of private transactions, referred the matter to the state legislatures. The framers of the Constitution were familiar with all this history. They were familiar with the governments which had thus exercised the prerogative of issuing bills having the quality, and intended for the purposes referred to. They had first drawn their breath under these governments; they *had helped to administer them. [*559 They had seen the important uses to which these securities might be applied.

In view, therefore, of all these facts when we find them establishing the present government, with all the powers before rehearsed, giving to it, amongst other things, the sole control of the money of the country and expressly

prohibiting the states from issuing bills of credit, and from making anything but gold and silver a legal tender, and imposing no such restriction upon the general government, how can we resist the conclusion that they intended to leave to it that power unimpaired, in case the future exigencies of the nation should require its exercise?

I am aware that according to the report of Mr. Madison in the original draft of the Constitution the clause relating to the borrowing of money read, "to borrow money and emit bills on the credit of the United States," and that the words "and emit bills" were, after some debate, struck out. But they were struck out with diverse views of members, some deeming them useless and others deeming them hurtful. The result was that they chose to adopt the Constitution as it now stands, without any words either of grant or restriction of power, and it is our duty to construe the instrument by its words, in the light of history. of the general nature of government, and the incidents of sovereignty.

The same argument was employed against the creation of a United States bank. A power to create corporations was proposed in the Convention and rejected. The power was proposed with a limited application to cases where the public good might require them and the authority of a single state might be incompetent. It was still rejected. It was then confined to the building of canals, but without effect. It was argued that such a power was unnecessary and might be dangerous. Yet Congress has not only chartered two United States banks, whose constitutionality has been sustained by this court, but several other institutions. As a means appropriate and conducive to the end of carrying into effect the other powers of the government, such as that of borrowing money **560*]** with promptness and dispatch, and *facilitating the fiscal operations of the government, it was deemed within the power of Congress to create such an institution under the general power given to pass all such laws as might be necessary and proper for carrying into execution the other powers granted. The views of particular members or the course of proceedings in the Convention cannot control the fair meaning and general scope of the Constitution as it was finally framed and now stands. It is a finished document, complete in itself, and to be interpreted in the light of history and of the circumstances of the period in which it was framed.

No one doubts at the present day nor has ever seriously doubted that the power of the government to emit bills exists. It has been exercised by the government without question for a large portion of its history. This being conceded, the incidental power of giving such bills the quality of legal tender follows almost as a matter of course.

I hold it to be the prerogative of every government not restrained by its Constitution to anticipate its resources by the issue of exchequer bills, bills of credit, bonds, stock, or a banking apparatus. Whether those issues shall or shall not be receivable in payment of private debts is an incidental matter in the discretion of such government unless restrained by constitutional prohibition.

This power is entirely distinct from that of coining money and regulating the value thereof. It is not only embraced in the power to make all necessary auxiliary laws, but it is incidental to the power of borrowing money. It is often a necessary means of anticipating and realizing promptly the national resources, when, perhaps, promptness is necessary to the national existence. It is not an attempt to coin money out of a valueless material, like the coinage of leather or ivory or kowrie shells. It is a pledge of the national credit. It is a promise by the government to pay dollars; it is not an attempt to make dollars. The standard of value is not changed. The government simply demands that its credit shall be accepted and received by public and private creditors during the pending exigency. Every government has *a right to demand this when its exist- [***561** ence is at stake. The interests of every citizen are bound up with the fate of the government. None can claim exemption. If they cannot trust their government in its time of trial they are not worthy to be its citizens.

But it is said, why not borrow money in the ordinary way? The answer is, the legislative department, being the nation itself, speaking by its representatives, has a choice of methods, and is the master of its own discretion. One mode of borrowing, it is true, is to issue the government bonds, and to invite capitalists to purchase them. But this is not the only mode. It is often too tardy and inefficient. In time of war or public danger, Congress, representing the sovereign power, by its right of eminent domain, may authorize the President to take private property for the public use and give government certificates therefor. This is largely done on such occasions. It is an indirect way of compelling the owner of property to lend to the government. He is forced to rely on the national credit.

Can the poor man's cattle and horses and corn be thus taken by the government when the public exigency requires it, and cannot the rich man's bonds and notes be in like manner taken to reach the same end? If the government enacts that the certificates of indebtedness which it gives to the farmer for his cattle and provender shall be receivable by the farmer's creditors in payment of his bonds and notes, is it anything more than transferring the government loan from the hands of one man to the hands of another—perhaps far more able to advance it? Is it anything more than putting the securities of the capitalist on the same platform as the farmer's stock?

No one supposes that these government certificates are never to be paid—that the day of specie payments is never to return. And it matters not in what form they are issued. The principle is still the same. Instead of certificates they may be Treasury notes, or paper of any other form. And their payment may not be made directly in coin, but they may be first convertible into government bonds, or other *government securities. Through what- [***562** ever changes they pass, their ultimate destiny is to be paid. But it is the prerogative of the legislative department to determine when the fit time for payment has come. It may be long delayed, perhaps many may think it too long after the exigency has passed. But the abuse of a power, if proven, is no argument against its existence. And the courts are not responsible

therefor. Questions of political expediency belong to the legislative halls, not to the judicial forum. It might subserve the present good if we should declare the Legal Tender Act unconstitutional, and a temporary public satisfaction might be the result. But what a miserable consideration would that be for a permanent loss of one of the just and necessary powers of the government; a power which, had Congress failed to exercise it when it did, we might have had no court here to-day to consider the question, nor a government or a country to make it important to do so.

Another ground of the power to issue Treasury notes or bills is the necessity of providing a proper currency for the country, and especially of providing for the failure or disappearance of the ordinary currency in times of financial pressure and threatened collapse of commercial credit. Currency is a national necessity. The operations of the government, as well as private transactions, are wholly dependent upon it. The state governments are prohibited from making money or issuing bills. Uniformity of money was one of the objects of the Constitution. The coinage of money and regulation of its value is conferred upon the general government exclusively. That government has also the power to issue bills. It follows, as a matter of necessity, as a consequence of these various provisions, that it is specially the duty of the general government to provide a national currency. The states cannot do it, except by the charter of local banks, and that remedy, if strictly legitimate and constitutional, is inadequate, fluctuating, uncertain, and insecure, and operates with all the partiality to local interests, which it was the very object of the Constitution to avoid. But regarded as a duty of the general government, it 563*] is *strictly in accordance with the spirit of the Constitution, as well as in line with the national necessities.

It is absolutely essential to independent national existence that government should have a firm hold on the two great sovereign instrumentalities of the sword and the purse, and the right to wield them without restriction on occasions of national peril. In certain emergencies government must have at its command, not only the personal services—the bodies and lives—of its citizens, but the lesser, though not less essential, power of absolute control over the resources of the country. Its armies must be filled, and its navies manned, by the citizens in person. Its material of war, its munitions, equipment, and commissary stores must come from the industry of the country. This can only be stimulated into activity by a proper financial system, especially as regards the currency.

A constitutional government, notwithstanding the right of eminent domain, cannot take physical and forcible possession of all that it may need to defend the country, and is reluctant to exercise such a power when it can be avoided. It must purchase, and by purchase command materials and supplies, products of manufacture, labor, service of every kind. The government cannot, by physical power, compel the workshops to turn out millions of dollars' worth of manufactures in leather, and cloth, and wood, and iron, which are the very first conditions of military equipment. It must stimulate and set in motion the industry of the country. In other words, it must purchase. But it cannot purchase with specie. That is soon exhausted, hidden or exported. It must purchase by credit. It cannot force its citizens to take its bonds. It must be able to lay its hands on the currency—that great instrument of exchange by which the people transact all their own affairs with each other; that thing which they must have, and which lies at the foundation of all industrial effort and all business in the community. When the ordinary currency disappears as it often does in time of war, when business begins to stagnate and general bankruptcy is imminent, then the government *must have power [*564 at the same time to renovate its own resources and to revive the drooping energies of the nation by supplying it with a circulating medium. What that medium shall be, what its character and qualities, will depend upon the greatness of the exigency, and the degree of promptitude which it demands. These are legislative questions. The heart of the nation must not be crushed out. The people must be aided to pay their debts and meet their obligations. The debtor interest of the country represent its bone and sinew, and must be encouraged to pursue its avocations. If relief were not afforded universal bankruptcy would ensue, and industry would be stopped, and government would be paralyzed in the paralysis of the people. It is an undoubted fact that during the late civil war, the activity of the workshops and factories, mines and machinery, ship-yards, railroads and canals of the loyal states, caused by the issue of the legal tender currency, constituted an inexhaustible fountain of strength to the national cause.

These views are exhibited, not for the purpose of showing that the power is a desirable one and, therefore, ought to be assumed; much less for the purpose of giving judgment on the expediency of its exercise of any particular case; but for the purpose of showing that it is one of those vital and essential powers inhering in every national sovereignty and necessary to its self-preservation.

But the creditor interest will lose some of its gold! Is gold the one thing needful? Is it worse for the creditor to lose a little by depreciation than everything by the bankruptcy of his debtor? Nay, is it worse than to lose everything by the subdivision of the government? What is it that protects him in the accumulation and possession of his wealth? Is it not the government and its laws? And can he not consent to trust that government for a brief period until it shall have vindicated its right to exist? All property and all rights, even those of liberty and life, are held to the fundamental condition of being liable to be impaired by providential calamities and national vicissitudes. Taxes impair my income or the value of my property. The condemnation *of my homestead, or a [*565 valuable part of it for a public improvement, or public defense, will sometimes destroy its value to me; the conscription may deprive me of liberty and destroy my life. So with the power of government to borrow money, a power to be exercised by the consent of the lender, if possible, but to be exercised without his consent, if necessary. And when exercised in

the form of legal tender, notes or bills of credit, it may operate for the time being to compel the creditor to receive the credit of the government in place of the gold which he expected to receive from his debtor. All these are fundamental political conditions on which life, property, and money are respectively held and enjoyed under our system of government, nay, under any system of government. There are times when the exigencies of the state rightly absorb all subordinate considerations of private interest, convenience, or feeling; and at such times, the temporary though compulsory acceptance by a private creditor of the government credit in lieu of his debtor's obligation to pay, is one of the slightest forms in which the necessary burdens of society can be sustained. Instead of being a violation of such obligation, it merely subjects it to one of those conditions under which it is held and enjoyed.

Another consideration bearing upon this objection is the fact that the power given to Congress to coin money and regulate the value thereof, includes the power to alter the metallic standard of coinage, as was done in 1834; whereby contracts made before the alteration, and payable thereafter, were satisfied by the payment of six per cent less of pure gold than was contemplated when the contracts were made. This power and this consequence flowing from its exercise, were much discussed in the great case of *Mixed Moneys*, in Sir John Davies's Report, and it was there held to belong to the King's ordinary prerogative over the coinage of money, without any sanction from Parliament. Subsequent acts of Parliament fixed the standard of purity and weight 566*] *in the coinage of the realm, which has not been altered for a hundred and fifty years past. But the same authority which fixed it in the time of Queen Anne, is competent at any time to change it. Whether it shall be changed or not is a matter of mere legislative discretion. And such is, undoubtedly, the public law of this country. Therefore, the mere fact that the value of debts may be depreciated by legal tender laws, is not conclusive against their validity; for that is clearly the effect of other powers which may be exercised by Congress in its discretion.

It follows as a corollary from these views, that it makes no difference in the principle of the thing, that the contract of the debtor is a specific engagement, in terms, to pay gold or silver money, or to pay in specie. So long as the money of the country, in whatever terms described, is in contemplation of the parties, it is the object of the legal tender laws to make the credit of the government a lawful substitute therefor. If the contract is for the delivery of a chattel or a specific commodity or substance, the law does not apply. If it is bona fide for so many carats of diamonds or so many ounces of gold as bullion, the specific contract must be performed. But if terms which naturally import such a contract are used by way of evasion, and money only is intended, the law reaches the case. Not but that Congress might limit the operation of the law in any way it pleased. It might make an exception of cases where the contract expressly promises gold and silver money. But if it has not done so; if the enactment is general in its terms, specific promises to pay the money in specie are just as much subject to the operation of the law as a mere promise to pay so many dollars—for that, in contemplation of law, is a promise to pay money in specie.

Hence I differ from my brethren in the decision of one of the cases now before the court, to wit: the case of *Trebilcock* v. *Wilson*, *post*, 460, in which the promise (made in June, 1861), was to pay, one year after date, the sum of $900, *with ten per cent interest from [*567 date, payable in specie. Of course this difference arises from the different construction given to the legal tender acts. I do not understand the majority of the court to decide that an act so drawn so as to embrace, in terms, contracts payable in specie, would not be constitutional. Such a decision would completely nullify the power claimed for the government. For it would be very easy, by the use of one or two additional words, to make all contracts payable in specie.

It follows as another corollary from the views which I have expressed that the power to make Treasury notes a legal tender, whilst a mere incidental one to that of issuing the notes themselves, and to one of the forms of borrowing money, is nevertheless a power not to be resorted to except upon extraordinary and pressing occasions, such as war or other public exigencies of great gravity and importance; and should be no longer exerted than all the circumstances of the case demand.

I do not say that it is a war power, or that it is only to be called into exercise in time of war; for other public exigencies may arise in the history of a nation which may make it expedient and imperative to exercise it. But of the occasions when, and of the times how long, it shall be exercised and in force, it is for the legislative department of the government to judge. Feeling sensibly the judgments and wishes of the people, that department cannot long (if it is proper to suppose that within its sphere it ever can) misunderstand the business interests and just rights of the community.

I deem it unnecessary to enter into a minute criticism of all the sayings, wise or foolish, that have, from time to time, been uttered on this subject by statesmen, philosophers, or theorists. The writers on political economy are generally opposed to the exercise of the power. The considerations which they adduce are very proper to be urged upon the depositary of the power. The question whether the power exists in a national government, is a great practical question relating to the national safety and independence, and statesmen *are better [*568 judges of this question than economists can be. Their judgment is ascertained in the history and practice of governments, and in the silence as well as the words of our written Constitution. A parade of authorities would serve but little purpose after Chief Justice Marshall's profound discussion of the powers of Congress in the great case of *McCulloch* v. *Maryland*, 14 Wheat. 416. If we speak not according to the spirit of the Constitution and authorities, and the incontrovertible logic of events, elaborate extracts cannot add weight to our decision.

Great stress has been laid on the supposed fact that England in all its great wars and emergencies, has never made its exchequer bills a legal tender. This imports a eulogium on

British conservatism in relation to contracts, which that nation would hardly regard as flattering. It is well known that for over twenty years, from 1797 to 1820, the most stringent paper money system that ever existed prevailed in England, and lay at the foundation of all her elasticity and endurance. It is true that the Bank of England notes, which the bank was required to issue until they reached an amount then unprecedented, were not technically made legal tenders, except for the purpose of relieving from arrest and imprisonment for debt; but worse than that, the bank was expressly forbidden to redeem its notes in specie, except for a certain small amount to answer the purpose of change. The people were obliged to receive them. The government had nothing else wherewith to pay its domestic creditors. The people themselves had no specie, for that was absorbed by the Bank of England, and husbanded for the uses of government in carrying on its foreign wars and paying its foreign subsidies. The country banks depended on the Bank of England for support, and of course they could not redeem their circulation in specie. The result was that the nation was perforce obliged to treat the bank-notes as a legal tender or suffer inevitable bankruptcy. In such a state of things it went very hard with any man who demanded specie in fulfilment of his contracts. A man by the name of Grigby tried it, and brought his case into court, and elicited **569***] from *Lord Alvanley the energetic expression: "Thank God, few such creditors as the present plaintiff have been found since the passing of the act." *Grigby* v. *Oakes*, 2 Bos. & P. 528. It is to be presumed that he was the last that ever showed himself in an English court.

It is well known that since the resumption of specie payments, the act of 1833, rechartering the bank, has expressly made the Bank of England notes a legal tender.

It is unnecessary to refer to other examples. France is a notable one. Her *assignats*, issued at the commencement and during the Revolution, performed the same office as our Continental bills; and enabled the nation to gather up its latent strength and call out its energies. Almost every nation of Europe, at one time or another, has found it necessary, or expedient, to resort to the same method of carrying on its operations or defending itself against aggression.

It would be sad, indeed, if this great nation were now to be deprived of a power so necessary to enable it to protect its own existence, and to cope with the other great powers of the world. No doubt foreign powers would rejoice if we should deny the power. No doubt foreign creditors would rejoice. They have, from the first, taken a deep interest in the question. But no true friend to our government, to its stability and its power to sustain itself under all vicissitudes, can be indifferent to the great wrong which it would sustain by a denial of the power in question—a power to be seldom exercised, certainly; but one, the possession of which is so essential, and as it seems to me, so undoubted.

Regarding the question of power as so important to the stability of the government, I cannot acquiesce in the decision of *Hepburn* v. *Griswold*, 8 Wall. 603, 19 L. ed. 513. I cannot consent that the government should be deprived of one of its just powers by a decision made at the time, and under the circumstances, in which that decision was made. On a question relating to the power of the government, where I am perfectly satisfied that it has the power, I can never consent to abide by a decision denying it, unless made with reasonable unanimity and *acquiesced in by the country. Where [*570 the decision is recent, and is only made by a bare majority of the court, and during a time of public excitement on the subject, when the question has largely entered into the political discussions of the day, I consider it our right and duty to subject it to a further examination, if a majority of the court are dissatisfied with the former decision. And in this case, with all deference and respect for the former judgment of the court, I am so fully convinced that it was erroneous, and prejudicial to the rights, interest and safety of the general government, that I, for one, have no hesitation in reviewing and overruling it. It should be remembered, that this court, at the very term in which, and within a few weeks after, the decision in *Hepburn* v. *Griswold*, *supra*, was delivered, when the vacancies on the Bench were filled, determined to hear the question re-argued. This fact must necessarily have had the effect of apprising the country that the decision was not fully acquiesced in, and of obviating any injurious consequences to the business of the country by its reversal.

In my judgment the decrees in all the cases before us should be affirmed.

Mr. Chief Justice **Chase**, dissenting:

We dissent from the argument and conclusion in the opinion just announced.

The rule, by which the constitutionality of an act of Congress passed in the alleged exercise of an implied power is to be tried is no longer, in this court, open to question. It was laid down in the case of *McCulloch* v. *Maryland*, 4 Wheat. 421, by Chief Justice Marshall, in these words: "Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional."

And it is the plain duty of the court to pronounce acts of *Congress not made in [*571 the exercise of an express power not coming within the reasonable scope of this rule if made in virtue of an implied power, unwarranted by the Constitution. Acts of Congress not made in pursuance of the Constitution are not laws.

Neither of these propositions was questioned in the case of *Hepburn* v. *Griswold*, 8 Wall. 606, 19 L. ed. 520. The judges who dissented in that case maintained that the clause in the act of February 25, 1862, making the United States notes a legal tender in payment of debts was an appropriate, plainly adapted means to a constitutional end, not prohibited but consistent with the letter and spirit of the Constitution. The majority of the court as then constituted, five judges out of eight, felt "obliged to conclude that an act making mere promises to pay dollars a legal tender in payments of debts previously contracted is not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress, is

inconsistent with the spirit of the Constitution, and is prohibited by the Constitution."

In the case of the *United States* v. *DeWitt*, 9 Wall. 41, 19 L. ed. 593, we held unanimously that a provision of the internal revenue law prohibiting the sale of certain illuminating oil in the states was unconstitutional, though it might increase the production and sale of other oils, and consequently the revenue derived from them, because this consequence was too remote and uncertain to warrant the court in saying that the prohibition was an appropriate and plainly adapted means for carrying into execution the power to lay and collect taxes.

We agree, then, that the question whether a law is a necessary and proper means to execution of an express power, within the meaning of these words as defined by the rule—that is to say, a means appropriate, plainly adapted, not prohibited but consistent with the letter and spirit of the Constitution—is a judicial question. Congress may not adopt any means for the execution of an express power that Congress may see fit to adopt. It must be a neces-
572*] sary and *proper means within the fair meaning of the rule. If not such it cannot be employed consistently with the Constitution. Whether the means actually employed in a given case are such or not the court must decide. The court must judge of the fact, Congress of the degree of necessity.

A majority of the court, five to four, in the opinion which has just been read, reverses the judgment rendered by the former majority of five to three, in pursuance of an opinion formed after repeated arguments, at successive terms, and careful consideration; and declares the legal tender clause to be constitutional; that is to say, that an act of Congress making promises to pay dollars legal tender as coined dollars in payment of pre-existing debts is a means appropriate and plainly adapted to the exercise of powers expressly granted by the Constitution, and not prohibited itself by the Constitution but consistent with its letter and spirit. And this reversal, unprecedented in the history of the court, has been produced by no change in the opinions of those who concurred in the former judgment. One closed an honorable judicial career by resignation after the case had been decided (27th November, 1869) after the opinion had been read and agreed to in conference (29th January, 1870), and after the day when it would have been delivered in court (31st January, 1870) had not the delivery been postponed for a week to give time for the preparation of the dissenting opinion. The court was then full, but the vacancy caused by the resignation of Mr. Justice Grier having been subsequently filled and an additional justice having been appointed under the act increasing the number of judges to nine, which took effect on the first Monday of December, 1869, the then majority find themselves in a minority of the court, as now constituted, upon the question.

Their convictions, however, remain unchanged. We adhere to the opinion pronounced in *Hepburn* v. *Griswold*. Reflection has only wrought a firmer belief in the soundness of the constitutional doctrines maintained, and in the importance of them to the country.

573*] *We agree that much of what was said in the dissenting opinion in that case, which has become the opinion of a majority of the court as now constituted, was correctly said. We fully agree in all that was quoted from Chief Justice Marshall. We had, indeed, accepted, without reserve, the definition of implied powers in which that great judge summed up his argument, of which the language quoted formed a part. But if it was intended to ascribe to us "the doctrine that when an act of Congress is brought to the test of this clause of the Constitution," namely: the clause granting the power of ancillary legislation, "its necessity must be absolute, and its adaptation to the conceded purpose unquestionable," we must be permitted not only to disclaim it, but to say that there is nothing in the opinion of the then majority which approaches the assertion of any such doctrine. We did, indeed, venture to cite, with approval, the language of Judge Story in his great work on the Constitution, that the words necessary and proper were intended to have "a sense at once admonitory and directory," and to require that the means used in the execution of an express power "should be bona fide, appropriate to the end" (1 Story, Const. 42, § 1251) and also ventured to say that the 10th Amendment, reserving to the states or the people all powers not delegated to the United States by the Constitution, nor prohibited by it to the states, "was intended to have a like admonitory and directory sense," and to restrain the limited government established by the Constitution from the exercise of powers not clearly delegated or derived by just inference from powers so delegated. In thus quoting Judge Story, and in this expression of our own opinion, we certainly did not suppose it possible that we could be understood as asserting that the clause in question "was designed as a restriction upon the ancillary power incidental to every grant of power in express terms." It was this proposition which "was stated and refuted" in *McCulloch* v. *Maryland*. That refutation touches nothing said by us. We assert only that the *words of the [*574 Constitution are such as admonish Congress that implied powers are not to be rashly or lightly assumed, and that they are not to be exercised at all, unless, in the words of Judge Story, they are "bona fide appropriate to the end," or, in the words of Chief Justice Marshall, "appropriate, plainly adapted" to a constitutional and legitimate end, and "not prohibited, but consistent with the letter and spirit of the Constitution."

There appears, therefore, to have been no real difference of opinion in the courts as to the rule by which the existence of an implied power is to be tested, when *Hepburn* v. *Griswold* was decided, though the then minority seem to have supposed there was. The difference had reference to the application of the rule rather than to the rule itself.

The then minority admitted that in the powers relating to coinage, standing alone, there is not "a sufficient warrant for the exercise of the power" to make notes a legal tender, but thought them "not without decided weight, when we come to consider the question of the existence of this power as one necessary and proper for carrying into execution other admitted powers of the government." This weight they found in the fact that an "express power over the lawful money of the country was con-

fided to Congress and forbidden to the states." It seemed to them not an "unreasonable inference" that, in a certain contingency, "making the securities of the government perform the office of money in the payment of debts would be in harmony with the power expressly granted to coin money." We perceive no connection between the express power to coin money and the inference that the government may, in any contingency, make its securities perform the functions of coined money, as a legal tender in payment of debts. We have supposed that the power to exclude from circulation notes not authorized by the national government might, perhaps, be deduced from the power to regulate the value of coin; but that the power of the government to emit bills of credit was an exercise of the power to borrow money, and that its power over the currency was incidental to 575*] that power and to the *power to regulate commerce. This was the doctrine of *The Veazie Bank* v. *Fenno*, 8 Wall. 548, 19 L. ed. 487, although not fully elaborated in that case. The question whether the quality of legal tender can be imparted to these bills depends upon distinct considerations.

Was, then, the power to make these notes of the government—the bills of credit—a legal tender in payments an appropriate, plainly adapted means to a legitimate and constitutional end? Or, to state the question as the opinion of the then minority stated it, "does there exist any power in Congress, or in the government, by express grant, in execution of which this Legal Tender Act was necessary and proper in sense here defined and under the circumstances of its passage?

The opinion of the then minority affirmed the power on the ground that it was a necessary and proper means, within the definition of the court, in the case of *McCulloch* v. *Maryland*, to carry on war, and that it was not prohibited by the spirit or letter of the Constitution, though it was admitted to be a law impairing the obligation of contracts, and notwithstanding the objection that it deprived many persons of their property without compensation and without due process of law.

We shall not add much to what was said in the opinion of the then majority on these points.

The reference made in the opinion just read, as well as in the argument at the bar, to the opinions of the Chief Justice, when Secretary of the Treasury, seems to warrant, if it does not require some observations before proceeding further in the discussion.

It was his fortune at the time the legal tender clause was inserted in the bill to authorize the issue of United States notes and received the sanction of Congress, to be charged with the anxious and responsible duty of providing funds for the prosecution of the war. In no report made by him to Congress was the expedient of 576*] making the notes of the *United States a legal tender suggested. He urged the issue of notes payable on demand in coin or received as coin in payment of duties. When the state banks had suspended specie payments, he recommended the issue of United States notes receivable for all loans to the United States and all government dues except duties on imports. In his report of December, 1862, he said that "United States notes receivable for bonds bearing a secure specie interest are next best to notes convertible into coin," and after stating the financial measures which in his judgment were advisable, he added: "The Secretary recommends, therefore, no mere paper money scheme, but on the contrary a series of measures looking to a safe and gradual return to gold and silver as the only permanent basis, standard, and measure of value recognized by the Constitution." At the session of Congress before this report was made, the bill containing the legal tender clause had become a law. He was extremely and avowedly adverse to this clause, but was very solicitous for the passage of the bill to authorize the issue of United States notes then pending. He thought it indispensably necessary that the authority to issue these notes should be granted by Congress. The passage of the bill was delayed, if not jeoparded, by the difference of opinion which prevailed on the question of making them a legal tender. It was under these circumstances that he expressed the opinion when called upon by the Committee of Ways and Means, that it was necessary;[1] and he was not sorry to find it sustained by the decisions of respected courts, not unanimous, indeed, nor without contrary decisions of state courts equally respectable. Examination and reflection under more propitious circumstances have satisfied him that this opinion was erroneous, and he does not hesitate to declare it. He would do so, just as unhesitatingly, if his favor to the legal tender clause had been at that time decided, and his opinion as to the constitutionality of the measure clear.

*Was the making of the notes a legal [*577 tender necessary to the carrying on the war? In other words, was it necessary to the execution of the power to borrow money? It is not the question whether the issue of notes was necessary, nor whether any of the financial measures of the government were necessary. The issuing of the circulation commonly known as greenbacks was necessary, and was constitutional. They were necessary to the payment of the army and the navy and to all the purposes for which the government uses money. The banks had suspended specie payment, and the government was reduced to the alternative of using their paper or issuing its own.

Now, it is a common error, and in our judgment it was the error of the opinion of the minority in *Hepburn* v. *Griswold*, 8 Wall. 606, 19 L. ed. 520, and is the error of the opinion just read, that considerations pertinent to the issue of United States notes have been urged in justification of making them a legal tender. The real question is, Was the making them a legal tender a necesssary means to the execution of the power to borrow money? If the notes would circulate as well without as with this quality it is idle to urge the plea of such necessity. But the circulation of the notes was amply provided for by making them receivable for all national taxes, all dues to the government and all loans. This was the provision relied upon for the purpose by the Secretary when the bill was first prepared, and his reflections since have

[1] Letters of the Secretary of the Treasury to the Committee of Ways and Means, January 22 and 29, 1862; Spaulding's Financial History, pp. 27, 46, 54.

convinced him that it was sufficient. Nobody could pay a tax, or any debt, or buy a bond without using these notes. As the notes, not being immediately redeemable, would, undoubtedly, be cheaper than coin, they would be preferred by debtors and purchasers. They would thus, by the universal law of trade, pass into general circulation. As long as they were maintained by the government at or near par value of specie they would be accepted in payment of all dues, private as well as public. Debtors, as a general rule, would pay in nothing else unless compelled by suit, and creditors would accept them as long as they would lose less by acceptance than by suit. In new transactions, sellers would demand and purchasers would pay 578*] *the premium for specie in the prices of commodities. The difference to them, in the currency, whether of coin or of paper, would be in the fluctuations to which the latter is subject. So long as notes should not sink so low as to induce creditors to refuse to receive them because they could not be said to be in any just sense payments of debts due, a provision for making them a legal tender would be without effect except to discredit the currency to which it was applied. The real support of note circulation not convertible on demand into coin, is receivability for debts due the government, including specie loans, and limitation of amount. If the amount is smaller than is needed for the transactions of the country, and the law allows the use in these transactions of but one description of currency, the demand for that description will prevent its depreciation. But history shows no instance of paper issues so restricted. An approximation in limitation is all that is possible, and this was attempted when the issues of United States notes were restricted to one hundred and fifty millions. But this limit was soon extended to four hundred and fifty millions, and even this was soon practically removed by the provision for the issue of notes by the national banking associations without any provision for corresponding reduction in the circulation of United States notes; and still further by the laws authorizing the issue of interest bearing securities, made a tender for their amount, excluding interest.

The best support for note circulation is not limitation, but receivability, especially for loans bearing coin interest. This support was given until the fall of 1864, when a loan bearing increased currency interest, payable in three years and convertible into a loan bearing less coin interest, was substituted for the six per cent and five per cent loans bearing specie interest, for which the notes had been previously received.

It is plain that a currency so supported cannot depreciate more than the loans; in other words below the general credit of the country. It will rise or fall with it. At the present moment, if the notes were received for five per 579*] cent *bonds, they would be at par. In other words, specie payments would be resumed.

Now, does making the notes a legal tender increase their value? It is said that it does, by giving them a new use. The best political economists say that it does not. When the government compels the people to receive its notes, it virtually declares that it does not expect them to be received without compulsion. It practically represents itself insolvent. This certainly does not improve the value of its notes. It is an element of depreciation. In addition. it creates a powerful interest in the debtor class and in the purchasers of bonds to depress to the lowest point the credit of the notes. The cheaper these become, the easier the payment of debts, and the more profitable the investments in bonds bearing coin interest.

On the other hand, the higher prices become, for everything the government needs to buy, and the greater the accumulation of public as well as private debt. It is true that such a state of things is acceptable to the debtors, investors in bonds and speculators. It is their opportunity of relief or wealth. And many are persuaded by their representations that the forced circulation is not only a necessity but a benefit. But the apparent benefit is a delusion and the necessity, imaginary. In their legitimate use, the notes are hurt, not helped by being made a legal tender. The legal-tender quality is only valuable for the purposes of dishonesty. Every honest purpose is answered as well and better without it.

We have no hesitation, therefore in declaring our conviction that the making of these notes a legal tender was not a necessary or proper means to the carrying on war or to the exercise of any express power of the government.

But the absence of necessity is not our only or our weightiest objection to this legal tender clause. We still think, notwithstanding the argument adduced to the contrary, that it does violate an express provision of the Constitution, and the spirit, if not the letter, of the whole instrument. It cannot be maintained that legislation justly *obnoxious to [*580 such objections can be maintained as the exercise of an implied power. There can be no implication against the Constitution. Legislation to be warranted as the exercise of implied powers must not be "prohibited, but consistent with the letter and spirit of the Constitution."

The 5th Amendment provides that no person shall be deprived of life, liberty, or property without compensation or due process of law. The opinion of the former minority says that the argument against the validity of the legal tender clause, founded on this constitutional provision, is "too vague for their perception." It says that a "declaration of war would be thus unconstitutional," because it might depreciate the value of property; and "the abolition of tariff on sugar or iron," because it might destroy the capital employed in those manufactures; and "the successive issues of government bonds," because they might make those already in private hands less valuable. But it seems to have escaped the attention of the then minority that to declare war, to lay and repeal taxes, and to borrow money, are all express powers, and that the then majority were opposing the prohibition of the Constitution to the claim of an implied power. Besides, what resemblance is there between the effect of the exercise of these express powers and the operation of the legal tender clause upon pre-existing debts? The former are indirect effects of the exercise of undisputed powers. The latter acts directly upon the relations of debtor and creditor. It violates that fundamental principle

of all just legislation that the legislature shall not take the property of A and give it to B. It says that B, who has purchased a farm of A for a certain price, may keep the farm without paying for it, if he will only tender certain notes which may bear some proportion to the price, or be even worthless. It seems to us that this is a manifest violation of this clause of the Constitution.

We think, also, that it is inconsistent with the spirit of the Constitution, in that it impairs the obligation of contracts. In the opinion of the then minority it is frankly said: "Undoubtedly, it is a law impairing the obli- **581*]** gation of contracts made *before its passage," but it is immediately added: "While the Constitution forbids the states to pass such laws, it does not forbid Congress," and this opinion, as well as the opinion just read, refers to the express authority to establish a uniform system of bankruptcy as a proof that it was not the intention of the Constitution to withhold that power. It is true that the Constitution grants authority to pass a bankrupt law, but our inference is, that in this way only can Congress discharge the obligation of contracts. It may provide for ascertaining the inability of debtors to perform their contracts, and, upon the surrender of all their property, may provide for their discharge. But this is a very different thing from providing that they may satisfy contracts without payment, without pretense of inability, and without any judicial proceeding.

That Congress possesses the general power to impair the obligation of contracts, is a proposition which, to use the language of Chief Justice Marshall (*Fletcher* v. *Peck*, 6 Cranch, 132), "must find its vindication in a train of reasoning not often heard in courts of justice." "It may well be added," said the same great judge (6 Cranch, 135), "whether the nature of society and of government does not prescribe some limits to legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, can be seized without compensation? To the legislature all legislative power is granted, but the question whether the act of transferring the property of an individual to the public is in the nature of a legislative power is well worthy of serious reflection."

And if the property of an individual cannot be transferred to the public, how much less to another individual?

These remarks of Chief Justice Marshall were made in a case in which it became necessary to determine whether a certain act of the legislature of Georgia was within the constitutional prohibition against impairing the obligation of contracts. And they assert fundamental principles of society and government in which that prohibition had its origin. **582*]** *They apply with great force to the construction of the Constitution of the United States. In like manner and spirit Mr. Justice Chase had previously declared (*Calder* v. *Bull*, 3 Dall. 388) that "an act of the legislature contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority." Among such acts he instances "a law that destroys or impairs the lawful private contracts of citizens." Can we be mistaken in saying that such a law is contrary to the spirit of a Constitution ordained to establish justice? Can we be mistaken in thinking that if Marshall and Story were here to pronounce judgment in this case they would declare the legal tender clause now in question to be prohibited by and inconsistent with the letter and spirit of the Constitution?

It is unnecessary to say that we reject wholly the doctrine, advanced for the first time, we believe, in this court, by the present majority, that the legislature has any "powers under the Constitution which grow out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted by it." If this proposition be admitted, and it be also admitted that the legislature is the sole judge of the necessity for the exercise of such powers, the government becomes practically absolute and unlimited.

Our observations thus far have been directed to the question of the constitutionality of the legal tender clause and its operation upon contracts made before the passage of the law. We shall now consider whether it be constitutional in its application to contracts made after its passage. In other words, whether Congress has power to make anything but coin a legal tender.

And here it is well enough again to say that we do not question the authority to issue notes or to fit them for a circulating medium, or to promote their circulation by providing for their receipt in payment of debts to the government, and for redemption either in coin or in bonds; in short, to adapt them to use as currency. Nor do we question the *law- [***583** fulness of contracts stipulating for payment in such notes, or the propriety of enforcing the performance of such contracts of holding the tender of such currency, according to their terms, sufficient. The question is, has Congress power to make the notes of the government, redeemable or irredeemable, a legal tender without contract and against the will of the person to whom they are tendered? In considering this question we assume as a fundamental proposition that it is the duty of every government to establish a standard of value. The necessity of such a standard is, indeed, universally acknowledged. Without it the transactions of society would become impossible. All measures, whether of extent or weight, or value, must have certain proportions of that which they are intended to measure. The unit of extent must have certain definite length, the unit of weight certain definite gravity, and the unit of value certain definite value. These units, multiplied or subdivided, supply the standards by which all measures are properly made. The selection, therefore, by the common consent of all nations, of gold and silver as the standard of value, was natural, or more correctly speaking, inevitable. For whatever definitions of value political economists may have given, they all agree that gold and silver have more value in proportion to weight and size, and are less subject to loss by wear or abrasion than any other material capable of easy subdivision and impression, and that their value changes less and by slower degrees, through considerable periods of time, than that of any other substance which could be used for the same purpose. And these are qualities indis-

pensable to the convenient use of the standard required. In the construction of the constitutional grant of power to establish a standard of value every presumption is, therefore, against that which would authorize the adoption of any other materials than those sanctioned by universal consent.

But the terms of the only express grant in the Constitution of power to establish such a standard leave little room for presumptions. The power conferred is the power to coin money, and these words must be understood as 584*] they were *used at the time the Constitution was adopted. And we have been referred to no authority which at that time defined coining otherwise than as minting or stamping metals for money; or money otherwise than as metal coined for the purposes of commerce. These are the words of Johnson, whose great dictionary contains no reference to money of paper.

It is true that notes issued by banks, both in England and America, were then in circulation, and were used in exchanges, and in common speech called money, and that bills of credit, issued both by Congress and by the states, had been recently in circulation under the same general name; but these notes and bills were never regarded as real money, but were always treated as its representatives only, and were described as currency. The legal-tender notes themselves do not purport to be anything else than promises to pay money. They have been held to be securities and, therefore, exempt from state taxation (*Bank* v. *Supervisors*, 7 Wall. 31, 19 L. ed. 62), and the idea that it was ever designed to make such notes a standard of value by the framers of the Constitution is wholly new. It seems to us impossible that it could have been entertained. Its assertion seems to us to ascribe folly to the framers of our fundamental law, and to contradict the most conspicuous facts in our public history.

The power to coin money was a power to determine the fineness, weight and denominations of the metallic pieces by which values were to be measured; and we do not perceive how this meaning can be extended without doing violence to the very words of the Constitution by imposing on them a sense they were never intended to bear. This construction is supported by contemporaneous and all subsequent action of the legislature; by all the recorded utterances of statesmen and jurists, and the unbroken tenor of judicial opinion until a very recent period, when the excitement of the Civil War led to the adoption, by many, of different views.

585*] *The sense of the Convention which framed the Constitution is clear, from the account given by Mr. Madison of what took place when the power to emit bills of credit was stricken from the reported draft. He says distinctly that he acquiesced in the motion to strike out, because the government would not be disabled thereby from the use of public notes, so far as they would be safe and proper, while it cut off the pretext for a paper currency, and particularly for making the bills a tender either for public or private debts. 3 Mad. Papers, 1346. The whole discussion upon bills of credit proves, beyond all possible question, that the Convention regarded the power to make notes a legal tender as absolutely excluded from the Constitution.

The papers of the Federalist, widely circulated in favor of the ratification of the Constitution, discuss briefly the power to coin money, as a power to fabricate metallic money, without a hint that any power to fabricate money of any other description was given to Congress (Dawson's Federalist, 294), and the views which it promulgated may be fairly regarded as the views of those who voted for adoption.

Acting upon the same views, Congress took measures for the establishment of a mint, exercising thereby the power to coin money, and has continued to exercise the same power, in the same way, until the present day. It established the dollar as the money unit, determined the quantity and quality of gold and silver of which each coin should consist, and prescribed the denominations and forms of all coins to be issued. 1 Stat. at L. 225, 246, and subsequent acts. Until recently no one in Congress ever suggested that that body possessed power to make anything else a standard of value.

Statesmen who have disagreed widely on other points have agreed in the opinion that the only constitutional measures of value are metallic coins, struck as regulated by the authority of Congress. Mr. Webster expressed not only his opinion but the universal and settled conviction of *the country when [*586 he said (4 Web. Works, 271, 280): "Most unquestionably there is no legal tender and there can be no legal tender in this country, under the authority of this government or any other, but gold and silver, either the coinage of our mints or foreign coin at rates regulated by Congress. This is a constitutional principle perfectly plain and of the very highest importance. The states are prohibited from making anything but gold and silver a tender in payment of debts, and although no such express prohibition is applied to Congress, yet as Congress has no power granted to it in this respect but to coin money and regulate the value of foreign coin, it clearly has no power to substitute paper or anything else for coin as a tender in payment of debts and in discharge of contracts."

And this court, in *Gwin* v. *Breedlove*, 2 How. 38, said: "By the Constitution of the United States gold and silver coin made current by law can only be tendered in payment of debts." And in *The United States* v. *Marigold*, 9 How. 567, this court, speaking of the trust and duty of maintaining a uniform and pure metallic standard of uniform value throughout the Union, said: "The power of coining money and regulating its value was delegated to Congress by the Constitution for the very purpose, as assigned by the framers of that instrument, of creating and preserving the uniformity and purity of such a standard of value."

The present majority of the court say that legal tender notes "have become the universal measure of values," and they hold that the legislation of Congress substituting such measures for coin by making the notes a legal tender in payment, is warranted by the Constitution.

But if the plain sense of words, if the contemporaneous exposition of parties, if common consent in understanding, if the opinions of courts avail anything in determining the meaning of the Constitution, it seems impossible to doubt that the power to coin money is a power

to establish a uniform standard of value, and that no other power to establish such a standard, by making notes a legal tender, is conferred upon Congress by the Constitution.

587*] *My brothers **Clifford** and **Field** concur in these views, but in consideration of the importance of the principles involved will deliver their separate opinions. My brother **Nelson** also dissents.

Mr. Justice **Clifford**, dissenting:

Money, in the constitutional sense, means coins of gold and silver fabricated and stamped by authority of law as a measure of value, pursuant to the power vested in Congress by the Constitution. Walker's Science of Wealth, 124; Liverpool on Coins, 8.

Coins of copper may also be minted for small fractional circulation, as authorized by law and the usage of the government for eighty years, but it is not necessary to discuss that topic at large in this investigation. 7 Jeff. Works, 462.

Even the authority of Congress upon the general subject does not extend beyond the power to coin money, regulate the value thereof and of foreign coin. Const., art. 8, clause 5.

Express power is also conferred upon Congress to fix the standard of weights and measures, and of course that standard, as applied to future transactions, may be varied or changed to promote the public interest, but the grant of power in respect to the standard of value is expressed in more guarded language, and the grant is much more restricted.

Power to fix the standard of weights and measures is evidently a power of comparatively wide discretion, but the power to regulate the value of the money authorized by the Constitution to be coined is a definite and precise grant of power, admitting of very little discretion in its exercise, and is not equivalent, except to a very limited extent, to the power to fix the standard of weights and measures, as the money authorized by that clause of the Constitution is coined money, and as a necessary consequence must be money of actual value, fabricated from the precious metals generally used for that purpose at the period when the Constitution was framed.

588*] *Coined money, such as is authorized by that clause of the instrument, consists only of the coins of the United States fabricated and stamped by authority of law, and is the same money as that described in the next clause of the same section as the current coins of the United States, and is the same money also as "the gold and silver coins" described in the 10th section of the same article, which prohibits the states from coining money, emitting bills of credit, or making "anything but gold and silver coin a tender in payment of debts."

Intrinsic value exists in gold and silver, as well before as after it is fabricated and stamped as coin, which shows conclusively that the principal discretion vested in Congress under that clause of the Constitution consists in the power to determine the denomination, fineness, or value and description of the coins to be struck, and the relative proportion of gold or silver, whether standard or pure, and the proportion of alloy to be used in minting the coins, and to prescribe the mode in which the intended object of the grant shall be accomplished and carried into practical effect.

Discretion, to some extent, in prescribing the value of the coins minted, is, beyond doubt, vested in Congress, but the plain intent of the Constitution is that Congress, in determining that matter, shall be governed chiefly by the weight and intrinsic value of the coins, as it is clear that if the stamped value of the same should much exceed the real value of gold and silver not coined, the minted coins would immediately cease to be either current coins or a standard of value as contemplated by the Constitution. Huskisson on Deprec. Curr., 22 Financial Pamph., 579. Commercial transactions imperiously require a standard of value, and the commercial world, at a very early period in civilization, adopted gold and silver as the true standard for that purpose, and the standard originally adopted has ever since continued to be so regarded by universal consent to the present time.

Paper emissions have, at one time or another, been authorized and employed as currency by most commercial nations, *and by no [*589 government, past or present, more extensively than by the United States, and yet it is safe to affirm that all experience in its use as a circulating medium has demonstrated the proposition that it cannot by any legislation, however stringent, be made a standard of value or the just equivalent of gold or silver. Attempts of the kind have always failed, and no body of men, whether in public or private stations, ever had more instructive teachings of the truth of that remark than the patriotic men who framed the Federal Constitution, as they had seen the power to emit bills of credit freely exercised during the war of the Revolution, not only by the Confederation, but also by the states, and knew from bitter experience its calamitous effects and the utter worthlessness of such a circulating medium as a standard of value. Such men so instructed could not have done otherwise than they did do, which was to provide an irrepealable standard of value, to be coined from gold and silver, leaving as little upon the subject to the discretion of Congress as was consistent with a wise forecast and an invincible determination that the essential principles of the Constitution should be perpetual as the means to secure the blessings of liberty to themselves and their posterity.

Associated as the grant to coin money and regulate the value thereof is with the grant to fix the standard of weights and measures, the conclusion, when that fact is properly weighed in connection with the words of the grant, is irresistible that the purpose of the framers of the Constitution was to provide a permanent standard of value which should, at all times and under all circumstances, consist of coin, fabricated and stamped, from gold and silver, by authority of law, and that they intended at the same time to withhold from Congress, as well as from the states, the power to substitute any other money as a standard of value in matters of finance, business, trade, or commerce.

Support to that view may also be drawn from the last words of the clause giving Congress the unrestricted power to regulate the value of foreign coin, as it would be difficult, if not impossible, to give full effect to the standard of value *prescribed by the Constitution, in [*590

times of fluctuation, if the circulating medium could be supplied by foreign coins not subject to any Congressional regulation as to their value.

Exclusive power to regulate the alloy and value of the coin struck by their own authority, or by the authority of the states, was vested in Congress under the Confederation, but the Congress was prohibited from enacting any regulation as to the value of the coins unless nine states assented to the proposed regulation.

Subject to the power of Congress to pass such regulations it is, unquestionably, true that the states, under the Confederation as well as the United States, possessed the power to coin money, but the Constitution, when it was adopted, denied to the states all authority upon the subject, and also ordained that they should not make anything but gold and silver coin a tender in payment of debts.

Beyond all doubt the framers of the Constitution intended that the money unit of the United States, for measuring values, should be one dollar, as the word "dollar" in the plural form is employed in the body of the Constitution, and also in the 7th Amendment, recommended by Congress at its first session after the Constitution was adopted. Two years before that, to wit, July 6, 1785, the Congress of the Confederation enacted that the money unit of the United States should "be one dollar," and one year later, to wit, August 8, 1786, they established the standard for gold and silver, and also provided that the money of account of the United States should correspond with the coins established by law. 1 Laws of the U. S., 1st ed. 646; 1 Curt. Hist. Const., 443; X. Journ. Cong. (Dunlap's ed.) 225; 1 Life of G. Morris, 273; XI. Journ. Cong., 179.

On the 4th of March, 1789, Congress first assembled under the Constitution, and proceeded without unnecessary delay to enact such laws as were necessary to put the government in operation which the Constitution had ordained and established. Ordinances had been passed 591*] during the Confederation *to organize the executive departments, and for the establishment of a mint, but the new Constitution did not perpetuate any of those laws, and yet Congress continued to legislate for a period of three years before any new law was passed prescribing the money unit or the money of account, either for "the public offices" or for the courts. Throughout that period it must have been understood that those matters were impliedly regulated by the Constitution, as tariffs were enacted, tonnage duties imposed, laws passed for the collection of duties, the several executive departments created, and the judiciary of the United States organized and empowered to exercise full jurisdiction under the Constitution.

Duties of tonnage and import duties were required, by the act of the 31st of July, 1789, to be paid in "gold and silver coin" and Congress in the same act adopted comprehensive regulations as to the value of foreign coin, but no provision was made for coining money or for a standard of value, except so far as that subject is involved in the regulation as to the value of foreign coin, or for a money unit; nor was any regulation prescribed as to the money of account. Revenue for the support of the government, under those regulations, was to be derived solely from duties of tonnage and import duties, and the express provision was that those duties should be collected in gold and silver coin. 1 Stat. at L. 24, 29.

Legislation under the Constitution had proceeded thus far before the Treasury Department was created. Treasury regulations for the collection, safe keeping and disbursement of the public moneys became indispensable, and Congress, on the 2d September, 1789, passed the act to establish the Treasury Department, which has even since remained in force. 1 Stat. at L. 65. By that act, the Secretary of the Treasury is declared to be the head of the Department, and it is made his duty, among other things, to digest and prepare plans for the improvement and management of the public finances *and for the support of the pub- [*592 lic credit; to prepare and report estimates of the public revenue and of the public expenditures; to superintend the collection of the revenue; to prescribe forms of keeping and stating accounts and for making returns; to grant all warrants for moneys to be issued from the Treasury in pursuance of appropriations by law, and to perform all such services relative to the finances as he shall be directed to perform.

Moneys collected from duties of tonnage and from import duties constituted at that period the entire resources of the national Treasury, and the antecedent act of Congress, providing for the collection of those duties, imperatively required that all such duties should be paid in gold and silver coin, from which it follows that the moneys mentioned in the act creating the Treasury Department were moneys of gold and silver coin which were collected as public revenue from the duties of tonnage and import duties imposed by the before-mentioned prior acts of Congress. Appropriations made by Congress were understood as appropriations of moneys in the Treasury, and all warrants issued by the Secretary of the Treasury were understood to be warrants for the payment of gold and silver coin. Forms for keeping and stating accounts, and for making returns and for warrants for moneys to be issued from the Treasury were prescribed, and in all those forms the Secretary of the Treasury adopted the money unit recognized in the Constitution, and which had been ordained four years before by the Congress of the Confederation.

Argument to show that the national Treasury was organized on the basis that the gold and silver coins of the United States were to be the standard of value is unnecessary, as it is a historical fact which no man or body of men can ever successfully contradict. Public attention had been directed to the necessity of establishing a mint for the coinage of gold and silver, several years before the Convention met to frame the Constitution, and a committee was appointed by the Congress of the Confederation to consider and report upon the subject. They reported on the 21st February, 1782, more than *a year before the Treaty of Peace, in [*593 favor of creating such an establishment, and on the 10th of October, 1786, the Congress adopted an ordinance providing that a mint should be established for the coinage of gold, silver, and copper, agreeably to the resolves of Congress previously mentioned, which prescribed the standard of gold and silver, and recognized the money unit established by the resolves passed

in the preceding year. 1 Laws of U. S. 647; X., Journ. Cong., 225; XI., *Id.*, 254; 8 Stat. at L. 80.

Congressional legislation organizing the new government had now progressed to the point where it became necessary to re-examine that subject and to make provision for the exercise of the power to coin money, as authorized by the Constitution. Pursuant to that power Congress, on April 2, 1792, passed the act establishing a mint for the purpose of a national coinage, and made provision, among other things, that coins of gold and silver, of certain fineness and weight, and of certain denominations, value and descriptions, should be from time to time struck and coined at the said mint. Specific provision is there made for coining gold and silver coins, as follows: First, gold coins, to wit: Eagles of the value of ten dollars or units; half eagles of the value of five dollars; quarter eagles of the value of two and a half dollars, the act specifying in each case the number of grains and fractions of a grain the coin shall contain, whether fabricated from pure or standard gold. Second, silver coins, to wit, "dollars or units," each to contain three hundred and seventy-one grains and four sixteenth parts of a grain of pure silver, or four hundred and sixteen grains of standard silver. Like provision is also made for the coinage of half dollars, quarter dollars, dimes, and half dimes, and also for the coinage of certain copper coins, but it is not necessary to enter much into those details in this case.

Provision, it must be conceded, is not there made, in express terms, that the money unit of the United States shall be one dollar, as in the ordinance passed during the Confederation, but the act under consideration assumes throughout **594*]** that the *coin called dollar is the coin employed for that purpose, as is obvious from the fact that the words "dollars" and "units" are treated as synonymous, and that all the gold coins previously described in the same section are measured by that word as the acknowledged money unit of the Constitution. Very strong doubts are entertained whether an act of Congress is absolutely necessary to constitute the gold and silver coins of the United States, fabricated and stamped as such by the proper executive officers of the mint, a legal tender in payment of debts. Constituted as such coins are by the Constitution, the standard of value, the better opinion would seem to be that they become legal tender for that purpose, if minted of the required weight and fineness, as soon as they are coined and put in circulation by lawful authority, but it is unnecessary to decide that question in this case, as the Congress, by the 16th section of the act establishing a mint, provided that all the gold and silver coins which shall have been struck at and issued from the said mint shall be a lawful tender in all payments whatsoever — those of full weight "according to the respective values herein declared, and those of less than full weight at values proportioned to their respective weights." Such a regulation is at all events highly expedient, as all experience shows that even gold and silver coins are liable to be diminished in weight by wear and abrasion, even if it is not absolutely necessary in order to constitute the coins, if of full weight, a legal tender.

Enough has already been remarked to show that the money unit of the United States is the coined dollar, described in the act establishing the mint, but if more be wanted it will be found in the 20th section of that act, which provides that the money of account of the United States shall be expressed in dollars or units, dimes or tenths, etc., and that all accounts in the public offices and all proceedings in the Federal courts shall be kept and had in conformity to that regulation. 1 Stat. at L. 248, 250.

Completed, as the circle of measures adopted by Congress *were, to put the new gov- [***595** ernment into successful operation, by the passage of that act, it will be instructive to take a brief review of the important events which occurred within the period of ten years next preceding its passage, or of the ten years next following the time when that measure was first proposed in the Congress of the Confederation. Two reasons suggest the 21st of February, 1782, as the time to commence the review, in addition to the fact that it was on that day that the committee of Congress made their report approving of the project to establish a national mint. VII., Journ. Cong., 286. They are as follows: (1) Because that date just precedes the close of the War of the Revolution; and (2) because the date at the same time extends back to a period when all America had come to the conclusion that all the paper currency in circulation was utterly worthless, and that nothing was fit for a standard of value but gold and silver coin fabricated and stamped by the national authority. Discussion upon the subject was continued, and the ordinance was passed, but the measure was not put in operation, as the Convention met the next year, and the Constitution was framed, adopted, and ratified; the President and the members of Congress were elected, laws were passed, the judicial system was organized, the executive departments were created, the revenue system established, and provision was made to execute the power vested in Congress to coin money and provide a standard of value, as ordained by the Constitution.

Perfect consistency characterizes the measures of that entire period in respect to the matter in question, and it would be strange if it had been otherwise, as the whole series of measures were, to a very large extent, the doings of the same class of men, whether the remark is applied to the old Congress, or the Convention which framed the Constitution, or to the first and second sections of the new Congress which passed the laws referred to and put the new system of government under the Constitution into full operation. Wise and complete as those laws were, still some *difficulties arose, [***596** as the several states had not adopted the money unit of the United States, nor the money of account prescribed by the 20th section of the act establishing the mint. Such embarrassments, however, were chiefly felt in the Federal courts, and they were not of long continuance, as the several states, one after another, in pretty rapid succession, adopted the new system established by Congress, both as to the money unit and the money of account. Virginia, December 19, 1792, re-enacted that section in the act of Congress without any material alteration, and New Hampshire, on the 20th of February, 1794, passed a similar law. 13 Hen.

Stat. (Va.) 478; Laws (N. H.), 240. Massachusetts adopted the same provision the next year, and so did Rhode Island and South Carolina. 2 Laws (Mass.), 657; Rev. Laws (R. I.), p. 319; 5 Stat. (S. C.), 262. Georgia concurred on the 22d of February, 1796, and New York on the 27th of January, 1797, and all the other states adopted the same regulation in the course of a few years. M. & C. Dig. (Ga.), 33; 3 Laws (N. Y.). Greenl. ed. 363. State concurrence was essential in those particulars to the proper working of the new system, and it was cheerfully accorded by the state legislatures without unnecessary delay.

Congress established as the money unit the coin mentioned in the Constitution, and the one which had been adopted as such seven years before in the resolve passed by the Congress of the Confederation. Dollars and decimals of dollars were adopted as the money of account by universal consent, as may be inferred from the unanimity exhibited by the states in following the example of Congress. Nothing remained for Congress to do to perfect the new system but to execute the power to coin money and regulate the value thereof, as it is clear that the Constitution makes no provision for a standard of value unless the power to establish it is conferred by that grant.

Power to fix the standard of weights and measures is vested in Congress by the Constitu- 597*] tion, in plain and unambiguous *terms, and it was never doubted, certainly not until within a recent period, that the power conferred to coin money or to fabricate and stamp coins from gold and silver, which in the constitutional sense is the same thing, together with the power to determine the fineness, weight and denominations of the moneys coined, was intended to accomplish the same purpose as to values. Indubitably it was so understood by Congress in prescribing the various regulations contained in the act establishing the national mint, and it continued to be so understood by all branches of the government — executive, legislative, and judicial — and by the whole people of the United States, for the period of seventy years from the passage of that act.

New regulations became necessary, and were passed in the meantime, increasing slightly the proportion of alloy used in fabricating the gold coins, but if those enactments are carefully examined it will be found that no one of them contains anything inconsistent in principle with the views here expressed. Gold, at the time the act establishing the mint became a law, was valued fifteen to one as compared with silver, but the disparity in value gradually increased, and to such an extent that the gold coins began to disappear from circulation, and to remedy that evil Congress found it necessary to augment the relative proportion of alloy by diminishing the required amount of gold, whether pure or standard. Eagles coined under that act were required to contain each two hundred and thirty-two grains of pure gold, or two hundred and fifty-eight grains of standard gold. 4 Stat. at L. 699. Three years later Congress enacted that the standard for both gold and silver coins should thereafter be such that, of one thousand parts by weight, nine hundred should be of pure metal and one hundred of alloy, by which the gross weight of the dollar was reduced to four hundred and twelve and a half grains, but the fineness was correspondingly increased, so that the money unit remained of the same intrinsic value as under the original act. Apply that rule to the eagle and it will be seen that its gross weight would be increased, as it was in fact by that act, but it continued *to contain, as under the pre- [*598 ceding act, two hundred and thirty-two grains of pure gold and no more, showing conclusively that no change was made in the value of the coins. 5 Stat. at L. 137.

Double eagles and gold dollars were authorized to be "struck and coined" at the mint, by the act of March 3, 1849, but the standard established for other gold coins was not changed and the provision was that the new coins should also be legal tender for their coined value. 9 Stat. at L. 397.

Fractional silver coins were somewhat reduced in value by the act of February 21, 1853, but the same act provided to the effect that the silver coins issued in conformity thereto should not be a legal tender for any sum exceeding $5, showing that the purpose of the enactment was to prevent the fractional coins, so essential for daily use, from being hoarded or otherwise withdrawn from circulation. 10 Stat. at L. 160.

Suppose it be conceded, however, that the effect of that act was slightly to debase the fractional silver coins struck and coined under it, still it is quite clear that the amount was too inconsiderable to furnish any solid argument against the proposition that the standard of value in the United States, was fixed by the Constitution, and that such was the understanding, both of the government and of the people of the United States, for a period of more than seventy years from the time the Constitution was adopted and put in successful operation under the laws of Congress. Throughout that period the value of the money unit was never diminished, and it remains to-day, in respect to value, what it was when it was defined in the act establishing the mint, and it is safe to affirm that no one of the changes made in the other coins, except, perhaps, the fractional silver coins, ever extended one whit beyond the appropriate limit of Constitutional regulation.

Treasury notes, called United States notes, were authorized to be issued by the act of February 25, 1862, to the amount of $150,000,000, on the credit of the United States, but they were not to bear interest, and were to be made *payable to bearer at the Treasury. [*599 They were to be issued by the Secretary of the Treasury, and the further provision was that the notes so issued should be lawful money and legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest upon bonds and notes of the United States, which the act provides "shall be paid in coin." 12 Stat. at L. 345. Subsequent acts passed for a similar purpose also except "certificates of indebtedness and of deposit," but it will not be necessary to refer specially to the other acts, as the history of that legislation is fully given in the prior decision of this court upon the same subject. *Hepburn v. Griswold*, 8 Wall. 618, 19 L. ed. 524; 12 Stat. at L. 370, 532, 710, 822.

Strictly examined, it is doubtful whether either of the cases before the court present any such questions as those which have been dis-

cussed in the opinion of the majority of the court just read; but suppose they do, which is not admitted, it then becomes necessary to inquire in the first place whether those questions are not closed by the recorded decisions of this court. Two questions are examined in the opinion of the majority of the court: (1) Whether the Legal Tender Acts are constitutional as to contracts made before the acts were passed; (2) whether they are valid if applied to contracts made since their passage.

Assume that the views here expressed are correct, and it matters not whether the contract was made before or after the act of Congress was passed, as it necessarily follows that Congress cannot, under any circumstances, make paper promises of any kind a legal tender in payment of debts. Prior to the decision just pronounced it is conceded that the second question presented in the record was never determined by this court, except as it is involved in the first question, but it is admitted by the majority of the court that the first question, that is, the question whether the acts under consideration are constitutional as to contracts made before their passage, was fully presented 600*] in the case of *Hepburn* v. **Griswold*, and that the court decided that an act of Congress making mere paper promises to pay dollars a legal tender in payment of debts previously contracted, is unconstitutional and void.

Admitted or not, it is as clear as anything in legal decision can be that the judgment of the court in that case controls the first question presented in the cases before the court, unless it be held that the judgment in that case was given for the wrong party and that the opinion given by the Chief Justice ought to be overruled.

Attempt is made to show that the second question is an open one, but the two, in my judgment, involve the same considerations, as Congress possesses no other power upon the subject than that which is derived from the grant to coin money, regulate the value thereof and of foreign coin. By that remark it is not meant to deny the proposition that Congress in executing the express grants may not pass all laws which shall be necessary and proper for carrying the same into execution, as provided in another clause of the same section of the Constitution. Much consideration of that topic is not required, as the discussion was pretty nearly exhausted by the Chief Justice in the case of *Hepburn* v. *Griswold*, 8 Wall. 614, 625, 19 L. ed. 523, 526, which arose under the same act and in which he gave the opinion. In that case the contract bore date prior to the passage of the law, and he showed conclusively that it could never be necessary and proper, within the meaning of the Constitution, that Congress, in executing any of the express powers, should pass laws to compel a creditor to accept paper promises as fulfilling a contract for the payment of money expressed in dollars. Obviously the decision was confined to the case before the court, but I am of the opinion that the same rule must be applied whether the contract was made before or after the passage of the law, as the contract for the payment of money, expressed in dollars, is a contract to make the payment in such money as the Constitution recognizes and establishes as a standard of value. Money *values can no more be [*601 measured without a standard of value than distances without a standard of extent, or quantities without a standard of weights or measures; and it is as necessary that there should be a money unit as that there should be a unit of extent, or of weight, or quantity. 7 Jeff. Works, 472; 22 Financial Pamph. 417; Horner's Bullion Rep.

Credit currency, whether issued by the states or the United States, or by private corporations or individuals, is not recognized by the Constitution as a standard of value, nor can it be made such by any law which Congress or the states can pass, as the laws of trade are stronger than any legislative enactment. Commerce requires a standard of value, and all experience warrants the prediction that commerce will have it, whether the United States agree or disagree, as the laws of commerce in that respect are stronger than the laws of any single nation of the commercial world. McCullock, Com. Dic. (ed. of 1869), 330. Values cannot be measured without a standard any more than time or duration, or length, surface, or solidity, or weight, gravity, or quantity. Something in every such case must be adopted as a unit which bears a known relation to that which is to be measured, as the dollar for values; the hour for time or duration; the foot of twelve inches for length; the yard for cloth measure; the square foot or yard for surface; the cubic foot for solidity; the gallon for liquids, and the pound for weights; the pound for avoirdupois being used in most commercial transactions and the pound troy "for weighing gold and silver and precious stones, except diamonds." 2 Bouv. Dic., 648; 7 Jeff. Works, 472; 1 Jeff. Corr., 133.

Unrestricted power "to fix the standard of weights and measures" is vested in Congress, but until recently Congress had not enacted any general regulations in execution of that power. 4 Stat. at L. 278; 5 Stat. at L. 133; 14 Stat. at L. 339. Regulations upon the subject existed in the states at the adoption of the Constitution, the same as those *which prevailed [*602 at that time in the parent country, and Judge Story says that the understanding was that those regulations remained in full force, and that the states, until Congress should legislate, possessed the power to fix their own weights and measures. 2 Story, Const. (3d ed.), § 1122; Rawle, Const., 102; Cooley, Const., 596; Pomeroy, Const., 263.

Power to coin money and regulate the value of domestic and foreign coin was vested in the national government to produce uniformity of value and to prevent the embarrassments of a perpetually fluctuating and variable currency. 2 Story, Const., § 1122.

Money, says the same commentator, is the universal medium or common standard by a comparison with which the value of all merchandise may be ascertained; and he also speaks of it as "a sign which represents the respective values of all other commodities." 2 Story, Const., § 1118. Such a power, that is, the power to coin money, he adds, is one of the ordinary prerogatives of sovereignty, and is almost universally exercised in order to preserve a proper circulation of good coin of a known value in the home market. Mill, Polit. Econ., 294.

Interests of such magnitude and pervading importance as those involved in providing for a uniform standard of value throughout the Union were manifestly entitled to the protection of the national authority, and in view of the evils experienced for the want of such a standard during the war of the Revolution, when the country was inundated with floods of depreciated paper, the members of the Convention who framed the Constitution did not hesitate to confide the power to Congress not only to coin money and regulate the value thereof, but also the power to regulate the value of foreign coin, which was denied to the Congress of the Confederation. 2 Phil. Paper Cur. 135; 9 Jeff. Works, 254, 289; 6 Sparks, Wash. Letters, 321.

Influenced by these considerations and others 603*] expressed *in the opinion of the Chief Justice, this court decided in the case referred to, that the act of Congress making the notes in question "lawful money and a legal tender in payment of debts" could not be vindicated as necessary and proper means for carrying into effect the power vested in Congress to coin money and regulate the value thereof, or any other express power vested in Congress under the Constitution. Unless that case, therefore, is overruled, it is clear, in my judgment, that both the cases before the court are controlled by that decision. Controversies determined by the Supreme Court are finally and conclusively settled, as the decisions are numerous that the court cannot review and reverse their own judgments. *Sibbald* v. *U. S.* 12 Pet. 492; *Wash. Bridge Co.* v. *Stewart*, 3 How. 424; *Peck* v. *Sanderson*, 18 How. 42, 15 L. ed. 262; *Noonan* v. *Bradley*, *ante*, 279.

But where the parties are different, it is said the court, in a subsequent case, may overrule a former decision, and it must be admitted that the proposition, in a technical point of view, is correct. Such examples are to be found in the reported decisions of the court, but they are not numerous, and it seems clear that the number ought never to be increased, especially in a matter of so much importance, unless the error is plain and upon the clearest convictions of judicial duty.

Judgment was rendered for the plaintiff in that case on the 17th of September, 1864, in the highest court of the state, and on the 23d of June in the succeeding year the defendants sued out a writ of error, and removed the cause into this court for re-examination. *Griswold* v. *Hepburn*, 2 Duv. 20. Under the regular call of the docket the case was first argued at the December term, 1867, but at the suggestion of the Attorney General an order was passed that it be re-argued, and the case was accordingly continued for that purpose. Able counsel appeared at the next term, and it was again elaborately argued on both sides. Four or five other cases were also on the calendar, supposed at that time to involve the same constitutional 604*] *questions, and those cases were also argued, bringing to the aid of the court an unusual array of counsel of great learning and eminent abilities. Investigation and deliberation followed; authorities were examined, and oft repeated consultations among the justices ensued, and the case was held under advisement as long as necessary to the fullest examination by all the justices of the court, before the opinion of the court was delivered. By law the Supreme Court at that time consisted of the Chief Justice and seven associate justices, the act of Congress having provided that no vacancy in the office of associate justice should be filled until the number should be reduced to six. 14 Stat. at L. 209. Five of the number, including the Chief Justice, concurred in the opinion in that case, and the judgment of the state court was affirmed, three of the associate justices dissenting. Since that time one of the justices who concurred in that opinion of the court has resigned, and Congress having increased the number of the associate justices to eight, the two cases before the court have been argued, and the result is that the opinion delivered in the former case is overruled, five justices concurring in the present opinion and four dissenting. Five justices concurred in the first opinion, and five have overruled it. 16 Stat. at L. 44. Persuaded that the first opinion was right, for the reasons already assigned, it is not possible that I should concur in the second, even if it were true that no other reasons of any weight could be given in support of the judgment in the first case, and that the conclusion there reached must stand or fall without any other support. Many other reasons, however, may be invoked to fortify that conclusion, equally persuasive and convincing with those to which reference has been made.

All writers upon political economy agree that money is the universal standard of value, and the measure of exchange, foreign and domestic, and that the power to coin and regulate the value of money is an essential attribute of national sovereignty. Goods and chattels were directly bartered *one for another, when [*605 the division of labor was first introduced, but gold and silver were adopted to serve the purpose of exchange by the tacit concurrence of all nations at a very early period in the history of commercial transactions. Walker's Science of Wealth, 127. Commodities of various kinds were used as money at different periods in different countries, but experience soon showed the commercial nations that gold and silver embodied the qualities desirable in money in a much greater degree than any other known commodity or substance. 1 Smith's Wealth of Nations, 35. Daily experience shows the truth of that proposition, and supersedes the necessity of any remarks to enforce it, as all admit that a commodity to serve as a standard of value and a medium of exchange must be easily divisible into small portions; that it must admit of being kept for an indefinite period without deteriorating; that it must possess great value in small bulk, and be capable of being easily transported from place to place; that a given denomination of money should always be equal in weight and quality, or fineness to other pieces of money of the same denomination, and that its value should be the same or as little subject to variation as possible. McCullock's Com. Dict. (ed. 1869) 894; Mill's Pol. Econ. 294; 7 Jeff. Works, 490. Such qualities, all agree, are united in a much greater degree in gold and silver than in any other known commodity, which was as well known to the members of the convention who framed the Constitution as to any body of men since assembled, and intrusted to any extent with the public affairs. They not only knew that the money of

the commercial world was gold and silver, but they also knew, from bitter experience, that paper promises, whether issued by the states or United States, were utterly worthless as a standard of value for any practical purpose.

Evidence of the truth of these remarks, of the most convincing character, is to be found in the published proceedings of that convention. Debate upon the subject first arose when an amendment was proposed, to prohibit the **606***] states *from emitting bills of credit or making anything but gold and silver coin a tender in payment of debts, and from the character of that debate, and the vote on the amendment, it became apparent that paper money had but few, if any, friends in the Convention. 3 Mad. Papers, 1442. Article seven of the draft of the Constitution, as reported to the Convention, contained the clause, "and emit bills on the credit of the United States," appended to the grant of power vested in Congress to borrow money, and it was on the motion to strike out that clause that the principal discussion in respect to paper money took place. Mr. Madison inquired if it would not be sufficient to prohibit the making of such bills a tender, as that would remove the temptation to emit them with unjust views. Promissory notes, he said, in that shape, that is, when not a tender, "may in some emergencies be best." Some were willing to acquiesce in the modification suggested by Mr. Madison, but Mr. Morris, who submitted the motion, objected, insisting that if the motion prevailed there would still be room left for the notes of a responsible minister, which, as he said, "would do all the good without the mischief." Decided objections were advanced by Mr. Ellsworth who said he thought the moment a favorable one "to shut and bar the door against paper money;" and others expressed their opposition to the clause in equally decisive language, even saying that they would sooner see the whole plan rejected than retain the three words, "and emit bills." Suffice it to say, without reproducing the discussion, that the motion prevailed—nine states to two—and the clause was stricken out and no attempt was ever made to restore it. Paper money, as legal tender, had few or no advocates in the Convention, and it never had more than one open advocate throughout the period the Constitution was under discussion either in the Convention which framed it, or in the conventions of the states where it was ratified. Virginia voted in the affirmative on the motion to strike out that clause, Mr. Madison being **607***] satisfied that if the motion prevailed *it would not have the effect to disable the government from the use of Treasury notes, and being himself in favor of cutting "off the pretext for a paper currency, and particularly for making the bills a tender, either for public or private debts." 3 Mad. Papers, 1344; 5 Elliott, Debates, 434, 485. When the draft for the Constitution was reported, the clause prohibiting the states from making anything but gold and silver a tender in payment of debts contained an exception, "in case Congress consented;" but the Convention struck out the exception, and made the prohibition absolute, one of the members remarking that it was a favorable moment to crush out paper money, and all or nearly all of the Convention seemed to concur in the sentiment. 2 Curt. Hist. Const. 364.

Contemporaneous acts are certainly evidence of intention, and if so, it is difficult to see what more is needed to show that the members of that Convention intended to withhold from the states and from the United States, all power to make anything but gold and silver a standard of value, or a tender in payment of debts. Equally decisive proof to the same effect is found in the debates which subsequently occurred in the conventions of the several states, to which the Constitution, as adopted, was submitted for ratification. 1 Ell. Deb. 492; 2 *Ibid.* 486; 4 *Ibid.* 184; *Ibid.* 334, 336; 3 *Ibid.* 290, 472, 478; 1 *Ibid.* 369, 370. Mr. Martin thought that the states ought not to be totally deprived of the right to emit bills of credit, but he says "that the Convention was so smitten with the paper money dread that they insisted that the prohibition should be absolute." 1 Ell. Deb. 376.

Currency is a word much more comprehensive than the word "money," as it may include bank-bills and even bills of exchange, as well as coins of gold and silver, but the word "money," as employed in the grant of power under consideration, means the coins of gold and silver fabricated and stamped as required by law, which, by virtue of their intrinsic value as universally acknowledged and their official origin, become the medium of exchange and the standard *by which all other values are [***608** expressed and discharged. Support to the proposition that the word "money," as employed in that clause, was intended to be used in the sense here supposed, is also derived from the language employed in certain numbers of the Federalist, which, as is well known, were written and published during the period the question whether the states would ratify the Constitution was pending in their several conventions. Such men as the writers of those essays never could have employed such language if they had entertained the remotest idea that Congress possessed the power to make paper promises a legal tender. Federalist, No. 44, p. 207; *Ibid.* No. 42, p. 197.

Like support is also derived from the language of Mr. Hamilton in his celebrated report recommending the incorporation of a national bank. He first states the objection to the proposed measure that banks tend to banish the gold and silver of the country; and secondly he gives the answer to that objection made by the advocates of the bank, that it is immaterial what serves the purpose of money, and then says that the answer is not entirely satisfactory, as the permanent increase or decrease of the precious metals in a country can hardly ever be a matter of indifference. "As the commodity taken in lieu of every other, it (coin) is a species of the most effective wealth, and as the money of the world it is of great concern to the state that it possesses a sufficiency of it to face any demands which the protection of its external interests may create." He favored the incorporation of a national bank, with power to issue bills and notes payable on demand in gold and silver, but he expressed himself as utterly opposed to paper emissions by the United States, characterizing them as so liable to abuse and even so certain of being abused that the government ought never to trust itself "with the use of so seducing and dangerous an element." Hist. U. S. Bank, 21,

24, 32. Opposed as he was to paper emissions by the United States, under any circumstances, it is past belief that he could ever have con- **609*]** curred in the proposition to make *such emissions a tender in payment of debts, either as a member of the Convention which framed the Constitution or as the head of the Treasury Department. Treasury notes, however, have repeatedly been authorized by Congress, commencing with the act of 30th June, 1812, but it was never supposed, before the time when the several acts in question were passed, that Congress could make such notes a legal tender in payment of debts. 2 Stat. at L. 766; 3 Stat. at L. 100. Such notes, it was enacted, should be received in payment of all duties and taxes laid, and in payment for public lands sold by the Federal authority. Provision was also made in most or all of the acts that the Secretary of the Treasury, with the approbation of the President, might cause Treasury notes to be issued at the par value thereof in payment of services, of supplies, or of debts for which the United States were or might be answerable by law, to such person or persons as should be willing to accept the same in payment, but it never occurred to the legislators of that day that such notes could be made a legal tender in discharge of such indebtedness, or that the public creditor could be compelled to accept them in payment of his just demands. 3 Stat. at L. 315.

Financial embarrassments, second only in their disastrous consequences to those which preceded the adoption of the Constitution, arose toward the close of the last war with Great Britain, and it is matter of history that those embarrassments were too great and pervading to be overcome by the use of Treasury notes or any other paper emissions without a specie basis. Expedients of various kinds were suggested, but it never occurred either to the Executive or to Congress that a remedy could be found by making Treasury notes, as then authorized, a legal tender, and the result was that the second Bank of the United States was incorporated. 3 Stat. at L. 266. Paper currency, it may be said, was authorized by that act, which is undoubtedly true; and it is also true that the bills or notes of the bank were made receivable in all payments to the United **610*]** States, if the same were at the time *payable on demand, but the act provided that the corporation should not refuse, under a heavy penalty, the payment in gold and silver of any of its notes, bills or obligations, nor of any moneys received upon deposit in the bank or in any of its offices of discount and deposit.

Serious attempt is made, strange to say, to fortify the proposition that the acts in question are constitutional, from the fact that Congress, in providing for the use of Treasury notes and in granting the charters to the respective national banks, made the notes and bills receivable in payment of duties and taxes, but the answer to the suggestion is so obvious that it is hardly necessary to pause to suggest its refutation. *Metropolitan Bank* v. *Van Dyck*, 27 N. Y. 400. Creditors may exact gold and silver or they may waive the right to require such money, and accept credit currency, or commodities other than gold and silver, and the United States, as creditors or in the exercise of their express power to lay and collect taxes, duties, imposts and excises, may, if they see fit, accept the Treasury notes or bank-bills in such payments as substitutes for the constitutional currency. Further discussion of the proposition is unnecessary, as it is plainly destitute of any merit whatever. 4 Web. Works, 271; *Thorndike* v. *U. S.* 2 Mass. 18.

Resort was also had to Treasury notes in the revulsion of 1837, and during the war with Mexico, and also in the great revulsion of 1857, but the new theory that Congress could make Treasury notes a legal tender was not even suggested, either by the President or by any member of Congress. 5 Stat. at L. 201; 5 Stat. at L. 469; 9 Stat. at L. 118; 11 Stat. at L. 257.

Seventy years are included in this review, even if the computation is only carried back to the passage of the act establishing the mint, and it is clear that there is no trace of any act, executive or legislative, within that period, which affords the slightest support to the new constitutional theory that Congress can by law constitute paper emissions a tender in payment of debts. Even Washington, the father of our country, refused to accept paper money in payment of debts contracted before the War of Independence, and the proof *is full to [*611 the point that Hamilton, as well as Jefferson and Madison, was opposed to paper emissions by the national authority. 2 Phil. Paper Cur. 135; 6 Sparks' Wash. Letters, 321.

Sufficient, also, is recorded in the reports of the decisions of this court to show that the court, from the organization of the judicial system to the day when the judgments in the cases before the court were announced, held opinions utterly opposed to such a construction of the Constitution as would authorize Congress to make paper promises a legal tender as between debtor and creditor. Throughout that period the doctrine of the court has been and still is, unless the opinion of the court just read constitutes an exception, that the government of the United States, as ordained and established by the Constitution, is a government of enumerated powers; that all the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people; that every power vested in the Federal government under the Constitution is in its nature sovereign, and that Congress may pass all laws necessary and proper to carry the same into execution; or, in other words, that the power being sovereign includes, by force of the term, the requisite means, fairly applicable to the attainment of the contemplated end, which are not precluded by restrictions or exceptions expressed or necessarily implied, and not contrary to the essential ends of political society. Hist. U. S. Bank, 95.

Definitions slightly different have been given by different jurists to the words "necessary and proper" employed in the clause of the Constitution conferring upon Congress the power to pass laws for carrying the express grants of power into execution, but no one ever pretended that a construction or definition could be sustained that the general clause would authorize the employment of such means in the execution of one express grant as would practically *nullify another or render another ut- [*612 terly nugatory. Circumstances made it neces-

sary that Mr. Hamilton should examine that phrase at a very early period after the Constitution was adopted, and the definition he gave to it is as follows: "All the means requisite and fairly applicable to the attainment of the end of such power which are not precluded by restrictions and exceptions specified in the Constitution, and not contrary to the essential ends of political society." Twenty-five years later the question was examined by the Supreme Court and authoritatively settled, the Chief Justice giving the opinion. His words were: "Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional." *McCulloch* v. *Maryland*, 4 Wheat. 421.

Substantially the same definition was adopted by the present Chief Justice in the former case, in which he gave the opinion of the court, and there is nothing contained in the Federal reports giving the slightest sanction to any broader definition of those words. Take the definition given by Mr. Hamilton, which, perhaps, is the broadest, if there is any difference, and still it is obvious that it would give no countenance whatever to the theory that Congress, in passing a law to execute one express grant of the Constitution, could authorize means which would nullify another express grant, or render it nugatory for the attainment of the end which the framers of the Constitution intended it should accomplish.

Authority to coin money was vested in Congress; to provide a permanent national standard of value, everywhere the same, and subject to no variation except what Congress shall make under the power to regulate the value thereof; and it is not possible to affirm, with any hope that the utterance will avail in the argument, that the power to coin money is not an express power, and if those premises are **613*]** *conceded, it cannot be shown that Congress can so expand any other express power by implication as to nullify or defeat the great purposes which the power to coin money and establish a standard of value was intended to accomplish.

Government notes, it is conceded, may be issued as a means of borrowing money, because the act of issuing the notes may be and often is a requisite means to execute the granted power, and being fairly applicable to the attainment of the end, the notes, as means, may be employed, as they are not precluded by any restrictions or exceptions, and are not repugnant to any other express grant contained in the Constitution. Light-houses, buoys, and beacons may be erected under the power to regulate commerce, but Congress cannot authorize an officer of the government to take private property for such a purpose without just compensation, as the exercise of such a power would be repugnant to the 5th Amendment. Power to lay and collect taxes is conferred upon Congress, but Congress cannot tax the salaries of the state judges, as the exercise of such a power is incompatible with the admitted power of the states to create courts, appoint judges, and provide for their compensation. *Collector* v. *Day*, *ante*, 122; *Ward* v. *Maryland*, *ante*, 260.

Congress may also impose duties, imposts and excises to pay the debts and provide for the common defense and general welfare, but the Congress cannot lay any tax or duty on articles exported from any state, nor can Congress give any preference by any regulation of commerce or revenue to the ports of one state over those of another, as the exercise of any such power is prohibited by the Constitution. Exclusive power is vested in Congress to declare war; to raise and support armies; to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces. Appropriations to execute those powers may be made by Congress, but no appropriations of money to that use can be made for a longer term than two years, as an appropriation for a longer term is expressly *pro- [**614** hibited by the same clause which confers the power to raise and support armies. By virtue of those grants of power, Congress may erect forts and magazines, may construct navy-yards and dock-yards, manufacture arms and munitions of war, and may establish depots and other needful buildings for their preservation, but the Congress cannot take private property for that purpose without making compensation to the owner, as the Constitution provides that private property shall not be taken for public use without just compensation.

Legislative power under the Constitution can never be rightfully extended to the exercise of a power not granted nor to that which is prohibited, and it makes no difference whether the prohibition is express or implied, as an implied prohibition, when once ascertained, is as effectual to negative the right to legislate as one that is expressed; the rule being that Congress, in passing laws to carry the express powers granted into execution, cannot select any means as requisite for that purpose or as fairly applicable to the attainment of the end, which are precluded by restrictions or exceptions contained in the Constitution, or which are contrary to the essential ends of political society. Hist. U. S. Bank, 95.

Concede these premises, and it follows that the acts of Congress in question cannot be regarded as valid unless it can be held that the power to make paper emissions a legal tender in payment of debts can properly be implied from the power to coin the money, and that such emissions, when enforced by such a provision, become the legal standard of value under the Constitution. Extended discussion of the first branch of the proposition would seem to be unnecessary, as the dissenting justices in the former case abandoned that point and frankly stated in the dissenting opinion delivered that they were not able to see in those clauses "standing alone, a sufficient warrant for the exercise of this power." Through their organ on the occasion they referred to the power to declare war, to suppress insurrection, to *raise and support armies, to provide [**615** and maintain a navy, to borrow money, to pay the debts of the Union, and to provide for the common defense and general welfare, as grants of power conferred in separate clauses of the Constitution. Reference was then made in very appropriate terms to the exigencies of the Treasury during that period and the conclusion reached, though expressed interrogatively, appears to be that the provision making the notes

a legal tender was a necessary and proper one as conducing "towards the purpose of borrowing money, of paying debts, of raising armies, of suppressing insurrection;" or, as expressed in another part of the same opinion, the provision was regarded as "necessary and proper to enable the government to borrow money to carry on the war." *Hepburn* v. *Griswold*, 8 Wall. 632, 19 L. ed. 529.

Suggestions or intimations are made in one or more of the opinions given in the state courts that the power assumed by Congress may be vindicated as properly implied from the power to coin money, but inasmuch as that assumption was not the ground of the dissent in the former case, and as the court is not referred to any case where a court affirming the validity of the acts of Congress in question has ventured to rest their decision upon that theory, it does not appear to be necessary to protract the discussion upon that point.

Such notes are not declared in the acts of Congress to be a standard of value, and if they were the provision would be as powerless to impart that quality to the notes as with the processes of the alchemist to convert chalk into gold or the contrivances of the mechanic to organize a machine and give it perpetual motion. Gold and silver were adopted as the standard of value, even before civil governments were organized, and they have always been regarded as such to the present time, and it is safe to affirm that they will continue to be such by universal consent, in spite of legislative enactments and of judicial decisions. Treasury notes, or the notes in question, called by what name they **616*]** may be, never *performed that office, even for a day, and it may be added that neither legislative enactments nor judicial decisions can compel the commercial world to accept paper emissions of any kind as the standard of value by which all other values are to be measured. *Hepburn* v. *Griswold*, 8 Wall. 608, 19 L. ed. 521. Nothing but money will, in fact, perform that office, and it is clear that neither legislative enactments nor judicial decisions can perform commercial impossibilities. Commodities, undoubtedly, may be exchanged as matter of barter, or the seller may accept paper promises, instead of money, but it is nevertheless true, as stated by Mr. Huskisson, that money is not only the common measure and common representative of all other commodities, but also the common and universal equivalent. Whoever buys, gives, whoever sells, receives such a quantity of pure gold or silver as is equivalent to the article bought or sold; or if he gives or receives paper instead of money, he gives or receives that which is valuable only as it stipulates the payment of a given quantity of gold or silver. 22 Financial Pamphlets, 580.

"Most unquestionably," said Mr. Webster, "there is no legal tender, and there can be no legal tender, in this country, under the authority of this government, or any other, but gold and silver. . . . This is a constitutional principle, perfectly plain and of the very highest importance." He admitted that no such express prohibition was contained in the Constitution, and then proceeded to say: "As Congress has no power granted to it in this respect but to coin money and to regulate the value of foreign coins, it clearly has no power to substitute paper or anything else for coin as a tender in payment of debts and in discharge of contracts," adding that "Congress has exercised the power fully in both its branches. It has coined money and still coins it, it has regulated the value of foreign coins and still regulates their value. The legal tender, therefore, the constitutional standard of value, is established and cannot be overthrown." 4 Web. Works, 271. Beyond peradventure he was of the opinion that gold and silver, at rates fixed by Congress, constituted the *legal [***617** standard of value, and that neither Congress nor the states had authority to establish any other standard in its place. *Ibid.* 280.

Views equally decisive have been expressed by this court in a case where the remarks were pertinent to the question presented for decision. *U. S.* v. *Marigold*, 9 How. 567. Certain questions were certified here which arose in the circuit court in the trial of an indictment in which the defendant was charged with having brought into the United States from a foreign place, with intent to pass, utter, publish and sell certain false, forged and counterfeit coins, made, forged and counterfeited in the resemblance and similitude of the coins struck at the mint. Doubts were raised at the trial whether Congress had the power to pass the law on which the indictment was founded. Objection was made that the acts charged were only a fraud in traffic, and as such, were punishable, if at all, under the state law. Responsive to that suggestion the court says that the provisions of the section "appertain rather to the execution of an important trust invested by the Constitution, and to the obligation to fulfil that trust on the part of the government, namely: the trust and the duty of creating and maintaining a uniform and pure metallic standard of value throughout the Union; that the power of coining money and of regulating its value was delegated to Congress by the Constitution for the very purpose of creating and preserving the uniformity and purity of such a standard of value, and on account of the impossibility, which was foreseen, of otherwise preventing the inequalities and the confusion necessarily incident to different views of policy which in different communities would be brought to bear on this subject. The power to coin money being thus given to Congress, founded on public necessity, it must carry with it the correlative power of protecting the creature and object of that power." Appropriate suggestions follow as to the right of the government to adopt measures to exclude counterfeits and prevent the true coin from being substituted by others *of no intrinsic value, [***618** and the justice delivering the opinion then proceeds to say, that Congress "having emitted a circulating medium, a standard of value indispensible for the purposes of the community and for the action of the government itself, the Congress is accordingly authorized and bound in duty to prevent its debasement and expulsion and the destruction of the general confidence and convenience by the influx and substitution of a spurious coin in lieu of the constitutional currency.

Equally decisive views were expressed by the court six years earlier, in the case of *Gwin* v.

Breedlove, 2 How. 38, in which the opinion of the court was delivered by the late Mr. Justice Catron, than whom no justice who ever sat in the court was more opposed to the expression of an opinion on a point not involved in the record.

No state shall coin money, emit bills of credit, or make anything but gold and silver a tender in payment of debts. These prohibitions, said Mr. Justice Washington, associated with the powers granted to Congress to coin money and regulate the value thereof and of foreign coin, most obviously constitute members of the same family, being upon the same subject and governed by the same policy. This policy, said the learned justice, was to provide a fixed and uniform standard of value throughout the United States, by which the commercial and other dealings between the citizens thereof, or between them and foreigners, as well as the moneyed transactions of the government, should be regulated. *Ogden* v. *Saunders*, 12 Wheat. 265. Language so well chosen and so explicit cannot be misunderstood, and the views expressed by Mr. Justice Johnson in the same case are even more decisive. He said the prohibition in the Constitution to make anything but gold and silver coin a tender in payment of debts is express and universal. The framers of the Constitution regarded it as an evil to be repelled without modification, and that they have therefore left nothing to be inferred or deduced from construction on the subject. 12 Wheat. 288.

619*] *Recorded as those opinions have been for forty-five years and never questioned, they are certainly entitled to much weight, especially as the principles which are there laid down were subsequently affirmed in two cases by the unanimous opinion of this court. *U. S.* v. *Marigold*, 9 How. 567; *Gwin* v. *Breedlove*, 2 How. 38; *Craig* v. *Missouri*, 4 Pet. 434.

Strong support to the view here taken is also derived from the case of *Craig* v. *Missouri*, last cited, in which the opinion was given by the Chief Justice. Loan certificates issued by the state were the consideration of the note in suit in that case, and the defense was that the certificates were bills of credit and that the consideration of the note was illegal Responsive to that defense, the plaintiff insisted that the certificates were not bills of credit, because they had not been made a legal tender, to which the court replied, that the emission of bills of credit and the enactment of tender laws were distinct operations, independent of each other; that both were forbidden by the Constitution; that the evils of paper money did not result solely from the quality of its being made a tender in payment of debts; that that quality might be the most pernicious one, but that it was not an essential quality of bills of credit nor the only mischief resulting from such emissions. *Briscoe* v. *Bank of Ky.* 11 Pet. 317; *Fox* v. *Ohio*, 5 How. 433.

Remarks of the Chief Justice in the case of *Sturges* v. *Crowninshield*, 4 Wheat. 204, may also be referred to as even more explicit and decisive to the same conclusion than anything embodied in the other cases. He first describes, in vivid colors, the general distress which followed the war in which our independence was established. Paper money, he said, was issued, worthless lands and other property of no use to the creditor were made a tender in payment of debts, and the time of payment stipulated in the contract was extended by law. Mischief to such an extent was done, and so much more was apprehended, that general distrust prevailed and all *confidence between man [**620** and man was destroyed. Special reference was made to those grievances by the Chief Justice because it was insisted that the prohibition to pass laws impairing the obligation of contracts ought to be confined by the court to matters of that description, but the court was of a different opinion, and held that the Convention intended to establish a great principle, that contracts should be inviolable; that the provision was intended "to prohibit the use of any means by which the same mischief might be produced." He admitted that that provision was not intended to prevent the issue of paper money, as that evil was remedied and the practice prohibited by the clause forbidding the states to "emit bills of credit" inserted in the Constitution expressly for that purpose, and he also admitted that the prohibition to emit bills of credit was not intended to restrain the states from enabling debtors to discharge their debts by the tender of property of no real value to the creditor, "because for that subject also particular provision is made" in the Constitution; but he added, "Nothing but gold and silver coin can be made a tender in payment of debts."

Utterances of the kind are found throughout the reported decisions of this court, but there is not a sentence or word to be found within those volumes, from the organization of the court to the passage of the acts of Congress in question, to support the opposite theory.

Power, as before remarked, was vested in the Congress under the Confederation to borrow money and emit bills of credit, and history shows that the power to emit such bills had been exercised, before the Convention which framed the Constitution assembled, to an amount exceeding $350,000,000. 2 Story, Const. 3d ed. 249; *Briscoe* v. *Bank of Ky.* 11 Pet. 337; 1 Jeff. Cor. 401; Am. Almanac (1830) 183. Still the draft of the Constitution, as reported, contained the words "and to emit bills" appended *to the clause authorizing [**621** Congress to borrow money. When that clause was reached, says Mr. Martin, a motion was made to strike out the words "to emit bills of credit;" and his account of what followed affords the most persuasive and convincing evidence that the Convention and nearly every member of it, intended to put an end to the exercise of such a power. Against the motion, he says, we urged that it would be improper to deprive the Congress of that power; that it would be a novelty unprecedented to establish a government which should not have such authority; that it was impossible to look forward into futurity so far as to decide that events might not happen that would render the exercise of such a power absolutely necessary, etc. But a majority of the Convention, he said, being wise beyond every event, and being willing to risk any political evil rather than admit the idea of a paper emission in any possible case, refused to trust the authority to a government to which they were lavishing the most unlimited powers of taxation, and to the mercy of

which they were willing blindly to trust the liberty and property of the citizens of every state in the Union, and "they erased that clause from the system." 1 Ell. Deb. 369.

More forcible vindication of the action of the Convention could hardly be made than is expressed in the language of the Federalist and the authority of Judge Story warrants the statement that the language there employed is "justified by almost every contemporary writer," and is "attested in its truth by facts" beyond the influence of every attempt at contradiction. Having adverted to those facts the commentator proceeds to say, "that the same reasons which show the necessity of denying to the states the power of regulating coin, prove with equal force that they ought not to be at liberty to substiute a paper medium instead of coin." Federalist, No. 44.

Emissions of the kind were not declared by the Continental Congress to be a legal tender, but Congress passed a resolution declaring that they ought to be a tender in payment of all private and public debts, and that a refusal to **622***] *receive the tender ought to be an extinguishment of the debt, and recommended the states to pass such laws. They even went further and declared that whoever should refuse to receive the paper as gold or silver should be deemed an enemy to the public liberty; but our commentator says that these measures of violence and terror, so far from aiding the circulation of the paper, led on to still further depreciation. 2 Journ. Cong. 21; 3 *Ibid*, 20; 2 Pitkin's Hist. 155, 156. New emissions followed and new measures were adopted to give the paper credit by pledging the public faith for its redemption. Effort followed effort in that direction until the idea of redemption at par was abandoned. Forty for one was offered, and the states were required to report the bills under that regulation, but few of the old bills were ever reported and, of course, few only of the contemplated new notes were issued, and the bills in a brief period ceased to circulate, and in the course of that year quietly died in the hands of their possessors. 2 Story, Const. 3d ed. §§ 1359, 1360; 2 Pitkin's Hist. 157; 1 Jeff. Cor. 402.

Bills of credit were made a tender by the states. but all such, as well as those issued by the Congress, were dead in the hands of their possessors before the Convention assembled to frame the Constitution. Intelligent and impartial belief in the theory that such men, so instructed, in framing a government for their posterity as well as for themselves, would deliberately vest such a power, either in Congress or the states, as a part of their perpetual system, can never, in my judgment, be secured in the face of the recorded evidences to the contrary which the political and judicial history of our country affords. Such evidence, so persuasive and convincing as it is, must ultimately bring all to the conclusion that neither the Congress nor the states can make anything but gold or silver coin a tender in payment of debts.

Exclusive power to coin money is certainly vested in Congress "but no amount of reasoning can show that executing a promissory note and ordering it to be taken in payment of *public and private debts is a species of [**623** coining money." Pomeroy, Const. § 409.

Complete refutation of such theory is also found in the dissenting opinion in the former case, in which the justice who delivered the opinion states that he is not able to deduce the power to pass the laws in question from that clause of the Constitution, and in which he admits, without qualification, that the provision making such notes a legal tender does, undoubtedly, impair the "obligation of contracts made before its passage," Extended argument, therefore, to show that the acts in question impair the obligation of the contracts made before their passage is unnecessary, but the admission stops short of the whole truth, as it leaves the implication to be drawn that the obligation of subsequent contracts is not impaired by such legislation. Contracts for the payment of money, whether made before or after the passage of such a provision, are contracts if the promise is expressed in dollars, to pay the specified amount in the money recognized and established by the Constitution as the standard of value, and any act of Congress which in theory compels the creditor to accept paper emissions, instead of the money so recognized and established, impairs the obligation of such a contract, no matter whether the contract was made before or after the act compelling the creditor to accept such payment, as the Constitution in that respect is a part of the contract, and by is terms entitles the creditor to demand payment in the medium which the Constitution recognizes and establishes as the standard of value.

Evidently the word "dollar" as employed in the Constitution, means the money recognized and established in the express power vested in Congress to coin money, regulate the value thereof and of foreign coin, the framers of the Constitution having borrowed and adopted the word as used by the Continental Congress in the ordinance of the 6th of July, 1785, and of the 8th August, 1786, in which it was enacted that the money unit of the United States should be "one *dollar," and that the money [**624** of account should be dollars and fractions of dollars as subsequently provided in the ordinance establishing a mint. 10 Journ. Cong. 225; 11 *Ibid.* 179.

Repeated decisions of this court, of recent date (*Bronson* v. *Rodes*, 7 Wall. 248, 19 L. ed. 146; *Butler* v. *Horwitz*, 7 Wall. 259, 19 L. ed. 149; *Bank* v. *Supervisors*, 7 Wall. 28, 19 L. ed. 61, have established the rule that contracts to pay coined dollars can only be satisfied by the payment of such money, which is precisely equivalent to a decision that such notes as those described in the acts of Congress in question are not the money recognized and established by the Constitution as the standard of value, as the money so recognized and established, if the contract is expressed in dollars, will satisfy any and every contract between party and party. Beyond all question, the cases cited recognize "the fact accepted by all men throughout the world, that value is inherent in the precious metals; that gold and silver are in themselves values, and being such, and being in other respects best adapted to the purpose, are the only proper measures of value; that

these values are determined by weight and purity, and that form and impress are simply certificates of value, worthy of absolute reliance only because of the known integrity and good faith of the government which" puts them in circulation. *Dewing* v. *Sears*, *ante*, 189; *Lane Co.* v. *Oregon*, 7 Wall. 73, 19 L. ed. 103; *Willard* v. *Tayloe*, 8 Wall. 568, 19 L. ed. 504.

When the intent of the parties as to the medium of payment is clearly expressed in a contract the court decide, in *Butler* v. *Horwitz*, above cited, that damages for the breach of it, whether made before or since the enactment of these laws, may be properly assessed so as to give effect to that intent, and no doubt is entertained that that rule is correct. Parties may contract to accept payment in Treasury notes, or specific articles, or in bank-bills, and if they do so they are bound to accept the medium for which they contracted, provided the notes, specific articles, or bills are tendered on the day the payment under the contract becomes due, and it is clear that such a tender, if seasonable 625*] and sufficient in *amount, is a good defense to the action. Decided cases also carry the doctrine much further and hold, even where the contract is payable in money, and the promise is expressed in dollars, that a tender of bank bills is a good tender if the party to whom it was made placed his objections to receiving it wholly upon the ground that the amount was not sufficient. *Bk. U. S.* v. *Bank of Ga.* 10 Wheat. 347; *Thompson* v. *Riggs*, 5 Wall. 678, 18 L. ed. 707; *Robinson* v. *Noble*, 8 Pet. 198; *Wright* v. *Reed*, 3 T. R. 554; *Snow* v. *Perry*, 9 Pick. 542; 2 Greenl. Ev. § 601.

Grant all that, and still it is clear, that where the contract is for the payment of a certain sum of money, and the promise is expressed in dollars or in coined dollars, the promisee, if he sees fit, may lawfully refuse to accept payment in any other medium than gold and silver, made a legal tender by act of Congress passed in pursuance of that provision of the Constitution which vests in Congress the power to coin money, regulate the value thereof and of foreign coin.

Foreign coin of gold and silver may be made a legal tender, as the power to regulate the value thereof is vested in Congress as well as the power to regulate the value of the coins fabricated and stamped at the mint.

Opposed, as the new theory is, by such a body of evidence covering the whole period of our constitutional history, all tending to the opposite conclusion, and unsupported as the theory is by a single historical fact entitled to any weight, it would seem that the advocates of the theory ought to be able to give it a fixed domicil in the Constitution, or else be willing to abandon it as a theory without any solid constitutional foundation. Vagrancy in that behalf, if conceded, is certainly a very strong argument at this day, that the power does not reside in the Constitution at all, as if the fact were otherwise, the period of eighty-five years which has elapsed since the Constitution was adopted is surely long enough to have enabled its advocates to discover its locality and to be able to point out its home to those whose researches have been less successful and whose 626*] conscientious *convictions lead them to the conclusion that, as applied to the Constitution, it is a myth without a habitation or a name.

Unless the power to enact such a provision can be referred to some one or more of the express grants of power of Congress, as the requisite means, or as necessary and proper for carrying such express power or powers into execution, it is usually conceded that the provision must be regarded as unconstitutional, as it is not pretended that the Constitution contains any express grant of power authorizing such legislation. Powers not granted cannot be exercised by Congress, and certainly all must agree that no powers are granted except what are expressed or such as are fairly applicable as requisite means to attain the end of a power which is granted, or, in other words, are necessary and proper to carry those which are expressed into execution. *Martin* v. *Hunter*, 1 Wheat. 326; *McCulloch* v. *Maryland*, 4 Wheat. 405; 1 Story, Const. (3d ed.) § 417.

Pressed by these irrepealable rules of construction, as applied to the Constitution, those who maintain the affirmative of the question under discussion are forced to submit a specification. Courts, in one or more cases, have intimated that the power in question may be implied from the express power to coin money, but inasmuch as no decided case is referred to where the judgment of the court rests upon that ground, the suggestion will be dismissed without further consideration, as one involving a proposition too latitudinous to require refutation. Most of the cases referred to attempt to deduce the power to make such paper emissions a legal tender from the express power to borrow money, or from the power to declare war, or from the two combined, as in the dissenting opinion in the case which is now overruled.

Authority, it is conceded, exists in Congress to pass laws providing for the issue of Treasury notes, based on the national credit, as necessary and proper means for fulfilling the end of the express power to borrow money, nor can it be doubted at this day, that such notes, when issued by the *proper authority, may law- [*627 fully circulate as credit currency, and that they may, in that conventional character, be lawfully employed, if the act authorizing their issue so provides, to pay duties, taxes and all the public exactions required to be paid into the national Treasury. Public creditors may also be paid in such currency by their own consent, and they may be used in all other cases, where the payment in such notes comports with the terms of the contract. Established usage founded upon the practice of the government, often repeated, has sanctioned these rules, until it may now be said that they are not open to controversy; but the question in the cases before the court is whether the Congress may declare such notes to be lawful money, make them a legal tender, and impart to such a currency the quality of being a standard of value, and compel creditors to accept the payment of their debts in such a currency as the equivalent of the money recognized and established by the Constitution as the standard of value by which the value of all other commodities is to be measured. Financial measures, of various kinds, for borrowing money to supply the wants of the Treasury, beyond the receipts from taxation and the sales of the public lands, have

been adopted by the government since the United States became an independent nation. Subscriptions for a loan of $12,000,500 were, on the 4th of August, 1790, directed to be opened at the treasury, to be made payable in certificates issued for the debt according to their specie value. 1 Stat. at L. 139. Measures of the kind were repeated in rapid succession for several years, and laws providing for loans in one form or another appear to have been the preferred mode of borrowing money, until the 30th of June, 1812, when the first act was passed "to authorize the issue of Treasury notes." 2 Stat. at L. 766.

Loans had been previously authorized in repeated instances, as will be seen by the following references, to which many more might be added. 1 Stat. at L. 142, 187, 345, 433, 607; 2 Stat. at L. 60, 245, 349, 610, 656, 694.

628*] *Earnest opposition was made to the passage of the first act of Congress authorizing the issue of Treasury notes, but the measure prevailed, and it may be remarked that the vote on the occasion was ever after regarded as having settled the question as to the constitutionality of such an act. Five millions of dollars were directed to be issued by that act, and the Secretary of the Treasury, with the approbation of the President, was empowered to cause such portion of the notes as he might deem expedient to be issued at par "to such public creditors or other persons as may choose to receive such notes in payment," it never having occurred to any one that even a public creditor could be compelled to receive such notes in payment except by his own consent. Twenty other issues of such notes were authorized by Congress in the course of the fifty years next after the passage of that act and before the passage of the acts making such notes a legal tender, and every one of such prior acts, being twenty in all, contains either in express words or by necessary implication, an equally decisive negation to the new constitutional theory that Congress can make paper emissions, either a standard of value or a legal tender.

5 Stat. at L. 202; 9 *Ibid.* 64; 4 *Ibid.* 764; 2 *Ibid.* 766, 801; 3 *Ibid.* 161, 213; 5 *Ibid.* 201, 228, 323, 469, 474, 581, 614; 9 *Ibid.* 39, 118; 11 *Ibid.* 257; 12 *Ibid.* 121, 179, 259, 313, 338.

Superadded to the conceded fact that the Constitution contains no express words to support such a theory, this long and unbroken usage, that Treasury notes shall not be constituted a standard of value nor be made a tender in payment of debts, is entitled to great weight, and when taken in connection with the persuasive and convincing evidence, derived from the published proceedings of the Convention, that the framers of the Constitution never intended to grant any such power, and from the recorded sentiments of the great men whose arguments in favor of the reported draft procured its ratification, and supported as that view is by the repeated decisions of this court, and by the infallible rule of interpretation that the language 629*] of one express power shall not be *so expanded as to nullify the force and effect of another express power in the same instrument, it seems to me that it ought to be deemed final and conclusive that Congress cannot constitute such notes or any other paper emissions a constitutional standard of value, or make them a legal tender in payment of debts—especially as it covers the period of two foreign wars, the creation of the second national bank, and the greatest financial revulsions through which our country has ever passed.

Guided by the views expressed in the dissenting opinion in the former case, it must be taken for granted that the legal tender feature in the acts in question was placed emphatically, by those who enacted the provision, upon the necessity of the measure to the further borrowing of money and maintaining the Army and Navy, and such appears to be the principal ground assumed in the present opinion of the court. Enough also appears in some of the interrogative sentences of the dissenting opinion to show that the learned justice who delivered it intended to place the dissent very largely upon the same ground.

Nothing need be added, it would seem, to show that the power to make such notes a standard of value and a legal tender cannot be derived from the power to borrow money, without so expanding it by implication as to nullify the power to coin money and regulate its value, nor without extending the scope and operation of the power to borrow money to an object never contemplated by the framers of the Constitution; and if so, then it only remains to inquire whether it may be implied from the power to declare war, to raise and support armies, or to provide and maintain a navy, or "to enable the government to borrow money to carry on the war," as the phrase is in the dissenting opinion in the former case.

Money is undoubtedly the sinews of war, but the power to raise money to carry on war, under the Constitution, is not an implied power, and whoever adopts that theory commits a great constitutional error. Congress may declare war and Congress may appropriate all moneys in the Treasury *to carry on the war, [*630 or Congress may coin money for that purpose, or borrow money to any amount for the same purpose, or Congress may lay and collect taxes, duties, imposts and excises to replenish the Treasury, or may dispose of the public lands or other property belonging to the United States, and may, in fact, by the exercise of the express powers of the Constitution, command the whole wealth and substance of the people to sustain the public credit and prosecute the war to a successful termination. Two foreign wars were successfully conducted by means derived from those sources, and it is not doubted that those express powers will always enable Congress to maintain the national credit and defray the public expenses in every emergency which may arise, even though the national independence should be assailed by the combined forces of all the rest of the civilized world. All remarks, therefore, in the nature of entreaty or appeal, in favor of an implied power to fulfil the great purpose of national defense or to raise money to prosecute a war, are a mere waste of words, as the most powerful and comprehensive means to accomplish the purpose for which the appeal is made are found in the express powers vested in Congress to lay and collect taxes, duties, imposts and excises without limitation as to amount; to borrow money also without limita-

tion, and to coin money, dispose of the public lands, and to appropriate all moneys in the public Treasury to that purpose.

Weighed in the light of these suggestions, as the question under discussion should be, it is plain, not only that the exercise of such an implied power is unnecessary to supply the sinews of war, but that the framers of the Constitution never intended to trust a matter of such great and vital importance as that of raising means for the national defense or for the prosecution of a war to any implication whatever, as they had learned from bitter experience that the great weakness of the Confederation during the war for independence consisted in the want of such express powers. Influenced by those considerations, the framers of the Constitution not only authorized Congress to lay and collect **631*]** taxes, duties, *imposts and excises to any and every extent, but also to coin money and to borrow money without any limitation as to amount, showing that the argument that to deny the implied power to make paper emissions a legal tender will be to cripple the government, is a mere chimera, without any solid constitutional foundation for its support.

Comprehensive, however, as the power of Federal taxation is, being without limitation as to amount, still there are some restrictions as to the manner of its exercise, and some exceptions as to the objects to which it may be applied. Bills for raising revenue must originate in the House of Representatives; duties, imposts, and excises must be uniform throughout the United States; direct taxes must be apportioned according to numbers: regulations of commerce and revenue shall not give any preference to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear or pay duties in another; nor shall any tax or duty be laid on articles exported from any state.

Preparation for war may be made in peace, but neither the necessity for such preparation nor the actual existence of war can have the effect to abrogate or supersede those restrictions, or to empower Congress to tax the articles excepted from taxation by the Constitution. Implied exceptions also exist, limiting the power of Federal taxation as well as that of the states, and when an exception of that character is ascertained the objects falling within it are as effectually shielded from taxation as those falling within an express exception, for the plain reason that the "government of the United States is acknowledged by all to be one of enumerated powers," from which it necessarily follows that powers not granted cannot be exercised. *McCulloch* v. *Maryland*, 4 Wheat. 405.

Moneys may be raised by taxes, duties, imposts, and excises to carry on war as well as to pay the public debt or to provide for the common defense and general welfare, but no appropriation of money to that use can be **632*]** made for a *period longer than two years, nor can Congress, in exercising the power to levy taxes for that purpose, or any other, abrogate or supersede those restrictions, exceptions and limitations, as they are a part of the Constitution, and as such, are as obligatory in war as in peace, as any other rule would subvert, in time of war, every restriction, exception, limitation and prohibition in the Constitution, and invest Congress with unlimited power, even surpassing that possessed by the British Parliament.

Congress may also borrow money to carry on war, without limitation, and in exercising that express power may issue Treasury notes as the requisite means for carrying the express power into execution; but Congress cannot constitute such notes a standard of value nor make them a legal tender, neither in time of war nor in time of peace, for at least two reasons, either of which is conclusive that the exercise of such a power is not warranted by the Constitution: (1) Because the published proceedings of the Convention which adopted the Constitution, and of the state conventions which ratified it, show that those who participated in those deliberations never intended to confer any such power. (2) Because such a power, if admitted to exist, would nullify the effect and operation of the express power to coin money, regulate the value thereof and of foreign coin; as it would substitute a paper medium in the place of gold and silver coin, which, in itself, as compared with coin, possesses no value, is not money, either in the constitutional or commercial sense, but only a promise to pay money, is never worth par, and often much less, even as domestic exchange, and is always fluctuating and never acknowledged either as a medium of exchange or a standard of value in any foreign market known to American commerce.

Power to issue such notes, it is conceded, exists without limitation, but the question is whether the framers of the Constitution intended that Congress in the exercise of that power or the power to borrow money, whether in peace or war, should be empowered to constitute paper emissions, of any kind, a standard of value, and make the same a legal *tender in [*633 payment of debts. Mere convenience, or even a financial necessity in a single case, cannot be the test, but the question is: What did the framers of the Constitution intend at the time the instrument was adopted and ratified?

Constitutional powers, of the kind last mentioned, that is, the power to ordain a standard of value and to provide a circulating medium for a legal tender, are subject to no mutations of any kind. They are the same in peace and in war. What the grants of power meant when the Constitution was adopted and ratified they mean still, and their meaning can never be changed except as described in the fifth article providing for amendments, as the Constitution "is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men and under all circumstances." *Ex parte Milligan*, 4 Wall. 120, 18 L. ed. 295.

Delegated power ought never to be enlarged beyond the fair scope of its terms, and that rule is emphatically applicable in the construction of the Constitution. Restrictions may at times be inconvenient, or even embarrassing; but the power to remove the difficulty by amendment is vested in the people, and if they do not exercise it the presumption is that the inconvenience is a less evil than the mischief to be apprehended if the restriction should be removed and the power extended, or that the existing inconvenience is the least of the two evils: and it should never be forgotten that the government

ordained and established by the Constitution is a government "of limited and enumerated powers," and that to depart from the true import and meaning of those powers is to establish a new Constitution or to do for the people what they have not chosen to do for themselves, and to usurp the functions of a legislator and desert those of an expounder of the law. Arguments drawn from impolicy or inconvenience, says Judge Story, ought here to be of no weight, as "the only sound principle is to declare *ita lex scripta est*, to follow and to obey." 1 Story, Const. 3d ed. § 426.

634*] *For these reasons I am of the opinion that the judgment in each of the cases before the court should be reversed.

Mr. Justice Field, dissenting:

Whilst I agree with the Chief Justice in the views expressed in his opinion in these cases, the great importance which I attach to the question of legal tender induces me to present some further considerations on the subject.

Nothing has been heard from counsel in these cases, and nothing from the present majority of the court, which has created a doubt in my mind of the correctness of the judgment rendered in the case of *Hepburn* v. *Griswold*, 8 Wall. 603, 19 L. ed. 513, or of the conclusions expressed in the opinion of the majority of the court as then constituted. That judgment was reached only after repeated arguments were heard from able and eminent counsel, and after every point raised on either side had been the subject of extended deliberation.

The questions presented in that case were also involved in several other cases, and had been elaborately argued in them. It is not extravagant to say that no case has ever been decided by this court since its organization, in which the questions presented were more fully argued or more maturely considered. It was hoped that a judgment thus reached would not be lightly disturbed. It was hoped that it had settled forever that under a Constitution ordained, among other things, "to establish justice," legislation giving to one person the right to discharge his obligations to another by nominal instead of actual fulfillment, could never be justified.

I shall not comment upon the causes which have led to a reversal of that judgment. They are patent to every one. I will simply observe that the Chief Justice and the associate justices, who constituted the majority of the court when that judgment was rendered, still adhere to their former convictions. To them the reasons for the original decision are as cogent and convincing now as they were when that 635*] *decision was pronounced; and to them its justice, as applied to past contracts, is as clear to-day as it was then.

In the cases now before us the questions stated, by order of the court, for the argument of counsel, do not present with entire accuracy the questions actually argued and decided. As stated, the questions are: 1. Is the act of Congress, known as Legal Tender Act, constitutional as to contracts made before its passage? Is it valid as applicable to transactions since its passage?

The act thus designated as the Legal Tender Act is the act of Congress of February 25th, 1862, authorizing the issue of United States notes, and providing for their redemption or funding, and for funding the floating debt of the United States (12 Stat. at L. 345), and the questions, as stated, would seem to draw into discussion the validity of the entire act; whereas, the only questions intended for argument, and actually argued and decided, relate: (1) To the validity of that provision of the act which declares that these notes shall be a legal tender in payment of debts, as applied to private debts and debts of the government contracted previous to the passage of the act; and (2) to the validity of the provision as applied to similar contracts subsequently made. The case of *Parker* v. *Davis* involves the consideration of the first question; and the case of *Knox* v. *Lee* is supposed by a majority of the court to present the second question.

No question was raised as to the validity of the provision of the act authorizing the issue of the notes, and making them receivable for dues to the United States; nor do I perceive that any objection could justly be made at this day to these provisions. The issue of the notes was a proper exercise of the power to borrow money, which is granted to Congress without limitation. The extent to which the power may be exercised depends, in all cases, upon the judgment of that body as to the necessities of the government. The power to borrow includes the power to give evidences of indebtedness and obligations of repayment. *Instruments [*636 of this character are among the securities of the United States mentioned in the Constitution. These securities are sometimes in the form of certificates of indebtedness, but they may be issued in any other form, and in such form and in such amounts as will fit them for general circulation, and to that end may be made payable to bearer and transferable by delivery. The form of notes, varying in amounts to suit the convenience or ability of the lender, has been found by experience a convenient form, and the one best calculated to secure the readiest acceptance and the largest loan. It has been the practice of the government to use notes of this character in raising loans and obtaining supplies from an early period in its history, their receipt by third parties being in all cases optional.

In June, 1812, Congress passed an act which provided for the issue of Treasury notes, and authorized the Secretary of the Treasury, with the approbation of the President, "to borrow from time to time, not under par, such sums" as the President might think expedient, "on the credit of such notes." 2 Stat. at L. 766.

In February, 1813, Congress passed another act for the issue of Treasury notes, declaring "that the amount of money borrowed or obtained by virtue of the notes" issued under its 2d section should be a part of the money authorized to be borrowed under a previous act of the same session. 2 Stat. at L. 801. There are numerous other acts of a similar character on our statute books. More than twenty, I be-

lieve, were passed previous to the Legal Tender Act.[1]

637*] *In all of them the issue of the notes was authorized as a means of borrowing money, or obtaining supplies, or paying the debts of the United States, and in all of them the receipt of the notes by third parties was purely voluntary. Thus, in the first act, of June, 1812, the Secretary of the Treasury was authorized, not only to borrow on the notes, but to issue such notes as the President might think expedient "in payment of supplies or debts due by the United States to such public creditors or other persons" as might "choose to receive such notes in payment at par." Similar provisions are found in all the acts except where the notes are authorized simply to take up previous loans.

The issue of the notes for supplies purchased or services rendered at the request of the United States is only giving their obligations for an indebtedness thus incurred; and the same power which authorizes the issue of notes for money must also authorize their issue for whatever is received as an equivalent for money. The result to the United States is the same as if the money were actually received for the notes and then paid out for the supplies or services.

The notes issued under the act of Congress of February 25th, 1862, differ from the Treasury notes authorized by the previous acts to which I have referred, in the fact that they do not bear interest and do not designate on their face a period at which they shall be paid, features which may affect their value in the market but do not change their essential character. There cannot be, therefore, as already stated, any just objection at this day to the issue of the notes, nor to their adaptation in form for general circulation.

Nor can there be any objection to their being made receivable for dues to the United States. Their receivability in this respect is only the application to the demands of the government, and demands against it, of the just principle which is applied to the demands of individuals against each other, that cross demands shall offset and satisfy each other to the extent of their respective amounts. No rights of third parties are in any respect affected by the application of the rule here, and the purchasing and borrow-
638*] ing power *of the notes are greatly increased by making them thus receivable for the public dues. The objection to the act does not lie in these features; it lies in the provision which declares that the notes shall be "a legal tender in payment of all debts, public and private," so far as that provision applies to private debts, and debts owing by the United States.

In considering the validity and constitutionality of this provision, I shall in the first place confine myself to the provision in its application to private debts. Afterwards I shall have something to say of the provision in its application to debts owing by the government.

In the discussions upon the subject of legal tender the advocates of the measure do not agree as to the power in the Constitution to which it shall be referred; some placing it upon the power to borrow money, some on the coining power, and some on what is termed a resulting power from the general purposes of the government; and these discussions have been accompanied by statements as to the effect of the measure, and the consequences which must have followed had it been rejected, and which will now occur if its validity be not sustained, which rest upon no solid foundation, and are not calculated to aid the judgment in coming to a just conclusion.

In what I have to say I shall endeavor to avoid any such general and loose statements, and shall direct myself to an inquiry into the nature of these powers to which the measure is referred, and the relation of the measure to them.

Now, if Congress can, by its legislative declaration, make the notes of the United States a legal tender in payment of private debts—that is, can make them receivable against the will of the creditor in satisfaction of debts due to him by third parties—its power in this respect is not derived from its power to borrow money, under which the notes were issued. That power is not different in its nature or essential incidents from the power to borrow possessed by individuals, and is not to receive a larger definition. Nor is it different from the power often granted to public and private corporations. The grant, it is true, is usually accompanied in these *latter cases with limitations as to [*639 the amount to be borrowed, and a designation of the objects to which the money shall be applied—limitations which in no respect affect the nature of the power. The terms "power to borrow money" have the same meaning in all these cases, and not one meaning when used by individuals, another when granted to corporations, and still a different one when possessed by Congress. They mean only a power to contract for a loan of money upon considerations to be agreed between the parties. The amount of the loan, the time of repayment, the interest it shall bear, and the form in which the obligation shall be expressed, are simply matters of arrangement between the parties. They concern no one else. It is no part or incident of a contract of this character that the rights or interests of third parties, strangers to the matter, shall be in any respect affected. The transaction is completed when the lender has parted with his money, and the borrower has given his promise of repayment at the time, and in the manner, and with the securities stipulated between them.

As an inducement to the loan, and security for its repayment, the borrower may, of course, pledge such property or revenues, and annex to his promises such rights and privileges as he may possess. His stipulations in this respect

1 Acts of Congress authorizing the issue of Treasury notes:

Vol. II.	Stat. at L.	p. 766.	Approved	June 30, 1812
" II.	"	" 801.	"	Feb. 25, 1813
" III.	"	" 100.	"	Mar. 4, 1814
" III.	"	" 161.	"	Dec. 26, 1815
" III.	"	" 213.	"	Feb. 24, 1815
" V.	"	" 201.	"	Oct. 12, 1837
" V.	"	" 228.	"	May 21, 1838
" V.	"	" 323.	"	Mar. 2, 1839
" V.	"	" 370.	"	Mar. 31, 1840
" V.	"	" 411.	"	Feb. 15, 1841
" V.	"	" 469.	"	Jan. 31, 1842
" V.	"	" 473.	"	Apr. 15, 1842
" V.	"	" 581.	"	Aug. 31, 1842
" V.	"	" 614.	"	Mar. 3, 1843
" IX.	"	" 39.	"	July 22, 1846
" IX.	"	" 64.	"	Aug. 6, 1846
" IX.	"	" 118.	"	Jan. 28, 1847
" XI.	"	" 237.	"	Dec. 23, 1857
" XI.	"	" 430.	"	Mar. 3, 1859

are necessarily limited to his own property, rights and privileges, and cannot extend to those of other persons.

Now, whether a borrower—be the borrower an individual, a corporation or the government—can annex to the bonds, notes, or other evidences of debt given for the money borrowed, any quality by which they will serve as a means of satisfying the contracts of other parties, must necessarily depend upon the question whether the borrower possesses any right to interfere with such contracts, and determine how they shall be satisfied. The right of the borrower in this respect rests upon no different foundation than the right to interfere with any other property of third parties. And if it will not be contended, as I think I may assume it will not be, that the borrower possesses any right, in order to make a loan, to interfere with the tangible and visible property of 640*] *third parties, I do not perceive how it can be contended that he has any right to interfere with their property when it exists in the form of contracts. A large part of the property of every commercial people exists in that form, and the principle which excludes a stranger from meddling with another's property which is visible and tangible equally excludes him from meddling with it when existing in the form of contracts.

That an individual or a corporation borrowing possesses no power to annex to his evidences of indebtedness any quality by which the holder will be enabled to change his contracts with third parties, strangers to the loan, is admitted, but it is contended that Congress possesses such power because, in addition to the express power to borrow money, there is a clause in the Constitution which authorizes Congress to make all laws "necessary and proper" for the execution of the powers enumerated. This clause neither augments nor diminishes the expressly designated powers. It only states in terms what Congress would equally have had the right to do without its insertion in the Constitution. It is a general principle that a power to do a particular act includes the power to adopt all the ordinary and appropriate means for its execution. "Had the Constitution," says Hamilton, in the Federalist, speaking of this clause, "been silent on this head, there can be no doubt that all the particular powers requisite as a means of executing the general powers would have resulted to the government by unavoidable implication. No axiom is more clearly established in law or in reason, that whenever the end is required the means are authorized; whenever a general power to do a thing is given, every particular power necessary for doing it is included." The Federalist, No. 44.

The subsidiary power existing without the clause in question, its insertion in the Constitution was no doubt intended, as observed by Mr. Hamilton, to prevent "all caviling refinements" in those who might thereafter feel a disposition 641*] *to curtail and evade the legitimate authorities of the Union; and also I may add, to indicate the true sphere and limits of the implied powers.

But though the subsidiary power would have existed without this clause, there would have been the same perpetually recurring question as now, as to what laws are necessary and proper for the execution of the expressly enumerated powers.

The particular clause in question has at different times undergone elaborate discussion in Congress, in cabinets, and in the courts. Its meaning was much debated in the first Congress upon the proposition to incorporate a national bank, and afterwards in the cabinet of Washington, when that measure was presented for his approval. Mr. Jefferson, then Secretary of State, and Mr. Hamilton, then Secretary of the Treasury, differed widely in their construction of the clause, and each gave his views in an elaborate opinion. Mr. Jefferson held that the word "necessary" restricted the power of Congress to the use of those means, without which the grant would be nugatory, thus making "necessary" equivalent to "indispensable."

Mr. Hamilton favored a more liberal, and in my judgment, a more just interpretation, and contended that the terms "necessary and proper" meant no more than that the measures adopted must have an obvious relation as a means to the end intended. "If the end," he said, "be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority." "There is also," he added, "this further criterion which may materially assist the decision. Does the proposed measure abridge a pre-existing right of any state, or of any individual? If it does not, there is a strong presumption in favor of its constitutionality; and slighter relations to any declared object may be permitted to turn the scale." From the criterion thus indicated it *would seem that the distin- [*642 guished statesman was of opinion that a measure which did interfere with a pre-existing right of a state or an individual would not be constitutional.

The interpretation given by Mr. Hamilton was substantially followed by Chief Justice Marshall, in *McCulloch* v. *Maryland*, when, speaking for the court, he said that if the end to be accomplished by the legislation of Congress be legitimate, and within the scope of the Constitution, "all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but are consistent with the letter and spirit of the Constitution, are constitutional." The Chief Justice did not, it is true, in terms declare that legislation which is not thus appropriate, and plainly adapted to a lawful end, is unconstitutional, but such is the plain import of the argument advanced by him; and that conclusion must also follow from the principal that, when legislation of a particular character is specially authorized, the opposite of such legislation is inhibited.

Tested by the rule given by Mr. Hamilton, or by the rule thus laid down by this court through Mr. Chief Justice Marshall, the annexing of a quality to the promises of the government for money borrowed, which will enable the holder to use them as a means of satisfying the demands of third parties, cannot be sustained as the exercise of an appropriate means of borrowing. That is only appropriate which has some relation of fitness to an end. Borrowing, as already stated, is a transaction

by which, on one side, the lender parts with his money, and on the other the borrower agrees to repay it in such form and at such time as may be stipulated. Though not a necessary part of the contract of borrowing, it is usual for the borrower to offer securities for the repayment of the loan. The fitness which would render a means appropriate to this transaction thus considered must have respect to the terms which are essential to the contract, or to the securities which the borrower may furnish as an inducement to the loan. The quality of legal tender does not touch the terms of the contract of borrowing, nor does it stand as a security for the loan. A security 643*] supposes *some right or interest in the thing pledged, which is subject to the disposition of the borrower.

There has been much confusion on this subject from a failure to distinguish between the adaptation of particular means to an end and the effect, or supposed effect, of those means in producing results desired by the government. The argument is stated thus: The object of borrowing is to raise funds; the annexing of the quality of legal tender to the notes of the government induces parties the more readily to loan upon them; the result desired by the government—the acquisition of funds—is thus accomplished; therefore, the annexing of the quality of legal tender is an appropriate means to the execution of the power to borrow. But it is evident that the same reasoning would justify, as appropriate means to the execution of this power, any measures which would result in obtaining the required funds. The annexing of a provision by which the notes of the government should serve as a free ticket in the public conveyances of the country, or for ingress into places of public amusement, or which would entitle the holder to a percentage out of the revenues of private corporations, or exempt his entire property, as well as the notes themselves, from state and municipal taxation, would produce a ready acceptance of the notes. But the advocate of the most liberal construction would hardly pretend that these measures, or similar measures touching the property of third parties, would be appropriate as a means to the execution of the power to borrow. Indeed, there is no invasion by government of the rights of third parties which might not thus be sanctioned upon the pretense that its allowance to the holder of the notes would lead to their ready acceptance and produce the desired loan.

The actual effect of the quality of legal tender in inducing parties to receive them was necessarily limited to the amount required by existing debtors, who did not scruple to discharge with them their pre-existing liabilities. For moneys desired from other parties, or supplies required for the use of the Army or Navy, the provision added nothing to the value of the notes. Their borrowing power or purchasing 644*] *power depended, by a general and a universal law of currency, not upon the legal tender clause, but upon the confidence which the parties receiving the notes had in their ultimate payment. Their exchangeable value was determined by this confidence, and every person dealing in them advanced his money and regulated his charges accordingly.

The inability of mere legislation to control this universal law of currency is strikingly illustrated by the history of the bills of credit issued by the Continental Congress during our Revolutionary War. From June, 1775, to March, 1780, these bills amounted to over $300,000,000. Depreciation followed as a natural consequence, commencing in 1777, when the issues only equalled $14,000,000. Previous to this time, in January, 1776, when the issues were only $5,000,000 Congress had, by resolution, declared that if any person should be "so lost to all virtue and regard to his country" as to refuse to receive the bills in payment, he should on conviction thereof by the committee of the city, county or district, or, in case of appeal from their decision, by the Assembly, Convention, Council or Committee of Safety of the colony where he resided, be "deemed, published, and treated as an enemy of his country, and precluded from all trade or intercourse with the inhabitants" of the colonies. 2 Journ. of Cong. 21.

And in January, 1777, when as yet the issues were only $14,000,000, Congress passed this remarkable resolution:

"*Resolved*, That all bills of credit emitted by authority of Congress ought to pass current in all payments, trade and dealings in these states, and be deemed in value equal to the same nominal sums in Spanish milled dollars, and that whosoever shall offer, ask, or receive more in the said bills for any gold or silver coins, bullion, or any other species of money whatsoever, than the nominal sum or amount thereof in Spanish milled dollars, or more in the said bills for any lands, houses, goods, or commodities whatsoever than the same could be purchased at of the same person or persons in gold, silver, or any other species of money whatsoever, *or shall offer to sell any goods or com- [*645 modities for gold or silver coins or any other species of money whatsoever and refuse to sell the same for the said continental bills, every such person ought to be deemed an enemy to the liberty of these United States and to forfeit the value of the money so exchanged, or house, land or commodity so sold or offered for sale. And it is recommended to the legislatures of the respective states to enact laws inflicting such forfeitures and other penalties on offenders as aforesaid as will prevent such pernicious practices. That it be recommended to the legislatures of the United States to pass laws to make the bills of credit issued by the Congress a lawful tender in payments of public and private debts, and a refusal thereof an extinguishment of such debts; that debts payable in sterling money be discharged with continental dollars at the rate of 4*s*. 6*d*. sterling per dollar, and that in discharge of all other debts and contracts continental dollars pass at the rate fixed by the respective states for the value of Spanish milled dollars."

The several states promptly responded to the recommendations of Congress and made the bills a legal tender for debts and the refusal to receive them, an extinguishment of the debt.

Congress also issued, in September, 1779, a circular addressed to the people on the subject, in which they showed that the United States would be able to redeem the bills, and they repelled with indignation the suggestion that there could be any violation of the public faith. "The pride of America," said the address, "revolts from the idea; her citizens know for what

purposes these emissions were made, and have repeatedly plighted their faith for the redemption of them; they are to be found in every man's possession, and every man is interested in their being redeemed; they must, therefore, entertain a high opinion of American credulity who suppose the people capable of believing, on due reflection, that all America will, against the faith, the honor, and the interest of all America, be ever prevailed upon to countenance, support, or permit so ruinous, so dis-
646*] graceful a *measure. We are convinced that the efforts and arts of our enemies will not be wanting to draw us into this humiliating and contemptible situation. Impelled by malice and the suggestions of chagrin and disappointment at not being able to bend our necks to the yoke, they will endeavor to force or seduce us to commit this unpardonable sin in order to subject us to the punishment due to it, and that we may thenceforth be a reproach and a byword among the nations. Apprised of these consequences, knowing the value of national character, and impressed with a due sense of the immutable laws of justice and honor, it is impossible that America should think without horror of such an execrable deed." 5 Journ. Cong. 351. This address was written by Mr. Jay. See, Flander's Lives and Times of the Chief Justices, vol. 1, p. 256.

Yet in spite of the noble sentiments contained in this address, which bears the honored name of John Jay, then President of Congress and afterwards the first Chief Justice of this court, and in spite of legal tender provisions and harsh penal statutes, the universal law of currency prevailed. Depreciation followed until it became so great that the very idea of redemption at par was abandoned.

Congress then proposed to take up the bills by issuing new bills on the credit of the several states, guaranteed by the United States, not exceeding one twentieth of the amount of the old issue, the new bills to draw interest and be redeemable in six years. But the scheme failed and the bills became, during 1780, of so little value that they ceased to circulate and "quietly died," says the historian of the period, "in the hands of their possessors." 2 Pitkin's Hist., 157.

And it is within the memory of all of us that during the late Rebellion the notes of the United States issued under the Legal Tender Act rose in value in the market as the successes of our arms gave evidence of an early termination of the war, and that they fell in value with every triumph of the Confederate forces. No legislation of Congress declaring these notes to be
647*] money, instead of representatives *of money or credit, could alter this result one jot or tittle. Men measured their value not by congressional declaration, which could not alter the nature of things, but by the confidence reposed in their ultimate payment.

Without the legal tender provision the notes would have circulated equally well and answered all the purposes of government—the only direct benefit resulting from that provision arising, as already stated, from the ability it conferred upon unscrupulous debtors to discharge with them previous obligations. The notes of state banks circulated without possessing that quality, and supplied a currency for the people just so long as confidence in the ability of the banks to redeem the notes continued. The notes issued by the national bank associations during the war, under the authority of Congress, amounting to $300,000,000, which were never made a legal tender, circulated equally well with the notes of the United States. Neither their utility nor their circulation was diminished in any degree by the absence of a legal tender quality. They rose and fell in the market under the same influences and precisely to the same extent as the notes of the United States, which possessed this quality.

It is foreign, however, to my argument, to discuss the utility of the legal tender clause. The utility of a measure is not the subject of judicial cognizance, nor, as already intimated, the test of its constitutionality. But the relation of the measure as a means to an end, authorized by the Constitution, is a subject of such cognizance, and the test of its constitutionality, when it is not prohibited by any specific provision of that instrument, and is consistent with its letter and spirit. "The degree," said Hamilton, "in which a measure is necessary, can never be a test of the legal right to adopt it. That must be a matter of opinion, and can only be a test of expediency. The relation between the means and the end, between the nature of a means employed toward the execution of the power and the object of that power, must be the criterion of unconstitutionality; not the more or less of necessity or utility."

*If this were not so, if Congress could [*648
not only exercise, as it undoubtedly may, unrestricted liberty of choice among the means which are appropriate and plainly adapted to the execution of an express power, but could also judge, without its conclusions being subject to question in cases involving private rights, what means are thus appropriate and adapted, our government would be, not what it was intended to be, one of limited, but one of unlimited, powers.

Of course Congress must inquire in the first instance and determine for itself not only the expediency, but the fitness to the end intended, of every measure adopted by its legislation. But the power of this tribunal to revise these determinations in cases involving private rights has been uniformly asserted, since the formation of the Constitution to this day, by the ablest statesman and jurists of the country.

I have thus dwelt at length upon the clause of the Constitution investing Congress with the power to borrow money on the credit of the United States, because it is under that power that the notes of the United States were issued, and it is upon the supposed enhanced value which the quality of legal tender gives to such notes, as the means of borrowing, that the validity and constitutionality of the provision annexing this quality are founded. It is true that, in the arguments of counsel, and in the several opinions of different state courts, to which our attention has been called, and in the dissenting opinion in *Hepburn* v. *Griswold*, 8 Wall. 603, 19 L. ed. 513, reference is also made to other powers possessed by Congress, particularly to declare war, to suppress insurrection, to raise and support armies, and to provide and maintain a navy; all of which were called into exercise and severely taxed at the time the Legal Tender Act was passed. But it is evident that the notes have no relation to these powers.

or to any other powers of Congress, except as they furnish a convenient means for raising money for their execution. The existence of the war only increased the urgency of the government for funds. It did not add to its powers to raise such funds, or change, in any respect, the nature of those powers or the transactions which they authorized. If the 649*] *power to engraft the quality of legal tender upon the notes existed at all with Congress, the occasion, the extent, and the purpose of its exercise were mere matters of legislative discretion; and the power may be equally exerted when a loan is made to meet the ordinary expenses of government in time of peace, as when vast sums are needed to raise armies and provide navies in time of war. The wants of the government can never be the measure of its powers.

The Constitution has specifically designated the means by which funds can be raised for the uses of the government, either in war or peace. These are taxation, borrowing, coining, and the sale of its public property. Congress is empowered to levy and collect taxes, duties, imposts and excises to any extent which the public necessities may require. Its power to borrow is equally unlimited. It can convert any bullion it may possess into coin, and it can dispose of the public lands and other property of the United States, or any part of such property. The designation of these means exhausts the powers of Congress on the subject of raising money. The designation of the means is a negation of all others, for the designation would be unnecessary and absurd if the use of any and all means were permissible without it. These means exclude a resort to forced loans, and to any compulsory interference with the property of third persons, except by regular taxation in one of the forms mentioned.

But this is not all. The power "to coin money" is, in my judgment, inconsistent with and repugnant to the existence of a power to make anything but coin a legal tender. To coin money is to mold metallic substance having intrinsic value into certain forms convenient for commerce, and to impress them with the stamp of the government indicating their value. Coins are pieces of metal, of definite weight and value, thus stamped by national authority. Such is the natural import of the terms "to coin money" and "coin;" and if there were any doubt that this is their meaning in the Constitution, it would be removed by the language which immediately follows the grant of the "power 650*] *to coin" authorizing Congress to regulate the value of the money thus coined, and also "of foreign coin," and by the distinction made in other clauses between coin and the obligations of the general government and of the several states.

The power of regulation conferred is the power to determine the weight and purity of the several coins struck, and their consequent relation to the monetary unit which might be established by the authority of the government—a power which can be exercised with reference to the metallic coins of foreign countries, but which is incapable of execution with reference to their obligations or securities.

Then, in the clause of the Constitution immediately following, authorizing Congress "to provide for the punishment of counterfeiting the securities and current coin of the United States," a distinction between the obligations and coins of the general government is clearly made. And in the 10th section, which forbids the states to "coin money, emit bills of credit, and make anything but gold and silver coin a tender in payment of debts," a like distinction is made between coin and the obligations of the several states. The terms "gold and silver," as applied to the coin, exclude the possibility of any other conclusion.

Now, money in the true sense of the term is not only a medium of exchange, but it is a standard of value by which all other values are measured. Blackstone says, and Story repeats his language, "Money is a universal medium or common standard, by a comparison with which the value of all merchandise may be ascertained, or it is a sign which represents the respective values of all commodities." 1 Bl. Com. 276; 1 Story, Const. § 1118. Money being such standard, its coins or pieces are necessarily a legal tender to the amount of their respective values for all contracts or judgments payable in money, without any legislative enactment to make them so. The provisions in the different coinage acts, that the coins to be struck shall be such legal tender, are merely declaratory of their effect when offered in payment, and are not essential to give them that character.

The power to coin money is, there- [*651 fore, a power to fabricate coins out of metal as money, and thus make them a legal tender for their declared values as indicated by their stamp. If this be the true import and meaning of the language used it is difficult to see how Congress can make the paper of the government a legal tender. When the Constitution says that Congress shall have the power to make metallic coins a legal tender, it declares in effect that it shall make nothing else such tender. The affirmative grant is here a negative of all other power over the subject.

Besides this, there cannot well be two different standards of value and, consequently, two kinds of legal tender for the discharge of obligations arising from the same transactions. The standard or tender of the lower actual value would in such case inevitably exclude and supersede the other, for no one would use the standard or tender of higher value when his purpose could be equally well accomplished by the use of the other. A practical illustration of the truth of this principle we have all seen in the effect upon coin of the act of Congress making the notes of the United States a legal tender. It drove coin from general circulation, and made it, like bullion, the subject of sale and barter in the market.

The inhibition upon the states to coin money and yet to make anything but gold and silver coin a tender in payment of debts, must be read in connection with the grant of the coinage power to Congress. The two provisions taken together indicate beyond question that the coins which the national government was to fabricate, and the foreign coins, the valuation of which it was to regulate, were to consist principally, if not entirely, of gold and silver.

The framers of the Constitution were considering the subject of money to be used throughout the entire Union when these provisions

were inserted, and it is plain that they intended by them that metallic coins fabricated by the national government, or adopted from abroad by its authority, composed of the precious metals, should everywhere be the standard and the only standard of value by which exchanges could be regulated and payments made. 652*] *At that time gold and silver molded into forms convenient for use, and stamped with their value by public authority, constituted, with the exception of pieces of copper for small values, the money of the entire civilized world. Indeed, these metals divided up and thus stamped, always have constituted money with all people having any civilization, from the earliest periods in the history of the world down to the present time. It was with "four hundred shekels of silver, current money with the merchant," that Abraham bought the field of Machpelah, nearly four thousand years ago. 23 Genesis, 16. This adoption of the precious metals as the subject of coinage—the material of money by all peoples in all ages of the world—has not been the result of any vagaries of fancy, but is attributable to the fact that they of all metals alone possess the properties which are essential to a circulating medium of uniform value.

"The circulating medium of a commercial community," says Mr. Webster, "must be that which is also the circulating medium of other commercial communities, or must be capable of being converted into that medium without loss. It must also be able not only to pass in payments and receipts among individuals of the same society and nation, but to adjust and discharge the balance of exchanges between different nations. It must be something which has a value abroad as well as at home, by which foreign as well as domestic debts can be satisfied. The precious metals alone answer these purposes. They alone, therefore, are money, and whatever else is to perform the functions of money must be their representative and capable of being turned into them at will. So long as bank paper retains this quality it is a substitute for money. Devested of this, nothing can give it that character." 3 Web. Works, 41.

The statesmen who framed the Constitution understood this principle as well as it is understood in our day. They had seen in the experience of the Revolutionary period the demoralizing tendency, the cruel injustice, and 653*] the intolerable *oppression of a paper currency not convertible on demand into money, and forced into circulation by legal tender provisions and penal enactments. When they, therefore, were constructing a government for a country, which they could not fail to see was destined to be a mighty empire, and have commercial relations with all nations, a government which they believed was to endure for ages, they determined to recognize in the fundamental law as the standard of value, that which ever has been and always must be recognized by the world as the true standard, and thus facilitate commerce, protect industry, establish justice and prevent the possibility of a recurrence of the evils which they had experienced and the perpetration of the injustice which they had witnessed. "We all know," says Mr. Webster," that the establishment of a sound and uniform currency was one of the greatest ends contemplated in the adoption of the present Constitution. If we could now fully explore all the motives of those who framed and those who supported that Constitution, perhaps we should hardly find a more powerful one than this." 3 Web. Works, 395.

And how the framers of the Constitution endeavored to establish this "sound and uniform currency" we have already seen in the clauses which they adopted providing for a currency of gold and silver coins. Their determination to sanction only a metallic currency is further evident from the debates in the Convention upon the proposition to authorize Congress to emit bills on the credit of the United States. By bills of credit, as the terms were then understood, were meant paper issues, intended to circulate through the community for its ordinary purposes as money, bearing upon their face the promise of the government to pay the sums specified thereon at a future day. The original draft contained a clause giving to Congress power "to borrow money and emit bills on the credit of the United States," and when the clause came up for consideration, Mr. Morris moved to strike out the words "and emit bills on the credit *of the United States," [*654 observing that, "if the United States had credit, such bills would be unnecessary; if they had not, unjust and useless." Mr. Madison inquired whether it would not be "sufficient to prohibit the making them a legal tender." "This will remove," he said, "the temptation to emit them with unjust views, and promissory notes in that shape may in some emergencies be best." Mr. Morris replied that striking out the words would still leave room for "notes of a responsible minister," which would do "all the good without the mischief." Mr. Gorham was for striking out the words without inserting any prohibition. If the words stood, he said, they might "suggest and lead to the measure," and that the power, so far as it was necessary or safe, was "involved in that of borrowing." Mr. Mason said he was unwilling "to tie the hands of Congress," and thought Congress "would not have the power unless it were expressed." Mr. Ellsworth thought it "a favorable moment to shut and bar the door against paper money." "The mischiefs," he said, "of the various experiments which had been made were now fresh in the public mind and had excited the disgust of all the respectable part of America. By withholding the power from the new government, more friends of influence would be gained to it than by almost anything else. Paper money can in no case be necessary. Give the government credit, and other resources will offer. The power may do harm, never good." Mr. Wilson thought that "it would have a most salutary influence on the credit of the United States to remove the possibility of paper money." "This expedient," he said, "can never succeed whilst its mischiefs are remembered, and as long as it can be resorted to, it will be a bar to other resources." Mr. Butler was urgent for disarming the government of such a power, and remarked "that paper was a legal tender in no country in Europe." Mr. Mason replied that if there was no example in Europe there was

none in which the government was restrained on this head, and he was averse "to tying up the hands of the legislature altogether." Mr. Langdon preferred to reject the whole plan than retain the words.

655*] *Of those who participated in the debates, only one, Mr. Mercer, expressed an opinion favorable to paper money, and none suggested that if Congress were allowed to issue the bills their acceptance should be compulsory—that is, that they should be made a legal tender. But the words were stricken out by a vote of nine states to two. Virginia voted for the motion, and Mr. Madison has appended a note to the debates, stating that her vote was occasioned by his acquiescence, and that he "became satisfied that striking out the words would not disable the government from the use of public notes, as far as they could be safe and proper; and would only cut off the pretext for a paper currency and particularly for making the bills a tender either for public or private debts." Mad. Papers, vol. 3, p. 1346.

If anything is manifest from these debates it is that the members of the Convention intended to withhold from Congress the power to issue bills to circulate as money—that is, to be receivable in compulsory payment, or, in other words, having the quality of legal tender—and that the express power to issue the bills was denied. under an apprehension that if granted it would give a pretext to Congress, under the idea of declaring their effect, to annex to them that quality. The issue of notes simply as a means of borrowing money, which of course would leave them to be received at the option of parties, does not appear to have been seriously questioned. The circulation of notes thus issued as a voluntary currency and their receipt in that character in payment of taxes, duties, and other public expenses, was not subject to the objections urged.

I am aware of the rule that the opinions and intentions of individual members of the Convention, as expressed in its debates and proceedings, are not to control the construction of the plain language of the Constitution or narrow down the powers which that instrument confers. Members, it is said, who did not participate in the debate may have entertained different views from those expressed. The several 656*] *state conventions to which the Constitution was submitted may have differed widely from each other and from its framers in their interpretation of its clauses. We all know that opposite opinions on many points were expressed in the conventions, and conflicting reasons were urged both for the adoption and the rejection of that instrument. All this is very true, but it does not apply in the present case, for on the subject now under consideration there was everywhere, in the several state conventions and in the discussions before the people, an entire uniformity of opinion, so far as we have any record of its expression, and that concurred with the intention of the Convention, as disclosed by its debates, that the Constitution withheld from Congress all power to issue bills to circulate as money, meaning by that bills made receivable in compulsory payment; or, in other words, having the quality of legal tender. Every one appears to have understood that the power of making paper issues a legal tender, by Congress or by the states, was absolutely and forever prohibited.

Mr. Luther Martin, a member of the Convention, in his speech before the Maryland legislature, as reported in his letter to that body, states the arguments urged against depriving Congress of the power to emit bills of credit, and then says that a "majority of the Convention, being wise beyond every event and being willing to risk any political evil rather than admit the idea of a paper emission in any possible case, refused to trust this authority to a government to which they were lavishing the most unlimited powers of taxation and to the mercy of which they were willing blindly to trust the liberty and property of the citizens of every state in the Union, and they erased that clause from the system."

Not only was this construction given to the Constitution by its framers and the people in their discussions at the time it was pending before them, but until the passage of act of 1862, a period of nearly three quarters of a century, the soundness of this construction was never called in question by any legislation of Congress or the opinion of any judicial tribunal. Numerous acts, as already stated, *were passed [*657 during this period, authorizing the issue of notes for the purpose of raising funds or obtaining supplies, but in none of them was the acceptance of the notes made compulsory. Only one instance have I been able to find in the history of congressional proceedings where it was even suggested that it was within the competency of Congress to annex to the notes the quality of legal tender, and this occurred in 1814. The government was then greatly embarrassed from the want of funds to continue the war existing with Great Britain, and a member from Georgia introduced into the House of Representatives several resolutions directing an inquiry into the expediency of authorizing the Secretary of the Treasury to issue notes convenient for circulation and making provision for the purchase of supplies in each state. Among the resolutions was one declaring that the notes to be issued should be a legal tender for debts due or subsequently becoming due between citizens of the United States and between citizens and foreigners. The House agreed to consider all the resolutions but the one containing the legal tender provision. That, it refused to consider by a vote of more than two to one. Benton's Abridg. vol. 5, p. 361.

As until the act of 1862 there was no legislation making the acceptance of notes issued on the credit of the United States compulsory, the construction of the clause of the Constitution containing the grant of the coinage power never came directly before this court for consideration, and the attention of the court was only incidentally drawn to it. But whenever the court spoke on the subject, even incidentally, its voice was in entire harmony with that of the Convention.

Thus in *Gwin* v. *Breedlove*, 2 How. 38, where a marshal of Mississippi, commanded to collect a certain amount of dollars on execution, received the amount in bank notes, it was held that he was liable to the plaintiff in gold and silver. "By the Constitution of the United

States," said the court, "gold or silver coin made current by law can only be tendered in payment of debts."

658*] *And in the case of *The U. S.* v. *Marigold*, 9 How. 567, where the question arose whether Congress had power to enact certain provisions of law for the punishment of persons bringing into the United States counterfeit coin with intent to pass it, the court said: These provisions "appertain to the execution of an important trust invested by the Constitution, and the obligation to fulfil that trust on the part of the government, namely: the trust and the duty of creating and maintaining a uniform and pure metallic standard of value throughout the Union. The power of coining money and of regulating its value was delegated to Congress by the Constitution for the very purpose, as assigned by the framers of that instrument, of creating and preserving the uniformity and purity of such a standard of value, and on account of the impossibility which was foreseen of otherwise preventing the inequalities and the confusion necessarily incident at different views of policy, which in different communities would be brought to bear on this subject. The power to coin money being thus given to Congress, founded on public necessity, it must carry with it the correlative power of protecting the creature and object of that power."

It is difficult to perceive how the trust and duty here designated, of "creating and maintaining a uniform and metallic standard of value throughout the Union," is discharged, when another standard of lower value and fluctuating character is authorized by law, which necessarily operates to drive the first from circulation.

In addition to all the weight of opinion I have mentioned, we have, to the same purport, from the adoption of the Constitution up to the passage of the act of 1862, the united testimony of the leading statesmen and jurists of the country. Of all the men who, during that period, participated with any distinction in the councils of the nation, not one can be named who ever asserted any different power in Congress than what I have mentioned. As observed by the Chief Justice, statesmen who disagreed widely on other points agreed on this.

659*] *Mr. Webster, who has always been regarded by a large portion of his countrymen as one of the ablest and most enlightened expounders of the Constitution, did not seem to think there was any doubt on the subject, although he belonged to the class who advocated the largest exercise of powers by the general government. From his first entrance into public life, in 1812, he gave great consideration to the subject of the currency, and in an elaborate speech in the Senate, in 1836, he said: "Currency, in a large and perhaps just sense, includes not only gold and silver and bank bills, but bills of exchange also. It may include all that adjusts exchanges and settles balances in the operations of trade and business; but if we understand by currency the legal money of the country, and that which constitutes a lawful tender for debts, and is the statute measure of value, then, undoubtedly, nothing is included but gold and silver. Most unquestionably there is no legal tender, and there can be no legal tender in this country, under the authority of this government or any other, but gold and silver—either the coinage of our own mints or foreign coins, at rates regulated by Congress. This is a constitutional principle perfectly plain, and of the very highest importance. The states are expressly prohibited from making anything but gold and silver a tender in payment of debts, and, although no such express prohibition is applied to Congress, yet, as Congress has no power granted to it in this respect but to coin money, and to regulate the value of foreign coins, it clearly has no power to substitute paper or anything else, for coin, as a tender in payment of debts and in discharge of contracts. Congress has exercised this power fully in both its branches. It has coined money, and still coins it; has regulated the value of foreign coins, and still regulates their value. The legal tender, therefore, the constitutional standard of value, is established and cannot be overthrown. To overthrow it would shake the whole system."

If, now, we consider the history of the times when the Constitution was adopted; the intentions of the framers of that instrument, as shown in their debates; the contemporaneous *exposition of the coinage power in the [*660 state conventions assembled to consider the Constitution, and in the public discussions before the people; the natural meaning of the terms used; the nature of the Constitution itself as creating a government of enumerated powers; the legislative exposition of nearly three quarters of a century; the opinions of judicial tribunals, and the recorded utterances of statesmen, jurists and commentators, it would seem impossible to doubt that the only standard of value authorized by the Constitution was to consist of metallic coins struck or regulated by the direction of Congress, and that the power to establish any other standard was denied by that instrument.

There are other considerations besides those I have stated, which are equally convincing against the constitutionality of the legal tender provision of the act of February 25th, 1862, so far as it applies to private debts and debts by the government contracted previous to its passage. That provision operates directly to impair the obligation of such contracts. In the dissenting opinion, in the case of *Hepburn* v. *Griswold*, 8 Wall. 603, 19 L. ed. 513, this is admitted to be its operation, and the position is taken that, while the Constitution forbids the states to pass such laws, it does not forbid Congress to do this, and the power to establish a uniform system of bankruptcy, which is expressly conferred, is mentioned in support of the position. In some of the opinions of the state courts, to which our attention has been directed, it is denied that the provision in question impairs the obligation of previous contracts, it being asserted that a contract to pay money is satisfied, according to its meaning, by the payment of that which is money when the payment is made, and that if the law does not interfere with this mode of satisfaction, it does not impair the obligation of the contract. This position is true so long as the term "money" represents the same thing in both cases or their actual equivalents, but it is not true when the term has different meanings. Money is a ge-

neric term, and contracts for money are not made without a specification of the coins or denomi-
661*] nations of money, and the *number of them intended, as eagles, dollars, or cents; and it will not be pretended that a contract for a specified number of eagles can be satisfied by a delivery of an equal number of dollars, although both eagles and dollars are money; nor would it thus be contended, though at the time the contract matured the legislature had determined to call dollars eagles. Contracts are made for things, not names or sounds, and the obligation of a contract arises from its terms and the means which the law affords for its enforcement.

A law which changes the terms of the contract, either in the time or mode of performance, or imposes new conditions, or dispenses with those expressed, or authorizes for its satisfaction something different from that provided, is a law which impairs its obligation, for such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement.

The notion that contracts for the payment of money stand upon any different footing in this respect from other contracts, appears to have had its origin in certain old English cases, particularly that of *Mixed Money* (Davies' Reports, 48), which were decided upon the force of the prerogative of the King with respect to coin, and have no weight as applied to powers possessed by Congress under our Constitution. The language of Mr. Chief Justice Marshall in *Faw* v. *Marsteller*, 2 Cranch, 20, which is cited in support of this notion, can only be made to express concurrence with it when detached from its context and read separated from the facts in reference to which it was used.

It is obvious that the act of 1862 changes the terms of contracts for the payment of money made previous to its passage, in every essential particular. All such contracts had reference to metallic coins, struck or regulated by Congress, and composed principally of gold and silver, which constituted the legal money of the coun-
662*] try. The several *coinage acts had fixed the weight, purity, forms, impressions, and denominations of these coins, and had provided that their value should be certified by the form and impress which they received at the mint.

They had established the dollar as the money unit, and prescribed the grains of silver it should contain, and the grains of gold which should compose the different gold coins. Every dollar was, therefore, a piece of gold or silver certified to be of a specified weight and purity, by its form and impress. A contract to pay a specified number of dollars was then a contract to deliver the designated number of pieces of gold or silver of this character; and, by the laws of Congress and of the several states, the delivery of such dollars could be enforced by the holder.

The act of 1862 changes all this; it declares that gold or silver dollars need not be delivered to the creditor according to the stipulations of the contract; that they need not be delivered at all; that promises of the United States, with which the creditor has had no relations, to pay these dollars, at some uncertain future day, shall be received in discharge of the contracts—in other words, that the holder of such contracts shall take in substitution for them different contracts with another party, less valuable to him, and surrender the original.

Taking it, therefore, for granted that the law plainly impairs the obligation of such contracts, I proceed to inquire whether it is for that reason subject to any constitutional objection. In the dissenting opinion in *Hepburn* v. *Griswold*, it is said, as already mentioned, that the Constitution does not forbid legislation impairing the obligation of contracts.

It is true there is no provision in the Constitution forbidding in express terms such legislation. And it is also true that there are express powers delegated to Congress, the execution of which necessarily operates to impair the obligation of contracts. It was the object of the framers of that instrument to create a national government competent to represent the entire country in its relations with foreign nations and to accomplish by its legislation measures of *common interest to all the people, [*663 which the several states in their independent capacities were incapable of effecting, or if capable, the execution of which would be attended with great difficulty and embarrassment. They, therefore, clothed Congress with all the powers essential to the successful accomplishment of these ends, and carefully withheld the grant of all other powers. Some of the powers granted, from their very nature, interfere in their execution with contracts of parties. Thus war suspends intercourse and commerce between citizens or subjects of belligerent nations; it renders during its continuance the performance of contracts previously made, unlawful. These incidental consequences were contemplated in the grant of the war power. So the regulation of commerce and the imposition of duties may so affect the prices of articles imported or manufactured as to essentially alter the value of previous contracts respecting them; but this incidental consequence was seen in the grant of the power over commerce and duties. There can be no valid objection to laws passed in execution of express powers that consequences like these follow incidentally from their execution. But it is otherwise when such consequences do not follow incidentally, but are directly enacted.

The only express authority for any legislation affecting the obligation of contracts is found in the power to establish a uniform system of bankruptcy, the direct object of which is to release insolvent debtors from their contracts upon the surrender of their property. From this express grant in the Constitution I draw a very different conclusion from that drawn in the dissenting opinion in *Hepburn* v. *Griswold*, and in the opinion of the majority of the court just delivered. To my mind it is a strong argument that there is no general power in Congress to interfere with contracts, that a special grant was regarded as essential to authorize a uniform system of bankruptcy. If such general power existed the delegation of an express power in the case of bankrupts was unnecessary. As very justly observed by counsel, if this sovereign power could be taken in any case without express *grant, it could be [*664 taken in connection with bankruptcies, which,

might be regarded in some respects as a regulation of commerce made in the interest of traders.

The grant of a limited power over the subject of contracts necessarily implies that the framers of the Constitution did not intend that Congress should exercise unlimited power, or any power less restricted. The limitation designated is the measure of congressional power over the subject. This follows from the nature of the instrument as one of enumerated powers.

The doctrine, that where a power is not expressly forbidden it may be exercised, would change the whole character of our government. As I read the writers of the great commentators and the decisions of this court, the true doctrine is the exact reverse, that if a power is not in terms granted, and is not necessary and proper for the exercise of a power thus granted, it does not exist.

The position that Congress possesses some undefined power to do anything which it may deem expedient, as a resulting power from the general purposes of the government, which is advanced in the opinion of the majority, would of course settle the question under consideration without difficulty, for it would end all controversy by changing our government from one of enumerated powers to one resting in the unrestrained will of Congress.

"The government of the United States," says Mr. Chief Justice Marshall, speaking for the court in *Martin* v. *Hunter*, 1 Wheat. 326, "can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given or given by necessary implication." This implication, it is true, may follow from the grant of several express powers, as well as from one alone, but the power implied must, in all cases, be subsidiary to the execution of the powers expressed. The language of the Constitution respecting the writ of habeas corpus, declaring that it shall not be suspended unless, when in **665***] cases *of rebellion or invasion, the public safety may require it, is cited as showing that the power to suspend such writ exists somewhere in the Constitution; and the adoption of the amendments is mentioned as evidence that important powers were understood by the people who adopted the Constitution to have been created by it, which are not enumerated, and are not included incidentally in any of those enumerated.

The answer to this position is found in the nature of the Constitution, as one of granted powers, as stated by Mr. Chief Justice Marshall. The inhibition upon the exercise of a specified power does not warrant the implication that, but for such inhibition, the power might have been exercised. In the convention which framed the Constitution a proposition to appoint a committee to prepare a bill of rights was unanimously rejected upon the ground that such a bill would contain various exceptions to powers not granted, and on this very account would afford a pretext for asserting more than was granted. Lloyd's Debates, 433, 437. In the discussions before the people, when the adoption of the Constitution was pending, no objection was urged with greater effect than this absence of a bill of rights, and in one of the numbers of the Federalist Mr. Hamilton endeavored to combat the objection. After stating several reasons why such a bill was not necessary, he said: "I go further and affirm that bills of rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted, and on this very account would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained when no power is given by which restrictions may be imposed? I will not *contend that such a provi- [***666** sion would confer a regulating power, but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge, with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a right to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers by the indulgence of an injudicious zeal for bills of rights." The Federalist, No. 84.

When the amendments were presented to the states for adoption they were preceded by a preamble stating that the conventions of a number of the states had, at the time of their adopting the Constitution, expressed a desire "in order to prevent misconception or abuse of its powers, that further declaratory and restrictive clauses should be added."

Now, will anyone pretend that Congress could have made a law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or the right of the people to assemble and petition the government for a redress of grievances, had not prohibitions upon the exercise of any such legislative power been embodied in an amendment?

How truly did Hamilton say that had a bill of rights been inserted in the Constitution, it would have given a handle to the doctrine of constructive powers. We have this day an illustration in the opinion of the majority of the very claim of constructive power which he apprehended, and it is the first instance, I believe, in the history of this court, when the possession by Congress of such constructive power has been asserted.

The interference with contracts by the legislation of the several states previous to the adoption of the Constitution *was the [***667** cause of great oppression and injustice. "Not only," says Story, "was paper money issued and declared to be a tender in payment of debts, but laws of another character, well known under the appellation of 'tender laws,' appraisement laws, instalment laws, and suspension laws, were from time to time enacted, which prostrated all private credit and all private morals. By some of these laws the due payment of debts was suspended; debts were, in

violation of the very terms of the contract, authorized to be paid by instalments at different periods; property of any sort, however worthless, either real or personal, might be tendered by the debtor in payment of his debts, and the creditor was compelled to take the property of the debtor, which he might seize on execution, at an appraisement wholly disproportionate to its known value. Such grievances and oppressions and others of a like nature were the ordinary results of legislation during the Revolutionary War and the intermediate period down to the formation of the Constitution. They entailed the most enormous evils on the country and introduced a system of fraud, chicanery, and profligacy, which destroyed all private confidence and all industry and enterprise." Story, Cont. § 1371.

To prevent the recurrence of evils of this character not only was the clause inserted in the Constitution prohibiting the states from issuing bills of credit and making anything but gold and silver a tender in payment of debts, but also the more general prohibition, from passing any law impairing the obligation of contracts. "To restore public confidence completely," says Chief Justice Marshall, "it was necessary not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The Convention appears to have intended to establish a great principle, that contracts should be inviolable." *Sturgis* v. *Crowninshield*, 4 Wheat. 206.

It would require very clear evidence, one would suppose, to induce a belief that with the evils resulting from what Marshall terms the system of lax legislation following the 668*] *Revolution, deeply impressed on their minds, the framers of the Constitution intended to vest in the new government created by them this dangerous and despotic power, which they were unwilling should remain with the states, and thus widen the possible sphere of its exercise.

When the possession of this power has been asserted in argument (for until now it has never been asserted in any decision of this court) it has been in cases where a supposed public benefit resulted from the legislation, or where the interference with the obligation of the contract was very slight. Whenever a clear case of injustice, in the absence of such supposed public good, is stated, the exercise of the power by the government is not only denounced, but the existence of the power is denied. No one, indeed, is found bold enough to contend that if A has a contract for one hundred acres of land, or one hundred pounds of fruit, or one hundred yards of cloth, Congress can pass a law compelling him to accept one half of the quantity in satisfaction of the contract. But Congress has the same power to establish a standard of weights and measures as it has to establish a standard of value and can, from time to time, alter such standard. It can declare that the acre shall consist of eighty square rods instead of one hundred and sixty, the pound of eight ounces instead of sixteen, and the foot of six inches instead of twelve, and if it could compel the acceptance of the same number of acres, pounds or yards, after such alteration, instead of the actual quantity stipulated, then the acceptance of one half of the quantity originally designated could be directly required without going through the form of altering the standard. No just man could be imposed upon by this use of words in a double sense, where the same names were applied to denote different quantities of the same thing; nor would his condemnation of the wrong committed in such case be withheld, because the attempt was made to conceal it by this jugglery of words.

The power of Congress to interfere with contracts for the payment of money is not greater or in any particular different from its power with respect to contracts for lands or *goods. The contract is not fulfilled [*669 any more in one case than in the other by the delivery of a thing which is not stipulated, because by legislative action it is called by the same name. Words in contracts are to be construed in both cases in the sense in which they were understood by the parties at the time of the contract.

Let us for a moment see where the doctrine of the power asserted will lead. Congress has the undoubted right to give such denominations as it chooses to the coins struck by its authority and to change them. It can declare that the dime shall hereafter be called a dollar, or, what is the same thing, it may declare that the dollar shall hereafter be composed of the grains of silver which now compose the dime. But would anybody pretend that a contract for dollars, composed as at present, could be satisfied by the delivery of an equal number of dollars of the new issue? I have never met anyone who would go to that extent. The answer always has been that would be too flagrantly unjust to be tolerated. Yet enforcing the acceptance of paper promises or paper dollars, if the promises can be so called, in place of gold or silver dollars, is equally enforcing a departure from the terms of the contract, the injustice of the measure depending entirely upon the actual value at the time of the promises in the market. Now reverse the case. Suppose Congress should declare that hereafter the eagle should be called a dollar, or that the dollar should be composed of as many grains of gold as the eagle, would anybody for a moment contend that a contract for dollars, composed as now of silver, should be satisfied by dollars composed of gold? I am confident that no judge sitting on this Bench and, indeed, that no judge in Christendom could be found who would sanction the monstrous wrong by decreeing that the debtor could only satisfy his contract in such case by paying ten times the value originally stipulated. The natural sense of right which is implanted in every mind would revolt from such supreme injustice. Yet there cannot be one law for debtors and another law for creditors. If the contract can at one time be changed by congressional *legislation for the benefit of the debt- [*670 or, it may at another time be changed for the benefit of the creditor.

For acts of flagrant injustice such as those mentioned, there is no authority in any legislative body, even though not restrained by any express constitutional prohibition. For as there are unchangeable principles of right and morality, without which society would be impossible, and men would be but wild beasts

preying upon each other, so there are fundamental principles of eternal justice, upon the existence of which all constitutional government is founded, and without which government would be an intolerable and hateful tyranny. There are acts, says Mr. Justice Chase, in *Calder* v. *Bull*, 3 Dall. 388, which the Federal and state legislatures cannot do, without exceeding their authority. Among these he mentions a law which punishes a citizen for an innocent action; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; and a law that takes the property from A and gives it to B. "It is against all reason and right," says the learned justice, "for a people to intrust a legislature with such powers; and therefore it cannot be presumed that they have done it. The genius, the nature, and the spirit of our state governments amount to a prohibition of such acts of legislation, and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid, and punish; they may declare new crimes, and establish rules of conduct for all its citizens in future cases; they may command what is right and prohibit what is wrong, but they cannot change innocence into guilt, or punish innocence as a crime, or violate the rights of an antecedent lawful private contract, or the right of private property. To maintain that our Federal or state legislatures possess such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments."

In *Ogden* v. *Saunders*, 12 Wheat. 303, Mr. Justice Thompson, referring to the provisions in the Constitution forbidding the states 671*] *to pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, says: "Neither provision can strictly be considered as introducing any new principle, but only for greater security and safety to incorporate into this charter provisions admitted by all to be among the first principles of government. No state court would, I presume, sanction and enforce an *ex post facto* law if no such prohibition was contained in the Constitution of the United States; so, neither would retrospective laws, taking away vested rights, be enforced. Such laws are repugnant to those fundamental principles upon which every just system of laws is founded. It is an elementary principle, adopted and sanctioned by the courts of justice in this country and in Great Britain, whenever such laws have come under consideration, and yet retrospective laws are clearly within this prohibition."

In *Wilkinson* v. *Leland*, 2 Pet. 657, Mr. Justice Story, whilst commenting upon the power of the legislature of Rhode Island under the charter of Charles II., said: "The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them, a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being without very strong and direct expressions of such an intention."

Similar views to these cited from the opinions of Chase, Thompson, Story, and Marshall, are found scattered through the opinions of the judges who have preceded us on this Bench. As against their collective force the remark of Mr. Justice Washington, in the case of *Evans* v. *Eaton*, 1 Pet. C. C. 323, is without significance. That was made at nisi prius in answer to *a motion for a nonsuit in an action [*672 brought for an infringement of a patent right. The state of Pennsylvania had, in March, 1787, which was previous to the adoption of the Constitution, given to the plaintiff the exclusive right to make, use, and vend his invention for fourteen years. In January, 1808, the United States issued to him a patent for the invention for fourteen years from that date. It was contended, for the nonsuit, that after the expiration of the plaintiff's privilege granted by the state, the right to his invention became invested in the people of the state, by an implied contract with the government, and, therefore, that Congress could not, consistently with the Constitution, grant to the plaintiff an exclusive right to the invention. The court replied that neither the premises upon which the motion was founded, nor the conclusion, could be admitted; that it was not true that the grant of an exclusive privilege to an invention for a limited time implied a binding and irrevocable contract with the people that at the expiration of the period limited the invention should become their property; and that even if the premises were true, there was nothing in the Constitution which forbade Congress to pass laws violating the obligation of contracts.

The motion did not merit any consideration, as the Federal court had no power to grant a nonsuit against the will of the plaintiff in any case. The expression under these circumstances of any reason why the court would not grant the motion, if it possessed the power, was aside the case, and is not, therefore, entitled to any weight whatever as authority. It was true, however, as observed by the court, that no such contract with the public, as stated, was implied, and inasmuch as Congress was expressly authorized by the Constitution to secure for a limited time to inventors the exclusive right to their discoveries, it had the power in that way to impair the obligation of such a contract, if any had existed. And this is, perhaps, all that Mr. Justice Washington meant. It is evident from his language in *Ogden* v. *Saunders*, that he repudiated the existence of any general power in Congress to destroy or impair vested private rights.

*What I have heretofore said respect- [*673 ing the power of Congress to make the notes of the United States a legal tender in payment of debts contracted previous to the act of 1862, and to interfere with contracts, has had reference to debts and contracts between citizens. But the same power which is asserted over these matters is also asserted with reference to previous debts owing by the government, and must equally apply to contracts between the government and the citizen. The act of 1862 declares that the notes issued shall be a legal tender in payments of all debts, public and pri-

vate, with the exception of duties on imports and interest on the public debt. If they are a legal tender for antecedent private debts, they are also a legal tender for such debts owing by the United States, except in the cases mentioned. That any exception was made was a mere matter of legislative discretion. Express contracts for the payment of gold or silver have been maintained by this court, and specifically enforced on the ground that, upon a proper construction of the act of 1862, in connection with other acts, Congress intended to except these contracts from the operation of the legal tender provision. But the power covers all cases if it exist at all. The power to make the notes of the United States the legal equivalent to gold and silver necessarily includes the power to cancel with them specific contracts for gold as well as money contracts generally. Before the passage of the Act of 1862, there was no legal money except that which consisted of metallic coins, struck or regulated by the authority of Congress. Dollars then meant, as already said, certain pieces of gold or silver, certified to be of a prescribed weight and purity by their form and impress received at the mint. The designation of dollars, in previous contracts, meant gold or silver dollars as plainly as if those metals were specifically named.

It follows, then, logically, from the doctrine advanced by the majority of the court as to the power of Congress over the subject of legal tender, that Congress may borrow gold coin upon a pledge of the public faith to repay gold at the maturity of its obligations, and yet, in 674*] direct disregard of its *pledge, in open violation of faith, may compel the lender to take, in place of the gold stipulated, its own promises; and that legislation of this character would not be in violation of the Constitution, but in harmony with its letter and spirit.

The government is, at the present time, seeking, in the markets of the world, a loan of several hundred millions of dollars in gold upon securities containing the promises of the United States to repay the money, principal and interest, in gold; yet this court, the highest tribunal of the country, this day declares, by its solemn decision, that should such loan be obtained, it is entirely competent for Congress to pay it off, not in gold, but in notes of the United States themselves, payable at such time and in such manner as Congress may itself determine, and that legislation sanctioning such gross breach of faith would not be repugnant to the fundamental law of the land.

What is this but declaring that repudiation by the government of the United States of its solemn obligations would be constitutional? Whenever the fulfilment of the obligation in the manner stipulated is refused, and acceptance of something different from that stipulated is enforced against the will of the creditor, a breach of faith is committed; and to the extent of the difference of value between the thing stipulated and the thing which the creditor is compelled to receive, there is repudiation of the original obligation. I am not willing to admit that the Constitution, the boast and glory of our country, would sanction or permit any such legislation. Repudiation in any form, or to any extent, would be dishonor, and for the commission of this public crime no warrant, in my judgment, can ever be found in that instrument.

Some stress has been placed in argument in support of the asserted power of Congress over the subject of legal tender in the fact, that Congress can regulate the alloy of the coins issued under its authority and has exercised its power in this respect, without question, by diminishing, in some instances, the actual quantity of gold or silver they contain. Congress, it is assumed, can thus put upon the coins issued *other than their intrinsic value; [*675 therefore, it is argued, Congress may, by its declaration, give a value to the notes of the United States, issued to be used as money, other than that which they actually possess.

The assumption and the inference are both erroneous, and the argument thus advanced is without force, and is only significant of the weakness of the position which has to rest for its support on an assumed authority of the government to debase the coin of the country.

Undoubtedly, Congress can alter the value of the coins issued by its authority by increasing or diminishing, from time to time, the alloy they contain, just as it may alter, at its pleasure, the denominations of the several coins issued, but there its power stops. It cannot make these altered coins the equivalent of the coins in their previous condition; and, if the new coins should retain the same names as the original, they would only be current at their true value. Any declaration that they should have any other value would be inoperative in fact, and a monstrous disregard by Congress of its constitutional duty. The power to coin money, as already declared by this court (*U. S.* v. *Marigold*, 9 How. 567), is a great trust devolved upon Congress, carrying with it the duty of creating and maintaining a uniform standard of value throughout the Union, and it would be a manifest abuse of this trust to give to the coins issued by its authority any other than their real value. By debasing the coins, when once the standard is fixed, is meant giving to the coins, by their form and impress, a certificate of their having a relation to that standard different from that which, in truth, they possess; in other words, giving to the coins a false certificate of their value. Arbitrary and profligate governments have often resorted to this miserable scheme of robbery, which Mill designates (2 Mill's Polit. Econ., page 20), as a shallow and impudent artifice, the "least covert of all modes of knavery, which consists in calling a shilling a pound, that a debt of one hundred pounds may be canceled by the payment of one hundred shillings."

*In this country no such debasement [*676 has ever been attempted, and I feel confident that none will ever be tolerated. The changes in the quantity of alloy in the different coins have been made from time to time, not with any idea of debasing them, but for the purpose of preserving the proper relative value between gold and silver. The first coinage act, passed in 1792, provided that the coins should consist of gold, silver and copper—the coins of cents and half-cents consisting of copper, and the other coins consisting of gold and silver—and that the relative value of gold and silver should be as fifteen to one, that is, that an ounce of gold should be taken as the equal in value of fifteen ounces of silver.

In progress of time, owing to the increased production of silver, particularly from the mines of Mexico and South America, this rela-

tive value was changed. Silver declined in relative value to gold until it bore the relation of one to sixteen instead of one to fifteen. The result was that the gold was bought up as soon as coined, being worth intrinsically sixteen times the value of silver, and yet passing by law only at fifteen times such value, and was sent out of the country to be recoined. The attention of Congress was called to this change in the relative value of the two metals and the consequent disappearance of gold coin. This led, in 1834 (4 Stat. at L. 699) to an act adjusting the rate of gold coin to its true relation to silver coin.

The discovery of gold in California, some years afterwards, and the great production of that metal, again changed in another direction the relative value of the two metals. Gold declined, or, in other words, silver was at a premium, and as gold coin before 1834 was bought up, so now silver coin was bought up, and a scarcity of small coin for change was felt in the community. Congress again interfered, and in 1853 reduced the amount of silver in coins representing fractional parts of a dollar, but even then these coins were restricted from being a legal tender for sums exceeding five 677*] *dollars, although the small silver coins of previous issue continued to be a legal tender for any amount. Silver pieces of the denomination of three cents had been previously authorized in 1851, but were only made a tender for sums of thirty cents and under. These coins did not express their actual value, and their issue was soon stopped, and in 1853 their value was increased to the standard of coins of other fractional parts of a dollar.

The whole of this subject has been fully and satisfactorily explained in the very able and learned argument of the counsel who contended for the maintenance of the original decision of this court in *Hepburn* v. *Griswold*. He showed by the debates that Congress has been moved, in all its actions under the coinage power, only by an anxious desire to ascertain the true relative value of the two precious metals, and to fix the coinage in accordance with it; and that in no case has any deviation from intrinsic value been permitted except in coins for fractional parts of a dollar, and even that has been only of so slight a character as to prevent them from being converted into bullion, the actual depreciation being made up by their portability and convenience.

It follows, from this statement of the action of Congress in altering at different times the alloy of certain coins, that the assumption of power to stamp metal with an arbitrary value and give it currency, does not rest upon any solid foundation, and that the argument built thereon goes with it to the ground.

I have thus far spoken of the legal tender provision with particular reference to its application to debts contracted previous to its passage. It only remains to say a few words as to its validity when applied to subsequent transactions.

So far as subsequent contracts are made payable in notes of the United States, there can of course be no objection to their specific enforcement by compelling a delivery of an equal amount of the notes, or by a judgment in damages for their value as estimated in gold or silver dollars, nor would there be any objection to such enforcement if the legal tender provision had never existed. From the general use *of the notes throughout the country [*678 and the disappearance of gold and silver coin from circulation, it may perhaps be inferred, in most cases, that notes of the United States are intended by the parties where gold or silver dollars are not expressly designated, except in contracts made in the Pacific states, where the constitutional currency has always continued in use. As to subsequent contracts, the legal tender provision is not as unjust in its operation as when applied to past contracts, and does not impair to the same extent private rights. But so far as it makes the receipt of the notes, in absence of any agreement of the parties, compulsory in payment of such contracts, it is, in my judgment, equally unconstitutional. This seems to me to follow necessarily from the duty already mentioned cast upon Congress by the coinage power—to create and maintain a uniform metallic standard of value throughout the Union. Without a standard of value of some kind, commerce would be difficult, if not impossible, and just in proportion to the uniformity and stability of the standard is the security and consequent extent of commercial transactions. How is it possible for Congress to discharge its duty by making the acceptance of paper promises compulsory in all future dealings—promises which necessarily depend for their value upon the confidence entertained by the public in their ultimate payment, and the consequent ability of the holder to convert them into gold or silver—promises which can never be uniform throughout the Union, but must have different values in different portions of the country; one value in New York, another at New Orleans, and still a different one at San Francisco?

Speaking of paper money issued by the states —and the same language is equally true of paper money issued by the United States—Chief Justice Marshall says, in *Craig* v. *Missouri*, 4 Pet. 432: "Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals *to [*679 immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all, the people declared in their Constitution that no state should emit bills of credit."

Mr. Justice Washington, after referring, in *Ogden* v. *Saunders*, 12 Wheat. 265, to the provision of the Constitution declaring that no state shall coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts, says: "These prohibitions, associated with the powers granted to Congress 'to coin money and to regulate the value thereof and of foreign coin,' most obviously constitute members of the same family, being upon the same subject and governed by the same policy. This policy was to provide a fixed and uniform standard of value throughout the United States, by which the commercial and other dealings between the citizens thereof, or between them and foreigners, as well as the mon-

eyed transactions of the government, should be regulated. For it might well be asked, why vest in Congress the power to establish a uniform standard of value by the means pointed out, if the states might use the same means, and thus defeat the uniformity of the standard, and consequently the standard itself? And why establish a standard at all for the government of the various contracts which might be entered into, if those contracts might afterwards be discharged by a different standard, or by that which is not money, under the authority of state tender laws? It is obvious, therefore, that these prohibitions in the 10th section are entirely homogeneous, and are essential to the establishment of a uniform standard of value in the formation and discharge of contracts."

It is plain that this policy cannot be carried out, and this fixed and uniform metallic standard of value throughout the United States be maintained, so long as any other standard is adopted, which of itself has no intrinsic value and is forever fluctuating and uncertain.

680*] *For the reasons which I have endeavored to unfold, I am compelled to dissent from the judgment of the majority of the court. I know that the measure, the validity of which I have called in question, was passed in the midst of a gigantic rebellion, when even the bravest hearts sometimes doubted the safety of the Republic, and that the patriotic men who adopted it did so under the conviction that it would increase the ability of the government to obtain funds and supplies, and thus advance the national cause. Were I to be governed by my appreciation of the character of those men, instead of my views of the requirements of the Constitution, I should readily assent to the view of the majority of the court. But, sitting as a judicial officer and bound to compare every law enacted by Congress and the greater law enacted by the people, and being unable to reconcile the measure in question with that fundamental law, I cannot hesitate to pronounce it as being, in my judgment, unconstitutional and void.

In the discussions which have attended this subject of legal tender, there has been at times what seemed to me to be a covert intimation, that opposition to the measure in question was the expression of a spirit not altogether favorable to the cause, in the interest of which that measure was adopted. All such intimations I repel with all the energy I can express. I do not yield to anyone in honoring and reverencing the noble and patriotic men who were in the councils of the nation during the terrible struggle with the Rebellion. To them belong the greatest of all glories in our history—that of having saved the Union, and that of having emancipated a race. For these results they will be remembered and honored so long as the English language is spoken or read among men. But I do not admit that a blind approval of every measure which they may have thought essential to put down the Rebellion is any evidence of loyalty to the country. The only loyalty which I can admit consists in obedience to the Constitution and laws made in pursuance of it. It is only by obedience that affection and reverence can be shown to a superior having a

681*] *right to command. So thought our great Master when he said to his disciples: "If ye love me, keep my commandments."

THE BALTIMORE & OHIO RAILROAD COMPANY, *Plff. in Err.*,
v.
ELLEN Z. HARRIS, Admr'x of John O. Harris, Deceased.

(See S. C. 12 Wall. 65-86.)

Corporation, when suable in a foreign state—demurrer—waiver of pleas in abatement—burden of proof of knowledge by passenger of memorandum on his ticket.

A corporation, if it does business in a foreign territory, consents to be sued there.

One state may make a corporation of another state, as there organized and conducted, a corporation of its own.

The acts of Congress made the Baltimore & Ohio Railroad suable in the District of Columbia.

The principle that a demurrer reaches back to the first error in the pleadings, has no application where the defect is one of form, and not of substance.

By pleading over in bar, a party waives all pleas in abatement.

The burden of proof of knowledge by a passenger, of a memorandum on his ticket limiting the liability of a railroad company, and of his assent to it, rests upon the company.

[No. 5.]

Argued Apr. 20, 1871. Decided May 1, 1871.

IN ERROR to the Supreme Court of the District of Columbia.

Suit was brought in this case in the court below by the defendant in error, to recover for damages received in a railroad accident. Judgment having been given in that court for the plaintiff, the defendant sued out this writ of error.

The case is fully stated in the opinion of the court.

Messrs. **Joseph H. Bradley** and **James A. Buchanan**, for plaintiff in error:

On the statement of the legislation of Virginia the question arises, What was the intention of the legislature? Was it to create a corporation, or to enable a corporation of another state legally to execute its powers within the state of Virginia?

I. First. All acts, *in pari materia*, although not declared to be amendatory of preceding acts, are to be construed as one act; and second, the intention of the legislature is to be gathered from a consideration of all the legislation on the same subject; and when thus discovered it is to prevail in the interpretation of the statutes.

We assume these propositions as postulates.

II. No form of words is necessary in the creation of a corporation. The words "incorporate," "found," "erect," are not necessary, but words equivalent may be used.

6 Vin. Abr. 263, tit. Corp. F; Com. Dig. tit. Franchises, F, 6; 2 Kent, Com. 276; *Conservators of the River Tone* v. *Ash*, 10 Barn. & C. 349.

III. Two corporations comprised of the same corporators, having charters granted *totidem verbis*, except as to the names of the states, incorporated by different states for the same pur-

NOTE.—*Pleading to the merits waives plea in abatement*—see note to Sheppard v. Graves, 14 L. ed. U. S. 518.

poses, may exist at the same time, and co-operate with each other; and yet they must be separate and distinct corporations.

Farnum v. *Can. Co.* 1 Sumn. 46, 60–64; *R. R. Co.* v. *Wheeler*, 1 Black, 286, 17 L. ed. 130, and cases cited, 297, 298; *R. Co.* v. *Md.* 10 How. 393; *Md.* v. *N. C. R. Co.* 18 Md. 193.

IV. The decision of the highest court of a state, construing a law of that state, and not in conflict with the Constitution and laws of the United States, will be followed by this court in construing the same law.

This has been so fully settled by a series of decisions of this court, that it is no longer an open question.

From *McKeen* v. *Delancy*, 5 Cranch, 22; *McCutchen* v. *Marshall*, 8 Pet. 220, to this day there has been no change in this rule.

True, it is said in *Carroll* v. *Carroll*, 16 How. 275, that, unless it was necessary for the state court to construe the statute in order to a decision of the case, this court will construe it for itself. But that is no modification of the principle.

V. In the case at bar, we have these statues construed by the court of appeals of Virginia, in the case of *R. Co.* v. *Gallahue*, 12 Gratt. 655; and by the court of appeals of West Va. in *Goshorn* v. *Ohio Co.* 1 W. Va. 308, and *R. Co.* v. *Marshall Co.* 3 W. Va. 319.

In the first of these cases, *Gallahue's*, the railroad company set up that it was a foreign corporation, and the state not having provided for process against a foreign company, it could not be sued in Virginia. Judge Allen, delivering the opinion of the court, takes up the proposition and decides the case on the ground that it is a corporation of the state of Virginia. The other two cases follow this.

VI. But, if the question is still an open one, the only intelligible construction to be given to the legislation of Virginia is, that it creates this corporation anew, to operate within the borders of that state.

(*a*) The object to be accomplished by the company was a great public object, requiring a vast amount of capital, stretching along hundreds of miles of the territory of Virginia; coming in contact with the lives and fortunes of multitudes of its citizens; employing hundreds of agents; and, in many respects, in direct conflict with the legislation and settled policy of the state.

(*b*) It also gave to it the highest prerogative power of the sovereignty of that portion of the eminent domain, which enabled it to take private property for public use, and yet for the private benefit of a foreign corporation.

(*c*) All these attributes, duties and powers were in the hands of a foreign corporation, over which the state could exercise only a very limited control, and, to enable it to act as a foreign corporation, would have given it advantages for transcending those it gave or could reasonably give to its own citizens, so far as it left the power of supervision and revocation of the chartered franchises solely in the hands of a foreign government.

(*d*) It was against the interests as well as the policy of the state, to pass merely an enabling act.

VII. The just construction of the words of the act, as well as the spirit and intent with which it was passed, show that it was intended to create a corporation.

(*a*) The very language of the act re-enacts the Maryland law, putting the state of Virginia in the place of that state.

(*b*) It grants power to take and hold stock to them, their successors and assigns; to be incorporated by the name of the Baltimore & Ohio Railroad Company; by that name to take and hold property, with perpetual succession; to sue and be sued. Each state reserves to itself and its citizens the same rights. The place of business, the meetings of the board of directors and of the company, are to be held in the city of Baltimore, at a fixed time; to use a corporate seal; to have and enjoy and exercise all powers, rights and privileges which other corporate bodies may lawfully do, for the purposes mentioned in the several acts. In fine, as we have said, it re-enacts the law of Maryland and makes it the law of Virginia.

(*c*) Other acts provide for subscriptions by the state, and modify the original act by making it subject to the general law regulating railroad companies, and subjecting it to taxation under certain circumstances.

Finally, in the act of 1850, it speaks of it in terms as a corporation, and guards against the forfeiture of its charter.

We conclude that, by the law of the state of Virginia, the Baltimore & Ohio Railroad Company is a corporation of that state, duly created.

Second. As to the effect of the several acts of Congress touching the Baltimore & Ohio Railroad Company.

The act of Congress of Mar. 2, 1831, 4 Stat. at L. 476, is the first act on this subject. It was followed by the act of Feb. 26, 1834, 4 Stat. at L. 672, and the act of Mar. 3, 1835, 4 Stat. at L. 757.

By the first of these acts, § 1, the company was authorized to extend its lateral road into and within the District of Columbia, and to exercise the same powers, rights, and privileges, and be subject to the same restrictions "as they may exercise, or are subject to, under and by virtue of their said charter or act of incorporation."

Here there is no grant of corporate franchises, but it is limited in terms to authorizing an existing corporation of a state to do certain things within this District. It provides, however, for a mode of acquiring the right of way different from that prescribed in its charter.

But the 6th and 7th sections of this act would seem to leave no room to doubt as to the intent of Congress. The 6th provides that Congress may grant the "same or similar privileges to those hereby granted to any other company or companies, incorporated or to be incorporated by the states of Maryland or Virginia, or by Congress," etc. There was then no other company incorporated by either of these states or by Congress, for like purposes, and it reserved the right of Congress to incorporate one. There is no intimation that this act was intended as an act of incorporation, nor any thing more than an authority to an existing corporation to come into the District.

But, if there was room for doubt left here,

the 7th section seems, *ex abundanti cautela*, to have been interposed to explain the former. By that it is provided that, if the state of Maryland shall determine to construct a railway between the city of Baltimore and the District of Columbia, or shall incorporate a company for the same purpose, then similar rights, immunities, privileges and powers conferred by this act on the Baltimore & Ohio Railroad be and the same are hereby conferred on the state of Maryland or any company, etc.

It can scarcely be pretended, if the same rights, privileges, etc., were conferred on the state of Maryland, that she would thereby become a corporation in this District. We, therefore, say this was an enabling act. In support of this view we refer to, and rely on, *Blackstone Mfg. Co.* v. *Blackstone*, 13 Gray, 488.

Messrs. **T. J. D. Fuller** and *W. D. Davidge*, for defendant in error:

The first point arising upon the record is the suability of the appellants within this District, and is presented by the pleadings. Had the appellant a *habitat* in this district, or was it found here at the time of the service of the writ?

The question involved is not one of citizenship; it is one of habitation only.

An artificial person may have a habitation, like a natural one. Cowp. 79.

A corporation may be embraced in the word "person." 5 Cranch, 84.

The general proposition, that "a legal entity or person, which exists by force of law merely, can have no existence beyond the limits of the state or sovereignty which brings it into life, and endues it with its faculties and powers" is undoubtedly correct. And yet, a corporation may sue in a foreign jurisdiction by the comity of that jurisdiction.

Bk. v. *Earle*, 13 Pet. 519.

If sued or made a party defendant in a foreign jurisdiction, and it appear and defend the suit, judgment binds and the proceedings are valid. 3 Mas. 15.

There is, therefore, no legal disability of the existence or presence of a corporation outside of the jurisdiction that creates it.

Its suability, either as plaintiff or defendant, in a foreign jurisdiction, depends on its own will, and the will of the foreign jurisdiction.

Ins. Co. v. *French*, 18 How. 406, 15 L. ed. 452.

The charter of the defendant, plaintiff in error, as conferred by Maryland, contemplates the exercise of corporate powers outside of the state, and such as were not within the power of the state alone to confer. It contemplates the extension and construction of the road into two other sovereignties for its termini.

And, immediately after its creation by the state of Maryland, it applies to Congress and the state of Virginia for the privilege of extending its road into their jurisdictions, and obtains it, with the corporate right to exercise the same powers as are conferred by the parent act. The enabling acts are in the same language, and contain the same recitals in their preambles, to wit, the charter of Maryland.

Virginia, in her highest court of appeals (12 Gratt. 655), has settled every question presented in the record favorable to the defendant in error.

The appellant has a legal *habitat* in this district, by virtue of the acts of Congress. 4 Stat. at L. 476, 672, 757.

Mark this language in the first act:

"And the said Baltimore & Ohio Railroad Company are hereby authorized to exercise the same powers, rights, and privileges, and shall be subject to the same restrictions, in the extension and construction of said road into and within the said District, as they may exercise or are subject to, under and by virtue of their said charter or act of incorporation, within the state of Maryland."

"And unless the said road shall, within one year, do certain things herein mentioned, then the rights conferred shall cease," etc., etc.

What the act of incorporation of Maryland could not do, the act of Congress did do.

It accomplished one of two things: It either incorporated the Baltimore & Ohio Railroad Company *de novo* in this District, or it recognized and established the Maryland Company in this District as its *habitat*.

But it may be said that the corporation is here for all the beneficial purposes it may claim, but not *cum onere*.

It may sue here by comity. It may sue here as its *habitat*. It may make contracts, create agencies, condemn land, exercise all the powers, franchises and privileges, that it may within the state of Maryland, but still it cannot be sued here!

The corporation, within this District, is in the exercise of a franchise by the assent of the sovereign power; a franchise which would exist if the charter of the company should be repealed by Maryland; a franchise, of which the sovereign power of this District cannot deprive it, unless by quo warranto or scire facias.

In either event, it is sufficient for our purpose. It makes the company a *habitat* in this District, in the one or the other capacity; and being here, in either of said characters, the company is estopped from denying its actual presence as an ideal person.

2. The corporate powers, conferred by the act of Congress by implication, necessarily confer the correlative rights of suing and being sued.

If it be created an artificial person, with the right of holding property, its suability or the right of defendant and protecting its property by suit is but an incident to its existence, whether artificial or natural.

Ang. & Ames, Corp. 7th ed. § 110; *Blackstone Mfg. Co.* v. *Blackstone*, 13 Gray, 488.

The company could hold its corporate meetings in this city.

6 Conn. 458; 36 U. S. 458; *Md.* v. *R. Co.* 18 Md. 193.

The corporation makes no division nor distinction between the portions of the road lying in Maryland and West Virginia; issues but one ticket for that part of the road.

There is but one company, one organization. There is no pretense for saying there is one company from Washington city to the Relay house or junction, as it is called, and another from Baltimore to the Virginia line, and a third from that to the Ohio river. The plaintiffs are, to all intents and purposes, one company, one corporation, with its principal office and offices located in Baltimore.

The case of *Day* v. *Union Rubber Co.* 3 Blatchf. 488, does not militate against our position, as that was a case against a foreign corporation where there was no statute law of the forum giving it a legal status; no legislative act of the sovereign giving sanction to its presence.

Mr. Justice **Swayne** delivered the opinion of the court:

This is a writ of error to the supreme court of the District of Columbia.

Harris sued the Baltimore & Ohio Railroad Company for injuries which he received by a collision. The declaration sets out that the company is a corporation established by law by the name of the Baltimore & Ohio Railroad Company, having a legal and recognized existence within the limits of the District of Columbia and exercising there their corporate rights and privileges in the making of contracts and receiving freight and passengers for transportation upon their roads from the city of Washington to the Ohio river; that at the city of Washington, on the 23d of October, 1864, the plaintiff, wishing to be transported by the company over their roads to the Ohio river and towards the city of Columbus in the state of 78*] Ohio, for the sum of $15 *paid to the company, purchased of them a ticket for a seat and passage in their cars, to be transported along their roads from the city of Washington to the Ohio river and towards the city of Columbus; that in pursuance of this contract he took his seat in one of the cars of the company; that the company, in consideration of the money so paid, undertook and promised to transport him safely to the Ohio river; that the company managed their trains so negligently and carelessly that two trains, running in opposite directions, came in collision near Mannington, in the state of Virginia, whereby the plaintiff received the injuries complained of.

The company pleaded two pleas in abatement:

(1) That the company was not an inhabitant of the District of Columbia when the writ was served; (2) that the company was not found in the District of Columbia when the writ was served.

To the first plea Harris replied that the company was an inhabitant of the District of Columbia by virtue of certain acts of Congress, the dates and titles of which are set forth, and that they had accepted the provisions of those acts and constructed their roads under them, availing themselves of the privileges thus conferred and doing business under them in the District of Columbia. To the second plea he replied that the company was found within the District of Columbia when the writ was served, and was within the jurisdiction of the court by virtue of the acts of Congress mentioned in the first replication.

The company demurred to these replications. The demurrers were overruled. The company thereupon filed the general issue of not guilty. The cause was tried by a jury and a verdict found for the plaintiff, upon which judgment was entered.

Upon the trial the counsel for the company prayed the court to instruct the jury that upon the evidence before them the plaintiff was not entitled to recover. The court refused to give this instruction, and the company excepted. Other exceptions appear by the record to have been taken, but they were not embodied in a bill of exceptions and we cannot, there- [*79 fore, consider them. The errors insisted upon here, at the first argument of the case, were:

The overruling of the demurrers to the replications to the pleas in abatement.

The refusal of the court to give the instruction above set forth.

And that the declaration is fatally defective, wherefore the judgment should have been arrested and must now be reversed.

When the case was first considered by this court in conference, it was found that while all the judges were of opinion that the judgment should be affirmed, there was a difference of opinion upon the question whether the acts of Congress and the statutes of Virginia relating to the company created a new and distinct corporation in the District of Columbia and in the state of Virginia respectively, or whether they were only enabling acts in respect to the corporation under the name of the "Baltimore & Ohio Railroad Company," as originally created by the state of Maryland. Subsequently the question was ordered to stand for re-argument, and it has been reargued by the counsel on both sides. As the solution of this question must determine, to a large extent, the grounds upon which the judgment of the court is to be placed, it is necessary carefully to consider the subject.

The Baltimore & Ohio Railroad Company was incorporated by an act of the legislature of Maryland, passed on the 28th of February, 1827. On the 8th of March following, the legislature of Virginia passed an act whereby, after reciting the Maryland act, it was declared "that the same rights and privileges shall be, and are hereby granted to the aforesaid company within the territory of Virginia, and the said company shall be subject to the same pains, penalties, and obligations as are imposed by said act, and the same rights, privileges, and immunities which are reserved to the state of Maryland or to the citizens thereof are hereby reserved to the state of Virginia and her citizens."

Several other statutes relating to the company were subsequently passed in Virginia, but they do not materially *affect the ques- [*80 tion under consideration, and need not be more particularly adverted to. By an act of the legislature of Maryland, of the 22d of February, 1831, the company was authorized to build a lateral road to the line of the District of Columbia. On the 2d of March, 1831, Congress passed an act which, after reciting, by a preamble, the original act of incorporation, enacted "that the Baltimore & Ohio Railroad Company, incorporated by the said act of the general assembly of the state of Maryland, shall be, and they are hereby authorized to extend into and within the District of Columbia a lateral railroad. . . . And the said Baltimore & Ohio Railroad Company are hereby authorized to exercise the same powers, rights, and privileges, and shall be subject to the same restrictions in the construction and extension of the said lateral road into and within the said District as

they may exercise or be subject to under or by virtue of the said act of incorporation in the extension and construction of any railroad within the state of Maryland, and shall be entitled to the same rights, benefits, and immunities in the use of said road and in regard thereto as are provided in the said charter, except the right to construct any lateral road or roads in said District from said lateral road." A number of local regulations follow, which are not material to be considered. A supplementary act of the legislature of Maryland, passed March 14, 1832, provided that the stock issued by the company to complete this lateral road "shall, united, form the capital upon which the net profits derived from the use of said road shall be apportioned," etc.

The acts of Congress of February 26th, 1834, and of March 3d, 1835, are confined to matters of detail. and may be laid out of view.

When the case was re-argued as directed by this court, the counsel for the company admitted that the acts of Congress in question were only enabling acts, and that they did not create a new corporation, but they insisted that the acts of Virginia were of a different character, and that they worked that result.

81*] *As regards the point under consideration we find no substantial difference. In both, the original Maryland act of incorporation is referred to, but neither expressly or by implication create a new corporation. The company was chartered to construct a road in Virginia as well as in Maryland. The latter could not be done without the consent of Virginia. That consent was given upon the terms which she thought proper to prescribe. With a few exceptions, not material to the question before us, they were the same as to powers, privileges, obligations, restrictions, and liabilities as those contained in the original charter. The permission was broad and comprehensive in its scope, but it was a license and nothing more. It was given to the Maryland corporation as such, and that body was the same in all its elements and in its identity afterwards as before. In its name, locality, capital stock, the election and power of its officers, in the mode of declaring dividends and doing all its business, its unity was unchanged. Only the sphere of its operations was enlarged.

In what it does in Virginia the same principle is involved, as in the transactions of the Georgia corporation in Alabama, which came under the consideration of this court in *Bank of Augusta* v. *Earle*, 13 Pet. 558. The distinction is that here the assent of the foreign authority is express, while there it was implied. A corporation is in law, for civil purposes, deemed a person. It may sue and be sued, grant and receive, and do all other acts not *ultra vires* which a natural person could do. The chief point of difference between the natural and the artificial person is that the former may do whatever is not forbidden by law; the latter can do only what is authorized by its charter. It cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented and will be bound accordingly. *Lafayette Ins. Co.* v. *French*, 18 How. 405, 15 L. ed. 451. For the *purposes of Federal jurisdiction it [*82 is regarded as if it were a citizen of the state where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted. There is a presumption of law which is conclusive. *Louisville, C. & C. R. Co.* v. *Letson*, 2 How. 497; *Marshall* v. *The Balt. & Ohio R. Co.* 16 How. 329; *O. & M. R. Co.* v. *Wheeler*, 1 Black, 297, 17 L. ed. 133.

We see no reason why several states cannot, by competent legislation, unite in creating the same corporation or in combining several preexisting corporations into a single one. The Philadelphia, Wilmington, & Baltimore Railroad company is one of the latter description. In the case of that company against Maryland, 10 How. 392, Chief Justice Taney, in delivering the opinion of this court, said: "The plaintiff in error is a corporation composed of several railroad companies, which had been previously chartered by the states of Maryland, Delaware, and Pennsylvania, and which, by corresponding laws of the respective states, were united together and form one corporation, under the name and style of the Philadelphia, Wilmington & Baltimore Railroad Company. The road of this corporation extends from Philadelphia to Baltimore." He gives the history of the legislation by which this result was produced. No question was raised on the subject, but the opinion assumes the valid existence of the corporation thus created. The case was brought into this court under the 25th section of the judiciary act of 1789. The jurisdictional effect of the existence of such a corporation, as regards the Federal courts, is the same as that of a copartnership of individual citizens residing in different states. Nor do we see any reason why one state may not make a corporation of another state, as there organized and conducted, a corporation of its own, *quoad hoc* any property within its territorial jurisdiction. That this may be done was distinctly held in *O. & M. R. Co.* v. *Wheeler, supra.* It is well settled that corporations of one state may exercise their faculties in another, *so far, and on [*83 such terms, and to such extent as may be permitted by the latter. *Blackstone Mfg. Co.* v. *Blackstone*, 13 Gray, 489; *Bank of Augusta* v. *Earle*, 13 Pet. 588. We hold that the case before us is within this latter category. The question is always one of legislative intent, and not of legislative power or legal possibility. So far as there is anything in the language of the court in the case of *O. & M. R. Co.* v. *Wheeler*, in conflict with what has been here said, it is intended to be restrained and qualified by this opinion. We will add, however, that as the case appears in the report, we think the judgment of the court was correctly given.

It was the case of an Indiana railroad company licensed by Ohio, suing a citizen of Indiana in the Federal court of that state.

In *Balt. & O. R. Co.* v. *Gallahue*, 12 Gratt. 658, it was held by the court of appeals of Virginia that the company was suable in that state. In this we concur. We think this condition is clearly implied in the license, and that the company, by constructing its road there, assented to it. The authority of that case was recog-

nized by the court of appeals of West Virginia, in *Goshorn* v. *Supervisors*, 1 W. Va. 308, and in *Balt. & O. R. Co.* v. *Supervisors*, 3 W. Va. 319. Here the question is whether the company was suable in the District of Columbia. In the case reported in Grattan, it was said: "It would be a startling proposition if, in all such cases, citizens of Virginia and others should be denied all remedy in her courts, for causes of action arising under contracts and acts entered into or done within her territory, and should be turned over to the courts and laws of a sister state to seek redress." The same considerations apply to the case before us. When this suit was commenced, if the theory maintained by the counsel for the plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress short of the seat of the company in another 84*] *state. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility. It is not to be supposed that Congress intended that the important powers and privileges granted should be followed by such results.

But turning our attention from this view of the subject and looking at the statute alone, and reading it by its own light, we entertain no doubt that it made the company liable to suit, where this suit was brought in all respects as if it had been an independent corporation of the same locality.

We will now consider, specifically, the several objections to the judgment, relied upon by the plaintiffs in error.

The pleas in abatement were bad. The demurrers reached back to the first error in the pleadings, and judgment was properly given against the party who committed it. If the replications were bad, bad replications were sufficient answers to bad pleas. But it is said the declaration was bad, and that the demurrers brought the defect in that pleading under review. The principle has no application where the defect is one of form, and not of substance. *Aurora City* v. *West*, 7 Wall. 82, 19 L. ed. 42.

The alleged defect in the declaration will be considered in connection with the error assigned relating to that subject. But if the court decided erroneously, the company waived the error by pleading over in bar. If it were desired to bring up the judgment upon the pleadings for examination by this court, the company should have stood by the demurrers. In the proper order of pleading which is obligatory a plea in bar waives all pleas, and the right to plead, in abatement. *Young* v. *Martin*. 8 Wall. 354, 19 L. ed. 418; *Aurora City* v. *West*, 7 Wall. 92, *supra; Clearwater* v. *Meredith*, 1 Wall. 42, 17 L. ed. 609; 1 Ch. Pl. 440, 441.

The bill of exceptions which brought upon the record the refusal of the court to instruct the jury that the plaintiff was not entitled to recover, exhibits, among others, the following facts: Harris contracted, paid his money, and 85*] received his *tickets at the city of Washington. The tickets consisted of three coupons —one for his passage from Baltimore to Columbus, Ohio; another for his passage from Washington junction to Baltimore, and the third for his passage from Washington city to Washington junction. It is necessary to consider only the two last mentioned. They are both headed "Baltimore & Ohio Railroad," and signed "L. M. Cole, General Ticket Agent." Above the coupon first mentioned is this memorandum: "Responsibility for safety of person or loss of baggage on each portion of the route is confined to the proprietors of that portion alone." Each coupon has printed on its face the words "conditioned as above." The coupon last mentioned gave Harris the right of passage over the lateral branch both in the District of Columbia and in Maryland. The second coupon gave him the same right in respect to the main stem both in Maryland and in Virginia.

The instruction asked for assumed erroneously that there were two corporations under the same name, one of them in Virginia, and that the latter was liable and alone liable to the plaintiff. The attempted limitation of responsibility by the memoranda at the head and on the face of the coupons proceeded upon the same erroneous assumption as to the duality of the corporate ownership of the roads.

These views are sufficiently answered by what has been already said upon the subject. But if we concurred with the counsel for the plaintiff in error, we should then hold that the agent who issued the coupons was the agent of both corporations; that the contract was a joint one; and that it involved a joint liability, unless the knowledge of the memoranda on the coupons and the assent of the plaintiff were clearly brought home to him. *Bissell* v. *Mich. S. & N. Ind. R.* 22 N. Y. 258; *Champion* v. *Bostwick*, 18 Wend. 175; *Cary* v. *Cleveland & T. R. Co.* 29 Barb. 35; *Quimby* v. *Vanderbilt*, 17 N. Y. 306; *Najac* v. *Bos. & L. R. Co.* 7 Allen, 329; *R. Co.* v. *Blake*, 7 Hurlst. & N. 987. In all such cases the burden of proof rests upon the carrier. *N. J. Steam N. Co.* v. *Merch. Bank*, 6 How. 383; *Brown* v. *Eastern R. Co.* 11 Cush. 97; *Bean* v. *Green*, 3 Fair. 422; *Dorr* v. *N. J. S. N. Co.* 4 Sandf. 136; 11 N. Y. 485. The bill of exceptions does *not show that [*86 any testimony was given upon that subject. The court was asked to assume that the limitation on the face of coupons was itself conclusive, and to instruct the jury accordingly. But having held the unity of the corporation, of the proprietorship of the roads, and of the contract, it is needless further to consider the case in this aspect. The instruction asked for was properly refused.

The jurisdiction of the court was not governed by the 11th section of the judiciary act of 1789. It did not depend upon the citizenship of the parties. It was controlled by acts of Congress local to the District. A citizen of the District cannot sue in the circuit courts of a state. *Hepburn* v. *Ellzey*, 2 Cranch, 445. If a corporation appear and defend in a foreign state it is bound by the judgment. Ang. & Ames, Corp. §§ 404, 405; *Flanders* v. *Ætna Ins. Co.* 3 Mason, 158; *Cook* v. *Chem. Trans. Co.* 1 Den. 98. If the declaration were insufficient, the additional averments in the replications admitted by the demurrer to be true, cured the de-

fect. *Lafayette Ins. Co.* v. *French*, 18 How. 405, 15 L. ed. 451.

The judgment of the Supreme Court of the District of Columbia is affirmed.

UNITED STATES, *Appt.*,
v.
ALONZO CHILD *et al.*

(See S. C. 12 Wall. 232-246.)

Acceptance of award of commissioners bars further claim—acceptance of less than claimed, not duress—claim against government.

The acceptance of the amount allowed by commissioners of a claim against the government, and giving a receipt therefor in full, is a bar to a claim for further allowance by the court of claims.

A party who, without force or intimidation and with a full knowledge of all the facts of the case, accepts, on account of an unliquidated and controverted demand, a sum less than he claims and believes to be due him, and agrees to accept it in full satisfaction, cannot avoid his act on the ground that this is duress.

The government cannot be held to a different rule than that which applies to private parties.

[No. 153.]

Argued Oct. 19, 1871. Decided Oct. 30, 1871.

APPEAL from the Court of Claims.

The petition in this case was filed in the court below, by the defendants in error, to recover a certain balance of money alleged to be due them for supplies of various kinds furnished to the United States. Judgment having been given in favor of the claimants, the defendant took an appeal to this court.

The case is fully stated in the opinion of the court.

Messrs. **B. H. Bristow,** *Solicitor Gen.*, and **C. H. Hill,** *Asst. Atty. Gen.*, for appellant:

The question now presented is, whether Congress did not intend, by the Joint Resolution of Mar. 11, 1862, to settle finally and forever the Frémont contracts in the west?

In order to determine the exact meaning of that Resolution, reference can be had to the notorious historical facts of the period, of which this court takes judicial notice. The charges of fraud and corruption, existing in the department of the west, had become notorious; General Frémont had been superseded in his command, and Major McKinstry, the chief quartermaster, was dishonorably dismissed from the service for his fraudulent transactions. A commission of high character had been appointed by the Secretary of War, to investigate all unsettled claims against that department. This was really an auditing board, appointed by the Secretary of War, in his discretion, and under circumstances which rendered it highly necessary to the public service that some such commission should be appointed. The report of that commission did establish the fact of frauds and of most stupendous frauds upon the government, in the matter of army contracts and purchasers. But at the same time the commissioners allowed, to the several parties presenting claims to the government, certain amounts as due from the government to them, and disallowed large sums as fraudulent.

Upon their report, Congress passed this resolution:

"That all sums allowed to be due from the United States to individuals, companies, or corporations by the commission heretofore appointed by the Secretary of War, shall be deemed to be due and payable and shall be paid by the disbursing officers, either in St. Louis or Washington, in each case upon the presentation of the voucher, with the commissioners' certificate thereon, in any form plainly indicating the allowance of the claim and to what amount."

At the time of this Joint Resolution, the court of claims had no power to render judgment against the government; but it was merely a commission appointed by the government to hear and pass upon claims, and its determinations had no force until confirmed by Congress. It was really only created to assist Congress in the investigation of claims upon the government, and when Congress settled a claim itself, it is to be presumed that there was no intention that it should come again before the legislature in the shape of a report from the court of claims.

U. S. v. *Adams*, 7 Wall. 481, 482, 19 L. ed. 255.

It is, therefore, under all the circumstances, difficult to believe that Congress, after thus ratifying the acts of a commission appointed to investigate frauds perpetrated upon the government and allowing the amount found due by it, intended to leave it open to the parties, after receiving the amount, to harass the government further, either in the court of claims or elsewhere, for the amounts which the commissioners, by their action, had found not to be due from the government to them. On the contrary, the action of the executive department of the government and the passage of this Joint Resolution, show that the government regarded these claims as extraordinary in their character, as tainted to a great extent with fraud, and as requiring a peculiar method of adjustment. That adjustment, it is contended, was designed by Congress as a final settlement of the claims and, therefore, these were claims which Congress, having chosen to settle itself, did thus withdraw from the jurisdiction of the court of claims.

This court has already had occasion to consider the nature of this commission.

U. S. v. *Adams, supra;* 9 Wall. 554, 19 L. ed. 584.

In that case, the court decided that the commissioners had no legal authority to compel a hearing and adjustment of the claim, but they were appointed rather to relieve those having claims upon the government from the hardship resulting from the suspension of the payment thereof, which the Secretary of War had been compelled to order under the circumstances;

NOTE.—*Payment of part of a debt no satisfaction of the whole; exceptions to the rule*—see notes, 9 L. ed. U. S. 1046; 26 L. ed. U. S. 1186.

Accord and satisfaction by part payment—see note, 20 L. R. A. 785.

and the persons who appeared before the commissioners voluntarily submitted their claims to be audited by them. This would be decisive of the present case unless there are some special facts which distinguish it in principle from *United States* v. *Adams*. But there are no such facts.

The court of claims, in its additional findings, while finding that the claims of the respondents were never submitted to said commission, proceed to find "that, before the said seizure, the claimants (respondents), in pursuance of the public notice of the said commission, had, in some manner not shown to the court, presented or given a notice of their claims against the defendant (United States) to the said commission." This last statement contradicts, as a matter of fact, the finding of the court, that the claims were never submitted, and shows that that is rather a conclusion of law from the facts than a finding of a question of fact, and, upon the facts found by the court of claims, it is an erroneous conclusion.

There is no proof that any particular method or form of submission of claims was established by the commissioners or by the Secretary of War, and if the respondents had in some manner presented or given notice of their claims to the said commission, it would seem, in the absence of any technical form of procedure, a fact hardly admitting of argument, that such presentation or notice of their claims could have constituted a submission of them for investigation.

The commissioners had no compulsory power, nor is there anything to show (and the court will certainly not presume) that they attempted to use compulsion, in order to bring parties to a settlement.

This was not the case of a liquidated claim against the government. The court decided, in the case just cited, that from the time the Secretary of War issued his order suspending payment, these claims must be regarded as disputed by the government. The doctrine of *Pinnell's Case*, has, therefore, no application to them. The settlement of such a claim as this between private individuals by the payment of a smaller sum than that first insisted on, and a receipt in full, would, unquestionably, be held to be the settlement of an unliquidated and disputed claim, and therefore final.

Wilkinson v. *Byers*, 1 Ad. & El. 106; *Palmerton* v. *Huxford*, 4 Den. 166; *Tuttle* v. *Tuttle*, 12 Met. 551.

But the peculiar character of this transaction, namely: the adjustment, by a commission appointed by a high executive officer, and whose action was ratified by solemn act of Congress, of claims tainted with fraud, and the acceptance of the payment as specially directed by Congress, renders the settlement of this case, if possible, still more conclusive. If these claims can now be re-opened, it is difficult to imagine what claims, settled by Congress, can ever be considered as finally at rest.

Messrs. Bartley & Casey, Lander & Merriman, and **Henry E. Davies**, for appellees:

The findings by the court of claims are conclusive, and the duty of this court is to ascertain if the law has been properly applied to those facts.

Rules of this court. *Burr* v. *Des Moines Co.*, 1 Wall. 102, 17 L. ed. 562; Conkl. Tr. 420; *Suydam* v. *Williamson*, 20 How. 428, 15 L. ed. 978; *Wheaton* v. *Hibbard*, 20 Johns. 290; N. Y. Code, § 268; *Sisson* v. *Barrett*, 2 N. Y. 406; *Johnson* v. *Whitlock*, 13 N. Y. 344.

This court will, therefore, assume upon these findings of fact, "that the claims of the claimants were never submitted to the said commission."

It follows, of course, that they were never voluntarily submitted to that commission.

These facts entirely withdraw this case from the principle decided in *United States* v. *Adams*, 7 Wall. 463, 19 L. ed. 249.

The principle, therefore, decided by the court in that case was, that voluntary submission of the claim, an adjudication thereupon of the amount due, followed by acceptance and payment thereof, concluded the claimant. The exact point decided is thus stated by this court in 9 Wall. 556, 19 L. ed. 584.

"In the view we have taken of the case, the giving of this receipt is of no legal importance. The bar to any further legal demand against the payment does not rest upon this acquittance, but upon the voluntary submission of the claims to the board, the hearing and final decision therein, the receipt of the vouchers containing the sum or amount found due to the claimant, and the acceptance of that amount under an act of Congress providing therefor."

The commission had no power or authority to withhold the vouchers of the appellees, with its knowledge or certificate thereon of the amount which it adjudges to be due to them, unless the appellees signed a receipt or agreement, that when the reduced amounts allowed by the commission should be paid, payment of such amount should be in full of all claimants' demands against the United States.

Neither did the order of the Quartermaster General of Mar. 19, 1862, referring each voucher to Major Miller, Quartermaster, for payment, under the Joint Resolution approved Mar. 11, 1862, or the said Joint Resolution, confer any power or authority upon him to exact or demand from the appellees a receipt or acknowledgment that the receipt of the amount allowed by the commission, on each account, was to be in full of the whole account.

Such receipt or acknowledgment did not, therefore, estop the appellees from showing the exact truth, and from claiming the just and full amount due to them.

Baker v. *Ins. Co.* 43 N. Y. 285.

Also, because they were exacted without authority.

2. They were each obtained by duress, and upon well-established and long-recognized principles; that fact being established, they present no obstacle to the appellees recovering what is justly due to them. This defense is of the most technical character, and ought never to be interposed to defeat an honest and just claim. It is hardly creditable to our government to obtain the property of its citizens, in its hour of necessity, and, when called upon for payment, set up a strictly technical defense, grounded upon the unauthorized acts of its own agents.

In this important feature, this case differs materially from that of Adams. In that, it was assumed that both receipts were voluntarily

rily given, and that the money was voluntarily accepted.

That these receipts or acknowledgments were obtained by duress is undeniable.

This fact is distinctly found as to the agreement or receipts given to the commission (see finding of fact, 3) and the court finds the same in substance as to the receipts given to Major Miller (see finding of fact, 4).

If the fact of duress be a question of law, then the court below, upon the facts, was justified in the conclusion that these receipts were void for that reason alone.

In addition to the authorities already cited on this point, the following additional may be profitably referred to:

Thomas v. *McDaniel*, 14 Johns. 185; *Atlee* v. *Backhouse*, 3 Mees. & W. 633; *Rourke* v. *Story*, 4 E. D. Smith, 54; and cases cited in *Harmony* v. *Bingham*, 12 N. Y. 109.

Mr. Justice **Miller** delivered the opinion of the court:

This case, which is brought here by appeal from the court of claims, belongs to a class of demands against the government originating at St. Louis, in the early days of the late Civil War, which, by order of the President, were investigated at that time by a special commission appointed for that purpose.

The claim of the appellees for the sum of $478,119.62 was examined by the special commission appointed by the President. It allowed the sum of $315,008.15 on the demand, and rejected the remainder of $163,111.47. They accepted the sum so allowed by the commission, **241***] gave receipts *in full of the accounts included in the demand, and have brought this suit to recover the amount rejected by the commission.

These facts are undisputed, and part of the findings of the court of claims in the case. If they stood alone they would bring it within the principles laid down by this court in the case of the *United States* v. *Adams*. That case was twice argued before us and affirmed by a full Bench, and as we are satisfied with the principles on which it was decided, they must govern us in passing on subsequent cases, so far as they fall within its rulings. 7 Wall. 463, 19 L. ed. 249; 9 Wall. 554, 19 L. ed. 584.

But the claimants contend that other facts found by the court of claims take this case out of the propositions laid down for the government of that case, and entitle them to an affirmance of the judgment rendered in their favor by the court of claims. An important difference between the two is said to exist in the fact that Adams voluntarily submitted his claim to the commission we have mentioned, and the claimants in this case did not. And it is insisted that this submission constituted an important if not a controlling element in the decision of the *Adams Case*.

The court in discussing the question of the conclusiveness of a receipt which Adams had given in order to obtain possession of his vouchers, and which he asserted to have been obtained by duress, says: "In the view we have taken of the case, the giving of the receipt is of no legal importance. The bar to any further legal demand against government does not rest upon this acquittance, but upon the voluntary submission of the claims to the board; the hearing and final decision thereon; the receipt of the vouchers containing the sum or account found due to the claimant, and the acceptance of the payment of that amount under the act of Congress providing therefor."

Counsel for the claimants construing the phrase "voluntary submission" here used, to mean such a submission as would constitute the commissioners a board of arbitrators, or at all events, such a submission as would render their decision legally conclusive, deny that the parties in the present *case ever made such [*242 a submission. As much importance seems to have been given to this question by both parties, an order was obtained from this court on motion of the appellants directing the court of claims to make a more specific finding of facts on that subject. Such a supplementary finding is in the present record, and that court says, among other things, that the claims of the claimant were never submitted to said commission. But they further say in this supplementary finding, that the claimants had, in some manner not shown to the court, presented or given notice of their claim against the defendants (the United States) to the said commission, but claimants had not presented their original vouchers, or any proofs, to the said commission. They also find that claimants appeared before said commission with witnesses, but what they testified to is not shown.

Taking these findings together, it seems to us that the court of claims meant to say that claimants did not submit their claims to the commission as arbitrators, or with intent that their decision should be conclusive, but that they did present their claims and did appear to support them with witnesses. This view of their meaning is confirmed by reference to their original finding, in which it is said that "claimants on their part never submitted their vouchers to the arbitration or decision of the commission." No doubt these were the facts of the case; and as to this part of it they come fairly within the decision of the court in *Adams Case*.

In the opinion of the court then delivered, it is held that this board had no authority to compel parties to submit their claims to it, and that its decisions were not conclusive when they did submit them. The court, referring to the various ways open to claimants to obtain satisfaction of their demands, and after speaking of an application to Congress, a suit in the court of claims, and a submission to this special commission, adds: "This tribunal afforded an additional advantage over others, namely: that if, after the hearing and adjustment of the claims, the claimants were not satisfied, they were free to dissent and look for redress to the only *legal tribunals provided in such [*243 cases." And to the application of Adams to remand the case to the court below, founded on the allegation that the court of claims had made a mistake in finding that he had submitted his claim to the board, this court responds: "Though it is true that the appellee did not present his claim to the board, as stated in the finding in the record on appeal, it cannot, in view of the original record of the evidence before the court of claims, be denied that he made himself a party to the proceedings and took the

benefit of the adjustment of his accounts by them, which brings the case within the principle decided in 7 Wallace." *U. S.* v. *Adams*, 9 Wall. 554, 19 L. ed. 584.

But though the claimants might have refused to abide by the decision of the board and sought relief from the court of claims or from Congress, they did not do so.

We lay out of view in this case, as in the *Adams Case*, the receipts which they gave, under protest, in order to regain possession of their vouchers. But we cannot disregard the finding of the court of claims that, after Congress had appropriated money to pay the sums found due by the commissioners, the claimants received the amount so allowed, and signed upon each voucher a receipt whereby they acknowledged having received said reduced amount "in full of the above account;" and that at the time of receiving this payment they made no formal objection or protest, but were required to and did sign the receipt above described.

Although it is found by the court that these receipts were not under seal and were without consideration, the latter statement must have some meaning not apparent to us, in view of the other fact found, also, that over $315,000 was paid to the claimants on those accounts at the time they gave the receipts.

To avoid the legal effect of these facts, it is argued that not only in giving the receipts above mentioned, but also in accepting the money for which they were given, the complainants acted under duress.

244*] *We can hardly conceive of a definition of duress that would bring this case within its terms. Authorities are cited to show that where, under peculiar circumstances, property is withheld from the owner and he is forced to pay some unjust demand to obtain possession of it, he can afterwards maintain a suit for the money so paid. But no case can be found, we apprehend, where a party who, without force or intimidation and with a full knowledge of all the facts of the case, accepts on account of an unliquidated and controverted demand, a sum less than what he claims and believes to be due him, and agrees to accept that sum in full satisfaction, has been permitted to avoid his act on the ground that this is duress. If the principle contended for here be sound, no party can safely pay by way of compromise any sum less than what is claimed of him, for the compromise will be void as obtained by duress. The common and generally praiseworthy procedure by which business men every day sacrifice part of claims which they believe to be just to secure payment of the remainder would always be duress, and the compromise void.

But it is argued that the government should be held to a different rule than that which applies to private parties. It is said that the amount in dispute here was so large that the claimants were compelled to accept what was offered, to avoid bankruptcy.

No fact found by the court of claims, or otherwise presented by the record, justifies us in supposing that the claimants were threatened with insolvency, and the circumstance that the claim which was the subject of the compromise was a very large one can hardly be accepted in a court of law or equity as a reason for setting it aside. If, indeed, there was any such pressing motive in the minds of the claimants arising out of the condition of their private affairs as influenced them strongly to accept the offer of the government, it cannot, in the absence of fraud or constraint on its part, invalidate the settlement.

It seems to us that this case, under the ordinary principles of law applicable to its class, is free from embarrassment.

*If there had been no reference to and [*245 no finding by the commission, it would still remain true, that here was a claim, the justice of which had been denied and the amount that was due on it had been in dispute for nearly two years. The government finally says to the claimants: "We will pay you a certain sum on this disputed claim provided you will take it in full satisfaction of the whole;" when, without intimidation, without fraud or concealment on the part of the government, without protest or objection on their part, the claimants accept the money offered and sign a receipt acknowledging it to be in full of the whole claim. Is not this a legal and binding compromise of the disputed demand? Is it not a voluntary adjustment of the matter in dispute between the parties? And we think that it is a strong additional argument in favor of the validity of this settlement when it is called in question in court, that the sum so agreed upon was found to be a balance justly due on the claim by a commission of three capable and honest men, appointed by the government to ascertain what was due, and that before this commission the other party presented his claim and produced his witnesses, and was allowed a full and fair hearing to any extent that he desired

In this view of the case it is of no avail to urge that the court of claims has found that the whole claim was just and ought to be paid. After the compromise, that question was no longer open to inquiry. It is of the very essence of such adjustments of disputed rights that the contest shall be closed; and whatever consideration might be given the finding of the court of claims on that subject in another department of the government, this department, which sits to administer the law, must be governed by its recognized principles.

The judgment of the Court of Claims is reversed, and the case will be remanded to that court, with directions to render judgment in favor of the United States.

*Mr. Justice **Clifford**, dissenting: [*246

The court of claims having found that the claim in this case was never submitted to the commission appointed by the direction of the President to examine such claims, I am unable to concur in the conclusion of the court that the case is controlled by the decision of the court in the case of *The U. S.* v. *Adams*, 7 Wall, 463, 19 L. ed. 249, and for the reason that the claim was never so presented, I dissent from the decision of the court, and I am requested to say that the **Chief Justice** dissents for the same reason.

THE PROVIDENCE WASHINGTON INSURANCE CO., *Plff. in Err.*,
v.
LEHMAN HUTCHBERGER *et al.*

THE MERCHANTS' INS. CO., *Plff. in Err.*,
v.
SAME.

THE ARCTIC INS. CO., *Plff. in Err.*,
v.
SAME.

(See S. C. 12 Wall. 164–166.)

Ten per cent damages, besides interest, given when appeal is for delay.

Where the court is of the opinion that the writ of error has been taken out only for delay, it will affirm the judgment below, with ten per cent damages in addition to interest.

[Nos. 161, 162, 163.]

Argued Oct. 23, 1871. Decided Oct. 30, 1871.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Suit was brought in these cases in the circuit court of Cook county, Illinois, by the defendants in error, to recover upon a certain contract of insurance. Upon petition of the defendants, the cases were removed to the court below, and in that court judgment was given, after trial by jury in each case, for the plaintiffs; whereupon the defendants sued out these writs of error.

Messrs. **O. B. Sansum** and *Robert Hervey*, for plaintiffs in error:

In both counts the plaintiffs in the court below declared upon a contract to insure them "against loss or damage by fire to the amount of $4,000, on their stock of staple and fancy dry goods and Yankee notions, contained in the four-story brick building situate No. 173 Lake street, in the city of Chicago, from Sep. 27, 1866, at 12 o'clock noon, until the full end and term of one year, thence next ensuing, which term was to expire Sep. 27, 1867, at noon; the said loss to be estimated according to the true and actual value of the property at the time such loss or damage should happen, and be paid within sixty days after notice and proof thereof, made by the said plaintiffs. It was, however, provided in said policy, that the said defendants shall have the right to replace said lost or damaged property with other of like kind and quality, within ninety days after having received notice of such loss or damage. . . . It was further provided that this insurance shall not be considered valid until countersigned by T. L. Miller agent of said defendants."

The contract is to insure goods of a certain description in a certain place for one year, to wit, from Sep. 27, 1866, to Sep. 27, 1867. And to entitle defendants in error to maintain the judgment, should not the declaration show, upon its face, by proper averments, that within the term and at the particular place mentioned in the contract, the goods mentioned in the contract were lost or damaged by fire?

And what is the averment upon that question?

Following the averment of interest in the property insured, the declaration reads: "And that afterwards, to wit, on the 2d of March, A. D. 1867, the said property, in the said policy of insurance mentioned, was burned, consumed and destroyed by fire, which did not happen or take place by means of any invasion," etc., etc.

As to where the goods were burned, consumed and destroyed by fire, the declaration is silent; as to whether a fire ever happened in 173 Lake street, Chicago, the declaration is silent.

And what is the averment as to the provision in the contract mentioned, *viz.*, "This insurance shall not be considered valid until countersigned by T. L. Miller, agent?"

Not one word.

It is a general rule in pleading, that the declaration must show a title in the plaintiff, or the court will arrest the judgment.

The contract provides for payment of damages, to be made in money sixty days after notice and proof thereof, with the right to the plaintiffs in error to replace the goods lost or damaged within ninety days after notice of the loss. And now, what are the averments upon this question?

The declaration avers notice of the loss, Mar. 4, 1867.

The record shows that May 16, 1867, the plaintiffs in the court below commenced this action, seventy-three days after notice of the loss, and seventeen days before the right to sue accrued.

It is submitted that the action is premature. An action does not lie before a cause of action accrues, and if it be not pleaded in abatement, yet if it appears upon the record, it may be moved in arrest of judgment.

Com. Dig. tit. *Action*, E, *Rushton* v. *Aspinwall*, Doug. 679; 9 Wheat. 595.

For these reasons the judgment ought to be arrested.

Mr. **Lyman Trumbull**, for defendants in error:

It is objected that the declaration, in neither of the cases, alleges where the goods were burned. But each declaration does allege that the insurance was "on the stock of staple and fancy dry goods and Yankee notions contained in the four-story brick building situate No. 173 Lake street, in the city of Chicago," and that "the said property, in the policy of insurance mentioned, was burned," etc., which is sufficiently specific; the inference from the allegations made clearly being that the goods were burned in the building where they were insured, but if they were not the declaration in this respect is as specific as the policy of insurance. If the one does not allege where the goods were burned, neither does the other limit the liability to a burning at any particular place.

It is objected that neither declaration alleges that the policy of insurance was signed by the agent of the company.

No such allegation was necessary. The agent himself may have issued and delivered the policy, which would dispense with his signature; or his signature may have been waived by the company. It was no more necessary to allege that the policy was signed by the agent than by the president and secretary of the company. The declaration alleges that the insurance company "made and executed to the plaintiffs a certain policy of insurance in writing, whereby," etc,; and this was sufficient. If

not executed so as to bind the company, it was not the instrument declared on, and the plaintiffs must have failed in their proof. In point of fact, the policy was countersigned by the agent, as appears from a copy set out in one of the declarations. After verdict, the court will presume that every material fact, inferable from what is alleged, was proved on the trial.

It is objected to the declaration in No. 161, that the action was prematurely brought.

If such were the case, the objection could only be taken advantage of by plea.

The insurance company agreed, by the terms of its policy, to pay for any loss at the expiration of sixty days from its occurrence and notice thereof. The declaration shows that more than sixty days transpired before the action was brought. The liability of the company was then fixed. If the company desired to avoid the payment of the money by replacing the goods destroyed, that was matter of defense to be shown by the company.

The days alleged in the declaration under a verdict, as those on which the goods were burned and the notice given, are not material; and different days may have been proved on the trial, and the court will presume that such proof was given, if necessary to sustain the judgment.

It is objected to the declaration in No. 163, that there is neither consideration nor promise alleged in the first count. This is immaterial. Other counts contain these allegations, and if there be one good count it is sufficient, even on general demurrer. 1 Chit. Pl. 659.

It being apparent, from the character of the objections in these cases, that the writs of error were prosecuted merely for delay, the defendants in error pray the court to award them damages, as provided by the rules of court in such cases.

Mr. Chief Justice **Chase** delivered the opinion of the court:

The court is satisfied that the writs of error in these cases were prosecuted merely for delay. The judgment of the circuit court must, therefore, be affirmed in each case, with ten per cent damages, under the 23d rule.

THE STATE OF LOUISIANA, *ex rel.* W. W. HANDLIN, *Plff. in Err.*,
v.
G. M. WICKLIFFE, Auditor of Public Accounts of the State of Louisiana.

(See S. C. 12 Wall. 173-175.)

Judge appointed by military authority—when power of, ceased—vacancy, when filled.

An appointment of a judge, which was purely military, authorized only by the necessities of military occupation, was subject to revocation whenever, in the judgment of the military governor, revocation should become necessary or expedient.

After the civil Constitution of the state was in full operation, independent of military control, the authority derived from the appointment by the military governor, designated by the President, ceased of necessity.

After the office became thereby vacant, the governor could enforce the vacancy by removal, and fill it by a new appointment.

[No. 96.]

Argued Oct. 18, 1871. Decided Oct. 30, 1871.

IN ERROR to the Supreme Court of the State of Louisiana.

The history and facts of the case are sufficiently stated by the court.

Messrs. **W. W. Handlin,** *Caleb Cushing,* and *J. T. Drew* for plaintiff in error.

Mr. Thos. J. Durant for defendant in error.

Mr. Chief Justice **Chase** delivered the opinion of the court:

During the late Civil War, when the state of Louisiana was occupied by the troops of the United States, George F. Shepley, who had been appointed military governor of the state, commissioned the relator, W. W. Handlin, as judge of the third district court of New Orleans, who took the prescribed oath and entered upon the duties of the office. Subsequently, while war was yet flagrant, a Constitution was adopted for the state, under military orders, by a portion of its citizens, and Michael Hahn was elected governor, and was also appointed military governor, in place of Shepley, by the President. Handlin, who remained judge after the election and appointment of Hahn, was removed from office by him on account, as it appears, of a decision to the effect that slavery still existed in the congressional districts which had been exempted by President Lincoln from the operation of the Proclamation of Emancipation. Claiming that, notwithstanding this removal, he remained of right in office and was entitled to its salary, Handlin sued out a writ of mandamus in the state court, after the final suppression of the Rebellion and reconstruction of the state, against Wickliffe, as auditor, to compel payment. The judgment of the court was against him, and the mandamus was dismissed. An appeal was taken to the supreme court of the state, and the judgment was affirmed. The case comes here by writ of error. It is too clear for argument that the appointment of the relator as judge was purely military, authorized only by the *necessities of military occupa- [*175 tion, and was subject to revocation whenever, in the judgment of the military governor, revocation should become necessary or expedient. The adoption of the Constitution during the war, under military orders, and the election of Hahn as governor, did not affect the military occupation, in the judgment of the national authorities, for Hahn was appointed military governor by the President. If the situation was not changed, Hahn, as military governor, had the same right as his predecessor to revoke the appointment of judge. If it was changed and the civil Constitution of the state was in full operation, independent of military control, the authority derived from the appointment by the military governor designated by the President, ceased of necessity. The office became vacant, and Hahn had whatever authority the state Constitution conferred to enforce the vacancy by removal, and to fill it by a new appointment. We are unable to approve the reasons assigned for removal, but we cannot doubt the power.

The judgment of the Supreme Court of Louisiana is, therefore, affirmed.

CHRISTIAN J. HOFFMAN and Henry G. Kennedy, *Plffs. in Err.*,
v.
THE NATIONAL CITY BANK OF MILWAUKEE.

(See S. C. 12 Wall. 181–193.)

Recovery of moneys paid on bills drawn on forged bills of lading—liability of acceptance—time of acceptance.

Where bills of exchange were drawn, accompanied with forged bills of lading, and were discounted by a bank, and subsequently accepted and paid by the acceptors, they cannot recover back from the bank the money paid by them, on the ground of the forgery of the bills of lading, of which the bank was ignorant at the time of their discount.

Proof that the bills of lading were forgeries, could not operate to discharge the liability of the acceptors to pay the amounts to the payees or their indorsees, where the payees were innocent holders, having paid value for the same in the usual course of business.

It is immaterial, in that regard, whether the bills were accepted while in the hands of the drawer and at his request, or whether they had passed into the hands of the payee before acceptance, and were accepted at his request.

[No. 102.]

Argued Oct. 16, 1871. Decided Oct. 30, 1871.

IN ERROR to the Circuit Court of the United States for the District of Wisconsin.

Suit was brought in the court below, by the plaintiffs in error, to recover back money paid by them as acceptors of certain bills of exchange. Judgment having been given for the defendant, the plaintiffs sued out this writ of error.

The case is fully stated by the court.

Mr. **Matt. H. Carpenter,** for plaintiffs in error:

The defendant is owner of certain drafts drawn upon the plaintiffs, which the defendant knows the plaintiffs will not pay unless accompanied with bills of lading, which will authorize the plaintiffs to receive the flour upon the faith and security of which the drafts are drawn. And knowing this, the defendant presented said drafts to the plaintiffs, accompanied by forged bills of lading, and the plaintiffs, believing the bills of lading to be genuine, paid the money to the defendant. Subsequently the plaintiffs ascertained the forgery, and brought the action for money had and received, to recover from the defendant the money thus paid, as money paid under mistake.

Had the defendant's officers known, when they presented them to the plaintiffs, that the bills of lading were forged, their conduct would have been criminal. Not knowing this, it will be claimed that the money was paid by the plaintiffs to the defendant under a mistake, in which both parties participated. But we shall see that this makes no difference. In *Hudson* v. *Robinson*, 4 M. & S. 478, Lord Ellenborough, Ch., J., says: "An action for money had and received, is maintainable wherever the money of one man has, without consideration, got into the pocket of another."

That this principle is equally applicable to payment of money on forged paper, both parties, the party paying and the party receiving, being equally ignorant and innocent, see *Canal Bk.* v. *Bk. of Albany*, 1 Hill, 287, where the court says:

"The conduct of both was bona fide, and the negligence, or rather misfortune of both, the same. It was the duty, or, more properly, a measure of prudence, in each, to have inquired into the forgery, which both omitted. But this raises no preference, at law or equity, in favor of the defendants, but against them. They have obtained the plaintiffs' money without consideration; not as a gift, but under a mistake. For the very reason that the parties were equally innocent, the plaintiffs have the right to recover; and that was conceded throughout, in the authority cited on another point by the defendants' counsel." *U. S. Bk.* v. *Bk. of Georgia*, 10 Wheat. 333.

In *Bk. of Com.* v. *Union Bk.* 3 N. Y. 230, where it was held that the acceptor of a draft which was forged, not as to the signature of the drawer but by an alteration in the body of the draft, might recover back the money, as money paid under a mistake. The court, distinguishing the case from that of the forgery of the drawer's signature, which the acceptor is presumed to know, says:

"The greater negligence, in a case of this kind, is chargeable on the party who received the bill from the perpetrator of the forgery. So far as respects the genuineness of the bill, each indorser receives it on the credit of the previous indorsers," etc.

The bill of lading being the inducement to the plaintiffs to accept and pay the draft, and not being within the principle that the plaintiffs, as acceptors, were bound to know whether or not it was genuine (that rule being confined to the signature only of the drawer) the defendant being an indorser of the draft which carried the bill of lading with it, and having presented the draft for payment attached to the bill of lading, should be held to have guarantied the genuineness of the bill of lading.

In *Goddard* v. *Bk.* 4 N. Y. 147, the signature of the drawer was forged, and the bill was paid the day after it was protested by the plaintiff, without seeing the bill, for the honor of the drawer; the court held, the money could be recovered back.

For a full review and very able exposition of the cases and principles applicable to this question, see *Ellis* v. *L. Ins. & T. Co.* 4 Ohio St. 628, and cases cited by counsel and court.

Had the plaintiffs known the real facts of the case, they would not have accepted and paid the drafts, and could not have been compelled to do so. They paid the drafts to the defendant, because they did not know the facts; in other words, under a mistake.

Mr. **John W. Cary,** for defendant in error:

The drafts of Chapin, Miles & Co., were genuine. The defendant was an innocent holder and indorsee thereof for value, and the fraud practiced by the drawers upon the acceptors or drawees, could not affect the defendant's rights, and the total want of failure of consideration between the drawers and drawees, does not give the latter a right of action to recover back the money paid by them on the drafts from such bona fide indorsee for value.

The rights of a bona fide indorsee of a bill of exchange are well settled in the law, and this court has laid down a clear rule on the subject, in the case of *U. S.* v. *Bk.* 15 Pet. 377, as follows:

"The rule is that a want of consideration between the drawer and acceptor is no defense against the right of a third party, who has given a consideration for the bill, and this, even though the acceptor has been defrauded by the drawer; if that be not known by such third party before he gives value for it."

The case of *Craig* v. *Sibbett*, 15 Pa. 238, is directly in point. The only distinction between the two cases as to the facts is: that the drafts in this case were payable at sight, and were paid by the drawees on presentation, and they are not seeking to recover back the money which they have paid; while in *Craig* v. *Sibbett* the drafts were time drafts, and were accepted by the drawee on the faith of bills of lading, which afterwards turned out to be fictitious, and the acceptor resisted payment of the drafts on that ground.

The case of *Robinson* v. *Reynolds*, 2 Ad. & El. (N. S.) 196, covers every point in this case. In the case of *Coggill* v. *Bk.* 1 N. Y. 113, Bronson. J., in affirming the judgment, says: "It is enough that the holder has a good title to the bill, so that the acceptor, on paying it, can properly charge the amount against the funds of the drawer in his hands, if there be any; and if there be none, that he may have an action against the drawer for money paid to his use. As the acceptor can never resort to the payee or indorser, he has no interest in knowing through whose hands the bill has passed, except for the purpose of ascertaining that the holder has good title."

The plaintiffs could not have maintained this action, had the drafts themselves been forgeries. They were negotiated to defendant for value. It thereby became a bona fide holder and indorsee for value; and when the same were accepted or paid by the drawees, they made themselves the principal debtors. The defendant must be regarded as a stranger to the acceptor as to the consideration, and the acceptor is estopped to allege that the drafts were forged, or any other defense, not affecting the character of the defendant as a bona fide holder.

The drawee of a bill is held bound to know the handwriting of his correspondent, the drawer; and if he accepts or pays a bill in the hands of a bona fide holder for value, he is concluded by the act, although the bill turns out to be a forgery. If he has accepted, he must pay, and if he has paid, he cannot recover the money back.

Goddard v. *Bk.* 4 N. Y. 147; *Bk. of Com.* v. *Union Bk.* 3 N. Y. 230; *U. S. Bk.* v. *Bk. of Ga.* 10 Wheat. 333, 348; *Price* v. *Neale*, 3 Burr. 1355.

If the plaintiffs could not defeat the acceptance or payment of their drafts; if they were forgeries, much less can they attain the same object by alleging the forgery of some other paper, not a part of the draft.

The plaintiffs did not derive title to the forged bills of lading, or the property they purported to represent, through the defendant. They were not the vendees of the defendant; but derived their title directly from Chapin, Miles, & Co., their own correspondents.

The title to the property did not pass, and by the terms of the bills of lading did not purport to pass, to or through defendant, but passed directly from the shippers to plaintiffs. The bills of lading with the drafts were delivered to defendant, and were forwarded by defendant. Such delivery did not vest the legal title in the defendant, but operated only, at the most, as an equitable mortgage, pledge or lien to the defendant, until the drafts were accepted or paid, when all interest of the defendant ceased. It was entirely optional with plaintiffs, whether to pay or not to pay the drafts. Their payment was a voluntary act, done at the request of Chapin, Miles, & Co. Plaintiffs were under no compulsion or obligation to defendant to pay; they made payment because they believed it for their interests so to do, in pursuance of their agreement with Chapin, Miles, & Co.

Ketcham v. *Bk.* 19 N. Y. 499.

In the bills of lading, Chapin, Miles, & Co. were named as the shippers, and the plaintiffs as consignees. The consignee is the presumptive owner of the property named in the bill of lading.

Grove v. *Brien*, 8 How. 429; *Lawrence* v. *Minturn*, 17 How. 100, 15 L. ed. 58.

The mere delivery of the bills of lading to defendant, without any indorsement or assignment thereof, did not give defendant any interest in or title, either general or special, to the property named in the bill of lading.

Bk. v. *Jones*, 4 Den. 489.

The payment by plaintiffs was voluntary, and for that reason they cannot recover back the money paid. Money paid voluntarily cannot be recovered back, unless the party to whom the money is paid cannot, in good conscience, retain it.

Plaintiffs were not bound to pay the drafts to defendant; if they had refused, defendant could not have enforced payment; hence we say payment was voluntary.

Aiken v. *Short*, 1 Hurl. & N. 210; *Wilson* v. *Barker*, 50 Me. 447; *Edgar* v. *Shields*, 1 Grant, 361; *Bree* v. *Holbech*, 2 Doug. 655; *Corkle* v. *Maxwell*, 3 Blatchf. 413.

Admitting, for the purposes of the argument, that plaintiffs have a right of action to recover back the money paid by them on these drafts, such action will not lie against the defendant, but only against the National Park Bank of New York.

Bk. of Metropolis v. *N. E. Bk.* 1 How. 234.

Mr. Justice **Clifford** delivered the opinion of the court:

Acceptors of a bill of exchange, by the act of acceptance, admit the genuineness of the signatures of the drawers, and the competency of the drawers to assume that responsibility. Such an act imports an engagement, on the part of the acceptor, to the payee or other lawful holder of the bill, to pay the same, if duly presented, when it becomes due, according to the tenor of the acceptance. He engages to pay the holder, whether payee or indorsee, the full amount of the bill at maturity, and if he does not, the holder has a right of action against him, and he may also have one against the drawer. Drawers of bills of exchange, however, are not *liable to the holder, under [*187 such circumstances, until it appears that the bill was duly presented, and that the acceptor

refused or neglected to pay the same according to the tenor of the instrument, as their liability is contingent and subject to those conditions precedent.

Three bills of exchange, as exhibited in the record, were drawn by Chapin, Miles, & Co., payable to the order of the defendants, and the record shows that they, the defendants, received and discounted the three bills at the request of the drawers. Attached to each bill of exchange was a bill of lading for two hundred barrels of flour, shipped, as therein represented, by the drawers of the bills of exchange, and consigned to the plaintiffs; and the record also shows that the drawers, in each case, sent a letter of advice to the consignees apprising them of the shipment, and that they would draw on them as such consignees for the respective amounts specified in the several bills of exchange. Prompt reply in each case was communicated by the plaintiffs, acknowledging the receipt of the letter of advice sent by the shippers, and promising to honor the bills of exchange, as therein requested. Evidence was also introduced by the plaintiffs showing that the defendants indorsed the bills of exchange and forwarded the same, with the bills of lading attached, to the National Park Bank of the city of New York, their regular correspondents; that the same were subsequently indorsed by the latter bank, and forwarded to the Commonwealth Bank of Philadelphia for collection; that the Commonwealth Bank presented the bills of exchange, with the bills of lading attached, to the plaintiffs, as the acceptors, and that they paid the respective amounts as they had previously promised to do, and that the Commonwealth Bank remitted the proceeds in each case to the National Park Bank, where the respective amounts were credited to the defendants. Proof was also introduced by the plaintiffs showing that each of the bills of lading was a forgery, and that the plaintiffs, before the commencement of the suit, tendered the same and the bills of exchange to the defend- **188*]** ants, *and that they demanded of the defendants, at the same time, the respective amounts so paid by them to the Commonwealth Bank. Payment as demanded being refused, the plaintiffs brought an action of assumpsit against the defendants for money had and received, claiming to recover back the several amounts so paid as money paid by mistake; but the verdict and judgment were for the defendants, and the plaintiffs sued out a writ of error, and removed the cause into this court. Testimony was also introduced by the defendants tending to show that the shippers were millers; that they made an arrangement with the plaintiffs to ship flour to them at Philadelphia for sale in that market, the plaintiffs agreeing that they, the shippers, might draw on them for advances on the flour, to be reimbursed out of the proceeds of the sales; that for more than a year they had been in the habit of shipping flour to the plaintiffs under that arrangement and of negotiating drafts on the plaintiffs to the banks in that city, accompanied by bills of lading in form like those given in evidence in this case; that the drafts, with the bills of lading attached, were sent forward by the banks, where the same were discounted, and that the same were paid by the plaintiffs; that the drawers of the drafts in every case notified the plaintiffs of the same, and that the plaintiffs, as in this case, answered the letter of advice and promised to pay the amount. They also proved that the drawers of the drafts in this case informed their cashier that the same would always be drawn upon property and that the bills of lading would accompany the drafts, and that they had no knowledge or intimation that the bills of lading were not genuine. Instructions were requested by the plaintiffs, that if the jury found that the respective bills of lading were not genuine, that they were entitled to recover the several amounts paid to the Commonwealth Bank, with interest; but the court refused to give the instruction as prayed, and instructed the jury that if they found the facts as shown by the defendants, the plaintiffs could not recover in the case, even though they should find that the several bills of lading were a forgery.

*Money paid under a mistake of facts, [*189 it is said, may be recovered back as having been paid without consideration; but the decisive answer to that suggestion, as applied to the case before the court is: that money paid, as in this case, by the acceptor of a bill of exchange to the payee of the same or to a subsequent indorsee, in discharge of his legal obligation as such, is not a payment by mistake nor without consideration, unless it be shown that the instrument was fraudulent in its inception, or that the consideration was illegal, or that the facts and circumstances which impeach the transaction, as between the acceptor and the drawer, were known to the payee or subsequent indorsee at the time he became the holder of the instrument. *Fitch* v. *Jones*, 5 Ell. & Bl. 238; *Arbouin* v. *Anderson*, 1 Ad. & Ell. (N. S.) 498; *Smith* v. *Braine*, 16 Ad. & Ell. (N. S.) 244; *Hall* v. *Featherstone*, 3 Hurl. & N. 287.

Such an instrument, as between the payee and the acceptor, imports a sufficient consideration; and in a suit by the former against the latter, the defense of prior equities, as between the acceptor and the drawer, is not open unless it be shown that the payee, at the time he became the holder of the instrument, had knowledge of those facts and circumstances.

Attempt is made in argument to show that the plaintiffs accepted the bills of exchange upon the faith and security of the bills of lading attached to the same at the time the bills of exchange were discounted by the defendants. Suppose it was so, which is not satisfactorily proved, still it is not perceived that the concession, if made, would benefit the plaintiffs, as the bills of exchange are in the usual form and contain no reference whatever to the bills of lading, and it is not pretended that the defendants had any knowledge or intimation that the bills of lading were not genuine; nor is it pretended that they made any representation upon the subject to induce the plaintiffs to contract any such liability. They received the bills of exchange in the usual course of their business as a bank of discount and paid the full amount of the net proceeds of the same to the drawers, and it is not *even sug- [*190 gested that any act of the defendants, except the indorsement of the bills of exchange in the usual course of their business, operated to the prejudice of the plaintiffs or prevented them

from making an earlier discovery of the true character of the transaction. On the contrary, it distinctly appears that the drawers of the bills of exchange were the regular correspondents of the plaintiffs, and that they became the acceptors of the bills of exchange at the request of the drawers of the same and upon their representations that the flour mentioned in the bills of lading had been shipped to their firm for sale under the arrangement before described.

Beyond doubt the bills of lading gave some credit to the bills of exchange beyond what was created by the pecuniary standing of the parties to the same, but it is clear that they are not a part of those instruments nor are they referred to, either in the body of the bills or in the acceptance, and they cannot be regarded in any more favorable light for the plaintiffs than as collateral security accompanying the bills of exchange.

Sent forward, as the bills of lading were, with the bills of exchange, it is beyond question that the property in the same passed to the acceptors when they paid the several amounts therein specified, as the lien, if any, in favor of the defendants was then displaced and the plaintiffs became entitled to the instruments as the muniments of title to the flour shipped to them for sale and as security for the money which they had advanced under the arrangement between them and the drawers of the bills of exchange. Proof, therefore, that the bills of lading were forgeries could not operate to discharge the liability of the plaintiffs, as acceptors, to pay the amounts to the payees or their indorsees, as the payees were innocent holders, having paid value for the same in the usual course of business. *Leather* v. *Simpson*, L. R. 11 Eq. p. 398.

Different rules apply between the immediate parties to a bill of exchange, as between the drawer and the acceptor or between the payee and the drawer, as the only consideration 191*] *as between those parties is that which moves from the plaintiff to the defendant; and the rule is, if that consideration fails, proof of that fact is a good defense to the action. But the rule is otherwise between the remote parties to the bill, as, for example, between the payee and the acceptor, or between the indorsee and the acceptor, as two distinct considerations come in question in every such case where the payee or indorsee became the holder of the bill before it was overdue and without any knowledge of the facts and circumstances which impeach the title as between the immediate parties to the instrument. Those two considerations are as follows: First, that which the defendant received for his liability, and, secondly, that which the plaintiff gave for his title; and the rule is well settled that the action between the remote parties to the bill will not be defeated unless there be an absence or failure of both these considerations. *Robinson* v. *Reynolds*, 2 Q. B. 202; 2 Ad. & E. (N. S.) 202; S. C. in error, 2 Ib. 210; Byles, Bills, 5th Am. ed. 124; *Thiedemann* v. *Goldschmidt*, 1 De Gex, F. & J. p. 10.

Unless both considerations fail in a suit by the payee against the acceptor, it is clear that the action may be maintained, and many decided cases affirm the rule, where the suit is in the name of a remote indorsee against the acceptor, that if any intermediate holder between the defendant and the plaintiff gave value for the bill, such an intervening consideration will sustain the title of the plaintiff. *Hunter* v. *Wilson*, 4 Exch. 489; *Boyd* v. *McCann*, 10 Md. 118; *Howell* v. *Crane*, 12 La. Ann. 126; *Watson* v. *Flanagan*, 14 Tex. 354.

Where it was arranged between a drawer and his correspondent that the latter would accept his bills in consideration of produce to be shipped or transported to the acceptor for sale, the supreme court of Pennsylvania held, in *Craig* v. *Sibbett*, 15 Pa. 240, that the acceptor was bound to the payee by his general acceptance of a bill, although it turned out that the bill of lading forwarded at the same time with the bill of exchange was fraudulent, it not being shown that the payee of the bill *was [*192 privy to the fraud. Evidence was introduced in that case showing that the payee knew what the terms of the arrangement between the drawer and the payee were, but the court held that mere knowledge of that fact was not sufficient to constitute a defense, as the payee was not a party to the arrangement and was not in any respect a surety for the good faith and fair dealing of the shipper.

Failure of consideration, as between the drawer and acceptor of a bill of exchange, is no defense to an action brought by the payee against the acceptor, if the acceptance was unconditional in its terms, and it appears that the plaintiff paid value for the bill, even though the acceptor was defrauded by the drawer, unless it be shown that the payee had knowledge of the fraudulent acts of the drawer before he paid such value and became the holder of the instrument. *U. S.* v. *Bank of Metropolis*, 15 Pet. 393.

Testimony to show that the payees were not bona fide holders of the bills would be admissible in a suit by them against the acceptors, and would constitute, if believed, a good defense, but the evidence in this case does not show that they did anything that is not entirely sanctioned by commercial usage. They discounted these bills and they had a right to present them for acceptance, and having obtained the acceptance they have an undoubted right to apply the proceeds collected from the acceptors to their own indemnity. *Thiedemann* v. *Goldschmidt*, 1 De Gex, F. & J. 10; *Robinson* v. *Reynolds*, 2 Ad. & E. (N. S.) 211.

Forgery of the bills of lading would be a good defense to an action on the bills if the defendants in this case had been the drawers, but they were payees and holders for value in the regular course of business, and the case last referred to, which was decided in the exchequer chamber, shows that such an acceptance binds the acceptor conclusively as between them and every bona fide holder for value.

Very many cases decide that the drawee of a bill of exchange is bound to know the handwriting of his correspondent, *the drawer, [*193 and that if he accepts or pays a bill in the hands of a bona fide holder for value, he is concluded by the act, although the bill turns out to be a forgery. If he has accepted he must pay, and if he has paid he cannot recover the money back, as the money, in such a case, is paid in pursuance of a legal obligation as understood in the commercial law. *Goddard* v.

Merch. Bank, 4 N. Y. 149; *Bank of Commerce* v. *Union Bank*, 3 N. Y. 234; *U. S. Bank* v. *Bank of Ga.* 10 Wheat. 348; *Price* v. *Neale*, 3 Burr. 1355.

Difficulty sometimes arises in determining whether the plaintiff, in an action on a bill of exchange, is the immediate promisee of the defendant, or whether he is to be regarded as a remote party, but it is settled law that the payee, where he discounts the bill at the request of the drawer, is regarded as a stranger to the acceptor in respect to the consideration for the acceptance; consequently, if the acceptance is absolute in its terms and the bill is received in good faith and for value, it is no answer to an action by him that the defendant received no consideration for his acceptance or that the consideration therefor has failed; and it is immaterial in that behalf whether the bill was accepted while in the hands of the drawer and at his request, or whether it had passed into the hands of the payee before acceptance and was accepted at his request. Pars. Bills, 179; *Munroe* v. *Bordier*, 8 C. B. 862.

Certain other defenses, such as that the payments were voluntarily made, and that the title to the bills at the time the payments were made was in the National Park Bank, were also set up by the defendants, but the court does not find it necessary to examine those matters, as they are of the opinion that the payments, if made to the payees of the bills, as contended by the plaintiffs, were made in pursuance of a legal obligation, and that the money cannot be recovered back.

Judgment affirmed.

JESSIE J. COX *et al., Plffs. in Err.*,
v.
ELISHA B. LOTT.

(See S. C. "*State Tonnage Tax Cases*," 12 Wall. 204–220.)

State act levying duty of tonnage unconstitutional—vessels plying between different ports of same state.

A state act which levied a tax on all steamboats, vessels and other water craft, plying in the navigable waters of the state, at the rate of one dollar per ton of the registered tonnage thereof, is in direct contravention of the prohibition of the Constitution, that "No state shall, without the consent of Congress, levy any duty of tonnage."

The prohibition extends to all ships and vessels entitled to the privileges of ships and vessels employed in the coasting trade, whether employed in commercial intercourse between ports in different states, or between different ports in the same state.

Taxes levied by a state upon ships and vessels, owned by the citizens of the state as property, based on a valuation of the same as property, are not within the prohibition of the Constitution.

[No. 146.]

Argued Apr. 14. 1871. Decided Oct. 30, 1871.

IN ERROR to the Supreme Court of the State of Alabama.

Suit was brought by the plaintiffs in error, in the circuit court of Mobile county, Alabama, to recover back a certain tax. Judgment having been given for the plaintiffs, the defendant took an appeal to the supreme court of the state, by which the said judgment was reversed; whereupon the plaintiffs sued out this writ of error.

The case is further stated by the court.

Messrs. **P. Hamilton** and **J. A. Campbell**, for plaintiffs in error:

The tax is laid upon this vessel or boat, this instrument of navigation, while plying on the navigable waters of the state. If it were tied to the wharf or fastened to the bank, or used for any purpose but navigating the navigable waters of the state, the tax, by the terms of the act would not apply.

The right to navigate is made to depend on payment of this tax.

This tax is to be paid each year, on demand. If not so paid, the use of the boat is to be prevented by seizure and sale.

The case clearly shows a violation of the act of Congress, and is in violation of one of the fundamental conditions of the admission of Alabama into the Union, which forbids legislation of the description here sought to be enforced and, therefore, the law is void.

The tax by the state should be upon property as property, and not upon investments because they are in the shape of vessels or boats, and measured by their capacity as vessels or boats, which is the case here.

The state can tax the property of the citizen, no matter how unwisely, without objection from the Federal Constitution; but it cannot tax those articles which are exclusively within the regulation of the general government. That is to say: if the subject is within the regulation adopted by Congress, the state cannot impose a tax upon it in the character in which it is regulated by Congress, although it may tax the citizen upon so much of his property as may be invested therein.

The principle is recognized in *Battle* v. *Mobile*, 9 Ala. 234, 238. The city corporation levied a tax on all property of its citizens and within its limits. Under this, the liability of a steamboat, engaged in the same business as these boats, was denied. The validity of the tax was maintained. "The tax not being a specific tax, applicable alone to steamboats, but a general one, extending to all personal estate."

See *Hays* v. *Steamship Co.* 17 How. 600, 15 L. ed. 255.

Here, directly the reverse is the case; this tax is applicable alone to steamboats and to steamboats in use; that is, the very instruments of commerce.

Vessels are instruments of commerce, and fall within the power of Congress to regulate commerce.

Gibbons v. *Ogden*, 9 Wheat. 186; *People* v. *Brooks*, 4 Den. 479; *Steamboat Co.* v. *Livingston*, 3 Cow. 742; *People* v. *R. & S. R. Co.* 15 Wend. 131.

The vessels or boats in this case have all conformed to the regulations of the Congress, and have been enrolled and licensed for the coasting trade, and were in that condition at the time of the attempted collection of the tax. 1 Bright. Dig. 138.

The very form of the acts declares the intention to tax these boats as objects of regulation by Congress; the tax is measured by their registered tonnage, and is to be collected at the port where registered.

The boats are also subject to another set of

NOTE.—*Where ships are taxable*—see note, 37 L. R. A. 518.

regulations established by Congress for the government of vessels propelled in whole or in part by steam, and by them are required to be enrolled. Act, July 7, 1838, Mar. 3, 1843, and acts of 1852 and 1866; *Waring* v. *Clarke*, 5 How. 465.

This tax is in direct contravention of the prohibition of the Constitution: "No state shall, without the consent of Congress, lay any duty of tonnage."

There is no pretense of consent by Congress. This prohibition, therefore, stands, in this instance, as a universal and unqualified prohibition. "No state shall lay duty of tonnage."

Tonnage means capacity of the ship or vessel. The prohibition is, therefore, tantamount to "no state shall levy any duty on vessels in proportion to their capacity." Bouv. L. Dic. 7, Tonnage.

Duty means tax, toll, impost, custom. Web. Dic.

The obvious intent of this prohibition is, to forbid a tax upon vessels proportioned to their tonnage; a certain rate on each ton.

Steamship Co. v. *Port Wardens*, 6 Wall. 34, 18 L. ed. 750; and see, 3 Stew. & P. 304; 3 Strobh. 599; 4 Rich. 289.

If this be so, the argument is exhausted, and the tax is illegal; for it is a tax proportioned to tonnage.

It is contended, in behalf of the state, that this is but the exercise by it of the taxing power; and that these boats being used in navigating purely within its limits, the prohibition of the Federal Constitution does not apply to this tax; that it can tax its citizens and property in any form it sees fit.

This position does not meet the objection drawn from the act of Congress of Mar. 1819, and the ordinance of the Alabama Convention of Aug. 1819. With all its power of taxation, the state cannot levy a tax directly or indirectly upon the navigation of its rivers.

It does not meet the objection, that this legislation conflicts with the exclusive power of Congress over this subject of navigation of all navigable rivers, and which seems to be definitely settled by the recent decisions of this court.

The Belfast, 7 Wall. 624, 19 L. ed. 266; *Waring* v. *Clarke*, 5 How. 465.

The position does not meet the language of the prohibition, which expresses a universal proposition, without limitation or condition.

The prohibition is not limited to tonnage duties upon vessels engaged in foreign or interstate commerce.

It is not found in the Constitution in connection with any grant of power to Congress, nor in connection with any subject theretofore treated, from which any limitation or qualification of the prohibition can be inferred.

It is placed in juxtaposition with other absolute denials of power to the states; its companion denials are absolute, and are matters of national concern—raising troops and ships of war in times of peace, making agreements with other states, foreign nations, etc. This, like them, is absolute in its terms and is of national concern.

Its scope is, plainly, to withhold all power of taxation in that form from the states. Leaving the states unrestrained in their power to levy taxes upon the property of their citizens, the Constitution declares that they shall not lay any duty of tonnage.

In the case of *Bk.* v. *Lovell*, 18 Conn. 512, a suit was brought against a vessel to recover fees for passing through the channel of the river from New London to Norwich in the same state. The court upheld the claim, because it was compensation for the use of a channel improved by artificial means, and held that otherwise it would amount to a tonnage duty upon the vessel and be illegal, because such tax could not be imposed by a state, that power being alone confided to the government of the United States.

The supreme court of Alabama, 41 Ala. 246, has held that this same tax, when levied upon steamboats engaged in the lighterage business between the Port of Mobile and vessels at the anchorage in the Bay of Mobile, is illegal and cannot be enforced.

It is levied in precisely the manner in which Congress directed the levy of "a duty of tonnage" in the exercise of its power under the Constitution.

2 Bright. Dig. 651; 1 Stat. at L. 27.

But also, it is objectionable as a regulation of commerce. The court judicially knows the position and character of the rivers on which these boats ply, and the nature and course of the general commerce of the country, and that they are inseparably linked with that commerce and form part of that commerce between the states, by means of these vessels plying thereon, which is under the regulation of the general government.

Mr. **P. Phillips**, for defendant in error:

Here the owner of the property is a resident citizen; the property itself within the jurisdiction and its use confined to trade within the state.

Why should a citizen, whose fortune may be invested in such property, be exempt from contributing to the support of the state, whose laws are invoked for its protection?

The answer would seem to rest solely upon the use of the particular words imposing the tax, "at the rate of one dollar per ton on the registered tonnage."

What if the tax had been laid on the assessed value of the vessel? Then the validity of the act could only be successfully assailed by maintaining that the nature of the property or the business in which it is employed creates the exemption.

"A state (says Judge McLean) cannot regulate commerce; but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce, the same as other property owned by its citizens."

Passenger Cases, 7 How. 402; *Towboat Co.* v. *Bordelon*, 7 La. Ann. 192.

In another case this court asks: "Is a tax upon a ship as property, which is admitted to be an instrument of commerce, prohibited to a state? May it not tax the business of shipbuilding, the same as the exercise of any other mechanic art? There can be but one answer to these questions. No one can claim an exemption from a general tax on his business within the state, on the grounds that its products may be used in commerce.

Nathan v. *La.* 8 How. 82.

In a still later case, steamers engaged in commerce between New York and San Francisco, by way of Panama, were taxed under the laws of California. This tax having been paid under protest, an action was brought to recover it back. After adverting to the distinction between the home port and a foreign port, this court says: "We are satisfied that the state of California had no jurisdiction over these vessels for the purpose of taxation; they were not properly abiding within her limits, so as to become incorporated with the other personal property of the state; they were there but temporarily, engaged in lawful trade and commerce, with their *situs* at the home port, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid."

Hays v. *Steamship Co.* 17 How. 599, 15 L. ed. 255.

It is thus established beyond a peradventure, that there is nothing in the character of a vessel, or in the fact that she is engaged in carrying on foreign commerce or commerce among the states, which exempts her from the power of taxation in a state where she belongs. *A fortiori* such exemptions cannot be claimed when the vessel is not only owned in the state, but is engaged in commerce exclusively within its limits.

The power then being adequate to tax this property, does the act of the state become unconstitutional, because of the particular mode pointed out by it for ascertaining the value on which the tax is to be paid?

It would puzzle the ingenuity of counsel to assign a reason why there should have been engrafted on the Constitution an exemption from state taxation for property thus circumstanced. But, reasonable or unreasonable, it is asserted that such a provision exists.

"No state shall, without consent of Congress, lay any duty of tonnage, keep troops or ships of war, enter into any agreement or compact with another state or with a foreign power, or engage in war unless actually invaded."

All the provisions of this section alike refer to subjects of general concern, in which the people and the several states are interested. The prohibition of the tonnage duty referred to is a corollary to the grant of the commercial power. It is part and parcel of the policy, which declares that "no preference shall be given in any regulation of commerce or revenue, to the ports of one state over those of another;" and which further provides that "vessels bound to or from one state shall not be obliged to enter, clear, or pay duties in another."

This is not a tax upon vessels without reference to the place of ownership, but is one confined to those only owned in and engaged in the trade of the state, and subjects it to the same contribution which all other property in the state is made to bear.

Why should the state be prohibited from holding this property of its citizens liable to taxation, or why should the consent of Congress be necessary in a matter where the rights and interests of no others are concerned than those of the state and its citizens?

Perry v. *Torrence*, 8 Ohio, 525; *Cooley* v. *Wardens*, 12 How. 314.

Mr. Justice **Clifford** delivered the opinion of the court:

Assumpsit for money had and received is an appropriate remedy to recover back moneys illegally exacted by a collector as taxes, in all jurisdictions where no other remedy is given, unless the tax was voluntarily paid or some statutory conditions are annexed to the exercise of the right to sue, which were unknown at common law.

Where the party assessed voluntarily pays the tax he is without remedy in such an action, but if the tax is illegal or was erroneously assessed, and he paid it by compulsion of law or under protest, or with notice that he intends to institute a suit to test the validity of the tax, he may recover it back in such an action, unless the legislative authority, in the jurisdiction where the tax was levied, has prescribed some other remedy or has annexed some other conditions to the exercise of the right to institute such a suit. *Elliott* v. *Swartwout*, 10 Pet. 150; *Bend* v. *Hoyt*, 13 Pet. 267.

On the 22d of February, 1866, the legislature of Alabama passed a revenue act, and therein, among other things, levied a tax "on all steamboats, vessels, and other watercrafts plying in the navigable waters of the state, at *the [*210 rate of $1.00 per ton of the registered tonnage thereof," to "be assessed and collected at the port where such vessels are registered, if practicable; otherwise, at any other port or landing within the state where such vessel may be." Sess. Acts, 1846, p. 7.

Five steamboats were owned by the plaintiffs, who were citizens of that state, doing business at Mobile under the firm name set forth in the record. All the steamboats were duly enrolled and licensed in conformity to the act of Congress entitled, "An Act for Enrolling and Licensing Ships and Vessels to be Employed in the Coasting Trade of the United States," and the record shows that at the time the taxes which are the subject of controversy were imposed and collected, all those steamboats were engaged in the navigation of the Alabama, Bigbee, and Mobile rivers, in the transportation of freight and passengers between the Port of Mobile and other towns and landings on said rivers, within the limits of the state, the said rivers being "waters navigable from the sea by vessels of ten or more tons burthen." 1 Stat. at L. 77.

Such steamboats are deemed ships and vessels of the United States, and as such are entitled to the privileges secured to such ships and vessels by the act of Congress providing for enrolling and licensing ships and vessels to be employed in that trade. 1 Stat. at L. 305.

Annexed to the agreed statement exhibited in the record is a schedule of the taxes imposed and collected, in which are also given the names of the respective steamboats, their tonnage and their value, and the proportion assessed by the county as well as that imposed by the state. Committed as the assessments were to the same person to collect, it is immaterial whether the taxes were assessed for the state or for the county, as the collector demanded the whole amount of the plaintiffs, and they paid the same under protest, the sums specified as county taxes including also a charge made by the collector for fees in collecting the money.

211*] *Separately stated the taxes were as follows: On the steamboat C. W. Dorrance, 321 tons burden, valued at $5,000, taxed, state tax $321, county tax $322.25; Flirt, tonnage 214 tons, valued at $2,500, taxed, state tax $214, county tax $215.25; Cherokee, tonnage 310 tons, valued at $15,500, taxed, state tax $310, county tax $311.25; Coquette, tonnage 245 tons, valued at $4,000, taxed, state tax $245, county tax $246.25; St. Charles, tonnage 331 tons valued at $15,000, taxed, state tax $331, county tax $332.25; showing that the county tax as well as the state tax is $1 per ton of the registered tonnage of the steamboats, exclusive of the fees charged by the collector.

Demand of the taxes having been made by the collector, the plaintiffs protested that the same were illegal, but they ultimately paid the same to prevent the collector from seizing the steamboats and selling the same in case they refused to pay the amount. They paid the sum of $2,848.25 as the amount of the taxes, fees and expenses demanded by the defendant, and brought an action of assumpsit against the collector in the circuit court of the state for Mobile county to recover back the amount, upon the ground that the sum was illegally exacted. Judgment was rendered in that court for the plaintiffs, the court deciding that the facts disclosed in the agreed statement showed that the taxes were illegal, as having been levied in violation of the Federal Constitution. Appeal was taken by the defendant to the supreme court of the state, where the parties were again heard, but the supreme court of the state, differing in opinion from the circuit court where the suit was commenced, rendered judgment for the defendant, whereupon the plaintiffs sued out a writ of error and removed the record into this court for re-examination.

I. Two principal objections were made to the taxes by the plaintiffs, as appears by the agreed statement which is made a part of the record: (1) That the taxes as levied and collected 212*] *were in direct contravention of the prohibition of the Constitution, that "no state shall, without the consent of Congress, levy any duty of tonnage," and the proposition of the plaintiffs was and still is that the act of the legislature of the state directs in express terms that such taxes shall be levied on all steamboats, vessels and other water-craft plying in the navigable waters of the state. (2) That the state law levying the taxes violates the compact between the state and the United States, that "all navigable waters within the said state shall forever remain public highways, free to the citizens of the said state and of the United States, without any tax, duty, impost, or toll therefor imposed by the said state." 3 Stat. at L. 492.

1. Congress has prescribed the rules of admeasurement and computation for estimating the tonnage of American ships and vessels. 13 Stat. at L. 69, 444.

Viewed in the light of those enactments, the word "tonnage," as applied to American ships and vessels, must be held to mean their entire internal cubic capacity, or contents of the ship or vessel expressed in tons of one hundred cubic feet each, as estimated and ascertained by those rules of admeasurement and of computation. *Alexander* v. *Railroad Co.* 3 Strob. 598.

Power to tax, with certain exceptions, resides with the states independent of the Federal government, and the power, when confined within its true limits, may be exercised without restraint from any Federal authority. They cannot, however, without the consent of Congress, lay any duty of tonnage, nor can they levy any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws, as without the consent of Congress they are unconditionally prohibited from exercising any such power. Outside of those prohibitions the power of the states to tax extends to all objects within the sovereign power of the states, except the means and instruments of the Federal government. But ships and vessels *owned [*213 by individuals and belonging to the commercial marine are regarded as the private property of their owners, and not as the instruments or means of the Federal government, and as such, when viewed as property, they are plainly within the taxing power of the states, as they are not withdrawn from the operation of that power by any express or implied prohibition contained in the Federal Constitution. *Nathan* v. *Louisiana*, 8 How. 82; *Howell* v. *Maryland*, 3 Gill, 14.

Argument, therefore, to show that they may be taxed as other property belonging to the citizens of the state is hardly necessary, as the opposite theory is indefensible in principle, contrary to the generally received opinion, and is wholly unsupported by any judicial determination. Direct adjudication to support that proposition is not to be found in the reported decisions of this court, but there are several cases which concede that such a tax, if levied by a state, would be legal, and no doubt is entertained that the concession is properly made. *Passenger Cases*, 7 How. 402; *Hays* v. *Steamship Co.* 17 How. 598, 15 L. ed. 255.

Such a concession, however, does not advance the argument much for the defendant, as it is not only equally true but absolutely certain that no state can, without the consent of Congress, lay any duty of tonnage; and the question still remains to be determined whether the taxes in this case were or were not levied as duties of tonnage, as it is clear, if they were, that the judgment of the state court must be reversed.

Taxes levied by a state upon ships and vessels owned by the citizens of the state as property, based on a valuation of the same as property, are not within the prohibition of the Constitution, but it is equally clear and undeniable that taxes levied by a state upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the states from levying any duty of tonnage, without the consent of Congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the state which levies the tax or to the citizens *of another state, as the prohibition is [*214 general, withdrawing altogether from the states the power to lay any duty of tonnage under any circumstances, without the consent of Congress. *Gibbons* v. *Ogden*, 9 Wheat. 202; *Sinnot* v. *Davenport*, 22 How. 238, 16 L. ed. 246; *Foster* v. *Davenport*, 22 How. 245, 16 L. ed. 248; *Perry* v. *Torrence*, 8 Ohio, 524.

Annual taxes upon property in ships and

vessels are continually laid, and their validity was never doubted or called in question, but if the states, without consent of Congress, tax ships or vessels as instruments of commerce, by a tonnage duty, or indirectly by imposing the tax upon the master or crew, they assume a jurisdiction which they do not possess, as every such act falls directly within the prohibition of the Constitution. *Passenger Cases*, 7 How. 447, 481.

Prior to the adoption of the Constitution the states attempted to regulate commerce, and they also levied duties on imports and exports and duties of tonnage, and it was the embarrassments growing out of such regulations and conflicting obligations which mainly led to the abandonment of the Confederation and to the more perfect union under the present Constitution.

Congress possesses the power to regulate commerce with foreign nations and among the several states and it is well-settled law that the word "commerce," as used in the Constitution, comprehends navigation and that it extends to every species of commercial intercourse between the United States and foreign nations and to all commerce in the several states, except such as is completely internal and which does not extend to or affect other states. *Gibbons* v. *Ogden*, 9 Wheat. 193.

Authority is also conferred upon Congress to lay and collect taxes, but this grant does not supersede the power of the states to tax for the support of their own governments, nor is the exercise of that power by the states, unless it extends to objects prohibited by the Constitution, an exercise of any portion of the power that is granted to the United States.

215*] *Whether the act of laying and collecting taxes, duties, imposts and excises was a branch of the taxing power or of the power to regulate commerce, was directly under consideration in the case last cited; and it was conclusively settled that the exercise of such a power must be classed with the power to levy taxes. Had the Constitution, therefore, contained no prohibition, it is quite clear that it would have been competent for the states to levy duties on imports, exports, or tonnage, as they had done under the Confederation.

Tonnage duties are as much taxes as duties on imports or exports, and the prohibition of the Constitution extends as fully to such duties if levied by the states as to duties on imports or exports, and for reasons quite as strong as those which induced the framers of the Constitution to withdraw imports and exports from state taxation. Measures, however, scarcely distinguishable from each other may flow from distinct grants of power, as, for example, Congress does not possess the power to regulate the purely internal commerce of the states, but Congress may enroll and license ships and vessels to sail from one port to another in the same state; and it is clear that such ships and vessels are deemed ships and vessels of the United States, and that as such they are entitled to the priveleges of ships and vessels employed in the coasting trade. 1 Stat. at L. 287, 305; 3 Kent, Com. (11th ed.) 203.

Ships and vessels enrolled and licensed under that act are authorized to carry on the coasting trade, as the act contains a positive enactment that the ships and vessels it describes, and no others, shall be deemed ships and vessels of the United States entitled to the privileges of ships and vessels employed in the trade therein described. *Gibbons* v. *Ogden*, 9 Wheat. 212.

Evidently the word "license" as used in that act, as the court say in that case, means permission or authority, and it is equally clear that a license to do any particular thing is a permission or authority to do that thing, and if granted by a person having power to grant it, that it transfers to the grantee the right to do whatever it purports to authorize.

*Unquestionably, the power to regu- [*216 late commerce includes navigation as well as traffic in its ordinary signification, and embraces ships and vessels as the instruments of intercourse and trade as well as the officers and seamen employed in their navigation. *Brown* v. *Maryland*, 12 Wheat. 445; *New York* v. *Miln*, 11 Pet. 134; *People* v. *Brooks*, 4 Den. 476; *Steamboat Co.* v. *Livingston*, 3 Cow. 743.

Steamboats, as well as sailing ships and vessels, are required to be enrolled and licensed for the coasting trade, and the record shows that all the steamboats taxed in this case had conformed to all the regulations of Congress in that regard; that they were duly enrolled and licensed for the coasting trade and were engaged in the transportation of passengers and freight within the limits of the state, upon waters navigable from the sea by vessels of ten or more tons burden.

Tonnage duties, to a greater or less extent, have been imposed by Congress ever since the Federal government was organized, under the Constitution, to the present time. They have usually been exacted when the ship or vessel entered the port, and have been collected in a manner not substantially different from that prescribed in the act of the state legislature under consideration. Undisputed authority exists in Congress to impose such duties, and it is not pretended that any consent has ever been given by Congress to the state to exercise any such power.

If the tax levied is a duty of tonnage, it is conceded that it is illegal, and it is difficult to see how the concession could be avoided, as the prohibition is express, but the attempt is made to show that the legislature in enacting the law imposing the tax, merely referred to the registered tonnage of the steamboats "as a way or mode to determine and ascertain the tax to be assessed on the steamboats, and to furnish a rule or rate to govern the assessors in the performance of their duties."

Suppose that could be admitted, it would not have much *tendency to strengthen [*217 the argument for the defendant, as the suggestion concedes, what is obvious from the schedule, that the taxes are levied without any regard to the value of the steamboats. But the proposition involved in the suggestion cannot be admitted, as by the very terms of the act, the tax is levied on the steamboats wholly irrespective of the value of the vessels as property, and solely and exclusively on the basis of their cubic contents as ascertained by the rules of admeasurement and computation prescribed by the act of Congress.

By the terms of the law the taxation prescribed is "at the rate of one dollar per ton of the registered tonnage thereof" and the 90th section of the act provides that the tax col-

lector must, each year, demand of the person in charge of the steamboat whether the taxes have been paid, and if the person in charge fails to produce a receipt therefor by a tax collector, authorized to collect such taxes, the collector having the list must at once proceed to assess the same, and if the tax is not paid on demand he must seize such steamboat, etc., and after twenty days' notice, as therein prescribed, shall sell the same, or so much thereof as will pay the taxes and expenses for keeping and costs. Sess. Acts 1866, pp. 7, 31.

Legislative enactments, where the language is unambiguous, cannot be changed by construction, nor can the language be divested of its plain and obvious meaning. Taxes levied under an enactment which directs that a tax shall be imposed on steamboats at the rate of $1 per ton of the registered tonnage thereof, and that the same shall be assessed and collected at the port where such steamboats are registered, cannot, in the judgment of this court, be held to be a tax on the steamboat as property. On the contrary, the tax is just what the language imports, a duty of tonnage, which is made even plainer when it comes to be considered that the steamboats are not to be taxed at all unless they are "plying in the navigable waters of the state" showing to a demonstration that it as instruments of commerce, and 218*] *not as property that they are required to contribute to the revenues of the state.

Such a provision is much more clearly within the prohibition in question than the one involved in a recent case decided by this court, in which it was held that a statute of a state enacting that the wardens of a port were entitled to demand and receive, in addition to other fees, the sum of $5 for every vessel arriving at the port, whether called on to perform any service or not, was both a regulation of commerce and a duty of tonnage, and that as such it was unconstitutional and void. *Steamship Co.* v. *Port Wardens*, 6 Wall. 34, 18 L. ed. 750.

Speaking of the same prohibition, the Chief Justice said in that case that those words, in their most obvious and general sense, describe a duty proportioned to the tonnage of the vessel—a certain rate on each ton—which is exactly what is directed by the provision in the tax act before the court, but he added that it seems plain, if the Constitution be taken in that restricted sense, it would not fully accomplish the intent of the framers, as the prohibition upon the states against levying duties on imports or exports would be ineffectual if it did not also extend to duties on the ships which serve as the vehicles of conveyance, which was, doubtless, intended by the prohibition of any duty of tonnage. "It was not only a *pro rata* tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty."

Assume the rule to be as there laid down and all must agree that "the levy of the tax in question is expressly prohibited, as the schedule shows that it is exactly proportioned to the registered tonnage of the steamboats plying in the navigable waters of the state."

Strong as the language of the Chief Justice is in that case, it is no stronger than the language employed by the supreme court of the state to which this writ of error was addressed in the case of *Sheffield* v. *Parsons*, 3 Stew. & P. 304, in which the court in effect *says [*219 that no tax, custom or toll can be levied "on the tonnage of any vessel without the consent of Congress, for any purpose." Precisely the same rule was applied by that court to vessels duly enrolled and licensed for the coasting trade, and which were exclusively engaged in the towage and lighterage business in the bay and harbor of Mobile, carrying passengers and freight between the city and vessels at the anchorage below the bar. *Lott* v. *Morgan*, 41 Ala. 250.

Some stress was laid in that case upon the circumstances that the vessels taxed were engaged in transporting cargoes to and from vessels engaged in foreign commerce, bound to that port, but it is quite clear that that circumstance is entitled to no weight, as the prohibition extends to all ships and vessels entitled to the privileges of ships and vessels employed in the coasting trade, whether employed in commercial intercourse between ports in different states or between different ports in the same state. *People* v. *S. & R. R. Co.* 15 Wend. 131; *Steamboat Co.* v. *Livingston*, 3 Cow. 743.

Formerly harbor-masters, at the Port of Charleston, by an ordinance of that city, might exact one cent per ton, once in every three months, of every steam-packet or other vessel from certain adjoining states trading steadily there and performing regular successive voyages to that port, but when the question came to be presented to the court of errors of that state, the judges unanimously held that the exaction was a duty of tonnage, and that, as such, the provision was unconstitutional and void. *Alexander* v. *Railroad*, 3 Strob. 598.

Taxes in aid of the inspection laws of a state, under special circumstances, have been upheld as necessary to promote the interests of commerce and the security of navigation. *Cooley* v. *Port Wardens*, 12 How. 314.

Laws of that character are upheld as contemplating benefits and advantages to commerce and navigation, and as altogether distinct from imposts and duties on imports and exports and duties of tonnage. Usage, it is said, has sanctioned *such laws where [*220 Congress has not legislated, but it is clear that such laws bear no relation to the act in question, as the act under consideration is emphatically an act to raise revenue to replenish the treasury of the state and for no other purpose, and does not contemplate any beneficial service for the steamboats or other vessels subjected to taxation.

Beyond question the act is an act to raise revenue without any corresponding or equivalent benefit or advantage to the vessels taxed or to the ship-owners and, consequently, it cannot be upheld by virtue of the rules applied in the construction of laws regulating pilot dues and port charges. *State* v. *Charleston*, 4 Rich. 286; *Benedict* v. *Vanderbilt*, 1 Rob. N. Y. 200.

Attempt was made in the case of *Alexander* v. *Railroad, supra*, to show that the form of levying the tax was simply a mode of assessing the vessels as property, but the argument did not prevail, nor can it in this case, as the amount of the tax is measured by the tonnage

of the steamboats, and not by their value as property.

Reference is made to the case of *The Union Towboat Co.* v. *Bordelon*, 7 La. Ann. 195, as asserting the opposite rule, but the court is of a different opinion, as the tax in that case was levied, not upon the boat but upon the capital of the company owning the boat, and the court in delivering their opinion say the capital of the company is property, and the Constitution of the state requires an equal and uniform tax to be imposed upon it with the other property of the state for the support of government.

For these reasons the court is of opinion that the state law levying the taxes in this case is unconstitutional and void, that the judgment of the state court is erroneous, and that it must be reversed, and having come to that conclusion the court does not find it necessary to determine the other question.

Judgment reversed, with costs, and the cause remanded for further proceedings in conformity to the opinion of the court.

THE MOBILE TRADE COMPANY, *Plff. in Err.*,
v.
ELISHA B. LOTT.

(See S. C. *"State Tonnage Tax Cases,"* 12 Wall. 221-226).

States cannot levy a duty of tonnage on vessels —extent of prohibition.

Preceding case of Cox v. Lott, followed.

The states cannot levy a duty of tonnage on ships or vessels.

The prohibition extends to ships or vessels employed in commerce between ports, and places in the same state.

[No. 147.]

Argued Apr. 14, 1871. Decided Oct. 30, 1871.

IN ERROR to the Supreme Court of the State of Alabama.

The bill in this case was filed in a chancery court of the county of Mobile, Alabama, by the plaintiff in error, for an injunction against the collection of certain taxes. A decree having been entered in favor of the complainant, the respondent took an appeal to the supreme court of the state, by which the said decree was reversed. Whereupon the complainant sued out this writ of error.

The case is further stated by the court.

For abstract of arguments upon this case, see the case preceding, with which this case was argued.

Messrs. **P. Hamilton** and **J. A. Campbell** for plaintiff in error.

Mr. **P. Phillips** for defendant in error.

Mr. Justice **Clifford** delivered the opinion of the court:

Much discussion of the questions involved in this record will not be required, as they are substantially the same as those presented in the preceding case, which have already been fully considered and definitely decided.

Submitted, as the case was, in the court below, on a demurrer to the bill of complaint, and on the answer of the respondent, it will be necessary to refer to the pleadings to ascertain the nature of the controversy, by which it appears that the complainants are a corporation, created by the legislature of the state of Alabama, having their place of business at Mobile, in that state; that they were the owners of twelve steamboats, as alleged in the bill of complaint, filed by them on the 12th of October, 1867, in the chancery court for that county, and that the respondent is the collector of taxes for that county, and a resident of the city of Mobile.

Coming to the merits, the complainants allege that the respondent, as such collector, pretends and insists that they are liable under the laws of the state to pay a state tax of $1 per ton of the registered tonnage of the said several steamboats, without any regard to their value as property; that he also claims that he, as such collector, is authorized by law to collect that amount of the complainants, and also another sum equal to seventy-five per cent of the state tax, for the county, and also another sum, equal to twenty-five per cent of the state tax, as a school tax, making in all a tax of $2 per ton of the registered tonnage of the said several steamboats, exclusive of the fees of the collector and assessor, amounting to $1.50 on each of the said steamboats. All of the taxes in controversy in this case were levied by virtue of an act of the legislature approved February 19, 1867, entitled "An Act to Establish Revenue Laws for the State," and it is conceded that the provisions, so far as respects this controversy, are the same as the act under which the taxes were *levied in the [*222 preceding case. Sess. Acts 1867, p. 645; Rev. Code, 1867, p. 109, art. II. § 434, par. 11. Bills of the taxes, it is alleged, were rendered to the complainants, but it is not necessary to enter into these details, except to say that the taxes were levied in the same form as in the preceding case, and the complainants allege that the respondent claims that he is authorized, in case they refuse to pay the taxes, to seize the respective steamboats, and that he may proceed, after twenty days' notice, to sell the same, or as much thereof as will pay the taxes, expenses and costs. They, the complainants, deny the legality of the taxes and allege that the respondent, as such collector, threatens to seize the said steamboats and to proceed to sell the same to pay the taxes, expenses and costs, which, they insist, would be contrary to equity. Being without any remedy at law, as they allege, they ask the interposition of a court of equity, and allege that the taxes are illegal upon two grounds, which are as follows:

1. That the tax is a duty of tonnage, levied in violation of the 10th section of the 1st article of the Constitution, and in support of that allegation they allege that all the steamboats, at the time the taxes were levied, were, and that they still are, duly enrolled and regularly licensed to engage in the coasting trade under and in pursuance of the revenue laws of the United States, and that all the duties imposed upon the steamboats by the laws of the United States have been paid and discharged.

2. That the law of the state levying the taxes is in violation of the act of Congress passed to enable the people of Alabama territory to form a Constitution and state government, and for the admission of the same into the Union, and of the ordinance passed by the people of the territory accepting that provision. 3 Stat. at L. 492. Wherefore they pray for process and for an injunction. Process

was issued and served, and the respondent appeared and filed an answer, setting up the validity of the taxes and alleging that the taxes were not intended to be a tonnage duty, 223*] but simply and only a tax on *the personal property held by the complainants. He also demurred to the bill of complaint, insisting that nothing alleged and charged therein was sufficient to require a further answer. Prior to the filing of the answer the chancellor granted a temporary injunction, and the cause having been subsequently submitted to the court on bill and answer, the chancellor entered a decree making the injunction perpetual, and the respondent appealed to the supreme court of the state, where the injunction was dissolved and the bill of complaint was dismissed. Dissatisfied with that decree, the complainants sued out a writ of error and removed the cause into this court.

Different remedies are accorded to a complaining party in different jurisdictions for grievances such as the one set forth in the bill of complaint before the court. Usually preventive remedies are discountenanced as embarrassing to the just operations of the government, and the party taxed is required to pay the tax and seek redress in an action of assumpsit against the collector for money had and received. Decided cases may also be referred to where it is held that trespass will lie against the assessor, if it appear that the whole tax was levied without authority, as in that state of the case it is held that the assessor had no jurisdiction of the subject-matter. Preventive remedies, however, are accorded in some of the states, and in cases brought here by writ of error under the 25th section of the judiciary act, if no objection was taken in the court below to the form of the remedy employed, and none is taken in this court, it may safely be assumed that the proceeding adopted was regarded in the court below as an appropriate remedy for the alleged grievance. Doubts upon that subject cannot be entertained in this case, as the record shows that both courts heard and determined the case upon the merits, and all parties conceded throughout the litigation that the complainants were entitled to the relief prayed in the bill of complaint, if the taxes were illegal, and the law levying the same was unconstitutional and void.

224*] *Power to tax for the support of the state governments exists in the states independently of the Federal government, and it may well be admitted that where there is no cession of jurisdiction for the purposes specified in the Constitution, and no restraining compact between the states and the Federal government, the power in the states to tax reaches all the property within the state which is not properly denominated the instruments or means of the Federal government. *Nathan* v. *Louisiana*, 8 How. 82; *McCulloch* v. *Maryland*, 4 Wheat. 429; *Soc. for Savings* v. *Coite*, 6 Wall. 604, 18 L. ed. 901; *Brown* v. *Maryland*, 12 Wheat. 448; *Weston* v. *Charleston*, 2 Pet. 467.

Concede all that and still the court is of the opinion that the tax in this case is a duty of tonnage, and that the law imposing it is plainly unconstitutional and void. Taxes, as the law provides, must be assessed by the assessor in each county on and from the following subjects and at the following rates, to wit: "On all steamboats, etc., plying in the navigable waters of the state, at the rate of one dollar per ton of the registered tonnage thereof," which must be assessed and collected at the port where such steamboats are registered, etc. Rev. Code, 169. Copied as the provision is from the enactment of the previous year, it is obvious that it must receive the same construction, and as the tax is one dollar per ton it is too plain for argument that the amount of the tax depends upon the carrying capacity of the steamboat, and not upon her value as property, as the experience of everyone shows that a small steamer, new and well built, may be of much greater value than a large one, badly built or in need of extensive repairs. Separate lists are made for the county and school taxes, but the two combined amount exactly to $1 per ton, as in the levy for the state tax, and the court is of the opinion that the case falls within the same rule as the case just decided.

Evidently the word "tonnage" in commercial designation means the number of tons burden the ship or vessel will *carry, as esti- [*225 mated and ascertained by the official admeasurement and computation prescribed by the public authority. Regulations upon the subject are enacted by Parliament in the parent country and by Congress in this country, as appears by several acts of Congress. 1 Stat. at L. 305; 13 Stat. at L. 444. Tonnage, says a writer of experience, has long been an official term intended originally to express the burden that a ship would carry, in order that the various dues and customs which are levied upon shipping might be levied according to the size of the vessel, or rather in proportion to her capability of carrying burden. Hence the term, as applied to a ship, has become almost synonymous with that of size. Homan. Com. and Nav. Tonnage. Apply that interpretation to the word "tonnage" as used in the tax act under consideration, and it is as clear as anything can be in legislation that the tax imposed by that provision is a tonnage tax, or duty of tonnage, as the phrase is in the Constitution.

State authority to tax ships and vessels, it is supposed by the respondent, extends to all cases where the ship or vessel is not employed in foreign commerce or in commerce between ports or places in different states. He concedes that the states cannot levy a duty of tonnage on ships or vessels if the ship or vessel is employed in foreign commerce or in commerce "among the states," but he denies that the prohibition extends to ships or vessels employed in commerce between ports and places in the same state, and that is the leading error in the opinion of the supreme court of the state. Founded upon that mistake the proposition is that all taxes are taxes on property, although levied on ships and vessels duly enrolled and licensed, if the ship or vessel is not employed in foreign commerce or in commerce among the states.

Ships or vessels of ten or more tons burden duly enrolled and licensed, if engaged in commerce on waters which are navigable by such vessels from the sea, are ships and vessels of the United States entitled to the privileges secured to *such vessels by the act for en- [*226

rolling or licensing ships or vessels to be employed in the coasting trade. 1 Stat. at L. 205, 287.

Such a rule as that assumed by the respondent would incorporate into the Constitution an exception which it does not contain. Had the prohibition in terms applied only to ships and vessels employed in foreign commerce or in commerce among the states, his construction would be right, but courts of justice cannot add any new provision to the fundamental law and, if not, it seems clear to a demonstration that the construction assumed by the respondent is erroneous.

The decree of the Supreme Court of the State is reversed and the cause remanded for further proceedings in conformity to the opinion of this court.

194*] *THE HOWARD FIRE INSURANCE COMPANY, *Plff. in Err.*,

v.

THE NORWICH & NEW YORK TRANSPORTATION COMPANY.

(See S. C. 12 Wall. 194-201.)

Two causes of loss of property insured—discrimination — efficient cause — liability for loss.

In case of the concurrence of two causes of loss, one at the risk of the assured and the other insured against, if the damage by the perils respectively can be discriminated, each party must bear his proportion.

Where the damage by each cause of loss cannot be distinguished, the party responsible for the predominating efficient cause, or that by which the operation of the other is directly occasioned, as being merely incidental to it, is liable to bear the loss.

When an efficient cause nearest the loss is the peril expressly insured against, the insurer is not to be relieved from responsibility by his showing that the property was brought within that peril by a cause not mentioned in the contract.

[No. 130.]

Argued Apr. 5, 1871. Decided Nov. 6, 1871.

IN ERROR to the Circuit Court of the United States for the District of Connecticut.

Suit was brought in the superior court in New London county, Connecticut, by the defendant in error, to recover upon a contract of insurance. Upon petition of the defendant, the cause was removed to the court below. Judgment having been given for the plaintiff, the defendant sued out this writ of error.

The case is fully stated in the opinion of the court.

Messrs. **James C. Carter** and **George Pratt** for plaintiff in error.

Messrs. **James A. Hovey** and **Jeremiah Halsey** for defendant in error.

Mr. Justice **Strong** delivered the opinion of the court:

Mr. Phillips, in his Treatise on the Law of Insurance, lays down two rules respecting the concurrence of different causes of loss, which the plaintiffs in error contend should be applied to this case, and which, if applied, they insist must lead to a reversal of the judgment in the court below. 1 Phil. Ins. §§ 1136, 1137. The first of these is:

"In case of the concurrence of two causes of loss, one at the risk of the assured, and the other insured against, or one insured against by A, and the other by B, if the damage by the perils respectively can be discriminated, each party must bear his proportion."

*The second is: [*197

"Where different parties, whether the assured and the underwriter, or different underwriters, are responsible for different causes of loss, and the damage by each cannot be distinguished, the party responsibile for the predominating efficient cause, or that by which the operation of the other is directly occasioned, as being merely incidental to it, is liable to bear the loss."

Phil. Ins. vol. 1, §§ 1136, 1137.

These propositions may be accepted as correct statements of the law, and the question before us is, whether the circuit court, in giving judgment for the assured, failed to apply them rightly to the facts of the case.

The plaintiffs in error insured for the defendants the steamer Norwich, against fire, and the policy was in force when the loss occurred. It covered the steamer, her hull, boilers, machinery, tackle, furniture, apparel, etc., whether stationary or movable, whether the boat should be running or not running, and insured thereon $5,000 against all such loss or damage, not exceeding the sum insured, as should happen to the property by fire, other than fire happening by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power. Thus, loss from fire happening in consequence of any other cause than those excepted, was covered by the policy. The insurers took the risk of fires caused by lightning, explosions, and collisions. Such was the contract.

The circumstances attending the loss, as appears from the special findings of the court, by which the case was tried without the intervention of a jury, were substantially these:

While on one of her regular trips from Norwich to New York, on Long Island Sound, the steamer collided with a schooner, the latter striking her on her port side, and cutting her hull below the water line, in consequence of which she immediately and rapidly began to fill with water. Within ten or fifteen minutes after the collision the water reached the floor of the furnace, and the steam thereby generated blew out the fire, which communicated with the woodwork of the boat. Her upper works and her combustible freight were soon enveloped in flames, and they continued to burn half or three quarters of an hour, when she gradually sunk in twenty fathoms of water, heeling over. The steamer was so constructed that her main deck was completely housed in from stem to stern, up to her promenade or hurricane deck above. Her freight was stowed on the main deck, and her cabin and state-rooms were on the hurricane deck. From the effects of the collision alone, she would not have sunk below her promenade deck, but would have remained there suspended in the water and would have been towed to a place of safety, when she, her engines, tackle, and furniture could have been repaired and restored to their condition prior to the collision, for the sum of $15,000, the expense of towage included. The sinking of the steamer below the promenade deck was the result of the action of the fire, in burning off her light upper works and housing, thus liberating her freight, allowing much of it to

drift away, whereby her floating capacity was greatly reduced, so that she sunk to the bottom, and all the damage which she suffered beyond the $15,000 above named as chargeable to the collision (amounting to $73,000) including the cost of raising the boat, was the natural and necessary result of the fire and of the fire only. All these are found as facts by the circuit court.

It is now urged on behalf of the plaintiffs in error the findings in the case establish that the sinking of the steamer, wherein consisted principally the loss, or that part of it in excess of $15,000 chargeable to the collision, was the result of two concurrent causes, one the fire and the other the water in the steamer's hold, let in by the breach made by the collision. As the influx of the water was the direct and necessary consequence of the collision, it is argued that the collision was the predominating and, therefore, the proximate cause of the loss. The argument overlooks the fact, distinctly found, that the damage resulting from the sinking of the vessel was the natural and necessary result of the fire only. If it be said that this was but an inference from facts previously found, it was not for that reason necessarily a mere legal conclusion. But we need not rely upon this. Apart from that finding, the other findings, unquestionably of facts, show that neither the col- 198* j lision nor the presence of water in *the steamer's hold was the predominating efficient cause of her going to the bottom. That result required the agency of the fire. It is found that the water would not have caused the vessel to sink below her promenade deck, had not some other cause of sinking supervened. It would have expended its force at that point. The effects of the fire were necessary to give it additional efficiency. The fire was, therefore, the efficient, predominating cause, as well as nearest in time to the catastrophe, which not only directly contributed to all the damage done, after the steamer had sunk to her promenade deck, but enlarged the destructive power of the water, and rendered certain the submergence of the vessel. This plainly appears, if we suppose that the fire had occurred on the day after the collision, and had originated from some other cause than the collision itself. The effects of the prior disaster would then have been complete. The steamer would have been full of water, sunk to her promenade deck, and remaining thus suspended, would have been towed to a place of safety and saved, in that condition, to her owners, except for the new injury. But the fire occurring on the next day destroying the upper works and the housing, thus liberating the light freight and greatly reducing the floating capacity of the steamer, would have caused her to sink to the bottom as she did. In the case supposed, the water would have been as truly a concurrent and efficient cause of the steamer's sinking as it was in the case now in hand. It would have operated in precisely the same manner, remaining dormant until given new activity. But could there have been any hesitation in that case in determining which was the proximate, the efficient, predominating cause of the sinking of the vessel? And can it be doubted that the underwriters against loss by fire would be held responsible for such a loss? Wherein does the case supposed differ in principle from the present, when the facts found are considered? True, the fire in this case was caused by the collision, but the policy insured against fire caused by collision. True, the fire immediately following the filling of the steamer with water, or commenced while she was filling, but the effects of the *fire [*199 are conclusively distinguished from the breach in the steamer's hull, and the filling of her hold with water. The damages caused by the several agencies have been discriminated, and its proper share assigned to each. It is an established fact that the damaging effect of the water, independent of the fire, would not have reached beyond sinking of the steamer to its upper deck when she would have been saved from further injury.

There is, undoubtedly, difficulty, in many cases, attending the application of the maxim, "*Proxima causa, non remota spectatur*," but none when the causes succeed each other in order of time. In such cases the rule is plain. When one of several successive causes is sufficient to produce the effect (for example, to cause a loss) the law will never regard an antecedent cause of that cause, or the "*causa causans*." *Gen. Mutual Ins. Co.* v. *Sherwood*, 14 How. 366. In such a case there is no doubt which cause is the proximate one within the meaning of the maxim. But, when there is no order of succession in time, when there are two concurrent causes of a loss, the predominating, efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished. Such is, in effect, Mr. Phillips' rule. And certainly that cause which set the other in motion and gave to it its efficiency for harm at the time of the disaster, must rank as predominant. In the present case, however, the rule hardly seems applicable, because the damage resulting from the fire and that caused by the filling of the steamer, are clearly distinguished.

It is true, as argued, that as the insurance in this case was only against fire, the assured must be regarded as having taken the risk of collision, and it is also true that the collision caused the fire; but it is well settled that when an efficient cause nearest the loss is a peril expressly insured against, the insurer is not to be relieved from responsibility by his showing that the property was brought within that peril by a cause not mentioned in the contract. *St. [*200 *John* v. *Amer. Mut. Ins. Co.* 11 N. Y. 519. That case is instructive and is, in one particular at least, responsive to the argument of the plaintiffs in error. It exhibits the difference, in effect, between an express exception from a risk undertaken, and silence in regard to a peril not insured against. The policy, as here, was against fire, but it contained a provision that the company would not be liable "for any loss occasioned by the explosion of a steam-boiler." While it was in force there was an explosion of a steam-boiler which caused the destruction of the property insured by fire. It was held the insurers were not liable. The proviso, or exception, was construed, as extending to fire caused by such explosions, for, as the parties were contracting about the peril of fire alone, an express exception of all loss from explosions must have been meant to cover fire when a consequence of explosions; otherwise the exception would have been unmeaning. But the court said, if nothing had been said in the policy respecting a steam-boiler, the loss, having been

occasioned by fire as its proximate cause, would have rested on the insurers, although it had been shown as it might have been, that the fire was kindled by means of the explosion. The judgment thus turned on the effect of an express exception. Had there been none, the court would have inquired how the fire happened, whether by an explosion or not. In the case before us there is no exception of collisions, or fires caused by collisions. It must, therefore, be understood that the insurers took the risk of all fires not expressly excepted.

It has been argued that because the policy was against fire only, the assured are to be considered their own insurers against perils of the sea, including collisions, and as insurers against marine risks are liable for collisions, with all their consequences, including fires, the assured in this case must be held to have undertaken that risk. This would be so if they had taken out no policy against fire. But that works a material difference. Suppose these underwriters had insured the steamer against collisions and fire, and had then re-insured in another company against fire alone, as they 201*] *might have done, would it have been a sufficient answer to a suit brought by them against their insurers, that the fire which caused the steamer to sink was itself caused by a collision? No one will affirm that. Yet upon the theory of the plaintiffs in error, this is substantially what is now attempted. Before any policy was issued, the transportation company were their own insurers against collisions and fire, no matter how caused. They sought protection against some of the possible consequences of these risks, and they obtained a policy insuring them against all loss by fire, except fire caused by certain things, of which collision was not one. Against every other consequence of a collision than a fire, they remained their own insurers, but the risk of fire was no longer theirs.

We have already sufficiently said that the amount of the loss caused by the collision, apart from the fire, was distinctly ascertained, and the insurers were not charged with it. So was the amount of loss caused by the fire itself ascertained. If, therefore, it was a case of the concurrence of two causes of loss, one at the risk of the assured, and the other of the insurers, the damage resulting from each has been discriminated, and the insurers have been held liable only for that caused by the peril against which they contracted. *Vide, Heebner* v. *Eagle Ins. Co.* 10 Gray, 143.

Judgment has, therefore, been given in conformity with the rules, as above stated, in Phillips on Insurance. It is affirmed.

THE WESTERN MASSACHUSETTS INSURANCE COMPANY, *Plff in Err.*,

v.

THE NORWICH & NEW YORK TRANSPORTATION COMPANY.

(See S. C. 12 Wall. 201-204.)

Ins. Co. v. Transportation Co. *ante*, 378, affirmed.

The loss of the assured must be measured by the standard provided in the policy.

[No. 131.]

Argued Apr. 5, 1871. Decided Nov. 6, 1871.

IN ERROR to the Circuit Court of the United States for the District of Connecticut.

Suit was brought by the defendant in error in the superior court of New London county, Connecticut, to recover upon a policy of insurance. Upon petition of the defendant, the case was removed to the court below. Judgment having been given for the plaintiff, the defendant sued out this writ of error.

The case is further stated in the opinion of the court.

Messrs. **James C. Carter** and **George Pratt** for plaintiff in error.

Messrs. **James A. Hovey** and **Jeremiah Halsey** for defendant in error.

Mr. Justice **Strong** delivered the opinion of the court:

The controlling question in this case is the same as that which we have considered in the Howard Insurance Company against these plaintiffs in error, just decided. We do not propose to reconsider it. Here, as in the other case mentioned, the insurers undertook against fire, even though caused by collision; and here, as in that case, they have been held liable only for the damages caused by fire. But the issues of fact in this case were submitted to a jury and, it is therefore, to be considered whether they were submitted with proper instructions.

It is complained that the circuit court instructed the jury that the way to determine the question whether the insurers were liable was to consider and determine whether the steamer would have sunk except for the effect of the fire. This is hardly a fair statement of the manner in which the case was submitted. The charge must be taken, not in detached portions, but according to its general tenor and effect.

What the judge did charge was that the main question for the jury to determine was whether the loss sustained by the plaintiffs was the natural, necessary and inevitable consequence of the fire. Then, after referring to the facts as proved, the judge added: "The question is, Would she (the steamer) have gone to the bottom but for the fire? This is a vital question, and must be decided by the jury before the plaintiff can recover. You will say in view of the evidence, whether she would have gone to the bottom, or only settled down to her promenade deck and remain suspended in the water, but for the effect produced by the fire. If she would not have sunk, but only settled in the water to the promenade deck, except for the effect of the fire in reducing her floating capacity, then the plaintiffs are entitled to recover." That this was, in our opinion, proper instruction is sufficiently shown by what we have said in the case just decided. We have also shown that the policy contained no implied exception against the consequences of any marine peril.

The only other thing which need be noticed is the allegation of the plaintiffs in error that the jury were instructed to ascertain the amount of the damage, not by reference to the actual cash value of the subject, but by the cost of restoration. If this complaint were founded in fact, it would call for a reversal of the judgment, for the policy stipulated that loss or damage should be estimated according to the true and actual cash value of the property at the time the same should happen. But when the in-

sured offered evidence to prove what was the actual cash value of the steamer before the collision, from which the damage caused by the collision might have been deducted, and thus the cash value of the property, at the time when the fire attacked it, might have been ascertained, the plaintiffs in error objected and the evidence was excluded. There remained, then, no way of establishing the cash value except by ascertaining the cost of restoration to the condition in which the steamer was before the fire. This was allowed, but the jury were instructed that if the cost of repairs exceeded the damage done by the fire they should deduct the excess. It is plain, therefore, that under such instructions the loss of the assured must have been measured by the standard provided in the policy.

It is sufficient to say of the admission of evidence to prove how much it cost to raise the 204*] steamer, that if it was erroneous *it did no harm. The value of the boat when raised was proved to have been exactly equal to the cost of raising her, and the insurers had the benefit of it.

Nothing need be said of the other exceptions. They were not pressed in the oral argument, nor in the printed briefs, and they exhibit no error.

Judgment is affirmed.

177*] *UNITED STATES, *Appt.*,
v.
JOSEPH F. MAYES, Administrator of Sarah Alexander.

(See S. C. 12 Wall. 177-181.)
Construction of pension act.

The pension act of Feb. 23, 1853, was not intended to have a retroactive effect, not to confer a right to a pension commencing prior to its passage.

[No. 155.]

Argued Oct. 19, 1871. Decided Nov. 6, 1871.

APPEAL from the Court of Claims.

Sarah Alexander filed her petition in the court of claims to obtain a pension as a widow. Judgment having been given in her favor, the defendant took an appeal to this court. She having died, her administrator was substituted as appellee.

The case is fully stated by the court.

Messrs **B. H. Bristow**, *Solicitor Gen.*, *T. H. Talbot*, and **C. H. Hill**, *Asst. Atty. Gen.*, for appellant.

Mr. **John A. Wills** for appellee.

Mr. Justice **Strong** delivered the opinion of the court:

This case depends for its solution upon the construction we give to the 2d section of the act of Congress of February 3, 1853, entitled "An Act to Continue Half Pay to Certain Widows and Orphans." The plaintiff in the court below claims that, under that act, his intestate, as the widow of a Revolutionary soldier, was entitled to a pension, commencing March 4, 1848. She was allowed a pension only from February 3, 1853, the date of the passage of the act, and this suit is an effort to recover what are called arrears, *viz.:* the pension for the time which elapsed between March 4, 1848, and February 3, 1853.

It has been insisted on behalf of the United States, that the court of claims has no jurisdiction in such a case. We do not propose, however, to determine that question now, for we are of opinion that, if that court has jurisdiction, it erred in giving judgment for the plaintiff. The section of the act of 1853 under which the plaintiff claims, is as follows:

"And be it further enacted, that the widows of all officers, non-commissioned officers, musicians, and privates of the Revolutionary Army, who were married subsequently to January, *anno domini* eighteen hundred, shall be entitled to a pension in the same manner as those who were married before that date." It is clear that if this act stood alone, no widow could be entitled to a pension under it, commencing anterior to its passage. All statutes are to be construed as acting prospectively, unless a contrary intent appears beyond doubt. But it is said the act is to be construed with reference to the prior act of July 29, 1848, which enacted "that the widows of all officers, non-commissioned officers, musicians, soldiers, mariners, or marines and Indian spies who shall have served in the continental line, state troops, volunteers, militia, or in a naval service, in the Revolutionary War with Great Britain, shall be entitled to a pension, during such widowhood, of an equal amount per annum that their husbands would be entitled to if living, under existing pension laws, to commence on the 4th day of March, eighteen hundred and forty-eight, and to be paid in the same manner that other pensions are paid to widows." (Then followed the exceptions.) "But no widow, now receiving a pension, shall be entitled to receive a further pension, under the provisions of this act; and no widow married after the first day of January, one thousand eight hundred, shall be entitled to receive a pension under this act." The 2d section enacted that the same rules of evidence, regulations, and prescriptions shall apply and govern the Commissioner of Pensions and pension agents, as now prevail under existing pension laws which relate to widows of Revolutionary officers and soldiers. The argument of the plaintiff is, that the act of 1853 was substantially an amendment of this act, intended to repeal the provision it contains, that widows married after January 1, 1800, should not be entitled to its benefits, and that hence the two acts must be read together, and all widows be entitled to a pension commencing on the 4th of March, 1848. This is inferred from the assumption that the act of 1848 must be referred to in order to fix the rate or amount of the pension granted by the act of 1853, as well as its duration, and that if there be an implied reference for those purposes, there must be for the purpose of fixing the commencement of the pension.

The argument is not without weight, but we think it insufficient to overbalance the reasons there are for holding that the act of 1853 is intended to grant pensions only from the time of its enactment. It does not profess to be an amendment of any former act, and there is no necessary reference to the act of 1848, even for the purpose of fixing the rate or duration of the

pensions granted by it. Laws prior to the act of 1848 had determined the rate of pensions granted to widows of Revolutionary soldiers as equal to the pay of the husband, and the pension was, of course, during widowhood, unless restricted by the statute. Nor was reference to any former act necessary to ascertain when the pension was to commence, for it commenced, of course, with the passage of the act, unless a different intention was either expressed or plainly implied. True, the act of 1853 declared that widows married after January, eighteen hundred, shall be entitled to a pension in the same manner as those who were married before that date, but the manner may well refer to the mode in which the pension must be obtained by the adjudication of the Commissioner of Pensions and to the rules, regulations, and prescriptions provided by law long before 1848 for the government of the commissioner and pension agents, and for the payment of pensions. Certainly such a direction is not inconsistent with our holding that the act of 1853 was not intended to have a retroactive effect, or to confer a right to a pension commencing prior to its passage.

But, without pursuing this line of remark further, whatever might be our opinion respecting the construction of the statute, were the matter *res nova*, we cannot regard the 180*] *question as an open one. Immediately after the passage of the act, it was construed by the Commissioner of Pensions as granting pensions commencing only from and after its passage, and such construction has ever since been given to it by that bureau. That such was its meaning seems also to have been the understanding of the next succeeding Congress after it was enacted. The act of 1848 gave pensions to widows of soldiers and mariners when they had been married before the first day of January, 1800. The act of 1853 gave pensions to widows of soldiers, but not to widows of mariners. This was followed by an act passed February 28, 1855, giving pensions to widows of mariners and marines who served in the navy during the Revolutionary War, "in the same manner, and to the same extent," as the widows of soldiers of the army, "under the 2d section of the act of February 3, 1853." Here not only the manner, but the extent of the pension was directed, and widows of mariners were put upon the same footing with widows of soldiers married after January, 1800. Had it been understood that soldiers' widows, married after January, 1800, were entitled to pensions commencing March 4, 1848, it would have been unnecessary to declare that mariners' widows should have pensions "to the same extent" as under the act of 1853. But measuring the extent by the grant made in 1853, and not by that of 1848, tends to show that Congress regarded the extent, or commencement, of the pension under the act of 1853, as different from that of those granted by the act of 1848. And this is made quite certain by the history of the legislation. The act of 1855, when first proposed, contained the following provision: "And the pensions granted by this act, and those under the said section of the act of February 3, 1853, shall commence on the 4th day of March, 1848." This provision was intended to change the construction which the Commissioner of Pensions had given to the act of 1853 (30 Cong. Globe, 92), but it was stricken out, and the statute was enacted as it now stands. The intention of *Congress was thus clearly manifested [*181 to adopt the construction of the act of 1853, which had been given to it by the Pension Bureau, and we are hardly at liberty now to interpret it differently.

In view of this action of Congress, and the long standing construction of the act given by the department whose duty it was to act under it, we are of opinion that the plaintiff's intestate was not entitled to a pension commencing anterior to February 3, 1853. The judgment of the court of claims was, therefore, erroneous.

The judgment is reversed and the record remanded, with instructions to dismiss the plaintiff's suit.

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*THE STEAMBOAT SYRACUSE, etc., [*167
The Albany Canal Line Company, Claimant, *Appt.*,

v.

THOMAS LANGLEY.

(See S. C. "*The Syracuse*," 12 Wall. 167-173.)

Tug, when liable for injury to tow—insufficient excuse—variance.

Although by special agreement, a canal-boat was being towed at her own risk nevertheless, the steamer towing the canal-boat is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss.

In cases of collision, where the master of the vessel could not have prevented the accident at the moment it occurred, this will not excuse him, if by timely measures of precaution, the danger could have been avoided.

There is no doctrine of mere technical variance in the admiralty; and if there is no design in an omission to state facts, it is the duty of the court to extract the real case from the whole record and decide accordingly.

[No. 177.]

Argued Oct. 27, 1871. Decided Nov. 6, 1871.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel in this case was filed in the district court of the United States for the southern district of New York, by the defendant in error, to recover damages resulting from a collision, in which a canal-boat of the libelant, while being towed by the steamboat Syracuse, was crushed and lost. A decree having been entered in favor of the libelant, the claimants of the Syracuse took an appeal to the circuit court, by which the said decree was affirmed. Whereupon the said claimants took a further appeal to this court.

The case is further stated by the court.

Messrs. **R. D. Benedict** *& Benedict*, for appellants:

The boat was towed under a contract on the part of the libelant, that he would bear the risks of the navigation, provided the steamboat,

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NOTE.—*Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting*—see notes, 13 L. ed. U. S. 537; 25 L. ed. U. S. 168; 28 C. C. A. 532; 29 C. C. A. 368.

Rules for avoiding collision; steamer meeting steamer—see notes, 14 L. ed. U. S. 68; 35 L. ed. U. S. 453; 30 C. C. A. 630.

Measure of damages in cases of collision—see note, 11 L. ed. U. S. 35.

which furnished the propulsive power, was navigated with ordinary care and skill.

It is to be borne in mind, also, that the application of the libelant to be towed was made after the tow was "nearly made up, and the Syracuse had swung away from the dock and was heading down stream." It is, therefore, the risk of being towed in that particular tow, provided it was navigated with ordinary care, skill, and prudence, that the libelant assumed.

Where damage has occurred to a boat towed under such a contract, there is no presumption in favor of the canal-boat nor against the steamboat.

So the officers of the Syracuse were called upon to give a fair and cautious consideration to the facts within their knowledge, and to form upon them an honest judgment. But if it appear that, having done so, they misjudged (for instance: as to the strength of the tide which they were to meet, ever varying with the changing moon and the varying winds), or if they erred in their estimate of the distance apart of two vessels, such error is not negligence. A fair judgment is all that can be had and all, therefore, that the law requires.

Wells v. *Steam Nav. Co.* 2 N. Y. 208; *The Julia*, Lush. 231; *The Farragut*, 10 Wall. 334, 19 L. ed. 946.

It is necessary for the libelant to make out his case. He must point out and prove the negligence, which alone will relieve him from the risks which he assumed; the presumption is the other way. We insist that nothing of the sort has been established.

It is true that we come before this court with two decisions against us. We claim, however, that the questions to be decided are questions of law. There is not sufficient diversity of evidence to make them questions of fact. On appeal on a question of law, there is no presumption of law in favor of the decision below.

It would seem clear, that among the risks which the libelant assumed, was the risk of a crowded harbor at New York, and the risk which would arise from the tows meeting an ebb-tide in East river, which might be uncommonly strong, as it was.

It is clear from the evidence that, upon this occasion, there was one passage and only one which afforded a prospect of taking the tow through in safety, and that the Syracuse took that passage.

***Mr.* James C. Carter**, for appellee:

This question of negligence is one of fact purely. It originally involved the consideration of a voluminous mass of testimony of numerous witnesses, as to much of which there were on the one side and the other the usual charges of contradiction, falsity, inconsistency and want of candor. This testimony was fully considered in the district court, and the issue on the question of negligence found against the claimants. After elaborate arguments in the circuit court, the same result was reached. By the settled rule of this tribunal, so frequently declared as to be entirely familiar, the question is no longer open to argument.

The sole allegation in the answer, of the presence of anything tending to baffle the skill and diligence, was an ebb-tide, which "proved to be unusually strong." The charge of negligence on the part of the canal-boat, contained in the answer, need not be noticed, as it was abandoned at the trial.

Nothing unusual is proved about the tide. Upon consulting the almanac for December 1, 1861, it will be seen that it was a low course of tides at that time, the moon not becoming full until December 17.

But the claimants, upon the trial, introduced upon the stage a story that the channel way around the Battery, so far from having been entirely clear and unobstructed for a space of from one half to three quarters of a mile wide as the pleadings had allowed everybody to suppose for nearly four years, was, in point of fact, crowded with vessels at anchor, beyond all former precedent, so that there was left only a narrow passageway of but about 250 feet wide, and that to pass this width, a steamboat and tow attached to her nearly a quarter of a mile in length, was a task to which human skill was unequal.

It was distinctly charged in the libel, that the entire space between the Battery and the vessel struck was open, and that its width was from one half to three quarters of a mile. Is it credible that, if this allegation were untrue, and the main excuse and defense of the claimants rested upon its untruth, it would have been allowed to stand, not only undenied, but by the strongest implication admitted by the answer?

Yet they proved by their own witnesses that, about half an hour before, the Cayuga, a weaker boat and with but one helper, went through the same place without difficulty, with about the same number of boats in tow; and it was proved by the uncontradicted testimony of Gould, that two other tows went safely through, immediately after the Syracuse.

On the testimony of their own witnesses, the Syracuse was guilty of the grossest neglect and want of foresight, in making the attempt to pass the Battery at that time, with a tow of such magnitude.

The following points are undisputed in the evidence; indeed they are substantiated, admitted by Capt. Spotten himself:

(*a*) That he could have taken a tow, of say half the size through that passageway, however narrow it was, at that very time of the tide, without danger.

(*b*) That he could have taken that whole tow through the same passageway, after the tide had slacked.

(*c*) That he could have stopped and divided his tow anywhere above Thirteenth street, and this very thing is not infrequently done.

(*d*) That he could have stopped anywhere above Thirteenth street, and probably much lower down, headed his tow up the river, and there remained until slack water. And of course he could have stopped and gone down to the Battery and ascertained exactly what the state of things there was.

(*e*) That he would have so stopped and waited, had he known the crowded state of the river off the Battery.

(*f*) That he knew, at the time, that the waters off the Battery were probably crowded with vessels for such had been the case all through that fall.

(*g*) That he had on this particular occasion a fair view of the state of things off the Bat-

tery, when he was a long distance up the river from the Battery, and then saw that the waters off the Battery were crowded with vessels.

(*h*) Of course he knew or ought to have known the strength of the tide at the time, for that was his very business.

Mr. Justice **Davis** delivered the opinion of the court:

It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that, by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences. It is admitted in the argument, and proved by the evidence, that the canal-boat was not to blame, and the inquiry, therefore, is: Was the steamer equally without fault?

172*] *It frequently happens in cases of collision that the master of the vessel could not have prevented the accident at the moment it occurred; but this will not excuse him, if, by timely measures of precaution, the danger could have been avoided. Testing the present case by this rule there is no difficulty in determining by whose fault this collision occurred. It may be true, that the master of the Syracuse, after he got his boat off the Battery with her tow, in making the turn to go up the East river, was unable to keep the canal-boat from striking against the brig, but the question arises: Ought he to have encountered this peril?

Manifestly not, under the proof furnished by the officers of the Syracuse themselves.

Spotten, the master, swears that there was considerable danger in taking a tow of the magnitude he had on that occasion, around from the North to the East river, when there is a strong ebb-tide and numerous vessels in the bay, and that there are always a large number of vessels at anchor off the Battery, and at some distance up the North river. He adds, that in the night-time, as a measure of precaution, he has stopped higher up from the Battery, and left his tow there until morning. If this precaution was necessary at night, why not in daylight, as the ebb-tide was very strong, and the danger, therefore, imminent? Briggs, the pilot, testified that a tow only half as large could have been taken through the gangway without doing any damage, and that there was no difficulty of dividing the tow, and stopping anywhere above Thirteenth street, at which point there is nothing to obstruct the view of the water off the Battery.

In the state of case disclosed by these witnesses, is it not plain that ordinary prudence required the master to stop where he was able to hold his tow, long enough to ascertain the state of things at the Battery?

It is no valid excuse for proceeding down the river, that, when off Thirteenth street, it was impossible to know the width of the gangway through which the vessels must pass to get into the East river, because it was easy to tell, even at that distance, that the river at the Battery was full of vessels and, therefore, in the state of the tide, dangerous to navigate with such a fleet of boats. In view of the magnitude of the tow, the admitted danger of handling it in a strong ebb-tide where there is a large amount of shipping, and the ability to stop where the tow could be managed, it was, to use the mildest term, negligence to make the attempt to pass the Battery into the East river. As the master could have stopped anywhere above Thirteenth street, it was his duty, under the circumstances, to have done so, and either to have divided his tow, or remain there until the tide had slacked. If companies engaged in the business of towing will, through greed of gain, undertake to transport, from *Albany [*173 to New York, more canal-boats in one tow than can be safely handled in the waters of New York, they must see that the large amount of property intrusted to their care is not placed in jeopardy, through the want of preliminary caution and foresight on the part of the officers of their steamers.

It is objected that the libel does not specifically charge this antecedent negligence as a fault. This is true, and the libel is defective on that account, but in admiralty an omission to state some facts which prove to be material but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libelant, if the court can see there was no design on his part in omitting to state them. *The Quickstep*, 9 Wall. 670, 19 L. ed. 768; *The Clement*, 2 Curt. 363. There is no doctrine of mere technical variance in the admiralty, and subject to the rule above stated, it is the duty of the court to extract the real case from the whole record, and decide accordingly. It is very clear that the libelant had no design in view in omitting to state the failure to stop as a fault, and equally clear, that the proof on that subject, coming, as it did, from the opposite party, could not have operated to surprise them.

The judgment of the Circuit Court is affirmed.

UNITED STATES, *Appt.*,
v.
THOMAS G. W. CRUSELL.

(See S. C. 12 Wall. 175, 176.)

Appeal from court of claims, when dismissed—continuance of.

This court will deny a motion to dismiss an appeal from a judgment of the court of claims when made upon the sole ground that a motion for a new trial had been made and was pending in that court; but will dismiss the appeal when a new trial has been granted.

It will allow a continuance of the case on appeal here for a reasonable time pending the motion for a new trial in the court of claims.

[No. 173.]

Argued Oct. 26, 1871. Decided Nov. 6, 1871.

APPEAL from the Court of Claims.

On motion for continuance.

The petition in this case was filed in the court of claims by the appellee. Judgment hav-

ing been given in his favor, the defendant took an appeal to this court.

The case is sufficiently stated by the court.

Messrs. A. T. Akerman, Atty. Gen., **C. H. Hill**, *Asst. Atty. Gen.*, and *T. H. Talbot*, for appellants.

Mr. **Jas. Hughes** for appellee.

Mr. Chief Justice **Chase** delivered the opinion of the court:

This is an application for continuance founded upon the fact that evidence has been newly discovered, on which a motion in behalf of the United States has been made for a new 176*] trial, under the act *of June 25, 1868. By that act the court of claims is authorized "at any time, while any suit or claim is pending before, or on appeal from said court, or within two years next after the final disposition of any such suit or claim," to grant a new trial on motion of the United States.

In the case of *The U. S.* v. *Ayers*, 9 Wall. 608, 19 L. ed. 625, this court denied a motion to dismiss an appeal from a judgment of the court of claims when the motion was made, upon the sole ground that a motion for a new trial had been made by the United States, and was pending in that court, but afterwards dismissed the same appeal when a new trial had been granted. We are satisfied with the rulings then announced, and think that the spirit of them requires us to allow the continuance now asked for. We must not be understood, however, as giving any sanction to the idea that indefinite postponement of final hearing and determination can be obtained by repeated motions for continuance here.

The objection that more than two years had elapsed after judgment in the court of claims before the motion for new trial was made should be adddressed to that court in opposition to the motion. Its decision, whatever it may be, can be reviewed here.

The motion to set aside the continuance heretofore allowed in the case of United States v. John Silvey, No. 157, is denied.

THE JUNCTION RAILROAD COMPANY,
Plff. in Err.,
v.
THE BANK OF ASHLAND.

(See S. C. 12 Wall. 226-232.)

Usury—place of payment—purchase of securities — question of fact—sale of one's own bond—collateral security—corporations—U. S. courts take judicial cognizance of state laws.

*1. If a bond be not usurious by the law of the place where payable, a plea of usury cannot be sustained in an action thereon, unless it alleges that the place of payment was inserted as a shift or device, to evade the law of the place where the bond was made.

*Headnotes by Mr. Justice BRADLEY.

NOTE.—*Lex loci as to usury*—see note, 3 L. ed. U. S. 205.

Purchase of obligation at less than face value is not usury—see note, 8 L. ed. U. S. 623.

Conflict of laws as to usury—see note, 62 L. R. A. 33.

2. Where a plea is erroneously overruled on demurrer, and issue is joined on another plea under which the same defense might be made, the judgment will not be disturbed after verdict.

3. A prohibition against loaning money, at a higher rate of interest than the law allows, will not prevent the purchase of securities at any price which the parties may agree upon.

4. Whether a negotiation of securities is a purchase or loan, is ordinarily a question of fact and does not become a question of law, until some fact be proven irreconcilable with one or the other conclusion.

5. Though the negotiation of one's own bond or note is ordinarily a loan in law, yet, if the sale thereof be authorized by an act of the legislature, it becomes a question of fact, whether such negotiation was a loan or a sale.

6. The requiring or giving of collateral security for the payment of a bond when negotiated, is not inconsistent with the transaction being a sale.

7. The law of Ohio, authorizing railroad companies to sell their own bonds and notes at such prices as they may deem expedient, is extended by comity to the companies of other states, authorized to transact business in Ohio.

8. A corporation cannot plead usury to a bond payable in New York.

9. The courts of the United States will take judicial notice of the public laws of the several states; and in Indiana, of the private as well as the public laws of that state.

[No. 160.]

Argued Oct. 23, 1871. Decided Nov. 6, 1871.

IN ERROR to the Circuit Court of the Unit- States for the District of Indiana.

Suit was brought in the court below, by the defendant in error, upon certain railroad bonds. Judgment having been given for the plaintiff, the defendant sued out this writ of error.

The case is fully stated by the court.

Messrs. Rufus King, **Charles P. James**, and *S. J. Thompson*, for plaintiff in error:

The court erred in sustaining the demurrer to the first special plea. This plea expressly alleges that the transaction was not a purchase, and sets up facts unavoidably fixing it as a loan.

Churchill v. *Suter*, 4 Mass. 156; *Payne* v. *Trezevant*, 2 Bay (S. C.) 23; *Gaither* v. *Bk.* 1 Pet. 37; *Nichols* v. *Fearson*, 7 Pet. 109.

The finding on the fifth plea does not help the error in sustaining the demurrer to the first. It does not cover the same ground. The refusal of the trust company to purchase, and the allegation that the transaction was not a purchase, which the demurrer admits on the first plea, are not mentioned in the fifth. The finding is that the Ashland Bank had no notice, but the demurrer to the first plea admits that it had.

The court erred in the special finding that the said negotiation therein stated did not amount to a loan of said $125,000, but to a sale of the said bonds and coupons, and the transaction therein described and found "involved nothing usurious." *Bk.* v. *Jones*, 16 Ohio St. 145.

The transaction between the trust company and the railroad company was governed by the law of Ohio, and was a loan at ten per cent interest. The trust company was forbidden by the charter to lend at a greater rate of interest than seven per cent, and any contract for a higher rate was *ultra vires* and, therefore, null. The Bank of Ashland, receiving these bonds of the trust company, knew the law of its charter, which was by public act, and was further advised by the guaranty that

the transaction was a loan and, therefore, took the bonds, subject to all defenses.

Act Feb. 12, 1834, §§ 23, 28; 32 Ohio L. 73; *Churchill* v. *Suter*, 4 Mass. 156; *Payne* v. *Trezevant*, 2 Bay (S. C.) 23; *Gaither* v. *Bk.* 1 Pet. 37; *Nichols* v. *Fearson*, 7 Pet. 109; *Bk.* v. *Swayne*, 8 Ohio, 257; *Creed* v. *Bk.* 11 Ohio, 489; *Exporting Co.* v. *Clark*, 13 Ohio, 1; *Bk.* v. *Stevens*, 1 Ohio St. 233; *Busby* v. *Finn*, 1 Ohio St. 409; *Bk.* v. *Russell*, 1 Ohio St. 313.

Messrs. **A. G. Porter** and **W. H. Wadsworth**, for defendant in error:

A promise by a corporation to pay more than seven per cent in New York was not usurious at the date of these bonds, nor at their sale to the Ohio Life & Trust Company.

The New York statute of 1850 is a repeal of the laws of that state against usury, so far as the promises of corporations are concerned.

Curtis v. *Leavitt*, 15 N. Y. 88; *Butterworth* v. *O'Brien*, 23 N. Y. 275.

The Junction Railway Company had express authority by its charter, to borrow money on its own notes at any rate of interest; or to issue, sell, dispose of or negotiate its own bonds or promissory notes, within or without the state of Indiana, at such rates and for such prices as it might deem proper. Amended charter, Jan. 29, 1851, § 1.

These bonds it might lawfully sell at any discount in the state of Ohio, and the Ohio Life & Trust Company might lawfully buy them within that state, as its supreme court has also decided. *Bk. of Ashland* v. *Jones*, 16 Ohio St. 160.

Unless the statute violated by the contract does declare it void, or "utterly void" it is protected in the hands of a party without notice of the illegality.

Fleckner v. *Bk.* 8 Wheat. 353; *Bk.* v. *Prather*, 12 Ohio St. 504.

The charter of the Ohio Life & Trust Company does not declare the paper or contract void, but forfeits the charter, as we have seen.

Neither do the laws of Ohio against usury declare "all bonds, contracts, and assurances" made in violation of their provisions "utterly void" nor void.

These points have been ably and elaborately considered by the supreme court of Ohio (per Judge Peck). *Bk.* v. *Prather*, *supra*.

In that case the court holds that, whether the contract be *ultra vires*, or in violation of the general laws of the state against usury, it will be protected in Ohio, in the hands of an innocent holder for value.

This ruling is not only approved by this court, but by the English judges. 8 Wheat. *supra*.

Broughton v. *Manchester Water Works*, 3 B. & Ald. 10, per Holroyd; *Eastern Counties Railway* v. *Hawkes*, 35 Eng. L. & E. 32, by Lord St. Leonards, quoted by Judge Peck.

Mr. Justice **Bradley** delivered the opinion of the court:

This was an action of debt brought by the Bank of Ashland, a corporation of Kentucky, against the Junction Railroad Company, a corporation of Indiana, to recover the amount of nine bonds of the latter company, for $1,000 each, with interest coupons attached. The bonds bore date July 1, 1853, and were payable to Caleb Jones or bearer, at the office of the Ohio Life Insurance & Trust Company in the city of New York, on the first day of July, 1863, with interest, at the rate of ten per cent per annum, payable half yearly. The declaration contains twenty special counts on the bonds and coupons, and one common count for money lent, paid, had and received, and accounts stated. To the last count there was a plea of *nil debet*, and to the twenty special counts the defendant filed four special pleas, the substance of which was, that the bonds were obtained by the plaintiffs from the Ohio Life Insurance & Trust Company, and that they were originally negotiated by the defendant to that company in Cincinnati, at par, under the pretense of a sale of the bonds, but in truth by way of a loan of money from the Ohio Trust Company to the defendant upon interest at the rate of ten per cent per annum; a rate which, as stated in the first special plea, the Ohio company, by its charter, was prohibited from taking, and which, as stated in the second of said pleas, the defendant, by the law which authorized it to do business in Ohio, was prohibited from paying; and which, as stated in the third plea, was forbidden by the usury laws of New York, where the bonds were made payable. The pleas allege that the plaintiffs took the bonds with notice of a usurious consideration; these pleas being demurred to and overruled, the defendant filed a fourth special plea to the same count setting forth, substantially, the same facts as in the first plea, *with a more [*228 specific averment of a corrupt and usurious agreement. To this plea the plaintiff replied that the bonds were purchased from the defendant by the Ohio Life & Trust Company, in good faith, and that the plaintiff received them in good faith, with the assurance and belief that they had been so purchased, and had not been received as a security for a loan.

A jury being waived, the cause was tried by the court which made a special finding of the facts, the substance of which was, that the bonds declared on were, as alleged in the plea, originally negotiated by the defendant below to the Ohio Life Insurance & Trust Company, at its office in Cincinnati, Ohio, at par, being parcel of 125 bonds negotiated together; that the defendant proposed to sell the bonds to the trust company, but the latter refused to take them unless some persons other than the defendant would guaranty their payment, which was done; whereupon the negotiation was consummated; that said negotiation did not amount to a loan of money, but to a sale of the bonds and that the transaction involved nothing usurious; that in 1857, the trust company transferred the bonds to the plaintiff below, in payment of a debt; and that the plaintiff took them in good faith, without any notice of the fact of usury, or of illegality in the issuing of the bonds, but had notice of the guaranty. Upon these facts the court below gave the plaintiff judgment for the full amount of the bonds and interest.

Unless this case has become embarrassed by the pleadings, the facts as found by the court present a clear case in favor of the plaintiff. If they could have been given in evidence under the common count, we should have felt

no hesitation in sustaining the judgment on that count alone, disregarding the special counts and the pleadings thereto. But it has been held that an agreement under seal for the payment of money cannot be received to support the common money counts. It will be necessary, therefore, to examine the case with reference to the defenses set up in the special pleas. In all of them usury and want of authority in the original parties to make the negotiation are the points of defense relied on.

With regard to the question what law is to decide whether a contract is or is not usurious, the general rule is the law of the place where the money is made payable; although it is also held that the parties may stipulate in accordance with the law of the place where the contract is made. In this case it is conceded by all the pleas, and shown by the special finding of the court, that the place of payment of the bonds in question was the city of New York. By the law of that state, passed April 6th, 1850, of which the circuit court had a right to take judicial notice (*Owings* v. *Hall*, 9 Pet. 625), no corporation is allowed to interpose the defense of usury. None of the special pleas allege that the place of payment mentioned in the bonds was adopted as a shift or device to avoid the statute of usury. The device complained of was a pretended sale of 230*] *the bonds, when the transaction was really a loan. Admitting that it was a loan, it is not denied that it was made bona fide payable in New York. Hence the pleas cannot stand as pleas of usury, properly so-called. They must stand, if at all, on the allegation that one or both of the contracting parties was prohibited by law from making such a contract.

It is certain, however, that no such prohibition exists in the case of the defendant. By the supplement to its charter, passed by the legislature of Indiana, January 29th, 1851, it was authorized to borrow money or sell its securities at any rate of interest or price it might deem proper. The courts in Indiana are authorized by the Constitution of that state to take judicial notice of all its laws; and, therefore, the circuit court could take judicial notice of this law. By the law of Ohio, passed December 15, 1852, any railroad company authorized to borrow money, and to execute bonds or promissory notes therefor, was authorized to sell such bonds or notes at such times and in such places, either within or without the state, and at such rates, and for such prices, as in the opinion of the directors might best advance the interests of the company. This is tantamount to a repeal of the usury laws as to such companies. And although this law had primary reference to the railroad companies of Ohio, yet the supreme court of that state, in a very sensible and judicious opinion, has decided that it extends by comity to railroad companies of other states borrowing money in Ohio. Indeed, the second special plea sets forth a statute of Ohio, in relation to this very defendant, which makes it a corporation of Ohio, as well as Indiana, and authorizes it to perform any act within the state of Ohio the same as if it had originally been incorporated therein. This act, it seems to us, rendered the exercise of comity hardly necessary to bring the defendant within the privileges of the Ohio act of 1852.

It must be conceded, therefore, first, that the transaction in question, if a loan at all, was not an usurious loan by the law of the place which governed the contract; and, secondly, that the defendant had a perfect right to make it. This observation *is appli- [*231 cable to all the special pleas, and disposes entirely of the second of them, in which the defendant relies on its own disability to borrow money at a higher rate of interest than seven per cent; and also disposes of the third of said pleas, in which the statute of usury of the state of New York is pleaded. There remains, then, only the first plea, in which the point is taken that the Ohio Life Insurance & Trust Company was, by its charter, prohibited from taking more than seven per cent interest. This point is fully presented in the last plea on which issue was taken, and the defendant can, therefore, receive no harm, though the demurrer to its first plea was wrongly sustained. It still had the benefit of that defense under the last plea; and the result is presented to us in the finding of the court. That finding is, that the transaction was not a loan at all, but only a sale of the bonds; and it is not pretended that the Ohio Life & Trust Company might not purchase securities of this sort at any price it might deem expedient. But the defendant contends that this was a conclusion of law on the part of the court, and that it was erroneous. Surely the question whether a negotiation of bonds was a sale or a loan is ordinarily and prima facie a question of fact. To make it a question of law, some fact must be admitted or proved, which is irreconcilable with one conclusion or the other. What fact in this case is irreconcilable with the conclusion that this negotiation was a sale? The defendant contends that the fact that the bonds were its own obligations is such a fact, and alleges that in law a party cannot sell its own obligations to pay money. But it certainly may do this if authorized by law to do it; and it is shown that this very thing was authorized by the laws of Ohio, to the benefit of which the defendant was expressly, as well as by comity, entitled.

Again; the defendant alleges that the exaction of collateral security for the payment of the bonds was a fact wholly irreconcilable with a sale. We do not think so. Once concede that the obligor may sell its own bonds, what difference can it make how fully and strongly they may be secured? *The [*232 requirement of guaranties can only amount to evidence of intention at most; the weight of which, in connection with all the circumstances of the case, is to be judged of by the tribunal to which the facts are submitted. This has been fairly done in the present case, and the decision is against the defendant.

In this view of the case we do not decide whether the demurrer to the first plea was or was not well taken. We are disposed to think that it was, but do not deem it necessary to encumber the case with the discussion of that question.

The judgment is affirmed.

UNITED STATES, *Appt.*,
v.
WILLIAM W. BURNS.

(See S. C. 12 Wall. 246-254.)

When Army regulation does not bind Secretary of War—contract, when not void as to one part-owner, from disloyalty of the other part-owner—court of claims.

*1. The Army regulation number 1002, which declares that "no officer or agent in the military service shall purchase from any other person in the military service, or make any contract with such person to furnish supplies or services, or make any purchase or contract in which such person shall be admitted to any share or part, or to any benefit to arise therefrom," does not apply to contracts on behalf of the United States, which require for their validity the approval of the Secretary of War. The Secretary, although the head of the War Department, is not in the military service in the sense of the regulation, but is a civil officer.

2. In February, 1858, a contract was made on behalf of the United States with Sibley, an officer in the Army of the United States, for the manufacture and use of what is known as the Sibley tent, of which tent Sibley had secured a patent, by which contract the government was authorized to make and procure as many of the tents as it might require, by paying the sum of $5 for each tent, the contract to continue until the 1st of January, 1859, and longer unless the United States were notified to the contrary. In April, 1858, Sibley executed to Burns, another officer of the Army of the United States, an assignment of "the one-half interest in all the benefits and net profits arising from and belonging to the invention" from and after February 22, 1856. Soon after the commencement of the Rebellion, Sibley resigned his commission in the Army of the United States, and joined the Confederates. Burns remained true to his allegiance to the government of the United States, and served in the Army of the Union. After the resignation and defection of Sibley, one half of the royalty on each tent, made or procured by the government, was paid to Burns, under the contract with Sibley, until December 26, 1861, when further payments to him were forbidden by order of the Secretary of War, although the government continued to manufacture and use the tents as previously. Held; (1) That the assignment of Sibley passed to Burns one-half interest in the contract of Sibley with the government, and a right to a moiety of the royalty stipulated; (2) that the order of the Secretary of War in December, 1861, did not terminate the contract; (3) that the war department, by its previous payments to Burns of one-half of the royalty stipulated, severed his claim from that of Sibley, under the contract; (4) that the act of March 3, 1863, in barring Sibley, by reason of his disloyalty, of any action upon the contract with the government, in the court of claims, does not affect the rights of Burns to his moiety under that contract, or his right of action for the same in the court of claims. The act severs their claim.

3. The court of claims, in deciding upon the rights of claimants, is not bound by any special rules of pleading.

[No. 158.]

Argued Oct. 20, 1871. Decided Nov. 6, 1871.

APPEAL from the Court of Claims.

The petition in this case was filed in the court below by the appellee, to recover for the use of a certain patent for making conical tents. The court found the facts to be as follows: "That a patent for making an improved conical tent was issued to H. H. Sibley, in 1856; that in 1858 a proposition was made to Jones, agent for the Sibley tent, by Assistant Quartermaster General Thomas, to pay $5.00 royalty for every such tent made by the United States, as long as this agreement may be confirmed by the War Department, which proposition was accepted, to hold good until January 1, 1859, and longer, unless notice to the contrary should be given by the patentee; that an assignment of one half interest in said patent was made by the patentee to the petitioner; that the patentee at the time of perfecting said patent was an officer of the United States Army; but that, subsequently, he resigned his commission and joined the Confederates; that the petitioner was also an officer in the United States Army and continued loyal; that the United States used a large number of said tents, on which the royalty had not been paid; that Quartermaster General Meigs, by letter called the attention of the Secretary of War, in connection with this royalty, to paragraph 1002 Revised Regulations of the Army, 1861, which is as follows:

'1002. No officer or agent in the military service shall purchase from any other person in the military service, or make any contract with any such person to furnish supplies or services, or make any purchase or contract in which such person shall be admitted to any share or part, or to any benefit to arise therefrom.'

Upon this communication Secretary Cameron indorsed as follows:

'No further payments will be made to Major W. W. Burns on account of royalty on the Sibley tent.

Simon Cameron,
Secretary of War.'"

And the court found as conclusion of law:

1. That the contract between the United States and Major Sibley, made Feb. 18, 1858, was valid in law, and was not determined by the order of Secretary Cameron of Dec. 26, 1861.

2. That the assignment of Major Sibley to the petitioner, made Apr. 16, 1858, was valid in law, and that by that and the facts above found, the petitioner became entitled to one half of the royalty of $5.00 on 40,497 tents, made and procured by the United States, as above stated; that this sole action of the petitioner for said one half of the royalty is well brought under act of Mar. 3, 1862, ch. 92.

Judgment is to be entered for the petitioner for one half of the royalty or $2.50 on each of 40,497 tents, amounting to the sum of $101,-242.50.

Whereupon the defendant took an appeal to this court.

Messrs. **B. H. Bristow,** *Solicitor Gen.*, *T. H. Talbot*, and **C. H. Hill,** *Asst. Atty. Gen.*, for appellant:

The court has found as a fact, that the terms proposed in the letter of Jones to Thomas were approved by the Secretary of War, and a contract was made between the United States and Jones according thereto, and without regard to Thomas' previous letter. But this finding was erroneous in point of law. Jones' letter tendering the contract, must be read in the light of Thomas' letter, to which it was a reply, and the question as to what is the meaning of these two letters together, is a question of law, and not of fact.

Turner v. *Yates*, 16 How. 14; *Macbeth* v. *Haldimand*, 1 T. R. 172; *Hutchinson* v. *Bowker*, 5 M. & W. 534; *Smith* v. *Faulkner*, 12 Gray, 251.

The terms proposed in Thomas' letter, to pay a certain sum for each tent "As long as

*Headnotes by Mr. Justice FIELD.

this agreement may be confirmed by the War Department" was a direct reservation of a power to the War Department, to determine the contract.

The natural and proper construction is that those propositions in Thomas' letter which did not conflict with Jones' reply, and particularly this one now referred to, were adopted by Jones as the basis upon which he founded his proposition.

The agreement of Apr. 15, 1858, between Burns and Sibley, was an agreement of partnership. Sibley and Burns were going into the business of introducing and selling this patent, and towards the joint undertaking Sibley gives Burns an interest in the nature of a license jointly with him. No apt words are used from beginning to end, for assigning any interest to Burns in the patent itself, or giving him any right to bring a suit in his own name respecting it.

This construction is strengthened by the fact that this instrument was never recorded in the Patent Office, in a manner directed by § 11 of the patent law of 1836 (5 Stat. at L. 121) for, although an assignment of a patent is not avoided by the omission to record it, yet in the case of an instrument whose meaning is doubtful, the fact that it is not recorded is strong evidence that the parties did not regard it as, in legal effect, an assignment.

If this agreement gave Burns a right to have one half interest in the patent assigned to him, it was a merely equitable right, which could not operate as an assignment as against third parties, until an actual assignment had been made in pursuance of it.

But if he had any interest in this contract, it was purely an equitable one, and not one upon which he could sue the government. *Bonner* v. *U. S.* 9 Wall. 156, 19 L. ed. 666.

But the partnership existing between Sibley and Burns, and the rights of Burns thereunder in the contract, previously made between Sibley and the United States, would be terminated by Sibley becoming a public enemy at the breaking out of the war. That a partnership is dissolved by one of the partners becoming a public enemy, admits of no question. *Griswold* v. *Waddington*, 15 Johns. 57, 16 Johns. 438; Story, Part. §§ 315, 316.

By Sibley's becoming a public enemy, too, the contract between him and the United States became, to say the least, suspended during the continuance of the war. It is, therefore, difficult to conceive how Burns, whatever his rights may have been before, had any longer any rights against the United States. It may be doubtful whether, by becoming a rebel, Sibley did not forfeit all his rights under the letters patent, but certainly the continued use of his patent by the government during the war (as appears by the Quartermaster General's letter) was not under the contract; and as Burns was no party to the contract, and had no rights under it except through Sibley, his rights could be no greater than those of Sibley himself.

Oct. 26, 1861, the Quartermaster General called the attention of the Secretary of War to the matter of the royalty allowed Burns, and the Secretary, Dec. 26, directed that no further payment should be made to him. If the counsel for the United States are right in their construction of the contract originally made between the United States and Sibley, the Secretary of War had a right to determine it at any time, and it is insisted that this direction did so terminate it. It is said that no notice of this direction was given to Burns. But the government ceased to pay any royalty to him, which would seem to be a very effective form of notice. If no particular form of terminating the contract had been agreed upon, any action of the Secretary of War which was totally irreconcilable with the continuance of the contract would operate as a termination of it; and forbidding the Quartermaster General to pay the royalty which the government had agreed to pay under the contract, was certainly totally irreconcilable with an assumed continued existence of it.

Messrs. **James Hughes,** *Denver & Peck,* and **M. H. Carpenter,** for appellee:

1. General Burns was a joint owner of the invention (Sibley tent) with Sibley, and his interest antedated the letters patent and the contract with the United States.

2. Burns occupied toward Sibley the relation both of a joint owner and a partner in the invention and in all its benefits, including the letters patent and the contract with the United States for a royalty.

3. The contract of the United States to pay a royalty for the use of the tent, was made with W. E. Jones, "as the agent for the Sibley tent" and as it stood originally, was a joint contract with Sibley and Burns.

4. On this contract, upon the facts found, a separate action by Burns in the court of claims was well brought.

5. The acts of the parties, after discontinuing the payment of Sibley's moiety of the stipulated royalty, constitute a new contract with Burns separately, upon which his suit was well brought.

6. Sibley can maintain no suit against the United States, nor enforce any claim against them, without the express assent of Congress.

7. In the United States, the treason of one partner does not forfeit the rights or property of another.

Story, Part. §§ 9, 240, 315, 316, and *n.*; also § 304, and *n.* 4.

Mr. Justice **Field** delivered the opinion of the court:

Upon the facts found by the court of claims, we are of opinion that the contract entered into on behalf of the United States with Major Sibley, by which the government was authorized to make and procure as many of the Sibley tents as it might require, by paying the sum of $5 for each tent, was a valid contract, and not within the prohibitions of the Army regulation, number 1002. That regulation does not apply to contracts on behalf of the United States, which require for their validity the approval of the Secretary of War. Though contracts of that character are usually negotiated by subordinate officers or agents of the government, they are in fact and in law the acts of the Secretary, *whose sanc- [*252 tion is essential to bind the United States. The Secretary, though the head of the War Department, is not in the military service in the sense of the regulation, but, on the contrary, is a civil officer with civil duties to per-

form, as much so as the head of any other of the Executive Departments.

It would be carrying the regulation to an absurd extent to hold it was intended to preclude the War Department from availing itself, by purchase or any other contract of any property which an officer in the military service might acquire, if its possession or use were deemed important to the government. If an officer in the military service, not specially employed to make experiments with a view to suggest improvements, devises a new and valuable improvements in arms, tents, or any other kind of war material, he is entitled to the benefit of it and to letters patent for the improvement, from the United States, equally with any other citizen not engaged in such service; and the government cannot, after the patent is issued, make use of the improvement any more than a private individual, without license of the inventor or making compensation to him.

In the present case there is no question of the right of Sibley to the improved conical tent. He received a patent for the improvement in April, 1856, and, by the contract with him, the United States recognized his right to it, and to compensation for its use.

The contract was nothing more, in fact, than a license from him to the government to manufacture or procure the tent and use it, upon payment of a stipulated sum. By its terms the license extended until the 1st of January, 1859, and longer unless the United States were notified to the contrary. The power of determining this license thus remained with the patentee after that period, but the United States could also at any time have determined their liability by ceasing to make the tents. It does not appear that either party ever desired the termination of the license. Neither Sibley nor Burns, who had become, as hereafter stated, equally interested with Sibley in the contract, ever expressed **253***] *any intention to withdraw the license; and the United States continued to make and use the tents until the whole number were obtained, for which the present claim is asserted. The order of the Secretary in December, 1861, declaring that no further payment should be made to Burns on account of the royalty on the tent, was not intended, in our judgment, either as a repudiation of the liability of the United States to him for the tents previously procured, amounting to over 38,000, or of their liability to him for any tents that might be subsequently made, but only to leave the rights of Burns, connected as they were with a patent issued to one who had resigned his commission in the national Army and entered the Confederate service, to be determined by the proper judicial tribunals. If the Secretary had intended to terminate the contract, something more would have been required on his part, whilst the United States continued to manufacture and use the tents, than a mere direction to withhold the payments stipulated for such manufacture and use.

Burns, as we have said, had become equally interested with Sibley in the contract with the United States. In April, 1858, Sibley had executed to him an assignment of "the one half interest in all the benefits and net profits arising from and belonging to the invention," from and after the 22d of February, 1856, a period anterior to the issue of the patent. Whether this assignment be held to have transferred a legal title to one half of the patent itself is not, in our judgment, important. It passed a half interest in the contract of Sibley with the government, and the right of a moiety of the royalty stipulated by that contract.

The War Department recognized this half interest of Burns and, until the order of the Secretary in December, 1861, paid a moiety of the royalty to him. It thus severed his claim under the contract from that of Sibley. But independent of this fact, the rights of Burns in the contract and the compensation stipulated could not be forfeited nor impaired by the disloyalty of his associate. He was true in his allegiance to the government and served in the Army of the Union. His claim could, therefore, be presented and considered *in the court of claims by the act of [*254 March 3d, 1863. His associate, Sibley, is at the same time barred by that act of any action there, either joint or several, by reason of his disloyalty. The act does thus, in fact, sever their claims, allowing the claim of one to be prosecuted, and barring that of the other. The technical rule of pleading in an action in a common law court, by which a contract with two must be prosecuted in their joint names, if both are living, has no application to a case thus situated. And the court of claims, in deciding upon the rights of claimants, is not bound by any special rules of pleading.

We see no error in the ruling of that court, and therefore its judgment is affirmed.

BEN HOLLADAY, *Plff. in Err.*,
v.
THOMAS W. KENNARD.

(See S. C. 12 Wall. 254–259.)

Charge of judge construed to require only ordinary care—ordinary negligence, what is—carrier, liable for—due diligence, when required.

*1. During the late Civil War, the defendant was proprietor of a stage and express line upon the overland route to California. The stage was attacked by Indians and robbed of its contents, among which was a safe containing money of the plaintiff below. The judge charged the jury, in determining what was the duty of the express agent at that time, to inquire what a cool, self-possessed, prudent, careful man, would have done with his own property under the same circumstances; that it was the defendant's duty to provide such a man for this hazardous business. Held, that the charge was not erroneous; that it only required of the defendant what might be called ordinary care and diligence, under the special circumstances of the case.

2. What is ordinary negligence, depends on the character of the employment. Where skill and capacity are required to accomplish an undertaking, it would be negligence not to employ persons having those qualifications.

3. When goods in the hands of a common carrier are threatened to be destroyed or seized by a public enemy, he is bound to use due diligence to prevent such destruction or seizure.

4. It is not necessary that he should be guilty of fraud or collusion with the enemy, or wilful negligence, to make him liable; ordinary negligence is sufficient.

[No. 166.]

Argued Oct. 23, 1871. Decided Nov. 6, 1871.

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*Headnotes by Mr. Justice BRADLEY.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

Suit was brought in the court below, by the defendant in error, to recover for the loss of a certain package by the defendant, as a common carrier. Judgment having been given for the plaintiff, the defendant sued out this writ of error.

The case is fully stated in the opinion of the court.

Mr. **H. M. Ruggles** for plaintiff in error.

Messrs. W. W. McFarland and **Jos. Larocque** for defendant in error.

Mr. Justice **Bradley** delivered the opinion of the court:

This was an action of trespass on the case **255*]** against the defendant *as a common carrier, for the loss of a package of money delivered to his agent at Atchison, Kansas, on the 2d of January, 1865, to be carried to Central city in Colorado territory. The defendant was the proprietor of the overland stage line, which was then engaged in the transportation of passengers and goods from Atchison to Placerville in California, as a part of the great through mail across the continent. The package in question was delivered to the United States Express Company in New York, which forwarded it to Atchison and there delivered it to the defendant's agent. It was placed in a safe made of leather and iron and carried in the stage, in charge of an express agent in the defendant's employ. At the time of the loss, there were no persons in the stage but this express agent and the driver. The loss occurred by the stage being robbed by hostile Indians at Julesburg, on the morning of the 7th of January.

The Civil War at this period was still pending, and the Sioux, Cheyennes, and Arapahoes were hostile to the United States, and were constantly committing outrages against person and property, while crossing the plains between Missouri and California. It required much courage, coolness and vigilance to carry on the business of transportation by the overland route.

Julesburg, at that time, was a station of the express line, consisting of a log house and stable, a telegraph office and warehouse, occupied by three or four persons in charge. About a mile east of Julesburg was a mud house called Bulins Ranch. About a mile west of Julesburg was a military post occupied by about forty United States troops, under command of Captain O'Brien, and consisting of an adobe building about fifty feet long, with several outbuildings, and provided with two or three pieces of light ordnance.

About two o'clock in the morning, when three or four miles east of Julesburg, the stage was fired into by the Indians. Making what speed they could, the express agent and driver reached Bulins Ranch with the stage, stayed there **256*]** *until daylight and then went on to Julesburg, where they changed horses. They then proceeded to the military post, and informed Captain O'Brien that they had been attacked by Indians, and the express agent requested him to give them an escort, to protect the stage on its further progress. The captain said he could not give them an escort, as he had but forty men on duty, and was then mounting them to go and fight the Indians who were then in sight, and told the agent to remain where he was, as it would not be safe for him to go up the road. He then left with his command to engage the Indians, who, he said, were about fifteen hundred in number. After the troops had left the fort, the express agent changed the mail there, and then returned to Julesburg and had the horses put into the stable. They had not been put out more than fifteen minutes, when the Indians were observed coming towards the station, following the troops, fourteen of whom had been killed. There being no time to hitch the horses to the stage, the driver and express agent each mounted a horse and followed the soldiers back to the military post. The Indians stopped at the station, robbed the stage, broke open the safe, and rifled it of its contents. The troops soon brought their howitzers to bear on the Indians, and compelled them to retire to the hills.

Upon this evidence, the court instructed the jury that the attack of the Indians was that of a public enemy, and that defendant was exonerated from the ordinary responsibility of a common carrier, and was not liable for the loss of the money unless his agents were guilty of some carelessness, negligence or want of vigilance or attention, which contributed to the loss. The plaintiff below claimed that they were guilty of carelessness and negligence: first, in leaving the military post after being charged by Captain O'Brien to remain there; second, in unhitching and putting out the horses after going back to Julesburg. These points were very properly left to the jury, as questions of fact. But in giving the jury instructions on this subject, the presiding judge told them: "In determining what was the duty of the express agent at *that time, I can lay down no [***257** better rule for your guidance than this: what in your judgment would a cool, self-possessed, prudent, careful man have done with his own property, under the same circumstances? . . . Such a man, it was the duty of Mr. Holladay to provide for this very hazardous business. It was his duty to provide a cool, self-possessed man; a cautious, prudent man: a man of good judgment and forethought." The defendant's counsel, complain that this instruction was contrary to law, and exacted too much of the defendant; and at the trial they requested the judge to charge: first, that the capture of the package by the Indians threw on the plaintiff the burden of proving fraud or collusion of the carrier with the captors. Second, that if the jury believed that the express agent exercised his best judgment at Julesburg, the defendant could not be charged with negligence. Third, that wilful negligence is required to charge a carrier who has lost property by the act of the public enemy. The judge declined to charge the jury on these points, other than he had done in the course of his address to the jury.

The effect of the charge, as delivered, was that, although a common carrier is not responsible for the destruction or loss of goods by the act of a public enemy, he is, nevertheless, bound to use due diligence to prevent such destruction or loss. If his negligence or want of proper attention contributed *thereto, he would [***258** be liable therefor. It was not necessary, in this case, that there should have been fraud or col-

lusion with the Indians, or wilful negligence on the part of the defendant, or his agents, to render him liable. Supposing the express agent to have been a suitable person for the duty he had to perform, all that the charge exacted of him was, such care and attention as he naturally would have taken of his own goods; that is, ordinary care and attention.

Surely, the law requires this degree of diligence, and would make the defendant liable for the want of it; that is, for ordinary negligence. Whether such negligence was or was not proved was fairly left to the jury.

The only point, it seems to us, on which any doubt could arise as to the entire accuracy of the charge, is, as to the degree of care and attention required of the defendant himself in the selection of the agent. The court held that it was his duty to provide for this hazardous business a cool, self-possessed, prudent man, of good judgment and forethought. Now, surely, no one would think of employing a man wanting in any one of these qualifications to carry his own goods across the plains at that time. Ordinary prudence would dictate that such a man was essential for that hazardous service. Here, again, the charge really requires of the defendant to do nothing more than, as a prudent man, he would do in the transaction of his own business; in other words, it only exacts ordinary diligence and attention at his hands. Ordinary diligence, like most other human qualifications or characteristics, is a relative term, to be judged of by the nature of the subject to which it is directed. It would not be any want of ordinary care or diligence to intrust the shoeing of a horse to a common blacksmith, but it would be gross negligence to intrust to such a person the cleaning or repair of a watch. A man who would be perfectly competent to perform the duties of an express messenger now, on the Union Pacific Railroad, with a commodious express car at his service, might have been a very unfit and incompetent agent in 1865, when nothing but a mail coach traversed the prairie, and roving bands of hostile Indians infested the route.

259*] *Now, whether the agent in charge of the line, on this occasion was such a man as should have been employed, could only be judged of by what he did or what he neglected to do; and it was fairly left to the jury to say whether his conduct was such as a proper and competent man would have pursued or whether it was wanting in that respect; and the court took the pains to warn the jury that the result is not always a true criterion whether a man pursued a prudent course or not. They must judge fairly in reference to all the circumstances.

We do not mean to be understood as laying down any different rule from that which was laid down by this court in the late case of *Railroad Co.* v. *Reeves*, 10 Wall. 176, 19 L. ed. 909, namely: that ordinary diligence is all that is required of the carrier to avoid or remedy the effects of an overpowering cause. We think that when this case, with all its circumstances, is fairly considered, this was all that the judge who tried the cause exacted of the defendant, and that the question of negligence was fairly left to the jury.

The judgment is affirmed.

G. JULES GERMAIN, *Plff. in Err.*, *v.* JAMES MASON *et al.*

(See S. C. 12 Wall. 259-261.)

When one of several defendants may prosecute writ of error.

A defendant who has a separate, distinct, personal judgment against him for money, in which the other defendants have no interest, has a right to prosecute a writ of error in his own name without joining them.

[No. 514.]

Argued Oct. 27, 1871. *Decided Nov. 6, 1871.*

IN ERROR to the Supreme Court of the Territory of Montana.

On motion to dismiss.

Suit was brought in the court below by the defendants in error, to recover upon a mechanic's lien. Judgment having been given in their favor against one of the defendants, Germain, he sued out this writ of error.

The case is sufficiently stated by the court.

Mr. **Nathaniel Wilson** for defendants in error.

Messrs. A. M. Woodfolk, **M. Blair**, and *F. A. Dick* for plaintiff in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the supreme court of the territory of Montana, and a motion is made to dismiss it.

The ground for dismissal is that the writ describes the defendants in the original suit as G. Jules Germain and others, and it is said that this brings it within the ruling in the case of *Deneale* v. *Archer*, 8 Pet. 526, and similar subsequent cases.

The cases relied on for the dismissal of the writ are all reviewed in *Mussina* v. *Cavazos*, 6 Wall. 355, 18 L. ed. 810; and it is there said that they rest upon the principle that all the parties to the original judgment must, when it is a joint judgment, be brought before this court, and that this is not done by a writ which does not give their names.

In the case before us the writ is sued out by Germain alone, who is the only party mentioned as damaged by the alleged error of the court, and who alone gives the appeal bond. If, therefore, Germain can bring the writ without joining other parties as plaintiffs in error, the writ is not defective.

We have examined the record—a very confused one—but from it we gather enough to satisfy us that the judgment of which Germain complains is such a separate judgment against him as authorizes him to ask a review of it here without joining his co-defendants in the court below, who have not thought proper to disturb the judgment. *Masterson* v. *Herndon*, 10 Wall. 416, 19 L. ed. 953.

The suit was originally brought by the plaintiffs below against Germain, to recover a balance due for work and materials furnished in building a house, and to enforce a mechanic's lien for the debt.

Several other parties, claiming liens on the property, were made defendants, and the petition alleged that the lien of plaintiffs was paramount to all others.

The court so decided, and gave judgment against Germain *in personam* for the debt, with an order that, if it could not otherwise be made out of him, the real estate on which the lien was claimed should be sold, and out of the proceeds of the sale the debt of plaintiffs should be first paid.

The other lien creditors, co-defendants with Germain, have not sought to reverse the judgment; but Germain, who has a separate, distinct, personal judgment against him for money, in which the other defendants have no interest, has a right, we think, to prosecute a writ of error in his own name without joining them.

The motion is, therefore, overruled.

ROBERT BARTH *et al., Plffs. in Err.,*
v.
WILLIAM H. CLISE.

(See S. C. 12 Wall. 400–403).

Sheriff, when not liable for escape of prisoners produced on habeas corpus—immaterial errors.

By the common law, upon the return of a writ of habeas corpus and the production of the body of the party suing it out, the authority, under which the original commitment took place, is superseded.

After that time and until the case is finally disposed of, the safe-keeping of the prisoner is entirely under the control and direction of the court to which the return is made.

When a sheriff produced the body of a prisoner before the judge on the habeas corpus, his duties as the custodian of the prisoner ceased until he was remanded; and the flight of the prisoner while before the judge was not an escape from the custody of the sheriff.

Where the plaintiffs in error, have no right to recover in the action according to their own showing, the errors of the court below in admitting evidence and in the charge, would do them no harm.

[No. 112.]

Submitted Oct. 16, 1871. Decided Nov. 6, 1871.

IN ERROR to the Circuit Court of the United States for the District of Wisconsin.

Suit was brought in the court below by the plaintiffs in error, to recover damages for the escape of an imprisoned debtor. Judgment having been given for the defendant, the plaintiffs sued out this writ of error.

The case is further stated by the court.

Mr. **Geo. W. Lakin** for plaintiffs in error.

Messrs. **Matt. H. Carpenter** and *M. M. Cothren*, for defendant in error:

If the person to whom the writ of habeas corpus is directed be, as in this case, a public officer, his duty is ended for the time being, by delivering the subject of the writ into the custody of the officer who issued it. This is obvious from the form of the writ, and the general object sought to be obtained by it, as well as from section 22 R. S. Wis. p. 908, which provides that "if the party be not entitled to his discharge and be not bailed, the officer shall remand him to the custody or place him under the restraint from which he was taken, if the person under whose custody or restraint he was, be legally entitled thereto; if not so entitled, he shall be commited by such officer to the custody of such officer or person as by law is entitled thereto."

The defendant in this case was sheriff of Grant county. He held in his custody one Edward Brinkman. The judge of the circuit court of the county of which he was sheriff, directed him, by writ of habeas corpus, to bring the person of said Brinkman before him. He complied; and that judge never remanded him back to his custody. We think this exonerated him from all liability, even though he otherwise was bound to retain the prisoner in his custody.

Mr. Justice **Swayne** delivered the opinion of the court:

The plaintiff in error sued Edward Brinkman, as survivor of his late partner, Smid, in the circuit court of Grant county, to recover a large sum of money alleged to be due from Brinkman, as such survivor, to the plaintiffs. After the institution of the suit the plaintiffs applied to the county judge of Grant county for a writ of ne exeat against Brinkman. The writ was accordingly issued and placed in the hands of Clise, the defendant in this action, as the sheriff of that county, for execution. Pursuant to the writ, Clises arrested Brinkman, who, failing to give bail as required, was held in custody. A writ of habeas corpus was issued by the Honorable John T. Mills, the circuit judge of that circuit, directed to the sheriff of Grant county, whereby he was commanded to have before the judge, at Dodgeville, on the day therein specified, the body of Brinkman, with the cause of his imprisonment. Clise complied with this order. While the argument upon the writ of habeas corpus was in progress, Clise put Brinkman in the charge of Judge Dunn, one of his counsel, and absented himself. Before the argument was concluded, Brinkman fled to Canada and has not returned. The judge refused to take any further action in the case in the absence of Brinkman, and thus the proceeding terminated.

This action was brought by the plaintiffs in error against Clise for the escape of Brinkman. The cause was put at issue by the pleadings of the parties and was tried by a jury. A verdict was found and judgment rendered for the defendant, *Clise. The plaintiffs there- [*402 upon sued out this writ of error. It appears by the bill of exceptions found in the record that in two instances, upon the trial, evidence objected to by the plaintiffs was admitted and exceptions duly taken. The plaintiff also excepted to the several instructions given by the court to the jury. It is insisted that each of these exceptions involves an error which is fatal to the judgment.

In the view which we have found ourselves constrained to take of the case it is unnecessary to consider either of them.

The bill of exceptions purports to contain all the testimony. The fact that the habeas corpus was issued and that the sheriff obeyed it by making the proper return and taking Brinkman before the judge who issued it, are fully proved. The testimony is uncontradicted. There is no controversy between the parties upon the subject.

By the common law, upon the return of a writ of habeas corpus and the production of the body of the party suing it out, the authority under which the original commitment took place is superseded. After that time, and until the case is finally disposed of, the safe-keeping of the prisoner is entirely under the control and direction of the court to which the return is made. The prisoner is detained, not under the original

commitment, but under the authority of the writ of habeas corpus. Pending the hearing he may be bailed *de die in diem*, or be remanded to the jail whence he came, or be committed to any other suitable place of confinement under the control of the court. He may be brought before the court from time to time by its order until it is determined whether he shall be discharged or absolutely remanded. *King* v. *Bethel*, 5 Mod. 19; Bac. Abr. tit. *Habeas Corpus*, B. 13; *Anon.* 1 Vent. 330; *Sir Robert Peyton's Case*, 1 Vent. 346; Hurd, *Hab. Corp.* 324. We have not overlooked the statute of 31 Car. II. This doctrine has been recognized by this court. *In re Kaine*, 14 How. 134.

403*] *The statute of Wisconsin upon the subject is in accordance with the common law. It provides:

"Until judgment be given upon the return, the officer before whom such party shall be brought may either commit such party to the custody of the sheriff of the county in which such officer shall be, or place him in such care or under such custody as his age and other circumstances may require." Rev. Stat. of Wis. p. 908, § 23.

The entire responsibility for the safe-keeping of the prisoner under this statute rests with the officer before whom the prisoner is brought pursuant to the writ.

When Clise, as sheriff, produced the body of Brinkman before Judge Mills, Clise's duties as custodian of Brinkman ceased, and this cesser could be terminated only by an order of the judge clothing him with new duties and responsibilities. No such order was made. The flight of Brinkman was, therefore, in no sense an escape from the custody of Clise. His custody by Clise, in the absence of an order from the judge, would have been false imprisonment. The act of Clise in putting Brinkman in the charge of Dunn was simply a nullity. He had no authority at that time to do any act or to give any direction touching the subject.

The plaintiffs in error, according to their own showing, had not the shadow of a right to recover in this action against Clise. Conceding, for the purpose of this opinion, that the court below erred in all the particulars complained of, the errors have done them no harm. Opposite rulings could not have helped them. Their case was inherently defective. The defect was incurable and inevitably fatal. When such a defect exists, whether it be or be not brought to the attention of the court below or of this court by counsel, it is our duty to consider it and to give it effect. *Garland* v. *Davis*, 4 How. 131; *Roach* v. *Hulings*, 16 Pet. 319; *Patterson* v. *United States*, 2 Wheat. 222; *Harrison* v. *Nixon*, 9 Pet. 483; *Slacum* v. *Pomery*, 6 Cranch, 221. This is decisive of the case before us.

The defendant in error is entitled to have the judgment affirmed, and it is affirmed accordingly.

404*] THE STEAMER WESTERN METROPOLIS, Hiram Benner, Claimant, *Appt.*,

v.

JOHN LOW, Jr.

(See S. C. *"The Western Metropolis,"* 12 Wall. 389, 390.)

Commission ordered to take further testimony in a case of collision.

In a libel filed for a collision, the judgment in which has been appealed to this court, on affidavits that the testimony of witnesses on which judgment was rendered, was obtained by a corrupt agreement to pay them money, which was unknown to the appellant at the time of the trial in the court below, a commission is ordered to take the testimony of such witnesses in regard thereto.

[No. 284.]

Argued Nov. 10, 1871. Decided Nov. 10, 1871.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

Motion for a commission to take testimony.

The libel in this case was filed by the appellee, as owner of the schooner Triumph, to recover damages for a certain collision. The district court having entered a decree in his favor; which was affirmed upon appeal by the circuit court, the claimant for the Western Metropolis took an appeal to this court.

The appellant now makes affidavit, that since bringing this appeal he has learned of a corrupt agreement in respect to the testimony of appellee's witnesses, as shown by the affidavit of Eben D. Campbell and Alexander McDougall, and has also discovered other important evidence. Affidavits of said McDougall and Campbell were presented, stating that as inducement to them to attend and testify in the case on the trial below, said Low had agreed, if he succeeded in the suit, to pay them certain sums of money; to McDougall $500, and to Campbell $700, as shown by the following:

"Gloucester, Jan. 28, 1868.

We promise to pay Eben Campbell seven hundred dollars on demand, after getting money from case of schooner Triumph, which case is now pending in New York.

John Low & Son."

Messrs. **J. H. Ashton** and *Beebe & Donohue*, for appellant:

The affidavit shows a valid excuse for not taking the testimony now desired in the courts below. The papers filed show that the appellant was not aware of the facts stated until after the present appeal to this court, and thus the application is brought within the rule laid down in the case of *"The Mabey,"* 10 Wall. 419, 19 L. ed. 963.

Mr. **E. C. Benedict** for appellee.

The court made the following order per Mr. Chief Justice **Chase:**

On consideration of the motion filed in this cause by Mr. J. H. Ashton, for a commission to take further testimony, and of the argument of counsel thereupon had, as well in support of as against the same, and of the affidavits filed—it is now here ordered by the court, that a commission issue out of this court, directed to Fisher Ames, Esq., United States Commissioner, Boston, Massachusetts to take the testimony on interrogatories to be annexed thereto, of Eben D. Campbell and Alexander McDougall.

And it is further ordered that a commission also issue out of this court to John A. Osborn, Esq., United States Commissioner, city of New York, to take the testimony of John Roberts, on interrogatories to be annexed thereto.

And it is further ordered that such commissions be not issued except upon interrogatories to be filed by the appellant, and notice to the appellee or his agent or counsel, accompanied

with a copy of said interrogatories so filed, to file cross interrogatories within ten days from the service of such notice.

ALFRED KEARNEY, *Plff. in Err.*,
v.
CHARLES CASE, Receiver of the First National Bank of New Orleans.

(See S. C. 12 Wall. 275-285.)

Statement of facts signed by counsel, when disregarded—waiver of trial by jury, what is—insufficient waiver.

A statement signed by the defendant in error and by the counsel for the plaintiff after the writ of error had been sued out nine months, although called a statement of facts, must be disregarded.

The right to a jury trial can be waived by express agreement in open court and by implied consent.

Where a party is present by counsel and goes to trial before the court without objection or exception, he has voluntarily waived his right to a jury, and must be held in this court to the legal consequences of such a waiver.

If there is nothing to show that the party complaining of the error was present by himself or counsel, at the trial, and no jury was called, it is error for the court to try the issues without a jury.

[No. 150.]

Argued Oct. 18, 1871. Decided Nov. 13, 1871.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The petition in this case was filed in the court below, by the defendant in error, to recover upon certain promissory notes. Judgment having been given in favor of the plaintiff, the defendant sued out this writ of error.

The case is fully stated by the court.

Mr. **Thomas J. Durant** for plaintiff in error.

Messrs. A. T. Akerman, Atty. Gen., Asst. Atty. Gen. Field, and **B. H. Bristow,** *Solicitor Gen.*, for defendant in error:

The record does not show that any stipulation in writing, waiving a jury, was filed by the parties or their attorneys with the clerk in the court below, as required by the 4th section of the act of March 3, 1865. 13 Stat. at L. 501.

The absence of such stipulation, however, is not to be regarded as affecting the regularity of the proceeding in the court below. For, independent of any statutory provision on the subject, parties certainly might, by consent, waive the trial of issues of fact by a jury and submit the trial of both facts and law to the court; it would not be a mistrial; but the appellate court could not regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties. So that legislation was necessary, not to enable the court, by agreement of the parties, to decide a disputed question of fact upon the evidence, but in order to preserve to the parties submitting a cause to a trial before the court, both as to law and fact, the benefit of a review or re-examination in the appellate court, of questions of law arising upon the finding of the inferior court.

Guild v. *Frontin*, 18 How. 135, 15 L. ed. 290; *Campbell* v. *Boyreau*, 21 How. 226, 16 L. ed. 96; *Flanders* v. *Tweed*, 9 Wall. 429, 430, 19 L. ed. 679.

The act of March 3, 1865, by its 4th section, provides a clear and simple mode by which parties who submit cases to the court without the intervention of a jury, may have the rulings of the court reviewed here. This statute applies to the Federal courts in Louisiana as well as elsewhere, and necessarily supersedes all previous legislative provision with reference to the Federal courts in that state, respecting the same subject-matter.

Insurance Co. v. *Tweed*, 7 Wall. 51, 19 L. ed. 66.

But it requires, as a condition upon which the parties may waive a trial by jury, and at the same time save to themselves the right of review as respects all questions of law arising out of the facts found by the court, the filing with the clerk a written stipulation, signed by them or their attorneys, waiving a jury.

Flanders v. *Tweed*, 9 Wall. 428, 19 L. ed. 679.

In view of this requirement, it was held by this court, in the case last cited, that a copy of the stipulation should come up with the transcript in the return to the writ of error.

The agreed statement of facts, having been filed by the parties nearly a year after the rendition of the judgment and the issue and filing of the writ of error, cannot be regarded as a part of the record of the case nor as properly constituting anything on which error in the ruling of the court below may be assigned.

First, it is suggested that the cause should be tried here on the record as it stood when removed by the writ of error, which was the time of filing the writ.

Williams v. *Norris*, 12 Wheat. 121; *Brooks* v. *Norris*, 11 How. 207.

Second, irrespective of the circumstance that the statement of facts was not filed in the court below until many months after the issue and filing of the writ, it cannot be regarded as part of the record (and therefore cannot be considered upon a writ of error) on other grounds; as to which, see *Suydam* v. *Williamson*, 20 How. 438-440, 15 L. ed. 982.

Besides, in *Norris* v. *Jackson*, 9 Wall. 125, 19 L. ed. 608, this court laid down the following rules, as a result of an examination by it of the 4th section of the act of 1865, above cited, in reference to cases where issues of fact are submitted to the court:

"1. If the verdict of the court be a general verdict, only such rulings of the court, in the progress of the trial, can be reviewed as are presented by bill of exceptions, or as may arise on the pleadings.

"2. In such cases, a bill of exceptions cannot be used to bring up the whole testimony for review, any more than in a trial by jury.

"3. That if the parties desire a review of the law involved in the case, they must either get the court to find a special verdict, which raises the legal propositions, or they must present to the court their propositions of law, and require the court to rule on them.

"4. That objection to the admission or exclusion of evidence, or to such ruling on the propositions of law as the party may ask, must appear by bill of exceptions."

In this case, it is to be observed, the court

found no special verdict, nor does the agreed statement, which was filed after judgment, even purport to have been submitted to the court, or to set forth the facts upon which its judgment was predicated. And in the latter respect, more especially, is the case under consideration clearly distinguishable from *Insurance Co.* v. *Tweed, supra,* where certain parts of the opinion of the court below, which appeared in the record, having been agreed to by the parties as containing the material facts of the case, were treated here as facts found by the court. The statement mentioned should, accordingly, be viewed as a nullity, upon the principle of the decision of this court on a similar point in *Avendano* v. *Gay,* 8 Wall. 376, 19 L. ed. 422.

As the court below had jurisdiction of the cause, and as there is no other question of law open to re-examination here, there being no bill of exceptions nor anything upon which error can be assigned, its judgment must be presumed to be right, and on that ground should be affirmed.

Guild v. *Frontin,* 18 How. 135, 15 L. ed. 290; *Campbell* v. *Boyreau,* 21 How. 227, 16 L. ed. 97; *James* v. *Bank,* 7 Wall. 692, 19 L. ed. 275.

280*] *Mr. Justice **Miller** delivered the opinion of the court:

This case was tried by the court without a jury, and the defendant, against whom a judgment was recovered, brings it here by writ of error.

No question arises on the process or pleadings; there is no bill of exception, and the plaintiff in error relies on what purports to be a statement of facts in the case to show the error of which he complains. That statement does not profess to be facts found by the judge.

It says: "We agree that the foregoing shall be the statement of facts for the writ of error returnable to the Supreme Court of the United States." It is signed by defendant in error and by the counsel for plaintiff. The writ of error had been sued out nine months before this paper was signed and filed with the clerk.

It needs no argument to show that this court cannot look into such a paper as part of the record, nor make it the foundation of revising the judgment, though both parties consent to it. The case here must be tried on the rulings of the court below on what was before it, and this must appear by the record; and if the facts are to be considered they must appear by bill of exceptions, or by an agreed statement submitted to the court for its judgment, or by the finding of the court under the statute. It cannot be permitted that the parties, by consent, make up a case for this court after it has passed from the control of the court below. The case of *Insurance Co.* v. *Tweed,* 7 Wall. 44, 19 L. ed. 65, is not a parallel case. There the statement, such as it was, was made by the judge, and on it he founded his judgment. It was made and filed at the time the judgment was rendered; and, although defective in many respects, there was sufficient in it to present the legal propositions, if the confused character of the paper was waived. This the counsel here desired to do, and the court permitted. We are all of opinion, therefore, that the paper called a statement of facts must be disregarded.

But what judgment must follow? If the transcript of the record contained the written agreement of the parties submitting the case to the court, as provided by the act of March 3, 1865, we should have no difficulty in affirming the judgment. But not only is there no such paper found, but there is no statement anywhere in the record that the parties did agree, either in writing or otherwise, to submit the case to the court.

*The judiciary act of 1789, § 12, de- [*281 clares that the trial of issues in fact in the circuit courts shall, in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury. This provision and that found in the 7th Amendment of the Constitution, adopted after the judiciary act, namely: "that in suits at law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved," constituted the only legislative rule for the Federal courts, except in Louisiana, until the act of 1865. Undoubtedly, both the judiciary act and the amendment to the Constitution secured the right to either party in a suit at common law to a trial by jury, and we are also of opinion that the statute of 1789 intended to point out this as the mode of trial in issues of fact in such cases. Numerous decisions, however, had settled that this right to a jury trial might be waived by the parties, and that the judgment of the court in such cases should be valid. *Bank of Columbia* v. *Okely,* 4 Wheat. 235; *Hiriart* v. *Ballon,* 9 Pet. 156; *Parsons* v. *Armor,* 3 Pet. 425; *United States* v. *Rathbone,* 2 Paine, 578; *Guild* v. *Frontin,* 18 How. 135, 15 L. ed. 290; *Suydam* v. *Williamson,* 20 How. 427, 15 L. ed. 978; *Kelsey* v. *Forsyth,* 21 How. 85, 16 L. ed. 32; *Campbell* v. *Boyreau,* 21 How. 223, 16 L. ed. 96; *Burr* v. *Des Moines Co.* 1 Wall. 102, 17 L. ed. 562. Notwithstanding, however, the number of cases in which the waiver of this right is mentioned, and either expressly or tacitly held to be no objection to the judgment, it is remarkable that so little is said as to the mode in which this waiver shall be made to appear. In most of the cases it is somewhere in the record stated affirmatively that the parties did waive a jury, or did consent to the trial by the court without a jury. In the case of *Bank of Columbia* v. *Okely,* 4 Wheat. 235, the court held that there was an implied waiver of this right when the defendant made his note negotiable at the Bank of Columbia, there being in the charter of that bank a provision authorizing the collection of such debts by a summary proceeding, which did not admit of a jury trial. In *Hiriart* v. *Balion,* 9 Pet. 156, where a summary judgment was rendered against a surety in an appeal bond, it was held that the defendant, by becoming *surety in a court whose rules [*282 provided for such summary judgment, had waived his right to a trial by jury. It seems, therefore, that both by express agreement in open court, and by implied consent, the right to a jury trial could be waived. See *Phillips* v. *Preston,* 5 How. 290. But as was shown in the recent case of *Flanders* v. *Tweed,* 9 Wall. 425, 19 L. ed. 678, this court had held that no review of the decision of the court below could be had of any ruling at the trial where the par-

ties had consented to accept the court, instead of a jury, to decide issues of facts.

In this state of the law the act of 1865 was passed. The first two sections are devoted to prescribing the manner in which grand and petit juries shall be selected and impaneled in criminal trials. The 4th section enacts that issues of fact in civil cases, in any circuit court of the United States, may be tried and determined by the court without the intervention of a jury, whenever the parties or their attorneys of record file a stipulation in writing with the clerk of the court waiving a jury. It then proceeds to prescribe the mode of finding the facts, and the effect to be given to such finding, and provides for a review of the case by this court. The manner in which the record is to be prepared for this and the extent of the inquiry in this court are specifically pointed out.

The question arises on this statute whether this mode of submitting a case to the court without a jury was intended to be exclusive of all other modes, so that if there is no stipulation in writing waiving a jury, there is error, for which the judgment must be reversed. Although the language of the section might admit of that construction, it is not the only one of which it is susceptible. As stated in the case already referred to, of *Flanders* v. *Tweed*, the main purpose of the act, undoubtedly, was to enable the parties who were willing to waive a jury to have the case reviewed on writ of error when tried by the court alone. This was rendered necessary, as shown by Mr. Justice Nelson in the opinion in that case, by the former 283*] decisions, based on the *idea that in such cases the court did not sit as a court of law, but as quasi arbitrators. To remove this difficulty, the statute provided a mode by which the parties who agree to waive a jury should have the benefit of a writ of error to the rulings of the court on questions of law. The language of the section is that the stipulation may be filed with the clerk of the court, which is undoubtedly designed to enable the parties to make agreements in vacation; and it is required to be in writing, to prevent either party demanding a jury unexpectedly at the trial. In those courts where juries are called from a great distance and detained at a heavy sacrifice, the courts usually give jury trials the preference. The benefit, therefore, of an announcement by which the number of these trials is diminished, and the case placed in an attitude to be taken up at the convenience of the court and the parties, is obvious. We cannot believe that Congress intended to say that the parties shall not, as heretofore, submit their cases to the court unless they do so by a written stipulation, but that it was the intention to enact that if parties who consent to waive a jury desire to secure the right to a review in the Supreme Court of any question of law arising in the trial, they must first file their written stipulation, and must then ask the court to make a finding of such facts as they deem essential to the review, and ask the ruling of the court on points to which they wish to except. If this is not done the parties consenting to waive a jury stand as they did before the statute, concluded by the judgment of the court on all matters submitted to it. This we understand to be the effect of the opinion in *Flanders* v. *Tweed*.

But, although a written stipulation in the circuit court is essential to a review in this court, is the presence of the agreement or its copy in the transcript sent here indispensable? A copy of it should come up, as observed by Mr. Justice Nelson, and that is the more appropriate evidence of compliance with the statute. Still we are not prepared to say that if it shall affirmatively appear in any other part of the record proper, that such a writing was made by the *parties, that it will not be [*284 sufficient here. If, for instance, it is stated in the finding of facts by the court, or in the bill of exceptions, or in the record of the judgment entry, that such a stipulation was made in writing, the record would show that the condition in which a review is allowed existed, and we would not feel at liberty to contradict the record in this respect. In a case where there is no evidence that it was submitted in writing under the statute, but the record shows affirmatively that the parties waived a jury, we hold such evidence of waiver to be sufficient to support the judgment, but not sufficient to authorize a review of the rulings of the court at the trial. But the record before us contains no statement that the parties agreed in writing to submit the case to the court, nor any express statement that they waived a jury at all. The language of the judgment is that, "this cause came up for trial; J. D. Rouse and Elmer and King for plaintiffs; G. L. Bright and Bradford, Lea, and Finney, for defendants; when, after hearing the pleadings, evidence and argument, the court considering the same, it is ordered, adjudged and decreed," etc.

Is this court at liberty to infer from the entry a waiver of the right to a jury trial? When we consider the cases already cited, in which such a waiver has been implied, and that the right to have a jury when a party demands it, is so universally known and respected, we think that it is almost a necessary inference, where a party is present by counsel and goes to trial before the court without objection or exception, he has voluntarily waived his right to a jury, and must be held in this court to the legal consequences of such a waiver. *Phillips* v. *Preston*, 5 How. 290. But we are not prepared to go further.

If the state of the pleadings presents issues of fact to be tried, and there is nothing to show that the party complaining of the error was present by himself or counsel at the trial, and no jury was called, we think it is error for the *court to try those issues without a [*285 jury, because there can be no presumption that the party has waived his legal and constitutional right to have a jury.

The record before us presents, in the light of these views, a case where the parties consented to waive a jury, but did not take the steps necessary to secure the right to a review of the findings of the court as provided by statute.

There is, therefore, no error of which we can take cognizance, and the judgment of the Circuit Court is affirmed.

THE BROOKLYN LIFE INSURANCE CO.,
Plff. in Err.,
v.
HELEN A. M. MILLER.

(See S. C. "*Miller* v. *Life Ins. Co.*" 12 Wall. 285-304.)

Practice in trial by court—effect of findings—requests to find—policy delivered without payment of premium, valid.

Practice in trials by the court, and the method extent of review, fully stated.

Matters of fact found by the circuit court cannot be re-examined here.

The review, when the finding is general, is confined to the rulings of the court in the progress of the trial; and when the finding is special, nothing is open to review except the inquiry whether the facts found are sufficient to support the judgment.

Requests which assume as facts matters dependent upon the evidence, which are not embraced in the findings of the circuit court, show no ground of reversal.

Where an insurance policy is delivered without requiring payment of the premium, the presumption is that a credit was intended and the policy is valid.

[No. 186.]

Argued Oct. 31 and Nov. 1, 1871. Decided Nov. 13, 1871.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

Suit was brought in the superior court of Baltimore city, Maryland, by the defendant in error, upon a policy of life insurance. Upon petition of defendant, the case was removed to the court below. Judgment having been given for the plaintiff, the defendant sued out this writ of error.

This case is fully stated in the opinion of the court.

Mr. **Wm. Shepherd Bryan,** for plaintiff in error:

First. By the original contract between the parties, the policy was not to be binding on the company until the premium was paid. This is evident from the concluding portion of the statement making the basis of the contract, and also from the terms of the policy itself. If this condition precedent was not intended to be waived by the agents of the company, and if the deceased did not believe it was intended to be waived, the original contract was never changed. The defendant's first prayer ought, therefore, to have been granted by the court.

Second. At the time of the delivery, the deceased who was acting for the plaintiff, was informed by the memorandum at the foot of the receipt sent with the policy, that agents had no right to deliver the policy before payment of the premium; and that the policy was not in force until paid for. The memorandum at the foot of the policy also informed him that agents had no authority to waive any of the provisions of the policy.

This wrongful delivery, accompanied with the notice to the deceased, was no waiver. The defendant's second prayer ought to have been granted. Story, Cont., § 105.

Third. The delivery, such as it was, was procured by the deceased, upon the faith of his statement that Scott would pay the premium when called upon. The agents were deceived by this representation, and were acting under a false impression when they forwarded the policy. A delivery under such circumstances is naught. It would not pass title to goods. *Strong* v. *Taylor*, 2 Hill (N. Y.), 326; *Herring* v. *Hoppock*, 15 N. Y. 409; *De Wolf* v. *Babbett*, 4 Mas. 294; *Deshon* v. *Bigelow*, 8 Gray, 159; *Haggerty* v. *Palmer*, 6 Johns. Ch. 437.

But even a valid delivery would impose no responsibility upon the insurer, where there was an understanding that no liability was to attach before the premium was paid. *Mulrey* v. *Insurance Co.* 4 Allen, 116; *Tarleton* v. *Staniforth*, 5 T. R. 695, Affirmed in 1 Bos. & P. 471; *Bradley* v. *Insurance Co.* 32 Md. 112.

Such a delivery could not mislead the insured.

All the evidence in the case shows that the plaintiff was to be considered insured when the premium was paid; and not to be considered insured if it was not paid.

Fourth. Cases may be cited, where it is held that the insurers waived the payment of the premium, as a condition precedent to the commencement of the risk. But they were decided on the ground that the conduct of the insurers had induced the insured to believe that it was not required, and that the insured would otherwise have been lulled into a false security.

NOTE.—*Effect of delivery of life insurance policy before payment of first premium, contrary to its conditions.*

General agent of insurance company can waive a condition, that policy is not binding until premium is paid, by an unconditional delivery of the policy. Southern Ins. Co. v. Booker, 9 Heisk. 606, 24 Am. Rep. 344; Boehen v. Williamsburgh Ins. Co. 35 N. Y. 131; Trustees of Baptist Church v. Brooklyn Fire Ins. Co. 19 N. Y. 305; Golt v. National Protection Ins. Co. 25 Barb. 189.

Applicant for life insurance policy being unable to pay cash part of premium, agent agreed to provide for it and agreed upon certain terms for its payment, upon this, application was made, policy was issued, sent to agent and countersigned by him but retained in his possession, and upon the death of party returned to company, judgment in favor of insured, upon these facts, affirmed. Sheldon v. Conn. Mut. L. Ins. Co. 25 Conn. 207; 1 Bigelow Ins. Rep. 51; Baker v. Union L. Ins. Co. 6 Abb. Pr. (N. S.) 44, 1 Bigelow Ins. Rep. 595.

Where first premium was payable part in cash and part in notes, and the notes were not paid when due, the policy was held binding, notwithstanding a clause in it that the policy should be forfeited in case any premium should not be paid at the date when payable. McAllister v. New Eng. L. Ins. Co. 101 Mass. 558, 3 Am. Rep. 404.

A policy of insurance provided that it should be void unless premium was paid on or before day fixed, part was paid to the local agent and he gave time on the balance. Held, that the policy was not avoided. Murphy v. Southern L. Ins. Co. 3 Baxt. 440. 27 Am. Rep. 761.

The condition in the policy of forfeiture in case the annual premium is not paid, is for the benefit of the company solely, and a waiver of strict compliance continues the obligation. Receipt of an overdue premium is such a waiver. Mut. Ben. L. Ins. Co. v. Robertson, 59 Ill. 123, 14 Am. Rep. 8; F. & M. Ins. Co. v. Chestnut, 50 Ill. 111; Aetna Ins. Co. v. Maguire, 5 Ill. 342; Miller v. Phœnix Ins. Co. 27 Iowa, 203; Banton v. Am. L. Ins. Co. 25 Conn. 542; Wing v. Harvey, 27 Eng. L. & E. 140.

A policy of life insurance conditioned not to "take effect until the advance premium hereon shall have been paid during the lifetime of the person whose life is hereby insured" and "that no agent of the company shall make any contract binding the company, nor alter or change any condition of the policy nor waive forfeiture of this policy" was issued and handed the assured by the agent, who informed him there was no hurry about paying the premium, he died without having paid it. Held, keeping the policy was an acceptance of its conditions, and the policy never took effect. Davis v. Mass. etc. Life Ins. Co. 13 Blatchf. 462.

Authority of insurance agent to waive prepayment of premiums—see note, 13 C. C. A. 292.

Messrs. **George C. Maund** and **Archibald Stirling,** for defendant in error:

If any language in the policy or application, properly interpreted, amounts to a condition that the policy should not take effect until payment of the cash part of the premium, such condition was waived.

Boehen v. *Ins. Co.* 35 N. Y. 131.

In the above case it was held, that the delivery of a policy, without requiring payment, raises a presumption that a credit is intended, and that where a credit is intended, the policy will be valid though the premium has not been paid.

Goit v. *Ins. Co.* 25 Barb. 189; *Sheldon* v. *Ins. Co.* 26 N. Y. 460; *Wood* v. *Ins. Co.* 32 N. Y. 619; *Whitaker* v. *Ins. Co.* 29 Barb. 312; *Bragdon* v. *Ins. Co.* 42 Me. 262; *Trustees of First Bap. Ch.* v. *Brooklyn Ins. Co.* 18 Barb. 69, 19 N. Y. 305; *Post* v. *Ins. Co.* 43 Barb. 351; *N. Y. Cent. Ins. Co.* v. *Nat. Protection Ins. Co.* 20 Barb. 474.

It must be remembered that Miller had delivered his notes for a large portion of the premium; was he not liable upon these notes? If so, must not the company have incurred a corresponding obligation upon the policy?

Bragdon v. *Ins. Co.* 42 Me. 262; *Whitaker* v. *Ins. Co.* 29 Barb. 312; *Com. Mut. Ins. Co.* v. *Union Ins. Co.* 19 How. 323, 15 L. ed. 638.

There can be no longer any doubt of the authority of the general agent to waive a condition requiring payment as a prerequisite to the validity of the policy.

Boehen v. *Ins. Co.* 35 N. Y. 131; *Goit* v. *Ins. Co.* 25 Barb. 189; *Wood* v. *Ins. Co.* 32 N. Y. 619; *N. Y. Cent. Ins. Co.* v. *Nat. Ins. Co.* 20 Barb. 474; *Sheldon* v. *Ins. Co.* 26 N. Y. 460.

In considering the authority of general agents to waive the condition of the policy, attention must be given to the distinction recognized by all the decisions, between capital stock companies, of which this was one, and those established upon the mutual plan.

Brewer v. *Ins. Co.* 14 Gray, 203; *Baxter* v. *Ins. Co.* 1 Allen, 296.

Second. But in this case there is neither in the policy nor in the application any condition that the policy shall not attach until payment of the cash premium.

To show the converse of this, two clauses are relied on by the plaintiff in error; one in the policy and the other in the application.

That in the policy is as follows, to wit: "In case the said Helen A. M. Miller shall not pay or cause to be paid, the premium as aforesaid, on or before the day herein mentioned for the payment thereof, or any note or notes which may be given to and received by said company in part payment of any premium, on the day or days when the same shall become due, or in case the person whose life is insured by this policy, shall, etc., etc., then, and in every such case, the company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease, be null, void and of no effect."

This clause (intended to annul the policy after it shall have gone into effect) clearly refers not to the first cash premium, but to some other premium or note to become due after the policy shall have attached.

This was held by the court below to be its true interpretation.

The other clause relied on is in the application, and is as follows, to wit:

"It is agreed by the undersigned that the policy of assurance hereby applied for shall not be binding upon this company, until the amount of premium, as stated herein, shall have been received by said company or some authorized agent thereof, during the lifetime of the party therein assured.

This clause cannot affect the case in any way, because it refers to the policy, and there is nothing in the policy to which it can be made to apply. Its terms are "until the amount of premium, as (*i. e.*, in the mode) stated therein (*i. e.*, in the policy) shall have been received."

Referring to the policy for the mode in which the premium is to be paid, we find this language only: "By this policy of assurance, in consideration of . . . and of the sum of $254.85, to them in hand paid by Helen A. M. Miller, etc., etc."

Now, this language, as far as it designates the mode of payment at all, provides that the payment shall be in cash for the entire premium. But this was not the mode of payment agreed upon between the parties (as shown by the application and evidence) which was part in cash and part in notes. It therefore follows that, inasmuch as the mode of payment stated in the policy is different from that agreed upon between the parties, the clause under examination, which refers to the policy alone, has nothing upon which to operate. Suppose this premium had been paid in the manner agreed upon, to wit: a part in notes and the balance in cash, might it not still be urged by the company (if this clause is to have the effect contended for) that this policy never went into effect, because the amount of premium as stated therein (*i. e.*, all in cash) has never been paid? And yet the company does not contend for this construction, because to do so would be denying the indisputable agreement of the parties.

Third. While the acknowledgment, in the policy, of the receipt of the consideration money may be contradicted for some purposes, yet it cannot be contradicted for the purpose of annulling the policy, or showing that it never went into effect.

Goit v. *Ins. Co.* 25 Barb. 189; *N. Y. Cent. Ins. Co.* v. *Nat. Ins. Co.* 20 Barb. 475; 1 Phil. Ins. §§ 514, 515; *Barnum* v. *Childs*, 1 Sandf. 58; *McCrea* v. *Purmort*, 16 Wend. 471; *Morse* v. *Shattuck*, 4 N. H. 229; *Wilt* v. *Franklin*, 1 Binn. 502; *Belden* v. *Seymour*, 8 Conn. 312; 26 N. Y. 260.

Fourth. The finding of the court below being a special finding of all the facts stated in the plaintiff's prayer, this court cannot review the evidence upon which said finding was based, but must treat the facts found as conclusively proved. Their sufficiency to support the judgment may be inquired into, but of their sufficiency for that purpose no doubt can be entertained. The court, in fact, found that the agents of the company "waived the payment of the cash premium for several months, and treated the policy as an executed contract." If these facts are to be treated by this court as conclusively established by legal evidence, how

can the right of the plaintiff to recover be denied? 13 U. S. Stat. at L. 501.

Mr. Justice **Clifford** delivered the opinion of the court:

Issues of fact in civil cases pending in the circuit courts may be tried and determined by the court without the intervention of a jury, whenever the parties or their attorneys of record file a stipulation in writing with the clerk of the court waiving a jury. Such a submission necessarily implies that the facts shall be found by the court, and the act provides that the finding may be either general or special, and that it shall have the same effect as the verdict of a jury in a case where no such waiver is made. Exceptions, however, may be taken to the rulings of the court made in the progress of the trial, and if duly taken at the time the rulings were made, the rulings may be reviewed here, **296***] provided the *questions are properly presented by a bill of exceptions; and when the finding is special the review may also extend to the determination of the question whether the facts found are sufficient to support the judgment. 13 Stat. at L. 501.

On the 25th of June, 1868, the defendants insured the life of the husband of the plaintiff in the amount of $5,000 for the term of his natural life, "with participation of profits." Part of the premium, to wit, the sum of $254.85, was required by the rules of the company to be paid at the time the policy was delivered, and the policy recites that the plaintiff paid that sum to the defendants in hand, and the policy also states that the insured agreed to pay them a like sum on or before the 21st of June in each year during the continuance of the policy, and that the defendants, in consideration of those sums and of the representations and agreements contained in the application, promised and agreed to pay the plaintiff, or in case she should die before her husband, to pay the sum insured to her heirs, executors, administrators, or assigns, within sixty days after due notice and proof of the death of the person whose life is therein insured. Process was issued and served and the defendants appeared and pleaded the general issue that they never promised in manner and form as alleged in the declaration, and the issue tendered was joined by the plaintiff. Errors in pleading were waived and the parties filed a stipulation in writing that the issues of fact should be tried by the court without the intervention of a jury, and agreed that every defense admissible under any special plea should be admitted under the general issue. Evidence was introduced on both sides and the court rendered judgment for the plaintiff in the sum of $5,013.25, and the defendants sued out a writ of error and removed the cause into this court.

Most of the difficulty arising in the case pro- **297***] ceeds from *the failure of the court to comply strictly with the requirements of the act of Congress, which provides that issues of fact in civil cases may be tried and determined by the court without the intervention of a jury. Where a jury is waived, as therein provided, and the issues of fact are submitted to the court, the finding of the court may be either general or special, as in cases where an issue of fact is tried by a jury; but where the finding is general the parties are concluded by the determination of the court, except in cases where executions are taken to the rulings of the court in the progress of the trial. Such rulings, if duly presented by a bill of exceptions, may be reviewed here, even though the finding is general, but the finding of the court, if general, cannot be reviewed in this court by bill of exceptions or in any other manner.

By the express words of the act, the finding may be general or special; but if general it is final and conclusive between the parties, unless the court which tried the case shall grant a new trial or the judgment shall be reversed in the appellate court for some erroneous ruling made in the progress of the trial, which is duly presented by a bill of exceptions. Whether the finding is general or special the rulings of the court in the progress of the trial, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed in this court; and in a case where the finding is special the review may also extend to the determination of the question whether the facts found are sufficient to support the judgment.

Application for the policy was made by the husband of the plaintiff, since deceased, and he obtained the same for her benefit through the general agents of the insurers. Actual payment of the cash premium was never made by the plaintiff nor by her deceased husband. Nothing of the kind was pretended at the trial, but the plaintiff introduced evidence tending to prove that the agents of the company delivered the policy without complying with that part of their instructions; that they agreed to waive that requirement and to call upon a third person named by the decedent, *for the [*298 same, whenever they should deem it proper so to do, and that the policy was delivered to the applicant and became operative under that arrangement.

Policies, as the defendants proved, were required to be issued by the officers of the company and could not be legally executed by the ordinary agents. All such agents could do, in the outset, was to prepare the application, have it duly executed, and transmit it to the home office; and it appears that they did so in this case and that they received a policy in return duly executed. Whereupon they inclosed the policy, with the two notes for the credit portion of the premium, to the decedent, who promptly signed the notes and inclosed the same in a letter addressed by mail to the persons from whom the notes, with the policy, were received. In their letter to the decedent inclosing the policy, the agents say: "The cash payments we will get of Scott when the proper time arrives." They subsequently called upon that person for the cash premium, but he refused to pay it as he had agreed to do with the decedent, and the agents thereupon gave notice of his refusal to the applicant for the policy and requested him to make the payment. He acknowledged the receipt of their letter and promised to procure a draft for the amount and send it to them in a few days; but he did not send the draft, and the agents wrote him again informing him that the draft had never come to hand, and expressing their fears that if the payment was not made soon he would lose his policy, adding that the payment had been delayed so long that he would have to add in-

terest to the premium, amounting to $1.34. Payment being still neglected, and the agents having learned from Scott that the person insured was "quite sick," they informed him by letter that his policy was forfeited, and inclosed to him the two notes given for the credit portion of the premium, but the letter did not "reach his home" until after his death.

Such agents were instructed not to deliver policies until the whole premium was paid, and were told that if they did, the premium would stand charged to them until the same **299*]** *was received by the company or the policy was returned to the office. Evidence to that effect was also given by one of the agents who delivered this policy, but he admitted that it was their custom in some cases not to call for the money at the time from parties with whom they were well acquainted, and when asked on cross-examination what they meant by saying in their letter inclosing the policy to the applicant, that they would get the cash payment of the person named, when the proper time arrived, he admitted that they sometimes gave the receipt before they received the money, and that they had confidence in this case that they could get the money on call.

But the payment of the cash premium was not made, and in view of that fact and the other evidence in the case the defendants requested the court to rule as follows: (1) That the evidence showed that the agents never intended to waive the prepayment of the cash premium, and that the applicant for the policy did not believe that they intended to make any such waiver, and that the defendants, if the court so find, are not liable in this action. (2) That if the court so find, and that the applicant knew that the agents had no authority to deliver the policy without such payment, then there was no waiver of that requirement and the defendants are entitled to judgment. (3) That if the court believe from the evidence that the authority of the agents was such as is shown in their instructions, then the defendants are not bound by the act of the agents in delivering the policy without such payment, and the plaintiff cannot recover. (4) That the facts given in evidence, as recited, show that there was no waiver of that requirement, as is supposed by the plaintiff. (5) That the facts testified to by the two witnesses examined under the commission, if true, show that the agents of the defendants did not waive the payment of the cash premium.

Suppose the facts proved to have been as assumed by the defendants in their requests, then it might well be conceded that the judgment was for the wrong party, but the issues **300*]** *of fact were tried and determined by the circuit court, and the act of Congress provides that the finding of the circuit court in such cases shall have the same effect as the verdict of a jury, and the Constitution provides that no fact tried by a jury shall be otherwise re-examined, in any court of the United States than according to the rules of the common law. 2 Story, Const. § 1770. Facts so tried could only be re-examined, under the rules of the common law, either by the granting of a new trial by the court where the issue was tried or to which the record was returnable, or by the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings. *Parsons* v. *Bedford*, 3 Pet. 448; 2 Story, Const. § 1770. Matters of fact found by the circuit court under such a submission cannot be re-examined here, as by the express language of the act the review, when the finding is general, is confined to the rulings of the court in the progress of the trial, and even when the finding is special nothing else is open to review except the inquiry whether the facts found are sufficient to support the judgment.

Tested by these rules, which are believed to be undeniable, it is clear that no one of the said several requests presented by the defendants shows any ground for reversing the judgment, as every one of them assumes as facts matters dependent upon the evidence, and which are not embraced in the findings of the circuit court. All matters of fact must be found by the circuit court, and not by the Supreme Court, as the act of Congress provides that the issues of fact may be tried and determined by the circuit court where the suit is brought. Rejected by the circuit court as the several requests under consideration were, it is too plain for argument that no one of the propositions of fact therein contained is found to be true by the circuit court. On the contrary, the complaint of the defendants is that the circuit court improperly found a different state of facts, and gave judgment for the plaintiff. They contend that the circuit *court [***301** ought to have found the facts to be as assumed by them in their requests, and what they seek to accomplish by the writ of error is to show that the finding of the circuit court is erroneous, and to induce this court to set aside that finding, affirm the propositions of fact assumed in their requests, reverse the judgment of the circuit court, and grant a new trial or render judgment in their favor. Enough has already been remarked to show that nothing of the kind can be done, as the act of Congress requires that the facts must be found by the circuit court. *Norris* v. *Jackson*, 9 Wall. 127, 19 L. ed. 609. Inferences of fact must be drawn by the circuit court, which, by the agreement of the parties, is substituted for a jury, and cannot be drawn by this court, which sits as a court of errors. *Tancred* v. *Christy*, 12 Mees. & W. 323. Conclusions of fact cannot be found by this court when sitting as a court of errors under the act of Congress authorizing the circuit courts to try and determine issues of fact in civil cases, as in the case before the court. What is required is, that the findings of the circuit court shall contain the conclusions of fact, or, as the rule is stated in a recent decision of this court, a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest; and it is well-settled law that the finding must be sufficient in itself without inferences or comparisons, or balancing of testimony or weighing evidence. *Burr* v. *Des Moines Co.* 1 Wall. 102, 17 L. ed. 562.

Testimony as to a conversation between the agent of the defendants and the person designated by the applicant to pay the cash premium, was introduced by the plaintiff, subject to

the objection made by the defendants, but it is not necessary to examine that objection, as the testimony was subsequently stricken out at the defendants request.

Having disposed of the exceptions to the rulings of the court, it only remains to determine whether the facts found are sufficient to support the judgment. Separate findings are much to be preferred in such a case to the form **302*]** adopted *by the circuit court, as the review extends to the inquiry whether the judgment can be supported by the findings. Instead of that, however, the circuit court adopted the prayer presented by the plaintiff, and certified in the record that "the court finds all the facts stated in the above prayer, and orders judgment to be entered for the plaintiff" in the sum therein specified.

Throughout the trial it was conceded by the plaintiff that the cash premium was never paid, but she insisted that the requirement that it should be paid before the delivery of the policy was waived by the general agents of the defendants, and the prayer presented by her counsel embodied most or all of the evidence introduced to prove that theory. Omitting unimportant words it was to the effect following: That if the court shall find that the application was made by the husband of the plaintiff through the general agents of the defendants, and that the defendants thereupon executed the policy, and sent it to their general agents, and that the latter, upon the receipt of the policy, forwarded and delivered the same by mail to the applicant, who, in obedience to the directions of the said general agents, executed and remitted to them the premium notes as provided in the policy, and that the person whose life was insured died at the time alleged, whereof the defendants received notice prior to the institution of the suit, and refused to pay the sum insured solely upon the ground that the policy was not in force, and shall further find that said general agents did not demand immediate payment of the cash premium, neither at the time of the application nor at the time the policy was sent to or received by the person whose life was insured, but agreed with him to call upon the person named in the evidence for the same when to them it should seem proper so to do, and that said general agents waived the payment of said cash premium for several months, and treated the policy as an executed contract, then the plaintiff is entitled to judgment.

Assume the facts to be as stated in that prayer and found by the circuit court, the court here entertains no doubt that they are sufficient to support the judgment, which is **303*]** the only *question raised by any special finding. Beyond all doubt they show a waiver, and it may be proper, in view of the circumstances, to remark that the evidence reported in the record, if it could be re-examined, is even more persuasive and convincing to that effect than the statement of the plaintiff or the finding of the circuit court.

Evidence of the most convincing character is reported showing that it was the custom of the agents to give credit in certain cases to persons with whom they were well acquainted and knew to be responsible, and not to call for the money at the time the policy was delivered; and one of the instructions given to such agents affords a strong presumption that the custom was known to the company, as the instruction states that agents must not deliver policies until the whole premiums are paid, as the same will stand charged to their account until the premiums are received or the policies are returned to the office. Such evidence, however, cannot be re-examined, as this court is confined to the special finding and the rulings of that circuit court.

Attempt is made in argument to show that general agents have no power to waive such a requirement or to deliver the policy to the insured without first exacting the payment of the cash premium, but the court here, in view of the circumstances of this case, is entirely of a different opinion. *Boehen* v. *Ins. Co.* 35 N. Y. 131.

Where the policy is delivered without requiring payment the presumption is, especially if it is a stock company, that a credit was intended; and the rule is well settled where a credit is intended that the policy is valid though the premium was not paid at the time the policy was delivered, as where credit is given by the general agent and the amount is charged to him by the company the transaction is equivalent to payment. *Goit* v. *Ins. Co.* 25 Barb. 189; *Sheldon* v. *Atlantic Ins. Co.* 26 N. Y. 460; *Wood* v. *Ins. Co.* 32 N. Y. 619; *Bragdon* v. *Ins. Co.* 42 Me. 262; *First Bap. Ch. Brook.* v. *Ins. Co.* 18 Barb. 69, 19 N. Y. 305.

Premium notes were given in this case, and it must be *held under such circum- [***304** stances, that the insurance company assumes a reciprocal obligation where there is no evidence to impeach the bona fides of the transaction. *Whitaker* v. *Far. Ins. Co.* 29 Barb. 319; *Post* v. *Ætna Ins. Co.* 43 Barb. 351; *Commer. Ins. Co.* v. *Union M. Ins. Co.* 19 How. 323, 15 L. ed. 638.

Conditions, it is sometimes said, cannot be waived even by a general agent, but the decisive answer to that suggestion in this case is that the policy, when properly construed, does not contain any absolute condition that it shall not attach or be operative unless the cash premium is first paid by the insured, and in the absence of any such positive condition in the policy, it is not necessary to enter upon a discussion of that topic.

Judgment affirmed.

JULIUS WADSWORTH, *Plff. in Err.*,
v.
JOHN B. WARREN.

(See S. C. 12 Wall. 307-315.)

Reversal can only be for errors of law—question for jury—verbal agreement, when cannot vary written agreement.

In a case brought here by writ of error, this court can reverse the judgment only for errors of law apparent in the record.

It is a question for the jury, whether a contract has ever been consummated; or in other words whether it has been delivered and accepted as the contract of the defendant.

A verbal agreement between the parties, made at the time of the delivery of a deed, or previous thereto, that one of them should be released from the covenants contained in the deed, cannot defeat an action for an alleged breach of those covenants.

[No. 180.]

Submitted Oct. 27, 1871. Decided Nov. 13, 1871.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Suit was brought in the court below, by the plaintiff in error for rent alleged to be due upon an indenture of lease. Judgment having been given for the defendant, the plaintiff sued out this writ of error.

The case is sufficiently stated in the opinion of the court.

Mr. **John Van Arman,** for plaintiff in error:

The simple question presented by this record is: Whether or not a verbal agreement at the time of the execution of a deed, that one of the parties to it shall be released from the covenants contained in the deed, or that he shall not be bound by these covenants, can be given in evidence to defeat an action brought for an alleged breach of them.

Whatever verbal understanding or agreement may have existed between the parties prior to the final delivery of the lease, cannot be considered for the purpose of avoiding the effect of such delivery. What was said and done at that time can alone be regarded.

Railroad Co. v. *Howard*, 13 How. 334.

The lease, after it was signed and sealed by Warren and Fleming, was delivered by Fleming in Warren's presence to De Koven, plaintiff's agent. This was equivalent to a delivery to plaintiff. When a deed is delivered to the grantee or obligee and retained by him, he claiming that the delivery was absolute, in a contest between such obligee and the obligor, parol proof that the delivery was conditional or otherwise than absolute, is incompetent; otherwise, an avenue will be open for the overthrow of all titles by parol proof.

Braman v. *Bingham*, 26 N. Y. 491.

"If I seal my deed and deliver it to the party himself, to whom it is made, as an escrow upon certain conditions, etc., in this case let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as my deed presently."

Shep. Touch. 59; *Whyddon's Case*, Cro. Eliz. 520; Cruise, Dig. tit. 33; Deeds, ch. 2, § 80.

From the evidence contained in this record, the conclusion is irresistible, that all the parties intended that the instrument upon which this action is brought, should take effect and operate as a lease or demise of the premises described in it. Both of the lessees signed and sealed it, and it was delivered to the lessor by one in the presence of the other of them, who acquiesced in such delivery.

Parol evidence is no more admissible in such a case to limit the operation of a deed, or vary the legal import of the language used in it, than it is to vary or add to the language. To do the one is in effect to do the other, the result being in either case the same.

Aldrich v. *Hapgood*, 39 Vt. 621; *Countess of Rutland's Case*, 5 Coke. 26.

The evidence for the defendant, however, did not tend to prove a verbal agreement between Warren and De Koven, to the effect that the lease should not operate as a demise to Warren and Fleming, or that Warren should not be bound by the covenants contained in the lease. It is true that Warren said, in giving his testimony, that he never, in any way, or by any act, accepted the lease. But this is a legal conclusion to be inferred from what was done at the time. It cannot be regarded as evidence of any fact in the case.

Braman v. *Bingham, supra.*

Looking alone to the facts testified to by Warren himself as well as his two witnesses, Osgood and Fleming, it is clear that he did consent to be regarded as one of the lessees in the lease. He says that when he objected to this, De Koven said he would accept Fleming in the place of Osgood, and indorse a release of himself (Warren) on the back of the lease; that he told De Koven "that was all right."

The release was never executed, nor was De Koven ever called upon to execute or procure the execution of it. To be effectual, it must have been evidenced by a sealed instrument, executed by the plaintiff himself, or by his duly authorized agent.

Broom, Leg. Max. 682.

Messrs. **Elliott Anthony** and **C. F. Peck,** for defendant in error:

The only question in the case was one of fact, whether defendant, Warren, ever accepted the lease. Although there was some conflict of testimony, yet the weight of evidence strongly preponderated in favor of the non-acceptance of the lease by Warren, and the jury so found by their verdict; and we submit that the court very rarely disturbs the verdict of a jury, where there is evidence to support it, and never where the weight of evidence is with the verdict.

The first instruction asked by the plaintiff to be given to the jury, was substantially given by the court. The court twice told the jury in its charge, that if Warren had accepted the lease and become bound by its covenants, then an agreement by De Koven, as the agent of Wadsworth to release Warren, was not binding on Wadsworth, and was no defense to this action, and Warren would have to look to De Koven for any damages for his breach of promise to release.

The court, in its charge to the jury, left the question of fact to the jury, whether Warren accepted the lease and charged them, that if they should find that Warren did not accept the lease, he would not be bound by its covenants, and they should find a verdict for the defendant.

It seems hardly necessary to quote any authorities to show that, to make a deed or lease operative and binding on the parties, there must be a delivery and acceptance of it.

Jackson v. *Hill*, 5 Wend. 532; *Jackson* v. *Richards*, 6 Cow. 617; *Jackson* v. *Phipps*, 12 Johns. 421; Shep. Touch. 57.

The court instructed the jury that if Warren refused to accept the lease with Fleming, and the agent of plaintiff told Warren he should not be bound when he put his name to the lease and if Warren did not accept the lease with Fleming, then Warren would not be bound by the lease. We submit that that part of the charge is only the enunciation of the well-known doctrine, that to make a party liable on a lease, he must accept it.

Mr. Justice **Strong** delivered the opinion of the court:

Were this case before us on a motion for a

new trial we might feel constrained to send it back to another jury. But it has been brought here by a writ of error and we can, therefore, reverse the judgment only for errors of law apparent in the record.

The plaintiff's claim was for rent reserved by a written lease; and the defense set up was, that the lease, though signed by the lessor and by the defendant with another person, had, in fact, never been accepted by the defendant nor delivered as his deed. It had been arranged that he and George Osgood would take a demise of the premises, and the defendant had signed the lease in expectation that Osgood would also sign it, as joint lessee with him. But, Osgood subsequently declining, the defendant refused to accept the demise. It was then proposed that William Fleming should take the lease, and with the assent of the plaintiff's agent he signed the contract already signed by the defendant.

The testimony respecting the circumstances attending the transaction in question is con-
314*] tradictory. On the part of the *defendant it is that he refused to accept the lease without having Osgood bound with him; that the plaintiff's agent agreed to take Fleming in his and Osgood's place, and agreed that when Fleming signed the contract he would indorse on it a release of Warren, saying it would avoid the necessity of sending a new lease to Wadsworth, the plaintiff, for his signature. On the other hand, the plaintiff's agent denies that he promised to release Warren, and states that he told him he was the only man he looked to for the rent. He states further that the defendant brought Fleming to him, that both signed the lease and a duplicate thereof, and that the duplicate was delivered to Fleming and the defendant. The lease is dated April 20, 1867, and on the duplicate retained by the plaintiff's agent there appears an assignment of all his interest in the lease by the defendant to Fleming. This assignment is dated April 27, 1867, but it was evidently made on the day on which Fleming's signature to the lease was made, for there is no evidence that the duplicate retained by the plaintiff's agent was ever seen by the defendant after Fleming signed it. Coupling this with the evidence that De Koven, the plaintiff's agent, had agreed to take Fleming in the place of Osgood and Warren, and had said that signing the instrument in the manner in which it was signed, would avoid the necessity of sending a new lease to Wadsworth, the lessor, for his signature; coupling it also with the other evidence given by the defendant himself, that he did not accept the lease, or deliver the deed, we think it was a question to be submitted to the jury whether the contract had ever been consummated, or, in other words, whether it had been delivered and accepted as the contract of the defendant. It was not, therefore, erroneous to refuse the instruction prayed for, namely: "that the jury upon the evidence given, should find the issue for the plaintiff."

The other prayer of the plaintiff for instruction was substantially granted. The court, when speaking of the alleged promise of De Koven to release Warren from the lease, said it was a verbal promise not executed, and "if such was the agreement, Warren would have to look to De Koven for a *breach [*315 of it, and would have no defense here." And again the court said: "The mere verbal promise of De Koven to release Mr. Warren would not be a good defense here, I think, but would leave Warren to turn over on De Koven for a breach of promise."

The remaining exceptions taken to the charge cannot be sustained. It may be admitted, as claimed, by the plaintiff in error, that when a deed has been delivered, and the delivery has been accepted, a verbal agreement between the parties, made at the time of the delivery, or previous thereto, that one of them should be released from the covenants contained in the deed, cannot defeat an action at law brought for an alleged breach of those covenants; but the charge of the court was in harmony with this doctrine. It may also be conceded that there can be no conditional delivery of a deed to the grantee, or covenantee, therein named; but nothing in the charge intimated that there could be. The question submitted to the jury was, whether there had been any acceptance of the lease by the defendant. This was equivalent to submitting the inquiry, not whether the deed had been delivered on condition that Warren should be released afterward, but whether it had been delivered at all as the deed of the defendant. That such a submission was proper, in view of the evidence, we have already said.

The judgment is affirmed.

JOHN A. PARKER, *Plff. in Err.*,
v.
HENRY L. LATEY.

(See S. C. 12 Wall. 390, 391.)

Jurisdiction as to amount must appear, or case will be dismissed.

That the matter in controversy exceeds two thousand dollars must appear affirmatively, to show that jurisdiction exists in this court; and where it does not so appear, the writ of error must be dismissed.

[No. 201.]

Submitted Nov. 8, 1871. Decided Nov. 13, 1871.

IN ERROR to the Circuit Court of the United States for the District of Nebraska.

On motion to dismiss.

Suit in ejectment was brought in the court below, by the plaintiff in error. His declaration averred that the premises were "of the value of five hundred dollars and over."

The case is further stated by the court.

Messrs. **John J. Reddick** and *Clinton Briggs* for defendant in error.

Mr. J. M. Woolworth for plaintiff in error.

Mr. Justice **Clifford** delivered the opinion of the court:

Ejectment by the present plaintiff, to recover possession of a certain tract of land situate in the city of Omaha in the state of Nebraska, described as set forth in the declaration. Verdict and judgment were for the defendant, and the plaintiff sued out this writ of error.

NOTE.—*The record for the purpose of showing jurisdiction in the Supreme Court of the United States of a writ of error to a state court*—see notes, 63 L. R. A. 329, 471.

Objection is made by the defendant that the matter in controversy does not exceed $2,000, and upon an examination of the record the objection appears to be well founded. Enough must appear to show affirmatively that the jurisdiction exists, and as it does not in this case, *the writ of error must be dismissed.*

WILLIAM T. AVERY, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. 12 Wall. 304-307.)

Failure to present defense, when an estoppel —writ of audita querela, when not allowed —not against the United States.

No one can be relieved against a judgment, however unjust he may consider it, if he had a defense, and, through his own fault, failed to present it.

A party cannot re-open a judgment on the ground that he had a defense which he did not present, because ignorant of it, where he could have known if he had used reasonable diligence to ascertain it.

The writ of *audita querela* does not lie, where the party complaining has had a legal opportunity of defense and has neglected it.

Audita querela is a regular suit, in which the parties may plead and take issue on the merits, and cannot, therefore, be sued against the United States.

[No. 170.]

Argued Oct. 25, 1871. Decided Nov. 13, 1871.

IN ERROR to the Circuit Court of the United States for the District of West Tennessee.

The history and facts of the case are fully stated by the court.

Messrs. **Albert Pike** and *Robert W. Johnson* for plaintiff in error.

Messrs. **B. H. Bristow**, *Solicitor Gen.*, and **C. H. Hill**, *Asst. Atty. Gen.*, for defendant in error:

It nowhere appears in the record that the court erred in overruling the motion. There is no bill of exceptions and no reasons are assigned for the decision of the court. There is nothing, therefore, to base a writ of error upon. *Stevens* v. *Gladding*, 19 How. 64, 15 L. ed. 569.

But if the errors assigned by the plaintiff in error are open to him, the motion to enter satisfaction, being addressed to the discretion of the court, is not a final judgment within the meaning of the 22d section of the judiciary act to which a writ of error will lie.

Boyle v. *Zacharie*, 6 Pet. 646; *Evans* v. *Gee*, 14 Pet. 1; *Amis* v. *Smith*, 16 Pet. 303; *McCargo* v. *Chapman*, 20 How. 555 (61 U. S. XV. 1021); *Brooks* v. *Hunt*, 17 Johns. 484.

The writ of *audita querela* was properly refused, because, as the plaintiff in error admits, *audita querela* will not lie against the Crown.

Bac. Abr., *Audita Querela*, A; *Case* v. *Terrell* (*ante*, 134).

If a judgment recovered by the government is satisfied, and the court improperly refuses to enter satisfaction accordingly, the proper remedy would seem to be by application for a writ of mandamus.

McLean, J., in *McCargo* v. *Chapman*, 20 How. 557, 15 L. ed. 1022.

Mr. Justice **Davis** delivered the opinion of the court:

Avery, by petition filed in May, 1869, prayed the circuit court for the district of west Tennessee, to stay proceedings on the execution, and satisfy the judgment which the United States had obtained against him and another person in the same court, in March, 1857, on the ground that the United States had received for rent of real estate belonging to him, a sum larger than the amount of the judgment. The petitioner alleges as a reason why he did not present his demand as a set-off on the trial of the cause, that he did not know at the time that the money was in the Treasury, nor did he receive knowledge of that fact or evidence on which to base his demand until shortly before presenting his petition.

The court, without any formal pleadings, denied the prayer of the petition, and also refused to grant to the petitioner the writ of *audita querela*, which he asked for on the facts and statements contained in the petition.

Conceding, for the purposes of this suit, that the order of the circuit court in the premises is a final judgment, within the meaning of the 22d section of the judiciary act, to review which a writ of error will lie, did the court err in the disposition it made of the case?

It appears, from the account and vouchers filed with the petition, that the Treasury agents leased, during three years of the Rebellion, the house of Avery in Memphis, to one

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NOTE.—*Audita querela, its nature; when will lie.*

The writ of *audita querela* is a judicial writ directed to the court where the record is and founded on it. Poultney v. Treasurer, 25 Vt. 168; Gleason v. Peck, 12 Vt. 56, 36 Am. Dec. 329.

It is a proceeding to prevent, recall, avoid or set aside an execution founded upon matters subsequent to the judgment, which, therefore, the party could not plead. Longworth v. Screven, 2 Hill (S. C.) 298, 27 Am. Dec. 381; Gleason v. Peck, 12 Vt. 56, 36 Am. Dec. 329; Thatcher v. Gammon, 12 Mass. 270; Lovejoy v. Webber, 10 Mass. 101; Skillings v. Coolidge, 14 Mass. 43; Corbett v. Barnes, Cro. Car. 443.

It lies where defendant paid the debt, during the pendency of the suit and plaintiff afterwards took judgment (Lovejoy v. Webber, 10 Mass. 101; 4 Mod. 14); or where two judgments have been rendered for same cause of action and one has been paid (Browne v. Joy, 9 Johns. 221); or to vacate judgment against infant who defended without guardian (Starbird v. Moore, 21 Vt. 529); or to vacate a judgment against a lunatic whose guardian had not been notified (Lincoln v. Flint, 18 Vt. 247); or in favor of a trustee under trustee process to vacate a void execution against him. Wilson v. Fleming, 16 Vt. 649, 42 Am. Dec. 531.

A party discharged under the insolvent laws, after judgment, may be relieved by this writ. Pettit v. Seaman, 2 Root, 178; Baker v. Judges of Ulster Co. 4 Johns. 191.

Audita querela is not sustained for an error of the court (School Dist. v. Rood, 27 Vt. 214; Lamson v. Bradley, 42 Vt. 165); nor for any matter which might have been pleaded in the original action. Stainford v. Barry, 1 Aikens, 321, 15 Am. Dec. 692.

It does not lie for relief from a judgment on unauthorized appearance of attorney (Spaulding v. Swift, 18 Vt. 214; Abbott v. Dutton, 44 Vt. 551); nor where writ of error is proper at common law. Shear v. Flint, 17 Vt. 497; Little v. Cook, 1 Aikens, 363, 15 Am. Dec. 698.

Remedy by motion may now be obtained in most states where formerly the party would have been entitled to *audita querela*. Steele v. Boyd, 6 Leigh, 547, 29 Am. Dec. 218; Smock v. Dade, 5 Rand. 639, 16 Am. Dec. 780; Chambers v. Neal, 13 Mon. 256; Houston v. Neal, 2 Md. 305; Longworth v. Screven, 2 Hill (S. C.) 298, 27 Am. Dec. 381; Dunlap v. Clements, 18 Ala. 778; McDonald v. Falvey, 18 Wis. 571; Kendall v. Hodgins, 7 Abb. Pr. 309, 1 Bosw. 659.

N. H. Ford, and received from him monthly a certain specified sum for its occupation.

This lease was authorized, if the owner of the property was voluntarily absent from it and engaged in the Rebellion; and, as the Federal military forces during the term of the lease occupied Memphis, it is fairly to be inferred that Avery had abandoned his house under circumstances which warranted the officers of the government in taking possession of it; and the presumption is, in the absence of an averment in the petition to the contrary, that these officers discharged their duty, and paid into the Treasury the money received by them for the rent of this property long before the suit against Avery was tried in the circuit court. If so, and the United States, on this account, was indebted to Avery (a point on which we express no opinion) it was the duty of Avery to plead this indebtedness by way of set-off to the action brought against him. It is a familiar principle that no one can be relieved against a judgment, however unjust he may consider it, if he had a defense and, through his own fault, failed to present it. Avery is in this predicament. It will not avail him to say that he did not know, when the suit was tried that the money was in the Treasury, for it was his business to have informed himself on the subject. This he could easily have done, by communicating with the bureau of the Treasury Department where the accounts of the leases and sales of abandoned property were kept, and this inquiry would have resulted in obtaining evidence equally available for his purpose as that which accompanies his petition. It would lead to endless embarrassments in the administration of justice, if a party were permitted to re-open a **307***] judgment on the ground that he had *a defense. which. he did not present because ignorant of it; but which, the court can see, he could have known if he had used reasonable diligence to ascertain it. It is impossible to suppose that Avery, on his return to Memphis after the war, was not informed of the state of things concerning the occupation of his house during his absence. and yet he institutes no inquiry on the subject, and when subsequently sued by the United States for a large demand, allows it to pass into a judgment without the assertion of any claim for the use of his property. Under these circumstances he cannot be permitted to do, two years after the rendition of the judgment, what he should have done on the trial of the cause.

It follows, as the result of these views, that the circuit court did not err in overruling the motion to recall the execution and satisfy the judgment.

Nor did it err in refusing the writ of *audita querela*, because this writ does not lie, where the party complaining has had a legal opportunity of defense and has neglected it. *Lovejoy* v. *Webber*, 10 Mass 104; *Thatcher* v. *Gammon*, 12 Mass. 270; Bac. Abr. tit. *Audita Querela;* Whart. Law Lex., same title.

Besides, *audita querela* is a regular suit in which the parties may plead and take issue on the merits (*Brooks* v. *Hunt*, 17 Johns. 484) and cannot, therefore, be sued against the United States, as in England it could not against the Crown.

The judgment of the Circuit Court is affirmed.

GEORGE ALEXANDER, *Appt.*, *v.* JACINTO RODRIGUEZ *et al.*

(See S C. "*Villa* v. *Rodriguez*," 12 Wall. 323-342.)

Bona fide purchaser, who is not—quitclaim deed—right of mortgagor to redeem after deeding to mortgagee—mortgagee is trustee—full value paid and fairness must be shown—promise to reconvey valid—part owner may redeem his portion—account.

Persons who are lessees of real property, with the right to purchase the same at a fixed price, are not bona fide purchasers without notice as against an unrecorded mortgage.

A grantee in a quitclaim deed cannot defend as a bona fide purchaser without notice, against such mortgage.

The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption, is similar to that which governs where a sale by a *cestui que trust* to his trustee is drawn in question.

To give validity to a sale by a mortgagor to a mortgagee, it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth.

He must take no advantage of the fears or poverty of the other party; that the mortgagor knowingly surrendered and never intended to reclaim is of no consequence, if there is vice in the transaction.

Where the mortgagee assured the mortgagor before and after the conveyance, that if he could sell so as to repay him the money secured by the mortgage, he would return the surplus money, or if he could sell a portion sufficient to reimburse him, he would return the unsold portion, he cannot repudiate such assurances upon which his grantors were drawn in to convey.

One who holds a portion of the title by deed from a part of the mortgagors is clothed with their rights, and is entitled to redeem such portion upon paying a proper proportion of the mortgage debt and interest.

In decreeing the amount due, the rents, issues and profits, and improvements made upon the premises must also be taken into the account.

[No. 168.]

Submitted Dec. 16, 1870. Decided Nov. 13, 1871.

APPEAL from the Circuit Court of the United States for the District of California.

The history and facts of the case fully appear in the opinion of the court.

Messrs. M. Blair, F. A. Dick, and **Wm. Irvine**, for appellant:

From the facts stated by Rodriguez, we see that he moved, first, that what he demanded was an absolute deed; that the family yielded to him on the first interview. He says that he did not want any more security; he already had a mortgage. "I wanted the ownership." The consideration he gave was a mortgage debt on three sevenths of the land, and got a full title to seven sevenths. Had a stranger owned the land, he could have had no such bargain with him. The debt was worthless aside from the mortgage. He told the family that, unless they conveyed him the property for the mortgage debt, he would sell at public sale.

They had no opportunity to sell, no time given. He said, "Now is the time if you are disposed to sign, or say you do not want it."

At that time the family were unusually dis-

NOTE.—*Parol evidence admissible to prove a deed absolute a mortgage. Action to have deed declared a mortgage. Where a deed is absolute, but is as between the parties a mortgage, bona fide purchaser protected; but purchaser with notice stands in place of equitable mortgagee*—see note to Conway v. Alexander, 3 L. ed. U. S. 321; and note to Hughes v. Edwards, 6 L. ed. U. S 142.

tressed. They were ignorant laborers. Their stock had died of the famine, resulting from the drought of the winter of 1863-4, and they had no property whatever. They could make sale to no one else. Their motive for selling to him was gratitude. "They said they preferred that I should be the owner, because I was the one who had saved them on a former occasion, when they were about to lose the ranch on another mortgage." To this he replied: "If you are all agreed to convey to me your rights, I will accept your proposition with great pleasure and will take no steps to sell the ranch." "They told me they did it with great pleasure. Then I asked: Will Antonio also give me, out of gratitude, his one seventh, amounting to nearly 3,000 acres? Although he was only twenty years of age, he answered that he would; and he kept his word and gave me the land in February, 1865, as a free gift, and because he had been benefited by the use of these moneys, as well as the rest of the family.' To Antonio I said: 'It is very well, I trust to thee.'"

A stronger case could not be presented, to show want of fairness and equality in a bargain. He forced the family to an immediate decision, under a threat of selling under his mortgage, and they yielded. He is compelled, however, to assign other motives than fear to those who made a gift, and he shows that they were grateful for money that he had lent to his impoverished sister, on hard and grinding terms. They owed no gratitude to him for money which he shows that he had been making the most enormous profit on from Dec. 4, 1860, to Apr. 29, 1864. He had never done anything for this poor family. They had been at his mercy, and he spared them not; and after having gotten an immense profit out of his money, he resorts to this scheme to get a double growth of profits by taking their land from them.

There was not only this pecuniary loss to the family, but they gave up their home, where the family had always lived and held together, in their poverty and distress.

A more hard-hearted, unjust and destructive case of oppression could not be presented to the consideration of a court of equity.

"The mortgagee may contract subsequently to the mortgage, for the purchase of the equity of redemption on fair terms, and yet no agreement for a beneficial interest out of the mortgaged premises, while the mortgage continues, is permitted to stand, if impeached within a reasonable time. The reason is that the mortgagee, from his situation, wields a very influential motive, and has great advantage over the mortgagor in such a transaction." 4 Kent. 143.

"Contracts made with the mortgagor to lessen, embarrass, or restrain the right of redemption are regarded with jealousy, and generally set aside as dangerous agreements, founded in unconscientious advantages assumed over the necessities of the mortgagor." 4 Kent, 159.

"Whether a deed is to be regarded as a mortgage or an absolute conveyance, depends on the circumstances under which it is made, and the relations subsisting between the parties, and not exclusively or even chiefly upon their agreement."

3 Lead. Cas. Eq. 625; *Morris* v. *Nixon*, 1 How. 118.

"Hence, the nature of these circumstances and relations may be shown by parol evidence, not for the purpose of contradicting the deed, but of raising an equity paramount to its terms." 1 How. 625.

This rule "is independent of the agreement of the parties, and rests on considerations of public policy, which are paramount to the intention of the parties, and, consequently, to the form or means which they adopt." 1 How. 633.

It is not necessary that there should be mistake or fraud; it is enough that the real circumstances of the transaction do not appear on the face of the instrument, and are such as to render it legally void." 1 How. 633.

"Whether, therefore, a deed shall be construed as a mortgage, depends not so much on whether the parties mean to make a mortgage; . . . as on whether the nature of the transaction was such as to leave free scope for intention, and to authorize or permit an absolute, instead of a defeasible conveyance." 1 How. 633.

"When, therefore, from great inadequacy of price; from admission in the answer; from proof that an absolute has been substituted for a defeasible conveyance—fraudulently, or by taking an undue advantage of the necessities of the debtor, it distinctly appears that a deed is or should be viewed as a security for debt, an equity of redemption will arise in favor of the grantor, by construction of law, and without reference to the agreement of the parties as set forth in the deed, or extrinsic to it." 1 How. 630.

"A similar wish to protect the mortgagor against undue influence, has led to the rule, that where a mortgage has once been made, and the relation of debtor and creditor has been created, subsequent transfers of property on account of debt are to be regarded prima facie as securities.

1 How. 644; *Wakeman* v. *Hazleton*, 3 Barb. Ch. 148; *Parsons* v. *Mumford*, 3 Barb. Ch. 152.

"To insist on what was really a mortgage, as a sale, is, in equity, fraud."

Babcock v. *Wyman*, 19 How. 289, 15 L. ed. 644; citing *Russell* v. *Southard*, 12 How. 154; *Morris* v. *Nixon*, 1 How. 126.

In *Morris* v. *Nixon* a bill was filed in 1836, to set aside an absolute deed made in 1822, on the ground that in equity it should be held to be a mortgage.

The principles on which this case was decided are:

That where confidential relations exist between a debtor and a creditor and a conveyance is made by the debtor to the creditor, it will be treated as a mortgage, if the consideration of the deed is the debt; and this is the construction, in equity, of such a transaction. But the creditor may, by affirmative proof, rebut this presumptive case, by showing that actual negotiations for a sale took place, and a valid and fair sale, for adequate or reasonable price, was made, and that no advantage was taken of the needy circumstances of the debtor.

Decree below reversed.

In *Russell* v. *Southard*, 12 How. 139, Russell made an absolute deed to Southard, dated Sept. 24, 1827, and at the same time a writing was executed, stating the fact of the conveyance, the consideration and agreement by Southard to re-sell, on a day named, which was ex-

pressed to be conditional and without consideration. On the writings the court says, the case was against the plaintiff, Russell, who claimed the right to redeem. "The deed and memorandum certainly import a sale: the question is, if their form and terms were not adopted to vail a transaction differing in reality from the appearance it assumed."

The court says: "The deed will be construed, in equity, to be a mortgage," on proof of fraud or mistake, or some vice in the consideration. But the inquiry still remains: What amounts to an allegation of fraud, or of some vice in the consideration? It is the doctrine of this court, that when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as a payment of the purchase money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage."

Next, as to the written memorandum. "It is true, Russell must have given his consent to this form of the memorandum; but the distress for money under which he then was, places him in the same condition as other borrowers, in numerous cases reported in the books, who have submitted to the dictation of the lender, under the pressure of their wants; and a court of equity does not consider a consent, thus obtained, to be sufficient to fix the rights of the parties."

In *Wheeler* v. *Smith*, 9 How. 55, it was held that a release was void in equity, because executed hastily and without full knowledge of legal rights, and under depressed spirits.

See, also, *Clark* v. *Henry*, 2 Cow. 324, 7 Johns. Ch. 40; *Wharf* v. *Howell*, 5 Binn. 499, by Tilghman, Ch. J.

Deed held a mortgage, where no obligation was given for the money. "The intention of the parties is to be discovered, not only from the writings but from extraneous circumstances. The value of the property is an important consideration, and so are the acts and declarations of the parties."

In *Hallett* v. *Collins*, 10 How. 174, where a part owner of land obtained a release from the heirs of his co-tenant, who were poor, ignorant and just come of age, for inadequate consideration, it was held void. See, the subject of undue influence treated at large, in 3 Lead. Cas. in Eq. 101, 134, 139, 140, 141.

In *Strong* v. *Stewart*, 4 Johns. Ch. 167, there was an absolute deed, and on bill to redeem as a mortgage, the defendant denied the mortgage, set up his absolute deed, but in his answer "admitted that, after the assignment was executed, he gave the grantor, at his request, time to return the money and take back the assignment."

The case rested on parol proof of a loan and the admissions in the answer.

The court decided, first, that parol proof makes out the case; and then added: "In this case, the admissions in the answer were sufficient to presume a mortgage against the absolute terms of the mortgage."

In *Holmes* v. *Grant*, 8 Paige, 245, Holmes was in debt to Grant for $4,277, for which his notes were given, and Sept. 8, 1820, an absolute deed was made for the land in question, in consideration of the same, and a writing given back, that the grantor might have all over said amount the land would sell for within a year. Held, a mortgage, on the ground that it was given for a precedent debt, with right to redeem.

This decree was reversed:

(1) Because there was full value paid for the land; (2) it was shown that the creditor did not wish to take the land for his debt.

The Chancellor says: "I have looked into the evidence of the value of the farm at that time, for the purpose of seeing whether the amount paid for this conveyance was materially less than the cash value of the land."

Story, Eq. § 33, speaking of conveyance by parties between whom peculiar relations exist, says: "But the burden of establishing its perfect fairness, adequacy and equity is thrown upon the grantee."

If no such proof is established, courts of equity treat the case as one of constructive fraud. Story, Eq. §§ 311, 314.

It is a rule in equity, that so long as a person has an interest by an executory contract, he must take subject to all the equities which attach upon the title of his bargainer.

Nace v. *Boyer*, 30 Pa. 110, says: "So long as a contract remains executory, any ground of invalidity may be urged against it."

2 Lead. Cas. Eq. 96, states the rule thus: "The rule that a bona fide purchaser without notice is protected in equity against a prior equitable right, applies only to purchasers of the legal title."

2 Lead Cas. Eq. 72; *Boone* v. *Chiles*, 10 Pet. 177; *Vattier* v. *Hinde*, 7 Pet. 271.

It is the settled doctrine of this court, that one who acquires title by quitclaim deed, cannot be regarded as a bona fide purchaser without notice. In such cases, the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey.

May v. *Le Claire*, *ante*, 50; *Oliver* v. *Piatt*, 3 How. 363.

The Steeles had full notice of the nature of Rodriguez' title, for the deed recited the consideration thus: that three only of the children were indebted on the mortgage; also that five of the children were indebted for the taxes advanced; and stated that the consideration of the deed was said sums of money; thus revealing the fact that José and Ramona conveyed only for their proportion of taxes. Here was full proof that no bargain was made by the parties in proportion to the value of the interest sold.

The deeds showed that the family supposed they were conveying 13,000 acres, when the Steeles knew it was over 20,000 acres.

Messrs. W. W. Cope, R. J. Brent, and **T. T. Crittenden**, for appellees:

Jacinto Rodriguez, invested with title, assumed the general control of the property, paid the taxes, and executed to the defendants, Edgar W. Steele, Issac C. Steele, and Rennselaer E. Steele, the indenture of lease, by which he demised and leased the said premises to them for the term of five years, at the annual rent of $1,000. The contract also contained covenants on the part of the lessees, for the payment of rent and the erection of certain improvements: and on the part of the lessor, for the convey-

ance of the title in fee at the expiration of the term, upon the payment of a specific sum. These covenants were binding in law.

Laffan v. *Naglee*, 9 Cal. 662; *De Rutte* v. *Muldrow*, 16 Cal. 505; *Willard* v. *Tayloe*, 8 Wall. 557, 19 L. ed. 501.

According to the law of California, a deed absolute in form, though intended as a security, passes the legal title, as evidenced by the recent decisions of the supreme court in *Hughes* v. *Davis*, 40 Cal. 117, and *Espinosa* v. *Gregory*, 40 Cal. 58, overruling *Jackson* v. *Lodge*, 36 Cal. 28. But in making the deed of Apr. 29, 1864, it was not only intended to pass the legal title, but to do so in order that Rodriguez might have the power to sell and convey. It was intended as an absolute deed, and this intention clearly appears in the evidence of Jacinto Rodriguez, and is admitted in that of the widow, Rafaela Rodriguez de Villavicenia, who seems to have taken a leading part in the negotiations between the Villavicencias and Rodriguez. She admits that it was their intention, in executing the deed, to empower Rodriguez to sell a league or two of the land. This admission was most reluctantly made, under the pressure of cross-examination, and contradicts everything of importance to which she had previously sworn. If such was really the truth, the instrument of Apr. 29, 1864, would constitute a trust, not a mortgage, with the right in the trustee to sell or contract to sell, and thereby conclusively bind his grantees.

Green v. *Butler*, 26 Cal. 604; *Moore* v. *Burnet*, 11 Ohio, 340; *Bayley* v. *Greenleaf*, 7 Wheat. 54; 38 Cal. 586.

As to the sufficiency of evidence to convert a deed absolute on its face into a mortgage, see *Cook* v. *Gudger*, 2 Jones, Eq. 172; *Bryan* v. *Cowart*, 21 Ala. 92, 13 Ala. 246; *Franklin* v. *Roberts*, 2 Ired. Eq. 560; *Henley* v. *Hotaling*, 41 Cal. 22.

The appellant is estopped by the recitals in the deed of Apr. 29, 1864.

It is true that a deed, absolute in form, may be proved by parol to be in fact a mortgage. Such proof does not contradict the deed. A mortgage is in form a deed with a defeasance. This defeasance is usually embodied in the mortgage, but it may be on a separate piece of paper or lie in parol. In neither case does it contradict the deed. Defeasance, established by parol, is as consistent with the granting part of the deed, as if contained in the instrument. But here any parol defeasance contradicts the recitals of the deed.

Pierce v. *Robinson*, 13 Cal. 126; 3 Washb. Real Prop. 93, 368; 4 Kent. Com. 261, n.; *Jackson* v. *Parkhurst*, 9 Wend. 209; *Carver* v. *Jackson*, 4 Pet. 83; *Bingham* v. *Thompson*, 4 Nev. 224; *Sweet* v. *Mitchell*, 15 Wis. 662; see *Lloyd* v. *Burgess*, 4 Gill. 192.

When, however, an attempt is made to convert an absolute deed into a mortgage or other defeasible conveyance, not by proof that the consideration was a loan, or of other paramount and controlling facts and circumstances, but by varying the deed or engrafting an agreement upon it inconsistent with its terms, the principles which have been stated cease to be applicable, and the case will fall within the provisions of the statute of frauds and the well-established rule of evidence, which renders written instruments conclusive of the intention of those who execute them.

Storch v. *Carr*, 28 Pa. 135; *Brothers* v. *Harrill*, 2 Jones, Eq. 209; *Glisson* v. *Hill*, 2 Jones, 256; *Cook* v. *Gudger*, 2 Jones, 172.

In the language of the court in *Brothers* v. *Harrill*, there must be facts *dehors* the deed, to render a deed or other indefeasible transfer defeasible, inconsistent with the idea of its being an absolute conveyance, and sufficient to show that it is in fact a security, and not a purchase.

Even where there is an agreement to reconvey, it is not an absolute rule that the covenant to reconvey shall be regarded, either in law or equity, as a defeasance. The covenant to reconvey, it is true, may be one fact, taken in connection with other facts going to show that the parties really intended the deed to operate as a mortgage; but standing alone, it is not sufficient to work that result.

Henley v. *Hotaling*, 41 Cal. 22; *Holmes* v. *Grant*, 8 Paige, 243; *Mason* v. *Moody*, 26 Miss. 184; 12 Johns. 411; 19 Ves. 412; 2 Mass. 294.

The deed of Apr. 29, 1864, was executed in payment of a debt. The consideration expressed is the discharge of the grantees from all indebtedness, and the cancelation of the mortgage then held by the grantees. The mortgage, which secured the greater part of this indebtedness, was immediately discharged on the records of the county of San Louis Obispo. This being done, no debt existed, and where there is no debt, there can be no mortgage.

3 Lead. Cas. Eq. 635; 2 Washb. Real. Prop. 47; *Robinson* v. *Cropsy*, 6 Paige, 480; *Holmes* v. *Grant*, 8 Paige, 257; *Conway* v. *Alexander*, 7 Cranch, 237.

If the absolute deed was intended as a mortgage, what was the necessity for canceling the already existing mortgage?

The contract with the Steeles was virtually a sale and, as such, a conclusive execution of the power to sell vested in Rodriguez, even by the parol agreement set up in the evidence.

This covenant is based on a sufficient consideration, and will be specifically decreed in equity, notwithstanding it is optional with the lessees whether they will purchase; all such covenants run with the real estate, and are to be specifically decreed, and are not liable to the objection of want of mutuality.

Piggot v. *Mason*, 1 Paige, 412; *Van Horn* v. *Crain*, 1 Paige, 455; *Trant* v. *Dwyer*, 1 Dow & Cl. 125, 2 Bligh (N. S.), 11; *Willard* v. *Tayloe*, 8 Wall. 557, 19 L. ed. 501.

Even in cases where the renewal depended on no covenant of the lessors, but merely their practice, it was held that this imperfect right of renewal was vendible, as an inchoate interest.

Phyfe v. *Wardell*, 5 Paige, 268, 2 Edw. 47.

Even if the agreement with the Steeles had been by parol, yet their entry upon and improvement of the land would be part performance, entitling them to a specific execution of the agreement.

Haines v. *Haines*, 6 Md. 443; *King* v. *Thompson*, 9 Pet. 218; 10 Cal. 157; 19 Cal. 461, and cases cited.

The grantors of Rodriguez were informed of the terms of the contract with the Steeles before its execution. They made no protest, but, on

the contrary, acquiesced in the bargain. They assisted in erecting the stipulated improvements upon the land. They attended the cattle, and even became the tenants of the Steeles. Under such circumstances, are they not estopped from denying the validity of the contract?

Davis v. *Davis*, 26 Cal. 39; *Bowman* v. *Cudworth*, 31 Cal. 152; *Godeffroy* v. *Caldwell*, 2 Cal. 492; *Downer* v. *Ford*, 16 Cal. 347; *Boggs* v. *Merced Min. Co.* 14 Cal. 367; *McGarrity* v. *Byington*, 12 Cal. 431; *Ferris* v. *Coover*, 10 Cal. 631; *Carpentier* v. *Thirston*, 24 Cal. 281, *Storrs* v. *Barker*, 6 Johns. Ch. 168; 1 Story, Eq. §§ 384, 387, 388, 389; *Dann* v. *Spurrier*, 7 Ves. 235.

Mr. Justice **Swayne** delivered the opinion of the court:

This is an appeal in equity from the decree of the circuit court of the United States for the district of California. The appellant was the complainant in the court below. The decree was against him.

He seeks to redeem the premises in controversy according to the prayer of his bill. The defendant, Rodriguez, claims an indefeasible estate in them as regards the complainant and those from whom he derives title. The other defendants claim under a contract of purchase made with Rodriguez. The validity of the complainant's title, if his grantor had anything to convey, is not questioned. Nor is the original title of his grantor and of those who conveyed to him denied. But the defendants insist that the title of all those parties was vested absolutely in Rodriguez by deeds duly made and recorded before the conveyances to the complainant and his grantor were executed. The complainant insists that Rodriguez, after, as before, the legal title was conveyed to him, held the premises only as security for a debt. This is the hinge of the controversy between the parties.

337*] *The entire tract, of which the premises in controversy form a part, was conveyed by José Maria Villavicencia on the 13th of April, 1852, to his seven children. He died in 1853. The widow and five of the children, conveyed to Fulgencio, also one of the children, on the 16th of December, 1867. On the 26th of the same month Fulgencio conveyed to the complainant. By virtue of this conveyance he claims six sevenths of the tract. That proportion is his, if his title be valid.

The widow is the sister of the defendant, Rodriguez. On the 4th of December, 1860, she and three of the children, the other four being under age, executed to Rodriguez, for money then borrowed, a note for $4,000, payable a year from date, and bearing interest at the rate of two per cent a month, payable at the end of each six months thereafter; the interest, "if not so paid, to be added to the principal and draw interest at the same rate, compounding in the same manner." A mortgage upon the entire tract was given at the same time by the makers of the note to secure its payment. The mortgage contained a provision that in default of the payment of the interest as stipulated, the principal should become due and payable at the option of the mortgagee, and that the mortgage might thereupon be foreclosed, and the premises sold to satisfy the mortgage debt, and that out of the proceeds of the sale the mortgagee should be authorized to retain, besides his debt and costs, a counsel fee of five per cent upon the amount found to be due. The mortgage contained a further provision that the mortgagee might pay all taxes and encumbrances on the property, and that the amount of such advances should be secured by the mortgage, and should also bear interest at the rate of two per cent per month. Rodriguez subsequently paid $1,172, to redeem the property from a sale for taxes. On the 29th of April, 1864, the widow and five of the children conveyed to him by a deed absolute in form. It is recited in the deed that the debt secured by the mortgage then amounted to about $10,000. On the 17th of February, 1865, one of the children, who was a minor when this *deed was executed, and [*338 hence had not joined in it, also conveyed to Rodriguez. Nothing was paid to the grantor. On the 20th of May, 1865, the other and seventh child, who had then become of age, executed a like conveyance. The consideration paid was $100.

On the 22d of July, 1866, Rodriguez demised the premises so conveyed to him to his co-defendants, Edgar W., Isaac C., and Rensselaer E. Steele. The defendant, George Steele, subsequently became interested in this contract by an arrangment with the lessees. The leasehold term was for five years from the 1st of August, ensuing its date. Rodriguez stipulated that at the end of the term or within five days thereafter the lessees might purchase by paying him $25,000 in gold, and upon such payment being so made he covenanted that he would, by a sufficient deed, release and quitclaim to the lessees or their heirs and assigns, free from all encumbrances created by him, all the right and title which he then had to the premises or which he might thereafter acquire from the United States or from any of the heirs of José Maria Villavicencia.

The lessees and their assignees insist that they are bona fide purchasers without notice.

This proposition cannot be maintained. The contract gave them the option—it did not bind them—to buy at the time specified. That time had not arrived when this bill was filed. *Non constat* that they would then exercise their election affirmatively and pay the stipulated price. But this point is not material. The doctrine invoked has no application where the rights of the vendee lie in an executory contract. It applies only where the legal title has been conveyed and the purchase money fully paid. *Nace* v. *Boyer*, 30 Pa. 110; *Boone* v. *Chiles*, 10 Pet. 177, 211. The purchaser then holds adversely to all the world, and may disclaim even the title of his vendor. *Croxall* v. *Sherrerd*, 5 Wall. 289, 18 L. ed. 580.

This contract calls for a quitclaim deed. The result would be the same if such a deed had been executed and full payment *made, with- [*339 out notice of the adverse claim. Such a purchaser cannot have the immunity which the principle sought to be applied gives to those entitled to its protection. *May* v. *Le Claire*, 11 Wall. 232, *ante*, 53; *Oliver* v. *Piatt*, 3 How. 363. This contract may, therefore, be laid out of view. It is no impediment to the assertion

of the complainant's rights, whatever they may be. It does not in any wise affect them.

The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que trust* to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law. *Morris* v. *Nixon*, 1 How. 118; *Russell* v. *Southard*, 12 How. 139; *Wakeman* v. *Hazleton*, 3 Barb. Ch. 148; 4 Kent, Com. 143; *Holmes* v. *Grant*, 8 Paige, 245; 3 Lead. Cas. Eq. 625.

The terms exacted for the loan by Rodriguez were harsh and oppressive. The condition of 340*] the widow and orphans *might well have touched his kindred heart with sympathy. It seems only to have whetted his avarice. Two per cent a month—and this, if not paid as stipulated, to be compounded—was a devouring rate of interest. It was stipulated that the further advances should bear interest at the same rate. He demanded an adjustment when, from the failure of the crops and other causes, the property was greatly depressed, and he knew the widow and her children had no means of payment. The alternatives presented were an absolute conveyance of the property or a foreclosure and sale under the mortgage. He was anxious to procure the deed, and exulted when he got it. The debt and advances, with the interest superadded, were much less than the value of the property. The note and mortgage were executed by three of the children and the widow—the deed by the widow and five of the children. The other two children conveyed at later periods. The consideration of the conveyance by the four children not parties to the note and mortgage was such that if an absolute title passed their deeds must be regarded as deeds of gift of their shares of a valuable estate. Dana, who took the acknowledgment of the deed executed by the widow and five children, testifies that the widow inquired whether the deed contained all the agreements between her and Rodriguez. Dana translated it to her. She complained that the agreements were omitted. Rodriguez insisted that they were in the deed, and added "that they ought not to distrust him, as he was taking all these steps for their interest." The widow and children then executed the deed. Dana, speaking of a subsequent conversation with Rodriguez, on the same day, "which was altogether unsolicited," says: "He stated to me that his object in getting the Villavicencia family to execute the deed aforesaid was to secure his money; money which he had loaned or advanced to them, and save the property for the benefit of his sister and her family, while if it remained in their hands he might lose his money and his sister and her children would lose the whole property. He said they had done wisely in trusting him, as he intended to deal justly by his sister." Rodriguez was examined *as a [*341 witness. Referring to a period shortly preceding the execution of this deed, he says: "Afterwards I had with them a further conversation, and told them, I don't wish to speculate upon you, because you are my relations, and you have treated me well. If I can sell the ranch for enough to reimburse myself for my outlays as well as interest, I will return you the surplus money, if any; and, also, if I can sell a portion of the ranch, or enough to reimburse myself for my advance, I will do the same, and return to you the unsold portion of the ranch, but if I have bad luck and cannot sell it, I will lose my money." Elsewhere, in the same deposition, he says: "I stated at the ranch, and again stated to my sister afterwards, that I would return the surplus money, but it was no obligation of mine. It may be that I said so to Charles Dana at that time."

He made the same admissions to other persons who are in nowise connected with this litigation. Their testimony is found in the record. It is unnecessary to extend the limits of this opinion by accumulating and commenting upon it. The widow and five of the children, all who have been examined, testify that they understood the deeds to be only security for the debt. This explains the transaction as to those who were not parties to the note and mortgage. There is no other way of accounting for their conduct. The testimony of Rodriguez alone is sufficient to turn the scale against him. He cannot repudiate the assurances upon which his grantors were drawn in to convey. To permit him to do so would give triumph to iniquity. The facts indisputably established bring the case clearly within those principles by the light of which, in determining the rights of the parties, the judgment of this court must be made up. The complainant stands in the place of those from whom he derives title. He is clothed with their rights, and is entitled to redeem six sevenths of the premises upon paying that proportion of the mortgage debt and interest. The former must be held to include the amount advanced, as well as that represented by the note, and the latter be settled by the terms of the contract and the law of California. The *rents, issues and profits, and im- [*342 provements made upon the premises must also be taken into the account.

The decree is reversed and the cause will be remanded to the Circuit Court, with directions to enter a decree and proceed in conformity to this opinion.

MARIE LOUIS PERIN *et al., Appts.,*
v.
UNITED STATES.

(See S. C. 12 Wall. 315, 316.)

Claim for tort, when cannot be heard by court of claims.

A claim for the destruction of property by the United States naval forces in bombarding a town, cannot be heard by the court of claims.

[No. 211.]

Argued Nov. 9, 1871. Decided Nov. 13, 1871.

APPEAL from the Court of Claims.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **W. W. Boyce** for appellants.

Messrs. A. T. Akerman, Atty. Gen., and *C. H. Hill, Asst. Atty. Gen.,* for appellees.

Mr. Justice **Clifford** delivered the opinion of the court:

The petitioners alleged in the court that they were naturalized citizens of the United States; that just before the 13th day of July, 1854, they arrived at San Juan del Norte or Greytown, possessed of a valuable invoice of merchandise, with the intention of establishing a commercial house in some part of Central America; that on that day the town of San Juan was bombarded and burned by the United States sloop of war Cyane, and all the merchandise, books, and papers of the petitioners, together with their personal effects. Appearance was entered by the Assistant Attorney General, and he demurred to the petition because it did not set forth facts sufficient to constitute a cause of action, and the court below sustained the demurrer and dismissed the petition. Whereupon the petitioners appealed to this court, and alleged that the decision sustaining the demurrer was erroneous; but the court here, inasmuch as the claim is not one "founded upon any law of Congress, nor upon any regulation of an executive department; nor upon any contract, express or implied, with the government of the United States," *concurs in opinion with the Court of Claims, and affirms the decree dismissing the petition.*

THE NORTHERN RAILROAD COMPANY and John S. Lovering, *Pltfs. in Err.,*
v.
THE PEOPLE OF THE STATE OF NEW YORK.

(See S. C. 11 Wall. 384–388.)

State judgments, when not reviewable.

The principles announced in the case of Knox v. Exchange Bank, *post,* 414, govern this case.

The judgment of the state court did not rest in any manner on the New York act of March, 1857.

And as the validity or invalidity of that statute is in no way involved in the judgment, there is no question here of which this court has jurisdiction.

[No. 367.]

Argued Nov. 10, 1871. Decided Nov. 13, 1871.

IN ERROR to the Supreme Court of the State of New York.

On motion to dismiss.

Suit was brought in the supreme court of the state of New York by the defendants in error, for the dissolution of the corporation named as the plaintiff in error. Judgment having been given in favor of the plaintiff at a special term of said court, and successively affirmed upon appeal by the general term of said court and by the court of appeals, the defendants sued out this writ of error.

Messrs. **Wm. M. Evarts** and **J. Hubley Ashton,** for defendant in error:

The court decided that all the material facts averred in the complaint were admitted by the answer; and that, as there were no issues of fact to be determined by the court or jury, judgment, as matter of local practice, could properly be rendered on the complaint and answer.

The judgment was "that the Northern Railroad Company has surrendered and forfeited the franchises granted by any acts of incorporation, and is hereby dissolved."

The court adjudged that prior to 1857 the company had, on the admitted facts, done and omitted acts amounting in law to a surrender and forfeiture of its franchises to the state, and that by the act of Mar. 31, 1857, the state had accepted this previous surrender of its charter.

No question touching the constitutionality of the act of 1857 was, therefore, decided by the court at the special term.

Nothing whatever was determined about that act except, incidentally, that it was, in effect, an acceptance by the people of a previous surrender of its charter by the company, in virtue and by operation of the general law of the state.

This appears among other things:

By the exceptions to the judgment on appeal to the general term, which state the whole matter of exception, so far as that act is concerned, thus: to the decision of the court at special term, that prior to the passage of the act of 1857, the company had surrendered its franchises to the state, and that by that act the state accepted said surrender.

The decision of the court at general term, on appeal, in affirming the judgment of forfeiture entered at the special term, was not founded or predicated, to any extent whatever, on the effect of the act of 1857.

The opinion of the court of appeals, in affirming the judgment of dissolution and forfeiture, shows also that that court decided or passed upon no question whatever, either of constitutionality or construction, arising under the act of 1857.

People v. *R. Co.* 42 N. Y. 227.

It simply held that the court, at special term, had a right to render judgment on the complaint and answer, as there were no issues of fact to be tried; that the admitted facts showed that the company had forfeited its charter; that no sufficient excuse therefor was alleged in the answer, and that the individual defendants, having acted with knowledge of the previous forfeiture, were liable to be fined under the New York Code.

No part of this conclusion is founded upon any view, even of the construction, of the act of Mar. 31, 1857.

Twenty-five cases have been decided by this court, on writs of error to state courts since the act of 1867 was passed; and in one and all

of them, the doctrine is repeated, that the court, in this class of cases, can only consider such alleged errors as are involved in the record, and actually received the consideration of the state court.

Walker v. *Villavaso*, 6 Wall. 128, 18 L. ed. 854; *The Victory*, 6 Wall. 384, 18 L. ed. 849; *Hamilton Mfg. Co.* v. *Mass.* 6 Wall. 636, 18 L. ed. 906.

The other cases in 6 Wall. 18 L. ed. are:

Millingar v. *Hartupee*, 262, 18 L. ed. 830; *Rector* v. *Ashley*, 148, 18 L. ed. 733; *Reichert* v. *Felps*, 6 Wall. 165, 18 L. ed. 850; *Silver* v. *Ladd*, 440, 18 L. ed. 828.

In 7 Wall. 19 L. ed. the cases are:

Twitchell v. *Com.* 324, 19 L. ed. 223; *Austin* v. *The Aldermen*, 698, 19 L. ed. 226; *Banks* v. *The Mayor*, 22, 19 L. ed. 59.

In 8 Wall. 19 L. ed the cases are:

Furman v. *Nichol*, 56, 19 L. ed. 375; *Gibson* v. *Chouteau*, 317, 19 L. ed. 317; *Aldrich* v. *Ins. Co.* 495, 19 L. ed. 475.

In 9 Wall. 19 L. ed. the cases are:

Downham v. *Alexandria*, 659, 19 L. ed. 807; *Worthy* v. *Comrs.* 613, 19 L. ed. 566; *Carpenter* v. *Williams*, 786, 19 L. ed. 828; *Bk.* v. *Com.* 363, 19 L. ed. 704.

The cases in 10 Wall. 19 L. ed. are:

Downham v. *Alexandria*, 175, 19 L. ed. 930; *N. O. R.* v. *Morgan*, 260, 19 L. ed. 892; *Messenger* v. *Mason*, 509, 19 L. ed. 1029; *R. Co.* v. *McClure*, 515, 19 L. ed. 998; *Bethell* v. *Demaret*, 540, 19 L. ed. 1008.

In 11 Wall. *ante:*

Parmalee v. *Laurence*, *ante*, 48; *Ins. Co.* v. *The Treasurer*, *ante*, 112.

***Mr.* Caleb Cushing,** for plaintiffs in error:

The charter of a private corporation is a contract, the obligation of which cannot be impaired by the legislature of a state.

Dartmouth Coll. v. *Woodward*, 4 Wheat. 518; *Bk.* v. *Billings*, 4 Pet. 514; *Bk.* v. *Knoop*, 16 How. 369; *Dodge* v. *Woolsey*, 18 How. 331, 15 L. ed. 401; *Bk.* v. *Skelly*, 1 Black, 436, 17 L. ed. 173: *The Binghamton Bridge*, 3 Wall. 51, 18 L. ed. 137.

Where the legislature, in an act of incorporation, reserves the right to revoke the charter, in case the corporation should abuse its privileges, an act declaring a revocation, without the establishment of such fact by competent proceedings, is unconstitutional.

Baltimore v. *R. Co.* 13 Am. L. R. 750; *Ibid.* 13 Pitts. L. J. 576.

A constitutional question, one expressly enunciated in the 25th section of the judiciary act was, in this case, we submit, distinctly raised in the state court.

The question thus raised was, we submit, decided as required in the said 25th section of the judiciary act, so as to give this court jurisdiction; that is to say, the said act of the legislature of Mar. 31, 1857, was held to be constitutional.

We do not assert that the question was decided by the state court *in ipsissimis verbis*, but we submit that it was necessarily decided in order to induce the judgment rendered.

By reference to the judgment of the state court, rendered in this case, we find the following passages:

"The complaint shows that in this case the surrender was accepted by the government. . . . The answer puts in issue the validity of the judgment of dissolution, but it sets forth the statute of Mar. 31, 1857, being the act to provide for the formation of a corporation in place of the Northern Railroad Company, dissolved, etc. . . . The answer also sets forth the amendment of April 8, 1864, to the act of 1858, under which it appears that the Ogdensburgh & Lake Champlain Railroad Company became incorporated. By each of these statutes the legislature accepted the surrender of the franchise before granted to the Northern Railroad Company, and provided for conferring it upon another corporation. The old corporation was, therefore, 'dissolved in fact' and likewise dissolved in law, as early as 1858. It necessarily follows that the defendants should be adjudged guilty of usurping and using, without lawful warrant or charter, the franchise of being a corporation, as charged."

It will thus be seen that the act of March 31, 1857, the constitutionality of which was disputed by the defendants, was treated by the state court, in its judgment of ouster against the then defendant corporation, as a legitimate and valid law. In other words, the state court decided that the act of March 31, 1857, was constitutional.

The motion to dismiss rests on the single ground of want of jurisdiction.

To sustain the jurisdiction, it is sufficient that the constitutional question in regard to the act of March 31, 1857, was raised and decided in the state court.

In this relation, we call attention to the important modification of the 25th section of the judiciary act, made by the act approved Feb. 5, 1867. 14 Stat. at L. 386, § 2.

By the act of 1789, no error could be considered, except such as appeared on the face of the record. By the act of 1867, this restrictive proviso is, in substance, repealed.

The effect of such repeal is to enlarge the jurisdiction of this court, not in regard to the class of questions conferring jurisdiction, but as to the means of ascertaining whether the prescribed questions arose in a given case.

Under the act of 1789, this court could only ascertain from the face of the record whether the alleged question had arisen. The court was debarred from getting information on this point in any other way than from the face of the record. Information on this point may be obtained, in addition to what appears on the "face of the record," by any means or from any sources which this court may consider proper. We may well suppose that, under certain circumstances, affidavits may be introduced to inform this court of the questions raised in the state court. So, also, this court may establish some rule on the subject, providing for the manner in which questions arising under the act of 1867, and not appearing on the face of the record, may be brought to the judicial knowledge of this court.

Mr. Justice Miller delivered the opinion of the court:

The principles announced in the case of *Knox* v. *Exchange Bank*, *post*, 414, govern this case of *The Northern Railroad Company and others against the People of the State of New York*,

in which a motion is made to dismiss the writ of error to the Supreme Court of that State, on similar grounds.

We are unable to see that the judgment of the state court declaring the dissolution of the corporation which is here plaintiff in error, rested in any manner on the act of the New York legislature of March, 1857. It is true that the plaintiff in error, both in the pleading which it filed in the case and in the argument here, assails that statute, as taking property without due process of law, and impairing the obligation of contracts; but as the defendant in error claims nothing under that statute, and as the validity or invalidity of that statute is in no way involved in the judgment of dissolution rendered by the state court, there is no question here of which this court has jurisdiction.

The motion in that case to dismiss the writ of error is, therefore, granted.

JOHN S. KNOX, JR., *et al., Plffs. in Err.,*
v.
THE EXCHANGE BANK OF VIRGINIA,
Use of George W. Camp, Trustee.

(See S. C. 12 Wall. 379-384.)

Substitution of assignee in bankruptcy for party to action—re-instatement of case—state judgments, when not reviewable—motion denied.

When a party to a writ of error has been declared bankrupt and an assignee duly appointed and the writ of error dismissed, the assignee in bankruptcy may make application to re-instate it and to be substituted for the bankrupt as plaintiff in error.

Where the application is made during the same term, while the matter is still within the control of this court, the substitution asked for will be made if the case is one which ought to be re-instated.

This court is not authorized by the judiciary act to review the judgments of the state courts, because their judgments refuse to give effect to valid contracts or because such judgments, in their effect, impair the obligation of contracts.

It must be the Constitution or statute of the state which impairs the obligation of a contract, or the case does not come within our jurisdiction.

Where there is nothing in the record which shows jurisdiction in this court, the motion to re-instate will be denied.

[No. 500.]

Submitted Oct. 20, 1871. Decided Nov. 13, 1871.

IN ERROR to the Supreme Court of Appeals of the State of Virginia.

This is the same case as the preceding, *ante*, in which decision was made earlier in the term dismissing the writ of error. The assignee in bankruptcy, of the plaintiffs in error, now moves to re-instate the case.

The case is further stated in the opinion of the court.

Messrs. Geo. Wm. Brent and *C. W. Wattles*, for plaintiffs in error:

The judgment of the circuit court for Richmond was based on the ground that the 16th section of the Code of Virginia was a contract, and its obligation impaired by the act of Feb. 12, 1866. In Virginia, the Constitution of the state has this provision (article VI., § 4): "When a judgment or decree is reversed or affirmed by the supreme court of appeals, the reasons therefor shall be stated in writing, and preserved with the records of the case.

Do not the reasons for the judgment constitute a part of the judgment?

Mr. H. O. Claughton, for defendant in error:

The real grievance, of which the plaintiffs in error complain, is apparent in the sentence of the petition, immediately preceding the assignment of errors, to wit: "The Court of Appeals, however, has taken a different view of the subject, and has treated the act as abrogating §§ 15 and 16. If such is the effect, the obligation of the contract has been impaired, and we are entitled to invoke this court to protect us against the violation of the Constitution of the United States." The obligation of the contract, impaired by what? By the act of Feb. 12, 1866? No, but by the construction which the court of appeals placed upon the act.

R. Co. v. *Rock*, 4 Wall. 177, 18 L. ed. 381.

The decisions of this court have invariably held that the decisions of state courts construing state statutes, are not within the 25th section of the judiciary act of 1789.

McBride v. *Hoey*, 11 Pet. 167; *Strader* v. *Graham*, 10 How. 82; *Bk.* v. *Buckingham*, 5 How. 317; 12 How. 165.

The case of *Furman* v. *Nichol*, 8 Wall. 44, 19 L. ed. 370, is the latest and fullest authority upon the question of jurisdiction.

The record shows that there was no question of constitutionality raised, and that the judgment of the court below was enitrely independent of any such consideration, and would have been the same if the act of Feb. 12, 1866, had never been passed.

Mr. Justice **Miller** delivered the opinion of the court:

Since the order of the court dismissing this case, the assignee in bankruptcy of Robert F. Knox and John S. Knox, Jr., has made application to re-instate it, and to be substituted for them as plaintiff in error.

In the case of *Herndon* v. *Howard*, 9 Wall. 664, 19 L. ed. 809, it was decided that the proper course when a party to a writ of error had been declared bankrupt and an assignee duly appointed, was for the assignee in bankruptcy to make application to re-instate it and to be substituted for the bankrupt as plaintiff in error. The application here, being made during the term, while the matter is still within our control, we see no objection to the substitution asked for, if the case is one which ought to be re-instated.

The motion on which the writ of error was dismissed last spring was based on the allegation that no question is found in the record which would give this court jurisdiction to review the judgment of the state court. As it would be useless to set aside the order of dismissal merely to try that question again, on which the parties were fully heard, we must now inquire if that objection is well taken.

The case seems to be this: The Exchange Bank of Virginia was, by its charter, authorized to issue notes of circulation, which were made a valid tender to the bank, in payment

NOTE.—*What questions the Federal Supreme Court will consider in reviewing the judgment of state courts*—see note, 63 L. R. A. 571.

of any debt due to it. After the War of the Rebellion was over, a law was passed authorizing the insolvent banks of the state to make general assignments for the benefit of their creditors. The Exchange Bank being in that condition, made such an assignment, and the assignee sued and recovered against the present plaintiff in error, a judgment on a debt due by them to the bank. In the progress of the case the defendants brought into court and tendered notes of the bank sufficient to cover the debt, interest and costs to that date which they pleaded in payment.

The court of appeals of Virginia, in the judgment in which this writ is designed to bring before us, held that this could not be done.

It is now argued by the plaintiff in error that the original provision in the charter of the bank making its notes receivable for debts due to it was a contract; and that the obligation of that contract has been impaired. We have decided in the case of *Furman* v. *Nichol*, 8 Wall. 44, 19 L. ed. 370, that such a law does constitute a contract, which attaches to the notes in the hands of anyone to whom they may come, and we agree that if the 383*] *trustee of the bank is to be considered as occupying, for the purposes of this suit, the place of the bank, that the judgment of the court of appeals was erroneous.

But we are not authorized by the judiciary act to review the judgments of the state courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, when the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held. As this court said in *Railroad Co.* v. *Rock*, 4 Wall. 181, 18 L. ed. 382, it must be the Constitution, or statute of the state which impairs the obligation of a contract, or the case does not come within our jurisdiction. See, also, *Railroad Co.* v. *McClure*, 10 Wall. 511, 19 L. ed. 997.

What statute of Virginia is supposed to affect unfavorably the contract under which these notes were issued?

It is rather insinuated than fully declared, that the court gave such effect to the act of February 1866, under which the bank made its assignment. But nothing in the record shows that the court based its judgment on any such proposition. Nor is there anything in that statute which by any possibility can be said to impair the force given to those notes by the charter of the bank. The latter statute merely authorized, in general terms the insolvent banks to make assignments of all their effects for the benefit of all their creditors. This is a right which they probably had before. But whether they did or not the statute contains no expression from which the intent to affect the value of the notes of the bank as payment for its debts can be inferred.

In the case of *Nichol* v. *Furman* the state of Tennessee passed a law by which the notes of the bank receivable by its charter for taxes were no longer to be so received; and this court held that this latter statute impaired the obligation of the contract found in the charter. But there it was the statute which worked the injury and it was the judgment of *the state court holding the statute [*384 valid which gave this court jurisdiction.

So in the case of *Bridge Props.* v. *Hoboken Co.* 1 Wall. 148, 17 L. ed. 578. The legislature of New Jersey had passed a law authorizing the company to erect a railroad bridge at a certain point where the complainants alleged that they had an exclusive privilege for bridging the stream under a statute passed many years before. If the first statute gave this exclusive right, it was clear that the second statute impaired that right and so impaired the obligation of the contract. This we held to be a proper subject of inquiry by this court. But in the present case there can be no pretense that the statute which authorized the assignment by the bank impaired the obligation of the contract to receive its notes for its debts, nor does the right or claim of the trustee to refuse the notes in payment rest on this statute, or on any construction given to it by the court.

We are of opinion that nothing in the record before us shows jurisdiction in this court, and the motion to re-instate is for this reason, overruled.

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*DANIEL EDWARDS, *Plff. in Err.*, [*446
v.
EMILE TANNERET.

(See S. C. 12 Wall. 446–452.)

Jurisdiction of circuit court.

By the act of Congress of July 28, 1866, transferring into the Federal courts all suits in the provisional court of Louisiana, it was not the design of Congress to enlarge the jurisdiction of the Federal courts in the Louisiana district.

Hence the circuit court had no jurisdiction of an action commenced in the provisional court, in which both parties were citizens of Louisiana.

[No. 189.]

Argued Nov. 7, 1871. Decided Nov. 20, 1871.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

Suit was brought by the plaintiff in error, in the provisional court of Louisiana, for money alleged to be due to the plaintiff for work and materials. Judgment was given in that court for the plaintiff, May 13, 1865. July 17, 1865, an injunction was issued in said court against enforcing said judgment. July 28, 1866, Congress passed an act transferring all suits, causes, prosecutions or proceedings in that court, to the United States district court, for the eastern district of Louisiana, and giving authority to the circuit court to hear and determine such of the suits or proceedings thus transferred, as the circuit court could take jurisdiction of under the laws of the United States. Jan. 30, 1869, a writ of scire facias was issued by the circuit court upon said judgment. Proceedings being subsequently had in said court upon a motion to show cause, by the defendant, an order was entered quashing the said writ of scire facias, and decreeing that the cause be dismissed from said court as proceedings which, under the act of Congress, must remain in the district court; whereupon plaintiff sued out this writ of error.

NOTE.—*Jurisdiction of United States circuit court dependent on residence of parties; proper place of suit*—see note, 36 L. ed. U. S. 579.

The case is further stated by the court.

Messrs. **Weed** *& Clarke* and *Case & Rouse*, for plaintiff in error:

The case in which the judgment in favor of the plaintiff was rendered was not a "case pending" within the intention and meaning of the 2d section of said act of Congress. It had become a judgment, and being such, it remained for the circuit court to execute it.

Neither in the state courts of Louisiana, nor in the United States court in said state, can the execution of a judgment be suspended upon motion for a rule to stay execution. The execution of a judgment in that state can only be suspended upon petition, affidavit, and bond given for injunction.

Clement v. *Oakey*, 2 Rob. La. 91; *Minot* v. *Bk. of U. S.* 4 Rob. La. 490; *State* v. *Judge of the 2d Dist. Ct.* 9 La. Ann. 301; *State* v. *Judge of the 4th Dist. Ct.* 18 La. Ann. 110; *Wiley* v. *Woodman*, 19 La. Ann. 188; La. Code of Pr. arts. 296, 304.

The circuit court of Louisiana erred in not adopting those decisions as the rule by which it should have disposed of the plaintiff's motion to set aside the execution, issued by the circuit court upon said judgment.

U. S. v. *Morrison*, 4 Pet. 124; *Nesmith* v. *Shelden*, 4 McLean, 375; *Bk.* v. *Longworth*, 1 McLean, 35; *Nesmith* v. *Sheldon*, 7 How. 812; *Heydock* v. *Stanhope*, 1 Curt. 471; *Green* v. *Neal*, 6 Pet. 291; *Suydam* v. *Williamson*, 24 How. 427, 16 L. ed. 742; *Leffingwell* v. *Warren*, 2 Black, 599, 17 L. ed. 261; *Webster* v. *Cooper*, 14 How. 504.

Mr. **T. J. Durant**, for defendant in error:

The plaintiff, Edwards, by his counsel, appeared in the circuit court of the United States for the district of Louisiana, and made suggestions to the court that he had obtained the judgment in the United States provisional court for Louisiana, and omitting all mention of the injunction which had restrained the execution of that judgment, and suggesting that defendant was an alien and citizen of the Empire of France, obtained an order to transfer to said court the case at law, in which he had judgment, leaving behind and out of view, as if not existing, the proceedings in injunction, and actually issued a writ of fi. fa., although he knew that he was then under injunction to proceed no further at law.

The circuit court ordered that the cause be dismissed, as proceedings which, under the act of Congress approved July 28, 1866 (14 Stat. at L. 344) must remain in the archives of the clerk of the district court of the United States for the district of Louisiana.

That is, it was one of which the circuit court had no jurisdiction.

The circuit court tried the issues without a jury, and gave judgment after hearing evidence on the law and the fact. The parties thus constituted the judge an arbitrator, and his findings conclusive. *Graham* v. *Bayne*, 18 How. 62, 15 L. ed. 266.

The petition filed in the United States provisional court of Louisiana styles the plaintiff a "loyal citizen, residing in Louisiana;" *i. e.*, a citizen of the state where the suit is brought, Louisiana.

The citation issued to defendant on this petition styles him a citizen of the state of Louisiana. See *Sedam* v. *Williams*, 4 McLean, 56.

On the face of the record, then, the circuit court could have no jurisdiction, and the order of the lower court for the case to remain in the district court was right.

Mr. Justice **Strong** delivered the opinion of the court:

By the 1st section of the act of Congress of July 28, 1866 (14 Stat. at L. 344), all suits, causes, prosecutions or proceedings then in the United States provisional court for the state of Louisiana, with the records thereof, were transferred to the United States district court for the eastern district of the state, and authority was given to the circuit court to hear and determine such of the suits or proceedings thus transferred as the circuit court could take jurisdiction of, under the laws of the United States. The 2d section of the act directed, in effect, that in case suits or proceedings were then pending in the provisional court which could not have been instituted in the circuit court or the district court for that district, the records, when removed into the district court, should remain therein, without further action. And by the 3d section it was enacted that all judgments, orders, decrees, and decisions of the provisional court relating to the causes transferred by the act to the district court or to the circuit court held in the eastern district of Louisiana, should at once become the judgments, orders, decrees, and decisions of the said district court or the said circuit court, unless the same were inconsistent with the rules and proceedings thereof; and might be enforced as the judgments, orders and decrees of said district court or said circuit court.

It is manifest that by these enactments, no proceeding of any description was intended to be transferred into the circuit court, unless it was one of which the circuit court could take jurisdiction under the laws of the United States, as they were prior to the passage of the act.

All suits and proceedings were transferred into the district court, but only those could be acted upon by either the district or circuit court which might have been instituted in those courts, or one of them. All others were directed to remain in the district court without further action. It was not the design of Congress to enlarge the jurisdiction of the Federal courts in the Louisiana district, but rather to enable them to take up and dispose of cases which were within their jurisdiction, but which had been commenced in the provisional court and, either not carried to judgment when *that court was abolished, or, if carried [*450 to judgment, not completed by execution.

Such being the purpose and meaning of the act, it becomes necessary to inquire whether this was a case of which the circuit court could entertain jurisdiction under the laws of the United States, for if it was not, it never was legally transferred into that court, but it remained, by force of the statute, in the district court. The record discloses that the suit was brought in the provisional court by the plaintiff, who is described in the petition as a citizen, residing in the city of New Orleans, against the defendant, described as residing on False river, in the parish of Pointe Coupee. There is no other description of the citizenship of the parties contained in the petition. The

citation, however, describes both the plaintiff and the defendant as citizens of Louisiana, and these are all the averments of citizenship which can be found in the record. As the suit was brought for a balance of an account, its subject-matter did not bring it within the jurisdiction of the circuit court, and hence, if it was a case of which that court could entertain jurisdiction, it must be because of the citizenship of the parties. But when the plaintiff in an action invokes the jurisdiction of the circuit court because of the citizenship of the parties, it must appear upon the record that the citizenship is such as to justify the court in taking cognizance of the case. And certainly the pleadings here exhibit nothing from which the court can see that both parties are not citizens of Louisiana. As already noticed, the petition makes no averment respecting the citizenship of the defendant, and simply describes the plaintiff as a citizen, without asserting of what state or kingdom. And the citation describes both parties as citizens of Louisiana.

It is true that after the judgment was obtained in the provisional court an injunction was granted against its execution, but neither that injunction nor the bill or petition upon which it was founded, can be considered any part of this record; and if they could, they would not aid the plaintiff, for in neither of them is there any averment of the citizenship 451*] *of the parties. Nor does it sufficiently appear in any other way that both parties were not citizens of Louisiana. The plaintiff, indeed, when he moved for the transfer of the case into the circuit court, suggested that the defendant was an alien, but the suggestion was not made in the provisional court. No proof of it was offered, and the alleged alienage was subsequently denied. It is clear, therefore, that the case was not one of which the circuit court could entertain jurisdiction under the laws of the United States, and that it was never legally transferred to that court. It follows that the order dismissing the cause was correct.

We are to be understood as deciding only what is before us. We express no opinion respecting the regularity or effect of the injunction which was obtained in the provisional court.

The judgment of the Circuit Court is affirmed.

317*] *THEODORE D. ROGERS, *Plff. in Err.*,
v.
LOUIS E. RITTER *et al.*

(See S. C. 12 Wall. 317-322.)

Objection not taken in court below, cannot be heard—evidence by comparison of handwriting, when not admissible—when witness competent to testify to handwriting.

An objection insisted upon for the first time in this court is ineffectual.

Evidence, by comparison of handwriting, is not admissible when the witness has had no previous knowledge of the handwriting, but is called on to testify merely from a comparison of hands.

If a person has seen another write his name but once, he can testify; and he is equally competent if he has personally communicated with him by letter, although he has never seen him write at all.

There are other modes in which one person can become acquainted with the handwriting of another, besides having seen him write or having corresponded with him, such as seeing his signature to official documents.

[No. 174.]

Argued Oct. 26, 1871. Decided Nov. 20, 1871.

IN ERROR to the Circuit Court of the United States for the District of California.

Suit was brought in the court below, by the plaintiff in error, to recover possession of a certain lot of ground. Judgment having been given for the defendants, the plaintiff sued out this writ of error.

The case is sufficiently stated in the opinion of the court.

Messrs. **M. Blair** and *F. A. Dick*, for plaintiff in error:

The court below erred in admitting the opinion of the defendants' witness, J. F. Sears, as evidence that the signature of José de la Cruz Sanchez to the so-called grant to Briones, and the signature of John C. Buchanan to the indorsement thereon, were the genuine signatures of those persons.

This witness' knowledge of the signatures of these persons, acquired not from having seen them write, nor having corresponded with them, but from seeing writing in the recorder's office supposed to be theirs, and from nothing more, did not render his opinion on that subject legal evidence.

2 Phil. Ev. pp. 595–613 and notes, 480, 481. 483; 2 Stark. Ev. 512–518; 1 Greenl. Ev. §§ 577, 578; *Strother* v. *Lucas*, 6 Pet. 767; *Greaves* v. *Hunter*, 2 Carr. & P. 477; *Goldsmith* v. *Bane*, 3 Halst. 87; *Thatcher* v. *Goff*, 11 La. 94.

No relaxation from the ordinary rules of evidence on this subject could be claimed on account of the antiquity of the papers sought to be proved, because these papers were less than twenty years old, and the person whose signature one of them was alleged to bear, was actually produced in court by the plaintiff, and swore that he never executed said papers.

2 Phil. Ev. 618 and note, 485; *Jackson* v. *Brookes*, 8 Wend. 426; *Strother* v. *Lucas*, 6 Pet. 767; 1 Greenl. Ev. 578.

Nor was this witness called as an expert, to prove whether the signatures to said papers were in an imitated and disguised or natural hand.

Goodtitle v. *Braham*, 4 T. R. 497.

Mr. Justice **Davis** delivered the opinion of the court:

Two points are made by the counsel for the plaintiff in error against the affirmation of this judgment.

It is insisted, in the first place, that the

NOTE.—*Evidence of handwriting or signature.*

The admission of a party or his attorney is competent proof of genuineness of party's signature. Walbridge v. Kennison, 1 Esp. 143; Steph. Ev. 26; Suydam v. Coombs, 3 Green, 138.

Person is not required to testify as to whether signature is his till he has seen body of paper. This, however, is in discretion of court on cross-examination. N. Am. F. Ins. Co. v. Throop, 22 Mich. 161; Hardy v. Norton, 66 Barb. 527.

Person is not entitled, nor required to, but may by consent, write in court as a test. Gilbert v. Simpson, 6 Daly, 29; King v. Donahue, 101 Mass. 155, 14 Rep. 589; Hutchins' Case, 4 City Hall Rec. 119; Hayes v. Adams, 2 Sup. Ct. (T. & C.) 593.

Witness may testify positively to signature of

grant in 1845, by Sanchez to Briones, if genuine should have been excluded from the jury, because it purported to be a grant by a justice of the peace of the jurisdiction, and no such officer had any power to grant land in California after the end of the year 1843. But in the state of the record, this court is not called upon to decide this question, for it does not appear that the objection was taken in the court below.

It is true the grant was attacked there, but on an entirely different ground. The main controversy concerning it was whether or not it was genuine. Its validity, if genuine, does not seem to have been questioned. We are not, therefore, required to travel through the various laws of Mexico, the acts of California governors, and the proceedings of departmental assemblies to determine at what period of time the powers of justices of the peace, acting as alcaldes, to grant building lots within their jurisdiction, ceased.

It is insisted, in the second place, that comparison of handwriting is in no case legal evidence, and as it was admitted to prove the genuineness of the disputed paper, the judgment should, on that account, be reversed. It is certainly true that the ancient rule of the common law did not allow of testimony derived from a mere comparison of hands, and equally true that there has been a great diversity of opinion, in the different courts of this country, in relation to this species of evidence. But in England this rule of the common law, as it respects civil proceedings, has been abrogated by the legislature, so that in the courts there, at the present day, in civil suits, the witness can compare two *writings [*321 with each other, in order to ascertain whether they were both written by the same person. 2 Tayl. Ev. 1484. It is, however, not necessary for the purposes of this case to discuss the subject in all its bearings, nor to depart from the rule laid down by this court in *Strother* v. *Lucas*, 6 Pet. 763, that evidence by comparison of hands is not admissible when the witness has had no previous knowledge of the handwriting, but is called upon to testify merely from a comparison of hands. The witnesses who testified in this case had previous knowledge of Sanchez's handwriting. It is true this knowledge was not gained from seeing him write, nor from correspondence with him, but in a way equally effectual to make them acquainted with it. Sanchez was for many years under Mexican rule in California, in official position, acting as justice of the peace, transacting the duties of alcalde, corresponding with the governor, and exercising for a time the power conferred upon him to grant small parcels of land to deserving persons. (Col. Hist. of San Francisco, by Dwinelle.) Necessarily, in the course of the administration of the duties of his office, he had

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another, leaving means of knowledge to cross-examination. Goodhue v. Bartlett, 5 McLean, 186; Whittier v. Gould, 8 Watts, 485; *contra:* Slaymaker v. Wilson, 1 Penr. & W. 216.

If a person cannot testify positively to the particular signature, he may to general acquaintance with writing of person, then to his means of knowledge, and then whether the signature is, or he believes it to be, that of the party. If he does not give means of knowledge, opposite party may cross-examine as to this before he testifies to signature. Slaymaker v. Wilson, 1 Penr. & W. 216; McCracken v. West, 17 Ohio, 16; Barnich v. Wood, 3 Jones, 206; Henderson v. Bank, 11 Ala. 855; Moody v. Rowell, 17 Pick. 490; Hopkins v. Megguirre, 35 Me. 78; Fash v. Blake, 38 Ill. 363; Shitler v. Bremer, 23 Pa. St. 413; Clark v. Freeman, 25 Pa. St. 133.

To qualify a witness to handwriting there is no standard fixed. It is sufficient if he has seen person write or writing be acknowledged or that he has received letters from him in answer to letters written to him, or that in course of business he has habitually acted on papers purporting to be signed by person, or that as a public officer he has had to pass on party's signature. Smith v. Walton, 8 Gill, 77; Edelen v. Gough, 8 Gill, 87; Rideout v. Newton, 17 N. H. 71; Rex v. Hornstooke, 25 St. Tr. 71; Magee v. Osborn, 32 N. Y. 669; Hammond v. Varian, 54 N. Y. 398; State v. Spence, 2 Har. 348; Johnson v. Daverne, 19 Johns. 134, 10 Am. Dec. 198; Tilford v. Knott, 2 Johns. Cas. 211; Southern Express Co. v. Thornton, 41 Miss. 216; Doe v. Suckermore, 5 Ad. & E. 703; Bowman v. Sanborn, 25 N. H. 87; Hess v. State, 5 Ohio, 5; Amherst B'k v. Root, 2 Met. 522; B'k of Com. v. Mudgett, 44 N. Y. 514; U. S. v. Champagne, 1 Ben. 241; State v. Allen, 1 Hawks, 6, 9 Am. Dec. 616; Pope v. Askew, 1 Ired. L. 16, 35 Am. Dec. 729; Hammond's Case, 2 Greenl. 33, 11 Am. Dec. 39; U. S. v. Simpson, 3 Penr. & W. 437, 24 Am. Dec. 331; Cochran v. Butterfield, 18 N. H. 115; 45 Am. Dec. 363.

As to the comparison of the writing to be proved with other writings at common law this could only be those already in evidence, and this rule is adopted in many states. Moore v. U. S. 91 U. S. 270; Williams v. Drexel, 14 Md. 566; Henderson v. Hackney, 16 Ga. 521; Hanley v. Gandy, 28 Tex. 211; Clay v. Anderson, 10 W. Va. 49; State v. Givens, 5 Ala. 747; Tome v. Parkersburg R. Co. 39 Md. 36, 17 Am. Rep. 540; Kannon v. Galloway, 58 Tenn. 230; Rowt v. Kyle, 1 Leigh, 216; State v. Givens, 5 Ala. 747; Pierce v. Northey, 14 Wis. 9; West v. State, 22 N. J. L. 212; Trustees v. Misenheimer, 78 Ill. 22; Clark v. Rhodes, 2 Helsk. 206; Otey v. Hoy, 3 Jones, 407; Van Sickle v. People, 29 Mich. 61; McAllister v. McAllister, 7 B. Mon. 269.

In other states comparison of disputed writings with others proved genuine is allowed by statute. 28 and 29 Vict. C. 18 § 8; Iowa Code, § 3,655; Law of N. Y. 1880, ch. 36.

The decisions in some states allowed such comparison without a statute. Wilson v. Beauchamp, 50 Miss. 24; State v. Hastings, 53 N. H. 452; Lyon v. Lyman, 5 Conn. 55; Moody v. Rowell, 17 Pick. 490, 28 Am. Dec. 317; Woodman v. Dana, 52 Me. 9; Homer v. Wallis, 11 Mass. 309, 6 Am. Dec. 169; Bacon v. Williams, 13 Gray, 572; Baker v. Haines, 6 Wheat. 284, 36 Am. Dec. 224; Bragg v. Colwell, 19 Ohio St. 413; Haycock v. Greup, 57 Pa. St. 438; B'k of Lancaster v. Whitehall, 10 S. & R. 110; State v. Hastings, 53 N. H. 452; Adams v. Field, 21 Vt. 256; Demerritt v. Randall, 116 Mass. 331.

There is one exception to the common-law rule in regard to comparison of handwriting. If the instrument to be used as a standard is properly in evidence in the cause for other purposes then the signature or paper in question may be compared with it by the jury. Jumpertz v. People, 21 Ill. 375; Kernin v. Hill, 37 Ill. 209; Brobston v. Cahill, 64 Ill. 358; Whitney v. Brunnell, 8 La. Ann. 429; State v. Fritz, 23 La. Ann. 55; Williams v. Drexel, 14 Md. 566; Smith v. Walton, 8 Gill, 86; Tome v. Parkersburg R. Co. 39 Md. 36, 90, 17 Am. Rep. 540; Van Wyck v. McIntosh, 14 N. Y. 442; Randolph v. Loughlin, 48 N. Y. 459; Miles v. Loomis, 10 Hun, 375; Aff'd, 75 N. Y. 288, 31 Am. Rep. 470.

There also is an exception in some cases when the writing is too old for any living witness to prove it. Woodard v. Spiller, 1 Dana, 180, 25 Am. Dec. 139.

Genuineness of a signature to a lost instrument may be testified to by an expert who has examined the signature, and who testifies to his recollection as compared with genuine signatures in evidence. Abbott v. Coleman, 22 Kan. 250, 31 Am. Rep. 186.

Court may exclude another writing made by party during the trial for the purpose of evidence and offered by him for comparison. Com. v. Allen, 128 Mass. 46, 35 Am. Rep. 356.

Expert who has no knowledge of writing of person, except from seeing him write several times, and that only for the purpose of testifying, is incompetent. Reese v. Reese, 90 Pa. St. 89, 35 Am. Rep. 634.

See, also, notes, 62 L. R. A. 817; 63 L. R. A. 163, 427, 937, 963; and 64 L. R. A. 303.

occasion frequently to attach his signature to papers of importance. These papers, after the United States took possession of the country, were deposited in the recorder's office of San Francisco, and the surveyor general's office, where the Mexican archives are kept. Sanchez also, as did most of the native Californians and Mexicans who had been in public life, appeared before the United States Land Commission, which sat in San Francisco, to determine the validity of Spanish grants, and gave his depositions. These depositions, with the other papers of the commission, at the expiration of it, were taken to the office of the Land Commissioner at Washington. As no question was raised on the trial, of the genuineness of these various writings—Sanchez was present and interposed no objection—they must be considered, if not as having been acknowledged by him, at least as having been proved to the satisfaction of the court.

In this condition of things, Sears, the clerk in the recorder's office for eight years, having the especial charge of the records; Hopkins, the custodian of the archives for an equal length of time, and Fisher, the secretary and interpreter for the Board of Land Commissioners, were called upon to testify upon the subject of the disputed signature. In order to lay a foundation for their competency, they were requested to state whether they were acquainted with the handwriting of Sanchez, and to give their means of knowledge. Each and all answered that they were familiar with it, and told how they knew it. Sears had frequently seen it in his office and had, many times, made certified copies of the papers to which it was attached, for the use of the courts. Indeed, so familiar was he with it, that, in speaking of it and the handwriting of another person, he said: "I have seen so many instruments and papers passing through my hands, that these signatures (naming them) are like household implements with us."

Hopkins, an expert in detecting writing not genuine, had examined the correspondence of Sanchez, while justice of the peace, with the governor, and other papers in the archives, to which his signature was affixed, quite often, and was, therefore, well acquainted with it.

Fisher knew it, because he had the custody, during the term of the board of land commissioners, of all the depositions taken by them, and acted as interpreter for those who could not speak the English language. The party making the depositions was required to sign them, after one of the commissioners had administered the oath. Then they passed into Fisher's hands, as secretary, who indorsed them and put them among the papers of the case. Sanchez's testimony, with many others, was taken, and although Fisher could not swear that he had actually seen him write his name, he believed he had, and at any rate he should know his signature from having seen it to the depositions.

The circuit court, after these witnesses had stated the manner in which they formed their knowledge of the handwriting of Sanchez, al-
322*] lowed them *to testify whether his signature to the grant in controversy was genuine or not; and the inquiry is: Did the court err in its ruling on this point? Obviously, the evidence is not obnoxious to the objection that it is a mere comparison of hands; that is, a comparison by a juxtaposition of two writings, in order to enable a witness, without previous knowledge of the handwriting of the party, to determine by such comparison whether both were written by the same person.

The witnesses in this case were conversant with the signature of Sanchez, and swore to their belief, not by comparing a disputed with an acknowledged signature, but from the knowledge they had previously acquired on the subject. The text writers all agree, that a witness is qualified to testify to the genuineness of a controverted signature if he has the proper knowledge of the party's handwriting. The difficulty has been in determining what is proper knowledge, and how it shall be acquired. It is settled everywhere, that if a person has seen another write his name but once he can testify, and that he is equally competent, if he has personally communicated with him by letter, although he has never seen him write at all. But is the witness incompetent unless he has obtained his knowledge in one or the other of these modes? Clearly not, for in the varied affairs of life there are many modes in which one person can become acquainted with the handwriting of another, besides having seen him write or corresponded with him. There is no good reason for excluding any of these modes of getting information and if the court on the preliminary examination of the witness, can see that he has that degree of knowledge of the party's handwriting which will enable him to judge of its genuineness, he should be permitted to give to the jury his opinion on the subject.

This was done in this case, and it is manifest that the three witnesses told enough to satisfy any reasonable mind that they were better able to judge of the signature of Sanchez, than if they had only received one or two letters from him, or saw him write his name once.

The judgment is affirmed.

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*SAMUEL S. THORP *et al.*, *Appts.*, [*408
v.
SAMUEL S. HAMMOND *et al.*

(See S. C. 12 Wall. 408-418.)

Custom to have no lookout, when insufficient—when one owner liable for collision—when other owners need not be joined.

A custom of the sea, not to have a lookout in the day-time or while reefing, if it were proved, would not be sufficient to justify the absence of a lookout in a case when the vessel was in close proximity to two others.

One of several owners, who commanded, sailed and exclusively managed a vessel and was the charterer, is responsible for the tortious acts of the vessel.

That the other owners are also sued with him is no bar to a recovery against him, as it is in accordance with admiralty practice to decree against one of several respondents to a libel for a tort, and to discharge the others.

[No. 184.]

Argued Oct. 31, 1871. Decided Nov. 20, 1871.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel in this case was filed in the district court of the United States for the southern district of New York, by the appellant to recover damages resulting from a collision. A decree having been entered dismissing the libel, the libelants took an appeal to the circuit court, by which the said decree was affirmed. Whereupon the libelants took a further appeal to this court.

The case is stated in the opinion of the court.

Mr. **D. McMahon,** for appellants:

As a matter of fact, we respectfully submit that the evidence in the transcript of the record fails to show that the vessel was so much under the exclusive control of Hammond as to relieve the general owners from their liability for the negligent navigation of the master and crew, as set up in the defendants' answer below.

By the local law of New York under such an arrangement, the general owners (the various appellees) were responsible for the engagements and misfeasances of the master, Hammond.

Saxton v. *Read*, Lalor's Supp. to Hill & D., 323, is directly in point; *Kenzel* v. *Kirk*, 37 Barb. 113; 32 How. Pr. 269; *McCready* v. *Thorne*, 49 Barb. 438; *Basset* v. *Crowell*, 3 Robt. (N. Y.) 72; *Vose* v. *Cockroft*, 45 Barb. 58; *Sager* v. *Nichols*, 1 Daly, 1; *Kohler* v. *Wright*, 7 Bosw. 318; *Sims* v. *Howard*, 40 Me. 276.

Under the general admiralty law, by which it is presumed this court will construe the liability sought to be charged upon the appellees, we submit that they are clearly liable to the appellants; assuming, of course, that the injury in question was occasioned by the negligence of those navigating the R. H. Huntley.

1. The act of Congress of March 3, 1851, § 3, 9 Stat. at L. 635, in effect, declares such to be the responsibility of the general owners, to the extent of the value of the colliding vessel and its freight.

Construction has been given to this section by *Walker* v. *Ins. Co.* 14 Gray, 288; *Allen* v. *Mackay*, 6 Law Rep. (N. S.) 686; *Spring* v. *Haskell*, 14 Gray, 309.

2. The 5th section of the same act provides that the charter or charterers of any ship or vessel, in case he or they shall man, victual and navigate such vessel at his or their own expense, or by his or their own procurement, shall be deemed the owner or owners of such vessel within the meaning of this act; and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof.

Hill v. *Golden Gate*, 5 Am. L. Reg. 142.

This section, we respectfully submit, does not apply to this case; for Samuel S. Hammond was not a charterer, nor did he navigate the schooner Huntley at his own expense. The proof shows that he paid the crew and for their victualing; but the port charges were divided. The owners paid for the repairs, and the ship chandlery bills; *i. e.*, they were taken out of their share of the gross earnings. The earnings were, with these exceptions, divided. He lacked several of the essential elements of a charterer.

It is against the policy of the maritime law, that these secret arrangements between a master and owners should qualify the maritime liability of the general owners to third parties.

To all the world, the master of a vessel is the accredited and presumptive agent of the general owners, in matters connected with the navigation of a vessel.

The Vrow Judith, 1 C. Rob. 151; *U. S.* v. *The Malek Adhel*, 2 How. 234; *The Columbia*, 1 C. Rob. 156; *The Druid*, 1 W. Rob. 399.

This point could not have been raised under the pleadings, as they were in the district court below. *The Commander-in-Chief*, 1 Wall. 52, 17 L. ed. 611.

At common law, any number of tort-feasors might be joined as defendants in the same action, at the suit of the party aggrieved, and a failure to inculpate any one or more of such parties was not ground for nonsuit as to all.

Archb. Pl. 72; 1 Chit. Pl. 99, and cases cited; *Low* v. *Mumford*, 14 Johns. 426.

In admiralty, parties who are injured by a collision have been allowed to maintain their libel *in rem*, and also their libel *in personam*, against different vessels and the different persons doing the injury complained of. In these actions some defendants have been discharged, and others have been held.

Newell v. *Norton*, 3 Wall. 266, 18 L. ed. 272, opinion; *Smith* v. *The Creole & Sampson*, 2 Wall. Jr. 485; *Chase* v. *Crary*, 24 How. Pr. 159.

Under the 5th section of the act of 1851, if Samuel S. Hammond be considered to be the charterer of the schooner R. H. Huntley, it was proper in the libel to call him owner, for the words of the act are, that he is "to be deemed the owner of such vessel."

On the merits of the collision, the libelants were clearly entitled to recover.

Messrs. **Richard H. Huntley** and *Wm. Fullerton*, for appellees:

The libelants cannot recover, because they have sued the general owners of the colliding vessels *in personam;* whereas, the vessel was not in their employ; was not managed or controlled by them; was not victualed nor manned by them; was not sailed by their agent nor by a person in their employ.

Lyman v. *Redman*, 23 Me. 289; *Hallet* v. *Ins. Co.* 8 Johns. 272; *McCabe* v. *Doe*, 2 E. D. Smith, 64; *Clendaniel* v. *Tuckerman*, 17 Barb. 184; *Tuckerman* v. *Brown*, 17 Barb. 191.

The owner of a vessel is never made liable as a carrier merely by virtue of his ownership.

The vessel must also have been in his employment, so as to make him a party to the contract for carriage.

Nor is it material to the question of liability, whether the owner of the vessel receive for its use a stipulated sum or a share of its earnings.

Cutler v. *Winsor*, 6 Pick. 335, cited in the opinion of the judge who tried the case, is to this effect. See, also, *Thompson* v. *Hamilton*, 12 Pick. 425; *Taggard* v. *Loring*, 16 Mass. 336; *Reynolds* v. *Toppan*, 15 Mass. 370; *Manter* v. *Holmes*, 10 Met. 402.

The judgment of the circuit court was right, and should be affirmed.

Sherman v. *Fream*, 30 Barb. 481; *Baker* v. *Huckins*, 5 Gray, 596; *Sproat* v. *Donnell*, 26 Me. 185; *Manter* v. *Holmes*, 10 Met. 402; *Nash*

v. *Parker*, 38 Me. 489; *Lincoln* v. *Wright*, 23 Pa. 76.

These are all decisions of state and common-law courts, but they profess to follow admiralty rules, and are sustained by Federal and admiralty court decisions.

Webb v. *Peirce*, 1 Curt. 104; *Thomas* v. *Osborne*, 19 How. 22, 15 L. ed. 534.

But aside from all decisions, the statute (9 Stat. at L. 635, §§ 3-5) seems to set this matter entirely at rest, and conclusively to dispose of the question.

The libelants cannot recover because they, and not the respondents, were guilty of the negligence which caused the collision.

The Brothers was under full sail and perfectly manageable, while the Huntley was under head sails only and was reefing, and in such position she was crippled, and was to be considered and treated as a favored vessel.

It appears to be customary, under such circumstances, not to keep a special lookout, and this custom the Brothers should have known.

But if the principle, that the stronger should give way to the weaker, is admitted, such lookout was unnecessary in any case, until the Brothers proves that her sudden going about in the manner she did, was not the cause of the collision, and this she has not attempted to do.

Mr. Justice **Strong** delivered the opinion of of the court:

This was a case of collision, in which the libelants impleaded the respondents personally, as owners of the schooner R. H. Huntley. The libel averred that, on the 12th day of February, 1860, the schooner Brothers, owned by the libelants, was negligently run into and sunk on the high seas by the R. H. Huntley, in consequence of the mismanagement of those on board the Huntley and in charge of her.

The manner in which the collision occurred, as we gather from the evidence, was as follows: On the morning of the day above mentioned, three schooners, the William Capes, the Brothers, and the R. H. Huntley, all bound for New York, were proceeding up the New Jersey coast, not far below Sandy Hook. They were all heavily laden and sailing close-hauled, having the wind about north-northwest, blowing fresh and fitfully. The general direction of their courses was about the same. The vessels were near each other, the Capes in advance and the Huntley next: After sailing thus, from eight in the morning until after nine, the wind having veered more northwardly, all the schooners tacked toward the northeast, thus standing off shore. When the Huntley tacked to stand out, she lowered her mainsail, in order to take in reefs; but the Capes and the Brothers continued to carry the same sail they had carried before. In consequence of this, the Brothers passed the Huntley, though on the leeward side, running at the speed of seven or eight knots, while the speed of the Huntley was only four or five. All the vessels ran on the off shore tack, some fifteen or twenty minutes, which carried them about two miles out to sea. The Capes then went about and stood in shore on her starboard tack, the Brothers following very soon after; but before the latter could gather headway after tacking, the Huntley ran into her, head on, striking her abaft the main rigging, and causing her to sink in half or three quarters of an hour. All the witnesses agree that when the Brothers tacked to stand in shore, the Huntley was astern of her, although they differ respecting the distance at which she was astern. The evidence, however, satisfactorily establishes that it was not less than five or six hundred yards, the Huntley being slightly to the windward. It is also clearly proved that there was no lookout on the Huntley; that no one on board of her saw the Brothers when she tacked, or when she was in stays, or noticed her at all after her tacking, until it was too late to avoid a collision. Though hailed from the Brothers, and told to keep off, no attention was given to the hail. The evidence also leaves no doubt that had those in charge of the Huntley been watchful, had they seen the Brothers when she went about, it would have been entirely in their power, by porting their helm, to pass under the Brothers' stern.

It is plain, as respects the merits of this suit, that the collision *was the result of [*414 gross carelessness in the management of the Huntley. Knowing, as the master did, that there were two schooners in close proximity to his own; knowing, also, as he must have known, that they were beating out their tacks, and would probably soon come about and put in shore, there can be no excuse for his failure to keep watch of their movements and to notice the change of course by the Brothers in season to port his helm and thus pass under her stern. That the hands on the Huntley were engaged in reefing the mainsail certainly did not relieve her from all obligation to observe the commonest precautions against inflicting an injury upon a neighboring vessel ahead, especially when the movements of that vessel were precisely what ought to have been anticipated.

The respondents, however, insist that it is a custom of the sea not to have a lookout in the daytime, or while reefing, and they have produced witnesses to prove such a custom. But the evidence falls far short of showing that such a custom exists generally, and if it were proved, it would not be a reasonable one, sufficient to justify the absence of a lookout in such a case as this, when the Huntley was in close proximity to two other vessels, both beating to the windward, and one of them, at least, expected soon to cross her bow.

It has not been claimed that the collision was the result of inevitable accident, without fault, but the respondents contend that it was due to the mismanagement of the Brothers, rather than to that of the Huntley. Their argument is that the Brothers was under full sail and perfectly controllable, while the Huntley, being under head sails only, with her hands engaged in reefing, was a crippled vessel and, therefore, one to be favored. Hence it is inferred that it was the duty of the Brothers to keep out of the way. It may be conceded that when two vessels are approaching each other, the one crippled and the other in good manageable condition, it is the duty of the latter, if possible, to give way to the former. But the Huntley can in no sense be said to have been a crippled vessel. She was running freely on her *off shore tack, four or five knots an [*415 hour, with her foresail and jib set. She observed

her helm perfectly, and though she may not have been able to come about as easily as she would had her mainsail been set, there was not the slightest difficulty in the way of her taking care of herself and avoiding collision with other vessels. The most obvious maneuvers, that of porting her helm, was not embarrassed at all by the fact that her mainsail was not spread.

It is further urged that the Brothers had not beaten out her tack when she came about, and hence, that her putting her helm down and turning in shore when she did was a fault which, by throwing her in the way of the Huntley, caused the disaster. Was it, however, a fault? It is by no means clear, from the evidence, that the Brothers had not beaten out her tack fully. On the contrary, the evidence that she had, appears to us to preponderate. But, whether she had or not, it is fully proved that her coming about when she did was rendered proper, if not necessary, by the fact that the Capes changed to the starboard tack. The Capes was the leading vessel, and while it is possible that the Brothers might have ported her helm and gone astern of her, it is obvious that the safer course was to tack when the Capes tacked. And there was no reason to apprehend that the Huntley, following astern at the distance of five or six hundred yards, and very little, if at all, at the windward, would be embarrassed by her tacking. She had passed the Huntley close on the latter's lee side, at a distance of not more than one hundred yards, and the Huntley, carrying on her foresail and jib, had been constantly falling off to the leeward. Abundant sea-room was, therefore, left for the following vessel. It required only that the Huntley's helm should be ported half a point to carry her safely past the Brothers. We think, therefore, the whole fault of the collision is justly chargeable to the Huntley.

It remains to inquire, whether the respondents, or any of them, are personally responsible for the injury. They were all general owners of the schooner at fault at the time when 416*] *the collision occurred, but the evidence shows that she was commanded, sailed and exclusively managed by Samuel S. Hammond, one of them, under an arrangement made between him and the other owners, whereby he had, in effect, become the charterer of the vessel, to be employed on his own account, without the management, control, restraint, or possession of the other owners. He sailed the vessel on shares, hiring his own crew, paying and victualing them, paying half of the port charges, retaining half the net freight after the port charges were taken out, and paying to the general owners the other half. It is clear, therefore, that he must be considered as having been the owner "*pro hac vice*." This accords with the authorities generally. *Hallet* v. *The Columbian Ins. Co.* 8 Johns. 272; *Webb* v. *Pierce*, 1 Curt. 104; *Thomas* v. *Osborn*, 19 How. 22, 15 L. ed. 534, see, also, act of Cong. of March 3, 1851, §§ 5, 9 Stat. at L. 636. Notwithstanding this, however, and though Samuel S. Hammond was the special owner, it has been contended on behalf of the libelants that all the general owners are liable for the torts committed by the schooner while she was thus let to charter. The circuit court was of opinion that they are not, and this court is equally divided upon the question.

But we are all of opinion that the owner *pro hac vice* is liable, and that he may be charged in this proceeding. The court below held that he had been sued merely as a part owner, not as the charterer, wrong-doer, or active cause of the disaster, and that as this liability was placed by the libel on the same ground as that of the other owners, the suit must stand or fail as to all the respondents, and they held the act of March 3, 1851, a bar to the suit in the form in which it had been brought. The court, therefore, dismissed the libel. This, we think, was an error. The act of 1851 enacts that the charterer or charterers of any ship or vessel, in case he or they shall man, victual and navigate such vessel at his or their own expense, or by his or their own procurement, shall be deemed the owner or owners of such vessel within the meaning of the act. § 5. The previous section had declared what shall be *the liability of owners for collisions.[*417 Samuel S. Hammond, therefore, is to be regarded as the owner, because the charterer and, as such, responsible for the tortious acts of the vessel. If the other general owners are not, he is. The libel, it is true, avers that all the respondents were owners at the time of the collision. It does not set forth whether they were general or special owners. Such an averment was unnecessary, for it is immaterial to their liability whether they were one or the other, if they had the possession and control of the vessel. It is ownership which determines the liability, and an averment of the mode in which ownership was acquired would be superfluous. Had Samuel S. Hammond been sued alone, as he might have been, the libel need not have averred more respecting his ownership than is averred now. It would have been of no importance to set out whether he became owner by purchase of the schooner, or by bequest, or by charter-party, for his liability would have been as fixed in each case as in the others. Nor does the libel in this case charge general ownership, as distinguished from ownership *pro hac vice*, or ownership as defined by the statute. There is nothing, then, in the structure of the libel which stands in the way of a recovery against Hammond as owner, unless it be that others are also sued with him. And surely that is no bar to a recovery against him. The libel is for a tort, and tort feasors are jointly and severally responsible. At common law, when several are sued, there may be a recovery against one alone, or against more than one, and less than the whole number. We know of no reason for a different rule in admiralty, and it is in accordance with admiralty practice to decree against one of several respondents to a libel for a tort, and to discharge the others. *Newell* v. *Norton*, 3 Wall. 257, 18 L. ed. 271; *Smith* v. *The Creole*, 2 Wall. Jr.

Our opinion, therefore, is, that even if the libel was rightly dismissed as to all the respondents except Samuel S. Hammond, the libelants are entitled to a decree against him.

*The decree of the Circuit Court is reversed, and the record is remitted, with instructions *to order a reference to ascertain the*[418*

damages, and to decree that the libelants recover against Samuel S. Hammond.

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*262] *THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Plff. in Err.*,
v.
EBEN SWIFT.

(See S. C. 12 Wall. 262-275.)

Obligation of common carrier—when attaches—limiting responsibility—baggage of passenger—surgical instruments.

*1. The obligations and liabilities of a common carrier are not dependent upon contract, though they may be modified and limited by contract. They are imposed by law, from the public nature of the employment.

2. If a common carrier of passengers and of goods and merchandise, have reasonable ground for refusing to receive and carry passengers applying for passage, and their baggage and other property, he is bound to insist, at the time, upon such ground, if desirous of avoiding responsibility. If, not thus insisting, he receives the baggage and other property, his liability is the same as though no ground for refusal existed.

3. The liability of a common carrier of goods and merchandise attaches when the property passes, with his assent, into his possession, and is not affected by the carriage in which it is transported, nor by the fact that the carriage is loaded by the owner. The common carrier is an insurer of the property carried, and the duty rests upon him to see that the packing and conveyance are such as to secure its safety.

4. It is not a ground for limiting the responsibility of a common carrier, where no interference is attempted with his control of the property carried, that the owner accompanies it and keeps a watchful lookout for its safety.

5. Where a railroad company receives for transportation, in cars which accompany its passenger trains, property of a passenger other than his baggage, in relation to which no fraud or concealment is practised or attempted upon its employees, it assumes, with reference to the property, the liability of a common carrier of merchandise.

6. Surgical instruments, in the case of a surgeon in the army traveling with troops, constitute part of his baggage.

[No. 171.]

Argued Oct. 26, 1871. Decided Nov. 20, 1871.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

Suit was brought in the court below, by the defendant in error, and judgment given in his favor upon the following agreed statement of facts, *viz.:*

1. That the plaintiff, Dec. 1861, and for some time prior and subsequent thereto, was a surgeon in the Army of the United States, on duty at Fort Randall, Dakota territory, where, for some time previous, he had been stationed and resided with his wife and family.

2. That Companies H and M of the 4th Artillery, in the service of the United States, constituted a part of the garrison at the aforesaid fort, and were, about the date last mentioned, ordered by the proper authority of the United States government to report for duty at Cincinnati, Ohio; and at the time the property mentioned in the plaintiff's declaration was destroyed by fire, said companies were *en route* from Fort Randall to Cincinnati, in obedience to orders, and were accompanied by the plaintiff and his family, who were traveling to the same destination, in obedience to similar orders.

3. That the defendant is, and was at said time, a corporation created and organized under an act of the general assembly of the state of Missouri, entitled "An Act to Incorporate the Hannibal & St. Joseph Railroad Company," approved Feb. 16, 1847, and had accepted the grant of lands contained in an Act of Congress entitled "An Act Granting the Right of Way and a Portion of the Public Lands to Aid in the Construction of Certain Railroads in the State of Missouri," approved June 10, 1852, and the act of the general assembly of the state of Missouri, approved Sep. 20, 1852, entitled "An Act to Accept a Grant of Land Made to the State of Missouri by the Congress of the United States, to Aid in the Construction of Certain Railroads in Missouri, and to Apply a Portion thereof to the Hannibal & St. Joseph Railroad." All of said acts are referred to, and made a part of this agreed case. Defendant's railroad extends from the city of St. Joseph, on the Missouri river, to the city of Hannibal, on the Mississippi river, across the state of Missouri.

4. That, in the month of June, prior to the burning of said property of the plaintiff, as hereinafter stated, the United States government, by Col. Curtis, notified the defendant

*Headnotes by Mr. Justice FIELD.

NOTE.—*Carrier of persons bound to accept all passengers; exceptions; when may exclude a passenger; must provide trains as advertised*—see note to Pearson v. Duane, 18 L. ed. U. S. 447.

What is included in "baggage" for which carrier is responsible.

Whatever the passenger takes with him for his personal use or convenience, either with reference to the immediate necessities or the ultimate purpose of the journey, must be considered personal luggage. This would include not only all articles of personal apparel, for use or ornament, but also the gun case or fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student and other articles the use of which is personal to the traveler and the taking of which has arisen from the fact of his journey. Macrow v. Great Western R. Co. L. R. 6 Q. B. 612; Van Horn v. Kermit, 4 E. D. Smith, 453.

Baggage includes articles of necessity or convenience, for personal use, and such as it is usual for persons traveling to take with them. Jordan v. Fall River R. Co. 5 Cush. 69.

With reference to merchandise carried as baggage it has been held that a common carrier is not responsible for it if its being included in the passenger's baggage is not disclosed. Blumantle v. Fitchburg R. Co. 127 Mass. 322, 34 Am. Rep. 376; Collins v. Boston & Me. R. Co. 10 Cush. 506; Stimson v. Conn. Riv. R. Co. 98 Mass. 83; Connolly v. Warren, 108 Mass. 146, 8 Am. Rep. 300; Macrow v. Great Western R. Co. L. R. 6 Q. B. 612; Davis v. Cayuga, etc. R. Co. 10 How. Pr. 332; Chamberlain v. Western Trans. Co. 45 Barb. 223.

Nor for samples of merchandise carried in a trunk for the purpose of carrying on traffic as a merchant. Hawkins v. Hoffman, 6 Hill, 586, 41 Am. Dec. 767; Scovill v. Griffith, 12 N. Y. 515.

Agreement to take merchandise as baggage cannot be proved by custom nor from appearance of package being such as to raise suspicion or inference that it contained merchandise. Alling v. B. & A. R. Co. 126 Mass. 121, 30 Am. Rep. 667; Mich. Cent. R. Co. v. Carrow, 73 Ill. 348, 24 Am. Rep. 248; Cahill v. London, etc. R. Co. 10 C. B. (N. S.) 154; 13 C. B. (N. S.) 818.

If the carrier accepts, as baggage, goods, knowing their character, or so packed that it is obvious, he is responsible for them. Hellman v. Holliday, 1 Woolw. 365; Minter v. Pacific R. Co. 41 Mo. 503; Gt. N. R. Co. v. Shepperd, 8 Exch. 30; Stoneman v. Erie R. Co. 52 N. Y. 429.

The following articles have been held to be baggage; a gold watch deposited in trunk by traveler

that it claimed the right, and would take possession of the road and use it whenever it desired, for the transportation of troops and munitions of war; that when the government did not need it for this purpose, the company could use it for the transportation of passengers and property. It was the policy of the government to keep the road open and have trains run on it with as much regularity as possible, so as to show its power and majesty, and thus have its moral effect upon the citizens along the line, reserving, however, the paramount right of the government to use the road when required for the purposes aforesaid.

5. That, when said companies arrived at St. Joseph under command of Lieut. Tannatt, *en route* for Cincinnati, aforesaid, said commanding officer notified and required said defendant to furnish transportation for said command, its baggage, camp equipments, arms, munitions, and the chattels of the officer commanding, as well as those of the plaintiff, from St. Joseph to Hannibal, the eastern terminus of said railroad, that, at that period, nearly all that portion of the state of Missouri, through which defendant's railroad ran, was in a state of rebellion; that, at that time and for some months prior thereto, armed bands of rebels committed frequent depredations on defendant's railroad by firing into trains, burning bridges, cars and trains of cars, depot buildings, and station-houses, destroying culverts and tearing up the track; that defendant's officers and agents at St. Joseph communicated these facts to said Tannatt, and so did Col. Smith, who was then in command of United States troops at St. Joseph; and on account of the great danger to said command along the line of defendant's railroad from said bands, defendant's officers refused to make any contract for the transportation of said command over said railroad, and none was made or signed until after said command had arrived at Hannibal, at which place the amount of compenstion for transportation was agreed upon; and after the arrival of the command at Cincinnati, said agreed compensation was paid, partly in cash and the balance in a voucher upon the United States government. The plaintiff was apprised of the state of the country through which the railroad passed, and the danger attending the transportation of said command over defendant's railroad, by said Tannatt and others, before he entered upon the journey as herein stated.

6. That, on demand of said Tannatt, defendant furnished transportation for said command, its baggage, camp equipments, arms, munitions of war, and the chattels of the officer commanding, as well as those of the plaintiff. This was Dec. 30, 1861. Out of several cars standing in the yard of defendant at St. Joseph, said Tannatt selected the car in which the baggage belonging to the officers and men of said command, its camp equipage, arms, munitions, also the property of the plaintiff, for which this suit is brought, were loaded. In said car were placed nine thousand musket cartridges. Said car was well built and in a safe and secure condition; and plaintiff was aware that his property was placed in said car. Said Tannatt, as is customary where troops are moving by public conveyance from one point to another, detailed some men from his command to guard his car, while another portion thereof packed and loaded it with the property before mentioned. The soldiers carried their arms in their hands for use in case of an attack from the enemy. None of defendant's officers, agents or employees had anything to do with selecting, packing or loading said car, but after the same was completed and said car locked up by said Tannatt, the agents and employees of defendant placed said car in the train next to the tender of the engine that moved said car and the train upon which said command were transported from St. Joseph to Hannibal. The train left St. Joseph about 11 o'clock P. M., but some time before leaving said city, the provost-marshal ordered said car unlocked and proceeded to inspect the contents by the aid of a lantern which he carried, after which it was again locked by Lieutenant Tannatt and kept guarded until it left St. Joseph for Hannibal.

Said train, in which said car was placed, was a regular passenger train of defendant and was well manned and equipped. It had a baggage car attached to it and a baggage-master in charge of said car, whose duty it was to receive and take charge of all baggage of passengers transported on said train and who did take charge of all baggage of passengers on said train that was offered him, checks being given therefor. There was ample room in said baggage car for plaintiff's baggage, and said bag-

on a railroad (Am. Contract Co. v. Cross, 8 Bush. 472, 8 Am. Rep. 471; *Contra:* Miss. C. R. Co. v. Kennedy, 41 Miss. 621); a watch and jewelry such as are usually worn (McCormick v. H. Riv. R. Co. 4 E. D. Smith, 181); articles for party's family and cloth for dresses (Dexter v. Sy. etc. R. Co. 42 N. Y. 326, 1 Am. Rep. 527); a carpet taken with knowledge of its character (Minter v. Pacific R. Co. 41 Mo. 503); money for traveling expenses (Merrill v. Grinnell, 30 N. Y. 594; Jones v. Voorhees, 10 Ohio, 180; Mad Riv. R. Co. v. Fulton, 20 Ohio, 318; Orange Co. B'k v. Brown, 9 Wend. 85, 24 Am. Dec. 129; Week v. Sar. R. Co. 19 Wend. 534; Hutchings v. Western R. Co. 25 Ga. 61; Doyle v. Keyser, 6 Ind. 242; Boman v. Maxwell, 9 Humph. 621; Davis v. Mich. Cent. R. Co. 22 Ill. 278; Dunlap v. International St. Co. 98 Mass. 371); clothing, traveling expenses, a few books, a lady's jewelry for dressing, an opera glass (Toledo, etc. R. Co. v. Hammond, 33 Ind. 379, 5 Am. Rep.221); a price book used by a commercial traveler in his daily business (Gleason v. Goodrich Trans. Co. 32 Wis. 85, 14 Am. Rep. 716).

The following articles have been held not to be baggage: a feather bed not intended for use on the voyage (Connolly v. Warren, 106 Mass. 146, 8 Am. Rep. 300); a box containing only merchandise, the contents of which was unknown to the carrier (Cahill v. London & N. W. R. Co. 13 Q. B. N. S. 818; Great Northern R. Co. v. Shepperd, 8 Exch. 30) watches to a large value contained in a traveling case (Belfast, etc. R. Co. v. Keys, 9 H. L. 556); two gold and two silver watches, plaintiff wearing also one (Miss. Cent. R. Co. v. Kennedy, 41 Miss. 671); a sacque, a muff, a napkin ring carried by a gentleman (Chicago, etc. R. Co. v. Boyce, 73 Ill. 510, 24 Am. Rep. 268); money carried in passenger's trunk for transportation merely, and not for traveling expenses (Orange Co. B'k v. Brown, 9 Wend. 85, 24 Am. Dec. 129; Merrill v. Grinnell, 30 N. Y. 621).

It is a question for the jury to determine what articles of property as to quantity, quality and value in a passenger's trunk may be deemed baggage, subject to the power of the court to correct any abuse. Brock v. Gale, 14 Fla. 523, 14 Am. Rep. 356.

Everything destined for use, personal convenience or even instruction or amusement of a passenger is baggage. Macklin v. N. J. S. Co. 7 Abb. Pr. N. S. 238.

See, also, note, 37 L. ed. U. S. 587.

gage car and its contents were not burned or destroyed. The car containing the property sued for was the only one burned; and no part of said train was attacked or molested by armed rebels or otherwise, as known.

The plaintiff did not place the property sued for in charge of said baggage-master, or other agent or employee of defendant, otherwise than as above stated, nor was the same ever taken possession of by defendant, except as hereinbefore set forth.

The plaintiff neither paid nor offered to pay anything to defendant for transportation of himself, family or goods. The only compensation paid was by the United States government, as hereinbefore stated, that being the usual compensation paid to railroad companies for transporting troops and munitions of war.

The car in which said property was loaded as aforesaid, while *en route* from St. Joseph to Hannibal from some cause unknown, and, so far as known, without any fault of the defendant, its agents or employees, except as disclosed in the foregoing agreed case, took fire and, with most of its contents, was consumed. After the discovery of said fire, most of the contents of said car could have been saved but from fear of injury by explosion of the cartridges known to be therein.

A surgeon of the United States Army is entitled, by army regulations, to eight hundred pounds of baggage.

The only reason assigned by defendant for refusal to make a contract for transportation at St. Joseph was, on account of impending danger from the unlawful acts of the enemy.

The property in question burned at or near Laclede, Missouri, about ninety-seven miles from St. Joseph, at about six o'clock A. M. No person is known to have entered said car from the time it left St. Joseph until it reached the place of accident.

If, upon the foregoing statement of facts, the court shall be of the opinion that the plaintiff is entitled to recover, then the amount of damages shall be ascertained by a referee, to be appointed by the court, who shall be instructed to decide the same according to law and report his finding to the court. Both parties shall have the right to except to and file a bill of exceptions to any decision or ruling of the court, on said agreed statement of facts or any instructions given to said referee, or ruling on the report of said referee when made, and may sue out a writ of error on the judgment of this court.

To the report of the special commissioner or referee subsequently made, the plaintiff in error filed, among others, the following exceptions:

Said commissioner has found that the plaintiff had 2,700 pounds of baggage and other property lost at the time alleged in said declaration, and assessed the value thereof at the amount claimed in said declaration, except the manuscript on veterinary surgery; whereas, he should have only found and assessed the value on eight hundred pounds of baggage, the amount for which he was entitled to transportation, according to the agreed statement of facts filed herein.

Said commissioner has likewise found and assessed the value of the silverware described in said bill of particulars, at the amount claimed therein to wit, the sum of $204.50, without finding that the same was necessary for the plaintiff and his family or either.

Said commissioner had found and assessed the value of the surgical instruments described in said bill of particulars, at the amount claimed therein, while the same belonged to the United States.

These objections the court overruled. The case is brought to this court by writ of error.

Mr. **James Carr,** for plaintiff in error:

The contract of baiment implies, *ex vi termini*, a delivery of the goods by the bailor to and an acceptance by the bailee, and as a consequence flowing from the delivery, a trust or confidence reposed by the former in the latter. There was neither trust nor confidence reposed in this case. The goods sued for were never delivered to the plaintiff in error. It had expressly refused to receive them. The car in which they were shipped was selected by the officer in command of the troops. It was guarded and packed by them and then locked by said officer. They were in the exclusive custody and control of said officer and men. He and his men were the agents of the defendant in error for this particular purpose. If the defendant in error desired to hold the plaintiff in error responsible as a common carrier why did he not deliver his goods to the agents and employees of the plaintiff in error, and let them select the car and pack and load them to suit themselves? Ought the plaintiff in error to be held responsible for the unskilful or negligent loading and packing of the agents of the defendant in error? Delivery and acceptance in some way, either actual or constructive, is indispensable. A carrier will not be chargeable, if there is no intention to trust him.

Story, Bail. § 533; *White* v. *Winnisimmet Co.* 7 Cush. 155; *Blanchard* v. *Isaacs*, 3 Barb. 388; *Tower* v. *R. Co.* 7 Hill. 47; *Brind* v. *Dale*, 8 Car. & P. 207; *E. I. Co.* v. *Pullen*, Str. 690; Ang. Car. §§ 113, 533; *Wells* v. *Steam Nav. Co.* 2 N. Y. 204; *Caton* v. *Rumney*, 13 Wend. 387; *Alexander* v. *Greene*, 3 Hill. 9; *Cohen* v. *Frost*, 2 Duer, 335; *Van Horn* v. *Kermit*, 4 E. D. Smith, 453; *The Crystal Palace* v. *Vanderpool*, 16 B. Mon. 302; *Leonard* v. *Hendrickson*, 18 Pa. 40.

But if it be held that there was a bailment to the plaintiff in error of the goods sued for, then it is affirmed that said bailment was obtained by compulsion and is not binding, because consent is of the essence of a contract; and where there is compulsion there is no consent, for this must be voluntary. Such a contract is not binding for another reason. It is founded on wrong. No party is allowed to establish a right on his wrong doing.

1 Pars. Cont. 319, 3d ed.; *Sasportas* v. *Jennings*, 1 Bay, 470; *Collins* v. *Westbury*, 2 Id. 211.

There never was any undertaking to carry, as is alleged in the declaration, and, as a consequence, there was no delivery.

Ang. Car. § 130; *Cohen* v. *Hume*, 1 McCord, 439.

Let it be conceded, for the sake of the argument, that the plaintiff in error was acting as a private carrier for hire, and not in its capacity of a common carrier of passengers and proper-

ty, when the goods sued for were burned; and still it cannot be held responsible in damages for the burning, in the absence of negligence. Now, it is expressly stated in the agreed statement of facts, that the goods sued for were burned without any fault of the defendant, its agents or employees.

Ang. Car. §§ 46, 54; Story, Bail. § 495; *Satterlee* v. *Groat*, 1 Wend. 273; *Wells* v. *Nav. Co.* 2 N. Y. 204; *Caton* v. *Rumney*, 13 Wend. 389; *Runyan* v. *Caldwell*, 7 Humph. 134; *Alexander* v. *Greene*, 3 Hill, 9; *Brind* v. *Dale*, 8 Carr. & P. 207.

The *onus probandi* of negligence in the case of a private carrier for hire is on the owner of the goods.

Story, Bail. § 454; Ang. Car. § 54; *Wyld* v. *Pickford*, 8 Mees. & W. 443; *Hinton* v. *Dibbin*, 2 Ad. & E. (N. S.) 646; *Brind* v. *Dale*, 8 Carr. & P. 207; *Foote* v. *Storrs*, 2 Barb. 326; *Lichtenhein* v. *R. Co.* 11 Cush. 70; *Nav. Co.* v. *Bk.* 6 How. 384.

The defendant in error was guilty of negligence, in having his goods loaded in the car with the 9,000 musket cartridges, which were of a highly combustible nature and liable to ignite by the friction occasioned by the oscillation of the train. He voluntarily had his goods placed in said car. He had the privilege of putting them in the baggage car, in charge of the baggage-master. He did not do so. The baggage car was not burned nor anything in it injured. *Volenti non fit injuria.*

White v. *Winnisimmet Co.* 7 Cush. 161; *Robinson* v. *Dunmore*, 2 Bos. & P. 416; Ang. Car. §§ 117, 57; *Brind* v. *Dale*, 8 Car. & P. 207.

The compensation paid by the government for carrying the defendant in error, was less than half the rate charged citizens for the same service. This compensation is grossly inadequate to the responsibility sought by the defendant in error to be fixed upon the plaintiff in error. Moreover, the army regulations entitled him to transportation for only 800 pounds of baggage; whereas the fact is, that he had 2,700 pounds, which he was having transported at the expense of the government, and at government rates and under the *ægis* of the government, instead of paying a fair and adequate compensation for the benefit conferred and the great responsibility incurred.

2 Kent, 802, sp. 103; Ang. Car. §§ 210, 214.

Silverware is not baggage. *Bell* v. *Drew*, 4 E. D. Smith, 59.

Samples of merchandise are not. *Hawkins* v. *Hoffman*, 6 Hill. 586; *R. Co.* v. *Marous*, 38 Ill. 219.

A trunk of merchandise is not. *Pardee* v. *Drew*, 25 Wend. 459; *Collins* v. *R. Co.* 10 Cush. 506.

Bank notes in a traveling trunk are not baggage. *Bk.* v. *Brown*, 9 Wend. 86.

The defendant did not own the surgical instruments sued for. They belong to the United States. He never accounted for them to the United States. He has no right to recover for them. The United States might sue the plaintiff in error and recover for them.

Mr. J. Hubley Ashton and *H. Goodfellow*, for defendant in error:

First. It will not be denied that this company was and is a common carrier of goods and merchandise, as well as of passengers and their

applies, whether a passenger has paid fare or not. *Hurt* v. *R. Co.* 40 Miss. 391.

It is settled by multitudes of cases, that the baggage of a passenger intrusted to one whose business it is to transport persons and their baggage and with whom the owner has embarked, is under the same protection as the goods which are intrusted to a common carrier of merchandise.

Merrell v. *Grinnell*, 30 N. Y. 609; 1 Sm. Lead. Cas. part I. p. 382.

2. The agreed case expressly finds that, on the demand of the officer in command of these troops, the defendant furnished transportation for them, as well as for the plaintiff, and the public and private property which they brought; that the car in which this property was stored, was placed by the agents and employees of the defendant in the train on which the command was carried and that, on the arrival of the troops at Hannibal, the compensation payable for transporting the troops and the property was fixed by agreement between the proper officer and the company, and the amount afterwards received from the United States by the defendant.

We understand from this, that the payment made by the government was for one entire service, precisely as if the amount had been agreed upon and paid before the troops started; and that the company had then furnished cars to convey them and their baggage and the public property in their charge. The payment made was for the fare of all the troops, and the freight on all the property they brought and placed in the company's car.

The compensation received was none the less such because it was adjusted afterwards.

The only reason why no contract was made and signed before they started, was; that the company did not desire to be responsible for any loss happening through rebel violence. At that day it was, doubtless, supposed such loss would not be within the exception of the act of the public enemy. But this court had not then decided the *Prize Cases* nor *Mauran* v. *Ins. Co.* 6 Wall. 1, 18 L. ed. 836.

No express stipulation was made, however, before they started, discharging the company from any of the duties annexed to its employment; much less from that of being liable for loss by accidental or other fire; and it is the law of this court that nothing short of such a stipulation can qualify the common-law liability of the carrier.

The arrangement in regard to the baggage was made with the company by the proper officer. That this arrangement contemplated a separate car for all the property with the command, and not the ordinary conveyance in the regular baggage car, as in the case of a private passenger, cannot affect the carrier's responsibility. Nor can it matter that the officer selected the car. The car was the defendant's. It is not pretended that the accident happened through any defect in the car.

It must be equally unimportant that the soldiers, and not the servants of the company, loaded the car, so far as the question of the delivery of the goods to it for carriage is concerned.

If a railway company take a car, though on its own truck, over its railway, they are common carriers.

N. J. R. Co. v. *P. R. Co.* 3 Dutch. 100.

And the court held in that case, that where common carriers undertake to carry an article for pay, the presumption is that they undertake as common carriers.

The company will not be exonerated because the owner of the goods furnishes his own car, and assumes the loading and unloading, and furnishes a brakeman to accompany the car. *Mallory* v. *R. Co.* 39 Barb. 488.

Nor if the goods are placed in a crate belonging to an express company, and placed in charge of the carrier.

Nav. Co. v. *Bk.* 6 How. 344.

Nor where a warehouseman, having cotton to send by rail, applied to the company, who ran a car upon a side track to the warehouse;

R. Co. v. *Smyser*, 38 Ill. 361; *Merritt* v. *Old Col. & N. Railw.* 11 Allen, 80;

Nor if the owner accompanies the goods to look after them;

Robinson v. *Dunmore*, 2 Bos. & P. 416;

Nor where a passenger on a boat takes charge of his property after it is placed on the boat;

Fisher v. *Clisbee*, 12 Ill. 344.

If the carrier receive an article for carriage, though not bound to receive it at the time or place, or in the condition in which offered, he is responsible.

Pickford v. *Grand Junc. R.* 12 Mees. & W. 766.

If the government paid for more baggage than the officer was entitled to carry, under the regulations, in the quartermaster's wagons, that was its affair.

The company furnished transportation for all the property with the command, and incurred the carrier's responsibility for all. If some of the property was not strictly baggage its acceptance for carriage renders the company liable for it.

Minter v. *R. Co.* 41 Mo. 507; *Glasco* v. *R.* 36 Barb. 561.

If a carrier suffer a passenger to treat property as baggage and there is no fraud, it cannot, after the loss, set up that it was merchandise.

Cahill v. *Lond. & N. W. Railw.* 13 C. B. (N. S.) 818; *Butler* v. *H. R. Railway*, 3 E. D. Smith, 571.

What is baggage? The court of appeals of New York, in a recent case, has well said (Ch. J. Denio and Mullin, J.) that it is necessarily a relative term, and must be defined by the facts and circumstances of each case; and that the question is one for the jury, rather than the court.

Merrill v. *Grinnell*, 30 N. Y. 609; *Hopkins* v. *Westcott*, 6 Blatchf. 64; *Woods* v. *Devin*, 13 Ill. 750; *McGill* v. *Rowand*, 3 Pa. St. 452; *Jones* v. *Voorhees*, 10 Ohio, 145.

As for the surgical instruments, it has been held that these, in the case of a medical man, are baggage.

Giles v. *Fauntleroy*, 13 Md. 129.

They are like the tools of a carpenter (*Porter* v. *Hildebrand*, 14 Pa. 129) the breastpin of a lady (3 Barr, *supra*) and the manuscript of a student. 6 Blatchf. (C. C.) 64, *supra*.

Defendant's counsel says the plaintiff did not

own the instruments. There is no such finding. If he did not, he was accountable for them to the government, and can recover for them.

Mr. Justice **Field** delivered the opinion of the court:

Two questions are presented by the record for our determination: (1) Whether upon the facts stated in the agreed case the railroad company was liable as a common carrier for the safe conveyance of the baggage and other property of the plaintiff; and (2) whether there was any error in the assessment of damages as allowed by the circuit court.

The railroad company was chartered by the legislature of Missouri in 1847, and for many years its railroad between the city of Hannibal, on the Mississippi river, and the city of Saint Joseph, on the Missouri river, has been constructed and in operation. Between those places the company was, in 1861, a common carrier, over its road, of passengers and their baggage, and of goods and merchandise. As such carrier, its duties and liabilities were plain; as a carrier of passengers it was bound, unless there was reasonable ground for refusal, to take all persons who applied for passage, and their baggage and, as a carrier of goods, to take all other property offered for transportation, and was responsible for the safe conveyance of the baggage and other property to the point for which they were destined, or the termination of the road, unless prevented by inevitable accident or the public enemy. Its obligations and liabilities in these respects were not dependent upon the contract of the parties, though they might have been modified and limited by such contract. They were imposed upon it by the law, from the public nature of its employment, independent of any contract.

If at any time reasonable ground existed for **271***] refusing to *receive and carry passengers applying for transportation, and their baggage and other property, the company was bound to insist upon such ground if desirous of avoiding responsibility. If not thus insisting, it received the passengers and their baggage and other property, its liability was the same as though no ground for refusal had ever existed.

It does not appear from the agreed case that the company refused to transport over its road the troops of the United States, and the plaintiff and his family who accompanied them, when they arrived, in December, 1861, at Saint Joseph, or their baggage, camp equipments, arms, munitions, and other property, but only that it refused to enter into any special contract for the transportation, on account of the danger to the troops from the insurrectionary condition of the country through which the road ran, and the frequent depredations committed by armed bands of rebels upon the railroad, and its track, bridges, depots and station-houses.

It was usual at the time, and during the entire war, for railroad companies to transport troops of the United States, with their baggage at a less rate per head, and their equipments, arms and munitions at a less rate per pound, than the prices paid by ordinary passengers for similar services, and it was, undoubtedly, the desire of the commanding officer in this case to have a special contract as to the amount of compensation to be paid for the transportation. As we read the agreed statement it was only a contract of this kind, fixing the rate of compensation, which was refused.

Whether the reasons assigned would also have justified a refusal to transport the troops and the plaintiff, with his family, and their baggage and other property, it is unnecessary to determine. It is enough to fasten a liability upon the company that it did not insist upon these reasons and withhold the transportation, but, on the contrary, undertook the carriage of men and property without being subjected to any compulsion or coercion in the matter.

The liability of the company was in no respect affected by the fact that the baggage, camp equipments, arms and munitions of the troops and the property of the plaintiff were *placed in a separate car, selected by [***272** the commanding officer out of several cars standing in the yard of the company, and not in its regular baggage car, or by the fact that the car was loaded by some of the soldiers detailed for that purpose, and not by the servants of the defendant. The car selected belonged to the company, and, after it was loaded and locked by the commanding officer, the agents and employees of the company took charge of it and placed it in the regular train, which transported the troops and the plaintiff and his family, next to the tender of the engine. The liability of the company attached when it thus took possession of the property. No objection was made at the time to the selection of a separate car for the baggage and other property of the troops and the plaintiff, or to the kind of property offered for transportation, or to the manner in which the property was packed, or to the locking up of the car by the commanding officer. If objection existed on any of these grounds, or on any other ground not concealed, but open to the observation of the company, it should have been stated before the property was received. The company might then have insisted, as a condition of its undertaking the transportation, upon the selection of a different car, or upon superintending its loading, or upon the possession of its key, or upon all of these things. Not having thus insisted, but having received the property and undertaken its transportation in the car in which it was placed, the company assumed, with respect to it, the ordinary liabilities of a common carrier

The case of *Mallory* v. *The Tioga R. Co.* 39 Barb. 488, is much stronger than this. There the company only agreed with the plaintiff to furnish the motive power to draw his cars laden with his property, he to load and unload the cars and to furnish brakemen, to be under the control of the conductor of the train to accompany them; yet the company was held liable, as a common carrier, for injuries to the cars and the property of the plaintiff not caused by inevitable accident or the public enemy. The court did not consider *the [***273** fact that the property was transported in the cars of the plaintiff and that the cars were loaded and unloaded by him, affected in any respect the liability of the company, the entire train in which the cars were moving being,

while on the route, under the control and management of its servants and employees.

In all such cases the liability of the common carrier attaches when the property passes, with his assent, into his possession, and is not affected by the car in which it is transported, or the manner in which the car is loaded. The common carrier is regarded as an insurer of the property carried, and upon him the duty rests to see that the packing and conveyance are such as to secure its safety. The consequences of his neglect in these particulars cannot be transferred to the owner of the property.

It does not distinctly appear, from the agreed case, whether any troops were detailed to guard the car which contained their property and that of the plaintiff, except while the car was being loaded. But if it were admitted that a special guard was appointed for the car on the route, the admission would not aid the company or relieve it of liability. The control and management of the car, or of the train, by the servants and employees of the company, were not impeded or interfered with; and where no such interference is attempted, it can never be a ground for limiting the responsibility of the carrier that the owner of the property accompanies it and keeps a watchful lookout for its safety.

The ruling of the court upon the findings of the referee appointed to ascertain the damages sustained by the plaintiff, does not appear to us to be open to any valid objection. A considerable portion of the property, it is true, was not personal baggage, which the company was obliged to transport under the contract to carry the person; nor does it appear that it was offered to the company as such. It embraced buffalo robes, hair mattresses, pillows, writing desks, tables, statuary, and pictures, in relation to which there could be no concealment, and it is not pretended that any was attempted. Where a railroad company receives 274*] for transportation, *in cars which accompany its passenger trains, property of this character, in relation to which no fraud or concealment is practised or attempted upon its employees, it must be considered to assume, with reference to it, the liability of common carriers of merchandise. It may refuse to receive on the passenger train, property other than the baggage of the passenger, for a contract to carry the person only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience; such quantity depending of course upon the station of the party, the object and length of the journey, and many other considerations. But if property offered with the passenger is not represented to be baggage, and it is not so packed as to assume that appearance, and it is received for transportation on the passenger train, there is no reason why the carrier should not be held equally responsible for its safe conveyance as if it were placed on the freight train, as undoubtedly he can make the same charges for its carriage.

Here two companies of artillery in the Army of the United States sought transportation with their arms, equipments and ammunition. The plaintiff, as surgeon in the army, was ordered to accompany the troops, and for him and his family and his property transportation was also sought as part of the general transportation for the whole command. On arrival at Hannibal, the amount of compensation for the entire transportation, which included carriage of men and property, was agreed upon and was subsequently paid. It is to be presumed, when the compensation was fixed, that the company took into consideration, not merely the peculiar kind of property carried by the troops, which could hardly be treated as simple baggage of travelers, but also the property besides baggage possessed by the plaintiff and his family. The value of the unpublished treatise on veterinary surgery, and of the jewelry, as estimated by the referee, was excluded in the amount allowed. The value of the surgical instruments was properly included. Instruments of that character in the case of a surgeon in the army traveling with troops, *may properly be regarded as part of [*275 his baggage. He may be required to use these instruments at any time, and must, accordingly, have them near his person where they can be had upon a moments notice. Whether the table silverware of the plaintiff, although of a very limited amount, can be regarded in the same manner, admits of much doubt. It does not appear that the plaintiff or his family had any occasion for this ware on the cars, or even that they carried it with any intention of using it on the route. It is not, however, necessary to charge the defendant that it should be treated as baggage. Its value may be properly included in the amount of damages, considering it only as a part of the property which the company received as a common carrier of goods, and against the loss of which, from any cause but inevitable accident or the public enemy, it was, as such carrier, an insurer to the plaintiff.

We see no error in the judgment of the Circuit Court, and it is accordingly affirmed.

AUGUSTUS W. WALKER, *Plff. in Err.*,
v.
A. M. DREVILLE, Widow of Louis Emmerling.

(See S. C. 12 Wall. 440–443.)

Appeal and writ of error in Louisiana Cases—appeal in equity proceedings.

Notwithstanding the peculiarities of the Civil Code of Louisiana, the distinctions between law and equity must be preserved in the Federal courts, and equity causes from that circuit must come here by appeal, and common law causes by writ of error.

Where a proceeding in equity, to wit: a foreclosure of a mortgage, is brought here by writ of error, and not by appeal, the writ must be dismissed.

[No. 151.]

Argued Oct. 18, 1871. Decided Nov. 27, 1871.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The history and facts of the case are fully stated by the court.

Mr. **T. J. Durant** for plaintiff in error.

Mr. **Miles Taylor** for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

The plaintiff in the circuit court of Louisiana filed her petition, in which she alleges

that Walker, the defendant, is indebted to her in the sum of $5,492.90, and she shows how this debt originated; how the note on which it is founded came into her possession; how much of it has been paid and how much remains due. She further sets forth that a mortgage was given by defendant on certain real estate, which she describes, to secure the payment of the note; and she files, as exhibits with her petition, copies of the note and the credits indorsed on it, and of the mortgage, with its acknowledgment and certificate of record.

She prays that Walker may be cited to appear before the court, and that, after legal proceedings had, he be condemned to pay the sum which she claims, with interest and costs, and five per cent lawyers' fees, as stipulated in the mortgage; and that the plantation mentioned in the mortgage be adjudged and decreed to be subject to the payment of the said debt, interest and costs; and then follows a separate prayer for general relief.

There is for answer: first, a short general denial of all the allegations of the petition; and there is afterwards a long supplemental answer, as it is called, which is in the nature of a cross-bill, setting up usury, and a cross demand, which is called by the court a reconvention. This latter pleading is, by order of the court, afterwards stricken out, apparently on the ground that it was barred by the statute of limitations. This, however, is done after a distinct hearing on that subject.

The final judgment or decree of the court is "that plaintiff recover of the defendant the sum claimed, with interest, costs and lawyers' fees; with privilege and mortgage on the property described in the notarial act, passed before Ad. Mazurean, notary, a certified copy of which is made part hereof."

We have been thus particular in stating the pleadings, the orders and the decree of the court, because we think they show, so as to need no further argument, to a mind familiar with equity jurisprudence, that the procedure is, in its essential nature, a foreclosure of a mortgage in chancery.

It has all the essential qualities of such a suit, and it has none which is not usual and appropriate in such a proceeding. It is true that there is a personal judgment against defendant, but the ninety-second rule of equity practice prescribed by this court clearly authorizes such a judgment in foreclosure cases. It is the precise mode of foreclosing mortgages adopted in many of the states under their codes, and in all of them when there is a separate chancery docket, such proceedings are classed among the chancery causes.

We have so often decided that notwithstanding the peculiarities of the Civil Code of Louisiana, the distinctions between law and equity must be preserved in the Federal courts and that equity causes from that circuit must come here by appeal, and common-law causes by writ of error, that we cannot now depart from that rule without overruling numerous decisions and a well settled course of practice. *San Pedro*, 2 Wheat. 132; *McCollum* v. *Eager*, 2 How. 61; *Minor* v. *Tillotson*, 2 How. 392; *Surgett* v. *Lapice*, 8 How. 48; *Brewster* v. *Wakefield*, 22 How. 118, 16 L. ed. 301; *Thompson* v. *R. Co.* 6 Wall. 134, 18 L. ed. 765.

The present case being a proceeding [*443 *in equity brought here by a writ of error, and not by appeal, the writ must be dismissed.*

Dissenting, Mr. Justice **Bradley** and Mr. Justice **Swayne.**

SAMUEL W. SMITH, *Plff. in Err.*,
v.
JOSEPH F. SHEELEY.

(See S. C. 12 Wall. 358–362.)

Estoppel by quitclaim deed—vendor, when cannot question power of corporation to purchase.

Where a person occupying land gives a power of attorney to sell his interest therein, and subsequently acquires the legal title and receives the money on the sale by his attorney, he cannot disavow such sale and recover the land, nor can his subsequent grantee do so, on the ground that he did not have the legal title at the time of the execution of the power of attorney, although the deed of the attorney was a quitclaim.

A party who makes a sale of real estate to a bank cannot question its capacity to take the title, after it has paid him the consideration for the purchase.

[No. 190.]

Submitted Nov. 7, 1871. Decided Nov. 27, 1871.

IN ERROR to the Circuit Court of the United States for the District of Nebraska.

Suit in ejectment was brought in the court below by the plaintiff in error. The defendant claimed under a prior deed, from the plaintiff's grantor, Mitchell, the validity of which deed was disputed by plaintiff. The said deed was a quitclaim, executed under a power of attorney, giving authority to convey for said Mitchell all the interest he then had in such premises. At the time of executing such power of attorney, Mitchell had not the legal title to the land, but did have it when his attorney executed said quitclaim deed. Judgment having been given for the defendant, the plaintiff sued out this writ of error.

The case is further stated by the court.

Mr. **J. M. Woolworth,** for plaintiff in error:

The deed from Mitchell, purporting to convey the premises to the Nemaha Valley Bank, was void, because there was no such corporation. Act July 1, 1836, 5 Stat. at L. 61.

It is not pretended that this act has been repealed, or that the territorial act incorporating the Nemaha Valley Bank, has ever been approved or confirmed by Congress.

Redick had no authority to make the deed to the bank in Mitchell's name.

He assumed to make the deed under a power of attorney from Mitchell. That power, in terms, limited his authority to convey the title, which, at the time of making it, Mitchell had.

From the patent of the government and from Lowe's deed, it appears that Mar., 1857, Lowe, as mayor, entered the town site of Omaha, including the premises in question, at the United States Land Office, in trust for the occupants, under the act of May 23, 1844. 5 Stat. at L., 657.

Of course, prior to that date, Mitchell had

no title to the lot, but only occupied it, and when the entry should be made, he would become entitled to a deed. This uncertain and shadowy right he authorized Redick to convey, and no other.

Messrs. **John I. Redick** and *Clinton Briggs*, for defendant in error:

Though Mitchell had no legal title at the time he made the power of attorney, yet he was as much the real owner of the lot as he was after the mayor had made the deed to him. He was one of the class of persons who was entitled to a deed from the mayor, under the provisions of the town site act of 1844. As the mayor deeded to him, we are certainly to presume that he was entitled to the deed; and if so, he was then the real owner, and the only effect of the mayor's deed was to clothe him with the legal title, or, in other words, to give him the written evidence of his title. The plaintiff admits that Mitchell was entitled to the mayor's deed.

Why did he receive as a consideration for the sale to the bank the sum of $1,175, if he did not intend to have the absolute title conveyed? Why does he let the matter pass in silence for six years? And even then, after the lapse of this long time, he only breaks this silence by a quitclaim deed of the lot to a third party, for the consideration of one dollar.

If Mitchell did not intend to give authority to sell and convey the lot after he should have acquired the legal title, he should have revoked the power; and not having done so, third persons and bona fide purchasers, who derive title mediately through him, ought not to suffer in consequence of his neglect.

But even if the deed from Mitchell to the bank had been made before he had obtained the mayor's deed, yet the after acquired legal title would inure to the benefit of the bank.

In the case of *The F. L. & T. Co.* v. *McKinney*, 6 McLean, 1, it was held that a quitclaim deed will pass the grantor's equitable interest in the land, and that the subsequently acquired legal title will inure to the grantee by way of estoppel.

A charter of incorporation cannot be declared void in a collateral suit, but can only be declared so by a proceeding instituted directly against it on behalf of the state.

Pearce v. *Olney*, 20 Conn. 544; *State* v. *Bryce*, 7 Ohio, 82 (2d pt.); *Webb* v. *Moler*, 8 Ohio, 548; *Frost* v. *Coal Co.* 24 How. 278, 16 L. ed. 637.

This corporation is certainly prima facie a competent grantee.

Mr. Justice **Davis** delivered the opinion of the court:

This was an action of ejectment, brought by the plaintiff in error, to recover the possession of a lot in the city of Omaha, and resulted in a verdict and judgment for the defendant.

Both parties claim by deeds from George W. Mitchell; and the controversy turns on the validity of defendant's deed, which is prior to that of the plaintiff. It appears by the evidence, that in May, 1857, Redick, in execution of the power conferred upon him by Mitchell, in the previous month of February, conveyed the lot in dispute to the Nemaha Valley Bank, for the consideration of $1,170. More than six years after this, when the property was worth $2,000, Mitchell and wife, by quitclaim deed, undertook to convey it, for the nominal consideration of one dollar, to the grantor of the plaintiff in error.

The plaintiff's title rests wholly on the last deed, and hence the necessity of the effort to get rid of the effect of the deed to the bank.

It is insisted, in behalf of the plaintiff in error, that Redick had no authority to make this deed in Mitchell's name, because the power under which he acted directed him to convey such title as Mitchell then had, which was only a possessory right. It is true that in February, 1857, when the power of attorney was given, Mitchell had not the legal title to the lot, but as the mayor of Omaha conveyed it to *him a short time afterwards, it is a [*361 fair presumption that he was, at the date of the execution of the power, one of the class of persons who were entitled to a deed from the mayor under the provisions of the town site act of 1844. If so, he was to all practical purposes the real owner of the property, and intended that Redick should sell and convey something more than a "mere uncertain and shadowy right" as the plaintiff in error claims.

But, in the state of the proof, it is not necessary to look into the power of attorney to see the extent of the authority conferred, because the subsequent conduct of Mitchell renders it an unimportant subject of inquiry. It would be grossly unjust for Mitchell, having acquired the legal title, to let Redick, under a power of attorney executed before the title was obtained, make a deed in his name to the bank, appropriate to himself the money received for the sale of the property, and then, six years afterwards, disavow the act of his attorney on the plea that he had exceeded his authority. The law will not permit this to be done, and estops Mitchell from setting up such a claim.

It is insisted, however, as an additional ground of objection to this deed, that the bank was not a competent grantee to receive title. It is not denied that the bank was duly organized in pursuance of the provisions of an act of the legislature of the territory of Nebraska, but, it is said, it had no right to transact business until the charter creating it was approved by Congress. This is so, and it could not legally exercise its powers until this approval was obtained, but this defect in its Constitution cannot be taken advantage of collaterally. No proposition is more thoroughly settled than this, and it is unnecessary to refer to authorities to support it. Conceding the bank to be guilty of usurpation, it was still a body corporate *de facto*, exercising at least one of the franchises which the legislature attempted to confer upon it, and in such a case the party who makes a sale of real estate to it, is not in a position to question its capacity to take the title, after it has paid the consideration for the purchase.

*If, prior to the execution of the deed, [*362 there had been a judgment of ouster against the corporation at the instance of the government, the aspect of the case would be different.

There is no error in the record, and the judgment is affirmed.

369*] *ROBERT M. SHOEMAKER *et al.*, *Plffs. in Err.*,
v.
E. W. KINGSBURY.

(See S. C. 12 Wall. 369-378.)

Railroad contractors, liability of, for negligence in carrying a passenger—risk of passenger.

*1. When contractors for building a railroad, running a construction train, consent to take a passenger for hire on their train, they are private carriers for hire, and are only bound to exercise such care and skill in the management and running of the train as prudent and cautious men, experienced in that business, are accustomed to use under similar circumstances.

2. The passenger, in such case, takes upon himself the risks incident to the mode of conveyance.

[No. 188.]

Argued Nov. 7, 1871. Decided Nov. 27, 1871.

IN ERROR in the Circuit Court of the United States for the District of Kansas.

Suit was brought in the first judicial district of the state of Kansas, in and for Leavenworth county, by the defendant in error, to recover for damages received by him while a passenger on a railroad car, belonging to the defendants. Upon petition of the defendants, the case was removed to the court below. Judgment having been given for the plaintiff in that court, the defendants sued out this writ of error.

The case is further stated in the opinion of the court.

Messrs. **J. P. Usher, W. T. Otto,** for plaintiff in error:

The court gave for plaintiff the following instruction to the jury:

"When it is proved that the car was thrown from the track and the plaintiff was injured, it is incumbent on the defendants to prove that the agents and servants in charge of the train were persons of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which they were engaged, and that they acted on this occasion with reasonable skill, and with the utmost prudence and caution; and if the disaster in question was occasioned by the least negligence or want of skill or prudence on their part, then the defendants are liable in this action."

Now, this instruction must be held to have been given with reference to the facts in the case:

1. That the accident was caused by the sudden leaping of an ox, from a place of concealment, before the advancing train, and which, striking and running upon the ox, threw the train in part off the track.

2. That the caboose in which Kingsbury was riding was not overturned or thrown from the track, but that his injuries were caused by his voluntarily leaping from the caboose, in which, if he had remained, he would not have been injured.

3. That the accident was in an uninhabited part of the country, upon the plains, where the defendants or their servants had not the slightest reason to expect any obstruction, and the leaping of the animal upon the track before the advancing train was as complete a surprise as if a rock had fallen from the skies upon the track before the train; and that, after the ox was discovered, it was impossible to avoid coming upon him.

The error in this instruction is, that it assumes that proof of this particular accident to the construction train, on which the plaintiff was being carried, cast the burden of proof upon the defendants, to establish that it was without their fault. This was error. The plaintiff averred and was bound to prove that he was injured by the negligence of the defendants, and without any fault or negligence of his own. This is the unvarying rule of law. *Deyo* v. *R. Co.* 34 N. Y. 9, and cases cited; *Holbrook* v. *R. Co.* 12 N. Y. 236; *Curtis* v. *R. Co.* 18 N. Y. 534; *Transport. Co.* v. *Downer, ante,* 160.

The instruction assumes that the car could not have been thrown from the track if the employees had been competent, and that the accident was an evidence of their incompetency.

Against this assumption we oppose the principle of law, that all persons are presumed to perform their duties; and in the employment of railroad operatives it is conclusively presumed that due care has been taken, until the contrary is proved.

The presumption is that the accident was unavoidable, until the contrary was proved.

As a test of the legality of this instruction: if the car were thrown from the track by an unavoidable accident, would the defendants be liable, though their operatives were unskilful and of vicious habits? Or, if they had possessed the highest degree of skill and been of unexceptionable habits, how would these virtues have profited the defendants, if the accident was caused by their negligence?

It was not the duty of the defendants to inquire after the habits of their employees; nor could their habits be put in issue in the cause, and it was error to do so. The court had no right to require evidence of the defendants on this subject. The instruction ought to have been: Did the defendants, taking into account the mode of transportation, as far as human care and foresight could go, provide for the safety of the plaintiff? And did their employees in charge of the train exercise the highest degree of skill and judgment on the occasion of the accident? Was the accident solely their fault, or was it unavoidable? The affirmative of all these issues was upon the plaintiff.

Messrs. **Geo. Earle** and **Geo. W. Paschal,** for defendant in error:

We contend that the fifth instruction of the court is in exact conformity with the law as pronounced by the Supreme Court of the United States in the case of *Stokes* v. *Saltonstall,* 13 Pet. 185.

In that case the court, in its instructions to the jury, held that the facts that the carriage was upset and the plaintiff's wife injured, were prima facie evidence that there was negligence or want of skill on the part of the driver; and threw upon the defendant the burden of proving that the accident was not occasioned by the driver's fault.

And again: "It being admitted that the carriage was upset and the plaintiff's wife injured, it is incumbent on the defendant to prove that the driver was a person of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which he engaged; and that he acted on this

*Headnotes by Mr. Justice FIELD.

occasion with reasonable skill and with the utmost prudence and caution; and if the disaster in question was occasioned by the least negligence or want of skill or prudence on his part, that the defendant is liable in this action."

The fifth instruction in this case of *Shoemaker* v. *Kingsbury* is taken, almost word for word, from the court's instructions in the case of *Stokes* v. *Saltonstall*, and its reversal would be equivalent to an overruling of the law laid down by the court in that case, and would unsettle the decisions bearing on the same questions in numerous cases throughout the country.

In the case of *The R. Co.* v. *Worthington*, 21 Md. 282, the court held "that the injury to the plaintiff (Worthington) was prima facie evidence of negligence on the part of the defendants, and it was incumbent on them to prove that they were not negligent, in order to discharge themselves from liability."

And again: "That it was a question of fact for the jury to determine from all the evidence in the cause, whether the injury to the plaintiff arose from any neglect on the part of the defendants or their agents, and if the jury should find that the injury in question was the result of an accident or act against which human care and foresight could not guard, and was not the result of negligence, in any degree, on the part of the defendants, then the plaintiff was not entitled to recover."

The learned counsel for the railroad company objected to these instructions, chiefly because the injury to Worthington was declared to be presumptive evidence of negligence, without prescribing any legal measure of proof by which the presumption could be rebutted, but referred to the case of *Stokes* v. *Saltonstall*, as furnishing the correct standard by which to determine whether the defendants were in fault or not.

The court of appeals of Maryland, in delivering its opinion in this case, said that the cases of *Stokes* v. *Saltonstall*, 13 Pet. 181, and *Stockton* v. *Frey*, 4 Gill, 414, conclusively established the law, and that in such cases the occurrence of the accident amounted to prima facie evidence of negligence on the part of the defendants, throwing upon them the onus of rebutting the presumption, by proving that there was no negligence.

Reference is further made to the case of *Galena & Chicago R. Co.* v. *Yarwood*, 17 Ill. 509, where the court, in delivering its opinion, held "That a passenger in a railway car need only show that he has received an injury, to make a prima facie case against the carrier. The carrier must rebut the presumption, to exonerate himself from responsibility."

In further support of this rule of law, reference is made to the following cases:

Crofts v. *Waterhouse*, 3 Bing. 319; *Ware* v. *Gay*, 11 Pick. 106; *Christie* v. *Griggs*, 2 Camp. 79; *Hegeman* v. *R'way*, 16 Barb. 353; *Holbrook* v. *R. Co.* 16 Barb. 113; *R. Co.* v. *Messino*, 1 Sneed, 221.

It is no answer to an action by a passenger against a carrier, that the injury was caused by the negligence, or even the trespass, of a third party.

Sullivan v. *P. & R. Railway*, 30 Pa. 234; 6 Am. Law Reg. 342; *Skinner's Case*.

Mr. Justice **Field** delivered the opinion of the court:

From the whole evidence in this case it is plain that the defendants were not common carriers of passengers at the time the accident occurred, which has led to the present action. They were merely contractors for building the Eastern Division of the Union Pacific Railway, and were running a construction train to transport material for the road. The entire train consisted, besides the engine and its tender, of cars for such material and what is called in the testimony a "caboose car." This latter car was intended solely for the accommodation of the men connected with the train; it contained their bunks and mattresses; they slept in it, and deposited in it the lamps of the cars and the tools they used. It was not adapted for passengers, and, according to the testimony of the conductor, the defendants did not wish to carry passengers, although when persons got on to ride the defendants did not put them off, and sometimes, though not always, fare was charged for their carriage.

The plaintiff, who was sheriff of a county in Kansas, and deputy-marshal of the district, desired to arrest a person on the line of the road, and to enable him to accomplish this purpose, he applied to the conductor for passage on the train as far as Wilson's Creek, and requested that the train would stop there until the arrest could be made. His wishes were granted in both respects, and for the services rendered he *paid at the time a portion [*376 of the fare charged, and the balance subsequently.

In the rendition of these services for the plaintiff, the defendants were simply private carriers for hire. As such carriers, having only a construction train, they were not under the same obligations and responsibilities which attach to common carriers of passengers by railway. The latter undertake, for hire, to carry all persons indifferently who apply for passage; and the law, for the protection of travelers, subjects such carriers to a very strict responsibility. It imposes upon them the duty of providing for the safe conveyance of passengers, so far as that is practicable by the exercise of human care and foresight. They are bound to see that the road is in good order; that the engines are properly constructed and furnished; that the cars are strong and fitted for the accommodation of passengers, and that the running gear is, so far as the closest scrutiny can detect, perfect in its character. If any injury results from a defect in any of these particulars they are liable.

They are also bound to provide careful and skilful servants, competent in every respect for the positions to which they are assigned in the management and running of the cars; and they are responsible for the consequences of any negligence or want of skill on the part of such servants.

They are also bound to take all necessary precautions to keep obstructions from the track of the road; and, although it may not be obligatory upon them, in the absence of legisla-

tive enactment, to fence in the road so as to exclude cattle, it is incumbent upon them to use all practical means to prevent the possibility of obstruction from the straying of cattle on to the track as well as from any other cause. As said by the supreme court of Pennsylvania, in speaking of the duty of railway companies in this particular (*Sullivan* v. *Phil. & R. R. Co.* 30 Pa. 234): "Having undertaken to carry safely, and holding themselves out to the world as able to do so, they are not to suffer cows to endanger the life of a passenger any more than 377*] a defective *rail or axle. Whether they maintain an armed police at cross roads, as is done by similar companies in Europe, or fence, or place cattle guards within the bed of their road, or by any other contrivance exclude this risk, is for themselves to consider and determine. We do not say they are bound to do the one or the other, but if, by some means, they do not exclude the risk, they are bound to respond in damages when injury accrues."

It is evident that the defendants in this case were not subject to any such stringent obligations and responsibilities as are here mentioned. They did not hold themselves out as capable of carrying passengers safely; they had no arrangements for passenger service, and they were not required to make provisions for the protection of the road such as are usually adopted and exacted of railroad companies. They did not own the road, and had no interest in it beyond its construction. It was no part of their duty to fence it in or to cut away the bushes or weeds growing on its sides.

The plaintiff knew its condition and the relation of the defendants to it when he applied for passage. He had been previously over it several times, and was well aware that there were no turntables on a portion of the route; a fact which compelled the defendants to reverse the engine on the return of the train from Walker's Creek. He, therefore, took upon himself the risks incident to the mode of conveyance used by the defendants when he entered their cars. All that he could exact from them, under these circumstances, was the exercise of such care and skill in the management and running of the train as prudent and cautious men, experienced in that business, are accustomed to use under similar circumstances. Such care implies a watchful attention to the working of the engine, the movement of the cars and their running gear, and a constant and vigilant lookout for the condition of the road in advance of the train. If such care and skill were used by the defendants, they discharged their entire duty to the plaintiff; and if an accident, notwithstanding, occurred, by which he was injured, they were not liable. They were not in-378*] surers of his *safety, nor responsible for the consequences of unavoidable accident.

The question should have been put to the jury whether the defendants did, in fact, exercise such care and skill in the management and running of the train at the time the accident occurred. They were not responsible to the plaintiff, unless the accident was directly attributable to their negligence or unskilfulness in that particular.

The evidence in the case shows that the accident was occasioned by the tender and engine [illegible]ing against a steer. The train was pro-

The history and facts are fully stated by the court.

Messrs. **J. M. Carlisle** and **J. D. McPherson,** for appellants:

The bill and amended bill claimed for the United States no other right than that which they conceded to all the bondholders. Upon this state of the pleadings, it was error to decree any preference or priority of any kind in favor of the United States; nor was any such priority or preference given by the original decree.

The United States, in the face of these mortgages, to secure coupon bonds, passing from hand to hand by delivery, sold and delivered to the company certain rolling stock, expressly agreeing that the same might be put upon the road and used in the ordinary way, but reserving to itself a secret lien upon the same, and stipulating moreover for other security for the payment of the purchase money. The company had the possession and use of this rolling stock, however, and persons dealing with the bonds secured by the recorded mortgages, had a right, by the consent of the United States, to look to this property as part of their security, nor had they any means of ascertaining that the same was claimed under any superior equity whatever. They dealt in the bonds, believing that this property was pledged for their payment.

Certainly an unrecorded mortgage could not prevail against one who had lent money to the company upon the faith of the property which it had in actual possession by purchase and delivery.

But the law of Kentucky goes farther, and places both prior and subsequent creditors upon an equal footing, as to unrecorded mortgages.

Messrs. **B. H. Bristow,** *Solicitor Gen.,* **C. H. Hill,** *Asst. Atty. Gen.,* for appellees:

No objection was taken to the mode of procedure in the circuit court, and the parties having voluntarily adopted it, their objection made here, for the first time, should not be entertained.

Laber v. *Cooper,* 7 Wall. 570, 19 L. ed. 152; *Houghton* v. *Jones,* 1 Wall. 705, 17 L. ed. 504; *R. Co.* v. *Bradley,* 10 Wall. 300, 19 L. ed. 894.

This appeal is prosecuted by parties who signed the stipulation and submitted the agreed case to the court. Surely they cannot be heard to complain of the supposed want of regularity in this proceeding.

Since the decision of this court in *Pennock* v. *Coe,* 23 How. 124, 16 L. ed. 440, that a mortgagee may take an equitable interest in property acquired by the mortgagor, after the execution of the mortgage, is a proposition not to be doubted; but it cannot be said, either upon principle or upon the authority of the case, that such interest attaches before the property is acquired by the mortgagor. On the contrary, the court in that case recognized and approved the maxim, that "a person cannot grant a thing which he has not:" "*ille non habet, non det.*" And this is true, both at law and in equity.

In this case the company took the property subject to the lien of the United States, and any right in or to it which passed to the bond holders, passed subject to the same lien. The mortgages did not convey to the mortgagees any greater right than the company had. The mortgagees do not occupy the position of bona fide purchasers for value, nor even of mortgagees for a present consideration. They have nothing but a naked equity, and that posterior in time and conscience to the equity of the United States. "*Qui prior est tempore, potior est jure.*"

The court of appeals of Kentucky has never applied the statute in a case like this. The words "any creditor" used in the statute mean a creditor who has an interest in or right to the thing attempted to be conveyed, and can have no application where all the parties are asserting mere equities, and are in a court of equity seeking its aid on equitable principles.

Swigert v. *Bk. of Ky.* 17 B. Mon. 289; *Bailey* v. *Welch,* 4 B. Mon. 244.

Mr. Justice **Bradley** delivered the opinion of the court:

This was a suit instituted by the United States, as the holder of a number of the first and second mortgage bonds of the New Orleans & Ohio Railroad Company, to foreclose the mortgage given to secure said bonds. These mortgages were executed in 1858 and 1860, respectively, and covered all the company's property of every kind, with a stipulation to include all future acquired property. The trustee of the mortgages and several individual bond holders were made parties, and the bill contained proper allegations as to the impracticability of making all of them parties. After a final decree of foreclosure and sale, and while the execution was in the hands of the marshal, it transpired that a portion of the rolling stock, consisting of two locomotives and ten cars, had been sold to the railroad *com- [*363 pany by the United States in 1866, and that simultaneously with the sale, the company gave to the United States a bond for the purchase money, wherein it was stipulated that the latter should have a lien therefor upon the property sold, and that the company should not sell it or part with it until payment of the price, without the consent of the United States. Hereupon the respective solicitors of all the parties, complainant and defendant, directed the marshal in writing, not to sell the said locomotives and cars. The rest of the property was sold, but brought less than the amount of the mortgage bonds.

The parties then, by their respective solicitors, filed a written statement of the facts in relation to said locomotives and cars, adding to what is above stated, the further fact that the bond given for the purchase money thereof was not recorded, and that its contents were unknown to all the bond holders of the railroad company, except Mr. Trimble, the trustee of the mortgages. Upon this statement, the question whether the United States had a superior equity in this property to that of the bond holders under the mortgages, was submitted to the court for its decision, and the court decided that they had a superior equity, and made a decree to that effect. This is the decree appealed from.

The appellants contend, first, that the court had no authority to make the decision; that

the proceeding was wholly irregular, without proper pleadings, and *coram non judice*. This objection hardly comes with a good grace from the appellants, who all joined in submitting the question to the court. But the jurisdiction was undoubted. A court of equity, in a suit for the foreclosure of a mortgage, clearly has cognizance of all questions relating to priority of lien on the property in litigation, as between the parties to the suit and those whom they lawfully represent. The mode in which the jurisdiction shall be exercised is not so much a matter of substance as of form. Ordinarily, a reference to a master before the final decree would be the formal method to pursue, but where, from oversight or other cause, this has been omitted, the parties may certainly agree (as was done here) to submit the matter to the court, upon a statement of facts, after the decree.

The appellants contend, in the next place, that the decision upon the facts was erroneous; that the mortgages, being prior in date to the bond given for the purchase money of these locomotives and cars, and being expressly made to include after-acquired property, attached to the property as soon as it was purchased, and displaced any junior lien. This, we apprehend, is an erroneous view of the doctrine by which after-acquired property is made to serve the uses of a mortgage. That doctrine is intended to subserve the purposes of justice, and not injustice. Such an application of it as is sought by the appellants would often result **365***] in *gross injustice. A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, although they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage, or judgment, or recognizance, can displace such mortgage for purchase money. And in such cases a failure to register the mortgage for purchase money makes no difference. It does not come within the reason of the registry laws. These laws are intended for the protection of the subsequent, not prior, purchasers and creditors.

Had the property sold by the government to the railroad company been rails, as in the case of *R. Co.* v. *Cowdry*, *ante*, 199, or any other material which became affixed to and a part of the principal thing, the result would have been different. But being loose property, susceptible of separate ownership and separate liens, such liens, if binding on the railroad company itself, are unaffected by a prior general mortgage given by the company, and paramount thereto.

In the case before us, the United States, at the time of making the sale, reserved a lien on the property, and imposed a condition of nonalienation until the price should be paid. Taken all together the transaction amounts to a transfer *sub modo*, and the lien must be regarded as attaching to the property itself, and as paramount to any other liens arising from the prior act of the company.

The decree is affirmed.

JOHN J. TOWNSEND, Executor of Frederick Bronson, Deceased, who was Executor of Arthur Bronson, Deceased, *Appt.*,

v.

EDWARD CHAPPELL *et al.*

(See S. C. *"Bronson's Executor* v. *Chappell,"* 12 Wall. 681-686.)

Principal, when bound by acts of volunteer agent—estoppel of—past acts of agents evidence of authority.

Where one without objection suffers another to do acts which proceed upon the grounds of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exist, in all respects as if the requisite power had been given in the most formal manner.

If he had justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, he is estopped to deny it.

Everything fairly within the scope of the powers exercised in the past may be done in the future, until notice of revocation or disclaimer is brought home to those whose interests are concerned.

[No. 203.]

Argued Nov. 9, 1871. Decided Nov. 27, 1871.

APPEAL from the Circuit Court of the United States for the District of Wisconsin.

The history and facts of the case are fully stated by the court.

Mr. **John J. Townsend,** in person, for appellant.

Messrs. **M. M. Cothren** and **Geo. W. Lakin** for appellees.

Mr. Justice **Swayne** delivered the opinion of the court:

This is an appeal in equity from the decree of the circuit court of the United States for the district of Wisconsin.

But a single question has been argued in this court, and that is one arising upon the facts as developed in the record. This opinion will be confined to that subject.

William C. Bostwick, acting for Frederick Bronson, negotiated the sale of a tract of land in Wisconsin to the defendants. According to his custom in such cases, Bronson forwarded to Bostwick the draft of a contract to be executed by the buyers. At the foot of the draft was a note in these words:

"William C. Bostwick, Esq., of Galena, is authorized to receive and receipt for the first payment on this contract. All subsequent payments to be made to F. Bronson, in the city of New York."

The defendants expressed to Bostwick a preference to receive a deed and give a mortgage. This was communicated to Bronson, who acceded to the proposition and forwarded to Bostwick a deed and draft of the bond and mortgage. On the 25th of March, 1865, the defendants paid to Bostwick, $1,500 of the purchase

NOTE.—*Agency implied from course of dealing*—see note, 42 C. C. A. 221.

money, and executed the bond and mortgage to secure the payment of the balance. According to the condition of the bond it was to be paid to the obligee in the city of New York, in instalments, as follows: $781.20 on the 13th of November, 1865, and the remaining sum of $4,562.40 in seven equal annual payments, from the 12th of February, 1865, with interest thereon at the rate of seven per cent per annum. The contract was erroneously construed by Bronson as requiring the interest on all the instalments to be paid with each one as it fell due. The other parties seem to have acquiesced in this construction. On the 4th of December, 1865, the defendants paid to Bostwick, as the agent of Bronson, $825.36 in discharge of the amount claimed to be due on the 30th of November, 1865, and took his receipt accordingly. **683*]** On the 28th of February, 1866, *they paid Bostwick $980 to meet the second instalment and interest, as claimed, with exchange, and took his receipt as before. Bostwick failed in December, 1866. These moneys were never paid over to Bronson. He denied the authority of Bostwick to receive them, and demanded payment from the defendants. They refused, and Bronson thereupon filed this bill to foreclose the mortgage. The validity of these payments is the question presented for our determination.

Agents are special, general, or universal. Where written evidence of their appointment is not required, it may be implied from circumstances. These circumstances are the acts of the agent and their recognition or acquiescence by the principal. The same considerations fix the category of the agency and the limits of the authority conferred. Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exists, in all respects as if the requisite power had been given in the most formal manner. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party had acted upon a mistaken conclusion. He is estopped to take refuge in such a defense. If a loss is to be borne, the author of the error must bear it. If business has been transacted in certain cases it is implied that the like business may be transacted in others. The inference to be drawn is, that everything fairly within the scope of the powers exercised in the past may be done in the future, until notice of revocation or disclaimer is brought home to those whose interests are concerned. Under such circumstances the presence or absence of authority, in point of fact, is immaterial to the rights of third persons whose interests are involved. The seeming and reality are followed by the same consequences. In either case the legal result is the same.

684*] *Bronson, as executor, had a large body of lands in Wisconsin for sale. For several years prior to the purchase by the defendants, Bronson had been in the habit of receiving and forwarding propositions to Bostwick. If approved, Bronson executed and forwarded contracts for the property, to be executed by the other parties. In the early part of the year 1860 Bostwick was startled by a memorandum touching payments, on a draft sent out by Bronson, like that in the draft sent to Bostwick for execution by the defendants. On the 9th of February he addressed a letter to Bronson, in which he said:

"My attention was naturally arrested by the note at bottom of the contract of Tormey, and if it is to be interpreted as an intimation that a withdrawal of my agency is contemplated, it would cause me not less surprise than pain, not so much by any means from the pecuniary consideration connected with it, as from the implied dissatisfaction on your part with the manner in which I have transacted your business; and it occasions the more surprise that I have always endeavored to attend with fidelity and promptness to your business and interests, and have never before had any intimation whatsoever from you that you were not entirely satisfied. I am wholly at a loss to conceive wherein I have given dissatisfaction, or failed to do all that was necessary to do or could be done under the particular circumstances of any case involving your business or interests in my hands."

On the 15th of the same month Bronson replied as follows:

"The memorandum at the foot of Tormey's contract I have recently put on all of my land contracts to repel the construction lately sought to be put on them, that the first or other payments, if received by the agent, is an implied waiver of the claim for exchange, and of the stipulation in the body of the contract, that the money is to be paid to me in the city of New York. In other words, it is but a repetition of a clause in the contract, as applicable to all except the first payment."

This correspondence suggests several remarks:

Bostwick speaks of his employment as having been, and then being, an "agency" for Bronson. He inquires whether *it was [**685** contemplated by Bronson to revoke it. Bronson does not deny nor revoke it. He says the object of the memorandum was to repel the construction that the receipt of "the first or other payments by the agent" was "an implied waiver of the claim for exchange" and which was the same thing in effect—a waiver of the stipulation in the contract that the money was to be paid to him "in the city of New York." It recognizes the authority of the agent to receive the subsequent payments as well as the first one, provided exchange were paid upon the former by the debtor.

The language employed by Bronson will admit of no other construction. It applies with full force to the bond of these defendants. They paid exchange as well as the principal and interest of the instalments in question. There is no evidence in the record that the authority thus admitted to exist was ever withdrawn. It must be presumed to have continued until the relations of the parties were terminated by Bostwick's failure and insolvency. Bostwick says in his deposition: "I advertised myself as the agent of the Bronson lands, which ad-

vertising was continued for a period of twelve or fourteen years." His testimony upon this subject in uncontradicted.

There are found in the record thirty-four letters from Bronson to Bostwick, all relating to business connected with the Bronson lands. The first letter bears date on the 12th of December, 1855; the last one on the 27th of November, 1865. They are in all respects such as would naturally be addressed by a principal to an agent in whose judgment, integrity, and diligence he had the fullest confidence. They refer to sales, to the delivery of deeds and contracts, the payment and collection of taxes, and a variety of other matters in the same connection. Ten of the letters authorize the delivery of contracts on the receipt of the first payment by Bostwick. Fourteen of them authorize the collection or acknowledge the transmission of other moneys. Bronson was absent in Europe from the 9th of October, 1861, until about the middle of December, 1864. During that time his business was attended to by his attorney, 686*] E. S. Smith, Esq., *of the city of New York. There are in the record twenty-one letters from him to Bostwick. They are of the same character with those from Bronson. Twelve of them acknowledge the collection and transmission of moneys for Bostwick. It is not stated whether they were the first or later payments, but the circumstances show clearly that they were in most, if not in all instances, of the latter character. All collections were made, and all business relating to the lands was transacted through Bostwick. In one of these letters Smith says:

"P. S.—Mr. Bronson, in a letter received, writes: 'I am willing to sell lands through Mr. Bostwick upon an advance of price equal to the depreciation of paper money at the time of sale,'" etc.

A further analysis of the letters of these parties would develop a large array of additional facts bearing in the same direction and hardly less cogent than those to which we have adverted. There is no intimation in any of them that Bostwick was regarded as the agent of the buyers, that he was not regarded as the agent of Bronson, or that he had in any instance exceeded his authority. It is unnecessary to pursue the subject further. Viewed in the light of the law, we think the evidence abundantly establishes two propositions:

1. That Bostwick was the agent of Bronson, and as such authorized to receive the payments in question.

2. If this were not so, that the conduct of Bronson—numerous transactions between him and Bostwick and the course of business by the latter—authorized or known to and acquiesced in by the former—justified the belief by the defendants that Bostwick had such authority and that Bronson was bound accordingly.

The decree of the Circuit Court is affirmed.

CHARLES G. SCOTT, *Appt.*,

v.

UNITED STATES.

(See S. C. 12 Wall. 443–445.)

Contract to carry goods, construction of

A contract to employ another to carry all the goods one has to transport between two points on a river, does not impose an obligation to employ that other to carry goods from a more distant point on the river, although in such transportation such goods pass between both points named in the contract.

[No. 206.]

Submitted Nov. 9, 1871. Decided Nov. 20, 1871.

APPEAL from the Court of Claims.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **A. H. Garland, E. L. Stanton,** and **N. P. Chipman** for appellant.

Messrs. **B. H. Bristow,** *Solicitor Gen.*, **C. H. Hill,** *Asst. Atty. Gen.*, for appellees.

Mr. Justice **Swayne** delivered the opinion of the court:

This is an appeal from the judgment of the court of claims. The facts of the case, so far as it is necessary to consider them, are as follows:

On the 13th of February, 1866, Henry T. Noble, assistant quartermaster in the volunteer military service of the United States, entered into a contract with the appellant, Scott, whereby the quartermaster "agrees to furnish all the transportation the United States may require from Little Rock, Arkansas, to Fort Smith, Arkansas, and to and from all points between Little Rock, Arkansas, and Fort Smith, Arkansas, when the same is to be furnished by river." Transportation was called for by the United States between Little Rock and Fort Smith, furnished by Scott, and duly paid for *by the government. Upon that [*444 subject there is no controversy between the parties. But the United States also shipped troops and stores from St. Louis to Fort Smith and Fort Gibson. The vessels, on their way, touched at Little Rock, but did not discharge there. While they were at Little Rock, Scott, in a written communication to the quartermaster, claimed the right, under his contract, to transport the troops and stores in question from that point to Fort Smith, and had boats ready to perform that service. None of the lading was delivered to him. Had he transported it, the freight, according to his contract, would have amounted to $17,605.66. The court of claims held that the transportation thus claimed was not within the contract, and dismissed his petition. Hence this appeal.

We think the decision of the court of claims was correct. The soundness of this view of the subject is too clear to require or admit of much discussion. The contract was for transportation between Little Rock and Fort Smith. Transportation from Little Rock to Fort Smith was not the same thing by any means as transportation from St. Louis to Fort Smith or Fort Gibson. Transportation from St. Louis to those places necessarily involved transportation by Little Rock, and thence over a common river route to the higher points of destination, but the voyages were wholly distinct and independent of each other. The greater includes the less, but that does not make them identical. In their totality they are as different as if the partial sameness did not exist. In the transportation between St. Louis and the other points named the part performed above Little Rock was but an ingredient in the mass. There is nothing which requires us to disintegrate it and give to Scott one part more than another. Such

elongated transportation is neither within the letter nor the meaning of his contract.

In cases like this it is the duty of the court to assume the standpoint occupied by the parties when the contract was made—to let in the light of the surrounding circumstances—to see as the parties saw, and to think as they must 445*] have *thought, in assenting to the stipulations by which they are bound. This process is always effective. When the terms employed are doubtful or obscure there is no surer guide to their intent and meaning. It must have been known to both Scott and the quartermaster that such transportation would be required as that under consideration. It is incredible that they intended to subject the United States to the delay, inconvenience and expense of the unlivery and reloading of every cargo which came up the river to Little Rock only to feed Scott's contract and meet its demands. He claims a monopoly, without regard to circumstances, of all the government transportation upon the waterway where his contract was to be fulfilled. Fort Gibson is above Fort Smith. As respects all lading to be shipped beyond Fort Smith the same unloading and reloading would be necessary there which had before occurred at Little Rock. A proposition, from which flow consequences so unreasonable, must itself be regarded as of that character. Where parties intend to contract by parol, and there is a misunderstanding as to the terms, neither is bound, because their minds have not met. *Baldwin* v. *Mildeberger*, 2 Hall, 176. Where there is a written contract, and a like misunderstanding is developed, a court of equity will refuse to execute it. *Coles* v. *Bowne*, 10 Paige, 534; *Calverley* v. *Williams*, 1 Ves. Jr. 211. If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to. *James* v. *Morgan*, 1 Lev. 111; *Thornborow* v. *Whitacre*, 2 Ld. Raym. 134; *Baxter* v. *Wales*, 12 Mass. 365. But it is unnecessary to invoke the aid of anything outside of the contract itself. Its interpretation presents no question for our consideration. That the proper construction has been given to it, we think is equally clear.

The judgment of the Court of Claims is affirmed.

LOUIS HANAUER *et al., Plffs. in Err.*,
v.
SAMUEL H. DOANE.

(See S. C. 12 Wall. 342-349.)

Action for goods sold in aid of Rebellion—promissory note for—when void.

*1. Action will not lie for the price of goods sold in aid of the Rebellion, or with knowledge that they were purchased for the Confederate States government.

2. A promissory note, the consideration of which is wholly or in part the price of such goods is void, and an action cannot be sustained thereon by a holder, who receives it knowing for what it was given.

3. Due-bills given for the price of such goods, and passed in the hands of a person knowing the fact, will not be a good consideration for a note.

*Headnotes by Mr. Justice BRADLEY.

NOTE.—*Right to recover price of property sold for unlawful use*—see note, 15 L. R. A. 834.

4. It is contrary to public policy, to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members.

[No. 196.]

Submitted Nov. 8, 1871. Decided Nov. 27, 1871.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

Suit was brought in the circuit court of Randolph county, Arkansas, by the defendant in error, to recover upon two promissory notes. Upon petition of the defendants, the case was removed into the court below. Judgment having been thereafter given for the plaintiff, the defendants sued out this writ of error.

The case is further stated by the court.

Messrs. **Watkins** and **Rose**, for plaintiffs in error:

In Arkansas, the rule of mercantile law as to commercial paper has been changed by statute, so that the maker of a note may set up any defense against the assignee that would have been good against the payee.

Smith v. *Capers*, 13 Ark. 9; *Robinson* v. *Swigart*, 13 Ark. 71; *Walker* v. *Johnson*, 13 Ark. 522; *Worthington* v. *Curd*, 22 Ark. 278.

In case of an illegal contract, however, the rule would be the same without any statute.

Tatum v. *Kelley*, 25 Ark. 210; *McMurtry* v. *Ramsey*, 25 Ark. 349; *Portis* v. *Green*, 25 Ark. 376; *Ruddell* v. *Landers*, 25 Ark. 238; *Chancely* v. *Bailey*, 37 Ga. 532.

The opinion of the court below is in accordance with the doctrine of some of the earlier English cases. But that doctrine has long since slept, and has come to be hardly anything more than a mere tradition.

In *Langton* v. *Hughes*, 1 Maule & S. 593, the court was unanimous in holding that "Parties who seek to enforce a contract for the sale of articles which in themselves are perfectly innocent, but which were sold with a knowledge that they were to be used for a purpose which is prohibited by law, are not entitled to recovery."

Cannan v. *Bryce*, 3 B. & Ald. 179; *McKinnell* v. *Robinson*, 3 Mees. & W. 435; *Pearce* v. *Brooks*, L. R. 1 Exch. 212.

In Mr. Benjamin's late work on Sales, p. 380, the author says: "The sale of a thing, in itself an innocent and proper article of commerce, is void when the vendor sells it, knowing that it is intended to be used for an immoral or illegal purpose. In several of the earlier cases, something more than this mere knowledge was held necessary, and evidence was required of an intention on the vendor's part to aid in the illegal, or profit by the immoral act. The later decisions overruled this doctrine."

The distinction between contracts illegal by common law and illegal by statute, is also a thing of the past.

1 Pars. Cont. 381.

Passing to the American cases, we observe that Chancellor Walworth, in *Nellis* v. *Clark*, 4 Hill, 430, cited the case of *McKinnell* v. *Robinson*, 3 Mees. & W. 435, with approval. The character of the contract in this case is not to be mistaken.

Gray v. *Hook*, 4 N. Y. 455; *Rose* v. *Truax*, 21 Barb. 376; *Perkins* v. *Savage*, 15 Wend. 418; *Pratt* v. *Adams*, 7 Paige, 653; *De Groot* v. *Van Duzer*, 20 Wend. 390; *Belding* v. *Pitkins*, 2 Cai. 147; *Ruckman* v. *Bryan*, 3 Den. 340; *Morgan* v. *Groff*, 5 Den. 364; *Graves* v. *Delaplaine*, 14 Johns. 146; *Beach* v. *Kezar*, 1 N. H. 184; *Spurgeon* v. *McIlwain*, 6 Ohio, 442; *Territt* v. *Bartlett*, 21 Vt. 184; *Nichols* v. *Ruggles*, 3 Day. 145; *Steele* v. *Curle*, 4 Dana, 387; Story, Conf. L. sec. 253; see, also, 2 Kent, Com. 466, *n.*; *Bk.* v. *Owens*, 2 Pet. 539; *Marshall* v. *R. R. Co.* 16 How. 334.

It will not be doubted, we presume, that giving aid and comfort to the Rebellion must be held as an illegal act. This court held, in *U. S.* v. *Padelford*, 9 Wall. 539, 19 L. ed. 791, that where one signed, as surety, a bond of a quartermaster of the Confederate States, he had given such aid and comfort. The act in that case was held to be voluntary. The proof here of voluntary character of the acts of Hunter & Oakes, is not questioned. The aid given was special and direct, not remote. Therefore, this case differs from *Thorington* v. *Smith*, 8 Wall. 9, 19 L. ed. 363, where the court's decision grew from the conclusion that the Confederate money was "imposed on the community by irresistible force."

A great number of cases scattered through the circuit court reports support our views, such as *Scudder* v. *Andrews*, 2 McLean, 464; *Piatt* v. *Oliver*, 1 McLean, 295; *S. C.* 2 McLean, 267; *Wilson* v. *Le Roy*, 1 Brock. 447; *Milne* v. *Huber*, 3 McLean, 212; *Cambioso* v. *Maffett*, 2 Wash. (C. C.) 98; *Walker* v. *Johnson*, 2 Cranch (C. C.) 203; *Root* v. *Godard*, 3 McLean, 102; *Weed* v. *Snow*, 3 McLean, 265; *Hayden* v. *Davis*, 3 McLean, 276; *Hawkins* v. *Cox*, 2 Cranch (C. C.) 173; *Thompson* v. *Milligan*, 2 Cranch (C. C.) 207; 4 Wash. 129.

In Brightly's Federal Digest, p. 177, is this among many other quotations: "A promissory note given in consideration of a loan of Confederate notes, to enable one to hire a substitute for the Confederate Army, is void." *Ex parte Milner*, 1 Am. L. J. tit. *Bank*, 15, 16 Am. L. R. 371.

"The consideration for which the notes were given being unlawful, it follows of course that the notes were void.

Craig v. *Mo.*, 4 Pet. 437.

***Mr.* A. H. Garland,** for defendant in error:

Hunter & Oakes being merchants, they were not prohibited from selling and then collecting the money for the sales made, unless in the transaction they shared in the motive or inducement of the purchaser. They must have been participators in the intent to aid the war for the South. This rule is without an exception.

Pars. Cont. 380, 382; *Simpson* v. *Bloss*, 7 Taunt. 246.

This is the law, as we find it in all the textbooks and reported cases.

1 Poth. Ob. 123-126; 2 Poth. Ob. 1-16 and notes; *Holman* v. *Johnson*, 1 Cowp. 341; 5 T. R. 599; 12 Wheat. 258; *Harris* v. *Runnels*, 12 How. 79; *Roby* v. *West*, 4 N. H. 290; *Wooten* v. *Miller*, 7 Smedes & M. 380; *Sortwell* v. *Hughes*, 1 Curt. 244; *Territt* v. *Bartlett*, 21 Vt. 184.

Mr. Justice **Bradley** delivered the opinion of the court:

This was an action commenced in the circuit court of Randolph county, Arkansas, by Doane, the defendant in error, against the plaintiffs in error, to recover the amount of two promissory notes, dated in February, 1867. These notes were originally given by the plaintiffs in error under the firm of L. Hanauer & Company, to one Hunter, in settlement of an account between L. Hanauer & Company and the firm of Hunter & Oakes, which had mostly accrued in the years of 1860, 1861 and 1862. A portion of this account was for items of private and family use; the residue was partly for supplies and for commissary stores for the Confederate Army, sold by Hunter & Oakes, to Louis Hanauer, a recognized supply contractor of the Confederate government; and partly for due-bills issued by Hanauer, as such contractor, to other persons in payment of army stores and supplies, and taken up by Hunter & Oakes, at Hanauer's request, under a promise to redeem the same.

The question in the case is: whether the notes sued on, having been given for the consideration mentioned, are valid.

We have already decided, in the case of *Texas* v. *White*, 7 Wall. 700, 19 L. ed. 227, that a contract made in aid of the late Rebellion, or in furtherance and support thereof, is void. The same doctrine has been laid down in most of the circuits, and in many of the state courts, and must be regarded as the settled law of the land. Any contract, tinctured with the vice of giving aid and support to the Rebellion, can receive no countenance or sanction from the courts of the country. Are the notes in suit of this kind? A portion of their consideration was stores and supplies furnished to the army contractor of the Confederate Government, and another portion was due-bills issued for the same consideration, and received by Hunter & Oakes with full notice of their character. If either of these portions of the consideration on which the notes were given was illegal, the notes are void *in toto*. Such is the elementary rule, for which it is unnecessary to cite authorities.

On the trial of the cause below, the judge, in charging the jury, instructed them that if Hunter & Oakes took up Hanauer's due-bills for value, at his request and on the faith of his promise to redeem them, made after he had given them out for supplies, these due-bills would constitute a good consideration for the notes. We do not think that this was a correct statement of the law. If Hanauer had borrowed money from Hunter & Oakes to redeem the due-bills himself, the transaction would have been different, and the loan of money would have been legal, although Hunter & Oakes had known for what purpose Hanauer wanted the money. They would have been one degree farther removed from the unlawful transaction. But, instead of this, they became the holders of the due-bills, knowing for what purpose and on what consideration they had been issued; and *hence their title was [*346 no better than that of the original holders. To vitiate this title it was not necessary, as stated by the judge, that Hunter & Oakes should have been interested in furnishing the supplies for

which the due-bills were given; nor that what they did should have been done with the view of aiding the rebel cause. If the due-bills were invalid in the hands of the original holders, they were invalid in the hands of Hunter & Oakes. Whether they were invalid depends on the solution of the question whether the sales of supplies to Hanauer, for the use of the Confederate Army, was, or was not, an illegal transaction. We think it was. But on this subject it is proper to examine the views of the judge at the trial.

With regard to that portion of the consideration of the notes which consisted of supplies sold by Hunter & Oakes to Hanauer for the Confederate Army, the judge instructed the jury that bare knowledge on the part of Hunter & Oakes that Hanauer intended or expected to turn the goods over to the rebel army, would not make the sale illegal and void, but that, to make it so, it must appear that Hunter & Oakes had some concern in furnishing the supplies to the rebel army, or intended to aid therein. In this instruction we think the judge erred. With whatever impunity a man may lend money or sell goods to another who he knows intends to devote them to a use that is only *malum prohibitum*, or of inferior criminality, he cannot do it without turpitude, when he knows or has every reason to believe that such money or goods are to be used for the perpetration of a heinous crime, and that they were procured for that purpose. In the words of Chief Justice Eyre, in *Lightfoot* v. *Tenant*, 1 Bos. & P. 551, 556, "The man who sells arsenic to one who, he knows, intends to poison his wife with it, will not be allowed to maintain an action on his contract. The consideration of the contract, in itself good, is there tainted with turpitude which destroys the whole merit of it. . . . No man ought to furnish another with the means of trans- **347*]** gressing the law, knowing that he *intended to make that use of them." On this declaration Judge Story remarks: "The wholesome morality and enlarged policy of this passage make it almost irresistible to the judgment; and, indeed, the reasoning seems positively unanswerable." Story, Confl. L., § 253. Can a man furnish another with the means of committing murder, or any abominable crime, knowing that the purchaser procures them and intends to use them for that purpose, and then pretend that he is not a participator in the guilt? Can he wrap himself up in his own selfishness and heartless indifference and say, "What business is that of mine? Am I the keeper of another man's conscience?" No one can hesitate to say that such a man voluntarily aids in the perpetration of the offense and, morally speaking, is almost, if not quite, as guilty as the principal offender.

No crime is greater than treason. He who, being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is himself guilty of treason or a misprision thereof. He voluntarily aids the treason. He cannot be permitted to stand on the nice metaphysical distinction that, although he knows that the purchaser buys the goods for the purpose of aiding the Rebellion, he does not sell them for that purpose. The consequences of his acts are too serious and enormous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act.

The decision of Chief Justice Eyre, in the case above referred to, has been followed in several other English cases. It was followed by Lord Ellenborough in *Langton* v. *Hughes*, 1 Maule & S. 593, where a druggist sold drugs of a noxious and unwholesome nature to a brewer, knowing that they were to be used in his brewery, contrary to law, and it was held that he could not recover the price. It was also followed by Chief Justice Abbott, in *Cannan* v. *Bryce*, 3 B. & Ald. 179, where it was held that money *lent to a man to en- **[*348** able him to settle his losses on an illegal stock-jobbing transaction, could not be recovered back. Said the Chief Justice: "If it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment? . . . The means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object." In that case the lender had no interest whatever in the unlawful transaction, and was only connected with it, as Hunter & Oakes were in this case, by knowing the object for which the money was borrowed. These cases were followed by the court of errors of New York, in the case of *De Groot* v. *Van Duzer*, 20 Wend. 390. Chancellor Walworth, in that case, observes that "those cases in which an independent contract has been held void from a mere knowledge of the fact of the illegal end in view, proceed upon the ground that the party having such knowledge, intended to aid the illegal object at the time he made the contract."

There are cases to the contrary; but they are either cases where the unlawful act contemplated to be done was merely *malum prohibitum*, or of inferior criminality; or cases in which the unlawful act was already committed, and the loan was an independent contract, made, not to enable the borrower to commit the act, but to pay obligations which he had already incurred in committing it. Of the latter class was the case of *Armstrong* v. *Toler*, 11 Wheat. 258; of the former, those of *Hodgson* v. *Temple*, 5 Taunt. 181, and others cited in the argument. In *Hodgson* v. *Temple*, where a buyer of spirituous liquors was known to be carrying on a rectifying distillery and a retail liquor shop at the same time, contrary to law, the vendor of the spirits was held entitled to recover the price. Sir James Mansfield said: "The merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment; but to effect that, it is necessary that the vendor should be a sharer in the illegal transaction."

*This seems to have been the view **[*349** taken by the judge who tried this cause below, and which he applied to this case. In our judgment it is altogether too narrow a view of the responsibility of a vendor in such a case as the present. Where to draw the precise line between the cases in which the vendor's knowledge of the purchaser's intent to

make an unlawful use of the goods, will vitiate the contract, and those in which it will not, may be difficult. Perhaps it cannot be done by exact definitions. The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members. This is all that we mean to decide in this case.

The judgment is reversed, and a new trial ordered.

Dissenting, Mr. Justice **Strong.**

THE GERMANIA FIRE INSURANCE COMPANY, The Niagara Fire Insurance Company, The Hanover Fire Insurance Company, and the Republic Fire Insurance Company of New York, *Plffs. in Err.*,

v.

BURWELL E. BOYKIN.

(See S. C. 12 Wall. 433-439.)

Affidavit by insane man of loss under policy, when sufficient—when joint action against several insurance companies maintainable—when this court may make final judgment.

The affidavit, whether of an insane man or not, is sufficient in the information which it conveys of the time, the nature and amount of the loss covered by a policy of insurance.

If the insured was so insane as to be incapable of making an intelligent statement, this would, of itself, excuse that condition of the policy.

Where the liability of four insurance companies depended on the same evidence and was founded on the same policy, and their defense rested on the same issues, to be supported by the same testimony, the action may be joint by consent.

The judgment of the court, which is against the defendants jointly for the full amount of the policy, is erroneous.

But where the verdict finds that each of the defendants had promised and assumed to pay one fourth thereof, a judgment may be certified from this court to the circuit court for plaintiff against each of the defendants, for the one fourth of amount of the plaintiff's damages, as ascertained by the verdict, and against them all for the costs in that court.

[No. 263.]

Argued Nov. 15, 1871. Decided Nov. 27, 1871.

IN ERROR to the Circuit Court of the United States, for the District of South Carolina.

Suit was brought in the court below by the defendant in error, upon a certain contract of insurance. Judgment having been given for the plaintiff, the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. J. M. Carlisle, **J. D. McPherson,** and *S. B. Paul,* for plaintiffs in error:

The first error assigned is, that the action was sustained and judgment given against all the defendant companies jointly, upon the agreement set up in the declaration.

This judgment is not supported by anything alleged in the declaration. It purports to establish the liability of each of the said companies for the whole sum insured by them all, in several and distinct portions. This is manifest error, for which the judgment might have been arrested on motion, and for which it must be reversed here.

The plaintiff offered evidence to prove that he was insane at the time he made the damaging admissions in question, and produced a record of proceedings on a writ *de lunatico inquirendo*, in which, April 7, 1867, he was found to be a lunatic.

The policy stipulated for and secured to the insurers the benefit of the statements of the insured under oath, as to certain facts material to the decision of the insurers.

If this stipulation was performed by furnishing such statements, then the insurers had a right to rely on them and, consequently, the insured cannot dispute them. *Irving* v. *Ins. Co.* 1 Bosw. 507.

If this be otherwise; if the plaintiff may show that his statements, as furnished, were the mere fancies of a madman, then they do not constitute a performance, and the insured cannot recover on a declaration averring performance. He shall have declared on the special facts in excuse of non-performance. If this be not so, then the plaintiff may send forward to the companies any bundle of waste paper, and after waiting sixty days, commence his action and recover.

Mr. **W. W. Boyce,** for defendant in error:

The affidavit of Boykin, after making a recital of the destruction of the property insured, states a fact, *viz.:* that Boykin insured his property because he was afraid one Jack, a freedman, would burn his gin-house and its contents (the property insured). This fact, if true, would vitiate the policy of insurance, as being a fraud on the Insurance Companies. Ancrum was introduced to prove certain facts occurring at the time the affidavit was prepared, which tended to show that this statement was interpolated in the affidavit by the fraud of one Hosmer, the agent of the insurance companies.

Clearly the evidence was admissible.

Attesting witnesses to a will are admissible to disprove the sanity of the testator.

Stock on *Non Compos Mentis*, 37, 560.

Fraud vitiates any, even the most solemn, transactions.

U. S. v. *The Amistad*, 15 Pet. 518; *Pratt* v. *Northam*, 5 Mas. 95; *Hartshorn* v. *Day*, 19 How. 223, 15 L. ed. 612; 1 Greenl. Ev., § 284, p. 320; *Blake* v. *Marnell*, 2 Ball & B. 47.

As to the instructions prayed for and refused. They assumed that if the plaintiff below was insane in January, no preliminary proofs of loss were given in law.

If the plaintiff was insane, yet the notice given was sufficient.

"If the parties have contracted in the words they have used, that notice shall be delivered; then, if the fact is, that notice is given by the parties, all is given which the parties have agreed to be done."

By the Vice Chancellor in *Robertson* v. *Lockie*, 10 Jur. 533.

If the plaintiff below was insane, he was excused from giving notice.

2 Pars. Cont. 476; *Breasted* v. *L. & T. Co.* 4 Hill, 73.

If he was not insane when notice was given, it was good.

Mr. Justice **Miller** delivered the opinion of the court:

The plaintiffs in error are four insurance companies, who had underwritten a policy of fire insurance in favor of the plaintiff in error, by which they insured him against loss to the amount of $10,000, each company making itself separately and severally liable to one fourth of the loss, if any occurred, and no more.

After loss, they were sued in one action, and a joint judgment rendered against them for the full sum of $10,000, with interest from the time the loss was payable.

In the course of the trial, exceptions were taken by the defendants in error to the introduction of testimony, and to the instructions given and refused by the court.

1. The exception as to the introduction of testimony relates to four affidavits, which are referred to in the bill of exceptions as "Exhibit 4." There is no such exhibit in the record, nor anything else which can be identified as either of these affidavits. We cannot, therefore, determine whether their admission damaged the defense or not, and the assignment of error based on this exception must be overruled.

2. The assignment which alleges error in the **436***] charge of *the judge is equally unfortunate. The charge is a very full and elaborate discussion of the law and the facts of the case, and no particular part of the charge, nor any special proposition of law found in it, is excepted to. We have repeatedly held that a general exception to the whole of such a charge is insufficient.

3. The exception to the refusal of the court to charge as requested may, with a little liberality, be held sufficient.

The substance of it is this:

The insured having applied to the agent of the insurers to make out proof of the loss, an affidavit was made by him, in which, after giving the particulars of the loss, he proceeded further to state that he believed the building had been set on fire by an incendiary; that he had heard of repeated threats of a person, whom he named, that he would burn the premises, and that it was in consequence of these threats that he had procured the insurance which he was then seeking to recover.

When this affidavit was laid before the insurance companies, they refused to pay, and notified the insured that they considered the policy void. Testimony was given to show that at the time Boykin made this affidavit he was insane, and, also, that it was procured from him by fraud.

Based on the facts of the case the defendants at the trial asked instructions, the substance of which is condensed in the proposition that they had a right to proof of loss by an intelligent being, and if plaintiff was insane no such proof had been given, and if he were sane then his affidavit showed such fraud as should defeat recovery. The last of these propositions is not denied, but was not asked as an independent instruction. But the first is too repugnant to justice and humanity to merit serious consideration. There are two obvious answers to it. First, the affidavit, whether of an insane man or not, is sufficient in the information which it conveys of the time, the nature and amount of the loss. Second, if he was so insane as to be incapable of making an intelligent statement, this would, of itself, excuse that condition of the policy. It is argued that plaintiff, having averred in his declaration that he did give them this information under oath, he cannot now be permitted to show an excuse by his insanity for not doing it. But, as already seen, his affidavit does literally prove the allegation, and if it contains something more which was the result of insanity, that does not vitiate what is well and truly stated in the affidavit. We are of opinion that all these prayers for instruction were properly rejected.

The remaining assignment of error, is, that the action was sustained and judgment given against all the defendant companies jointly.

We need not stop to inquire whether the action in this form should have been sustained if objection had been made at the proper stage of the suit, for by an express written agreement found in the record, defendants, by their counsel, *consented that the action [***437** should be brought jointly instead of severally. As their liability depended on the same evidence and was founded on the same policy, and as their defense rested on the same issues, to be supported by the same testimony, it was manifestly for their interest to have but one trial, and no reason is apparent to us why this could not be done by consent. But the terms of this consent did not authorize the court to render a joint judgment, by which each company would be bound for the whole loss. This was not their contract, and it may be doubted if their counsel could have bound them by such an agreement if they had intended it. The judgment of the court, therefore, which is against the defendants jointly and not severally for the full amount of the policy with interest, is erroneous and must be reversed.

But this error does not extend to the verdict. The amended declaration sets forth very distinctly the promises of the defendants as several and not joint, and the verdict of the jury is, "that the said defendants did promise and assume, as the said plaintiff hath alleged, and they assess the damages of the said plaintiff at $10,000, with interest from the 20th of March, 1867." The verdict of the jury, therefore, finds the amount of plaintiff's damages or loss, and that each of the defendants had promised and assumed to pay one fourth thereof, which is manifestly a good verdict, responsive to the issues and to the contract of the defendants. The circuit court ought to have rendered a judgment that plaintiff recover of each of said defendants, severally, a sum which would have been the one fourth part of the $10,000, and the interest from the time mentioned in the verdict, and a joint judgment against all the defendants for costs. While we are bound, therefore, to reverse the judgment of that court the foregoing statement indicates very clearly the judgment which this court must render under the 24th section of the judiciary act. That section enacts that where a judgment or decree shall be reversed in a circuit court, such court shall proceed to render such judgment or pass such decree *as the district court [***438**

should have rendered or passed; and the Supreme Court shall do the same in reversals therein, except when the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain; in which case they shall remand the cause for final decision. As the case before us does not come within the exception above mentioned, it is our duty to render the judgment which we have shown that the circuit court should have rendered. The process, the pleadings, the trial and the verdict are without error, and it surely cannot be necessary to set aside this verdict and award a new trial because the judgment which was rendered on that verdict was erroneous. And this was also the rule by which courts of error were governed at the common law. Indeed, it was for a long time denied that a court of error could award a *venire facias de novo*. In the case of *Philips* v. *Bury*, reported at great length in Skin. 447, which was an action in the king's bench and writ of error to the peers, who reversed the judgment below, the case was carried back and forward several times between the peers and the king's bench on the question of which court should render the judgment on the verdict, and it was finally settled that the House of Lords should give the judgment which the king's bench ought to have given, Eyre, Ch. J., saying that where judgment is upon a verdict, if they reverse a judgment they ought to give the same judgment that ought to have been given at first, and that judgment ought to be sent to the court below. So in *Slocomb's Case*, Cro. Car. 442, on a general verdict where judgment was reversed in the king's bench, it was, in the language of the reporter "agreed by all the court, if the declaration and verdict be good, then judgment ought to be given for plaintiff, whereof Jones at first doubted, but at last agreed thereto, for we are to give such judgment as they ought to have given there." In 1 Salkeld (*Anon.* 1 Salk. 401; see, also, *Butcher* v. *Porter*, 1 Show. 400) it is said: "If judgment be below for plaintiff and error **439***] is brought *and that judgment reversed, yet if the record will warrant it, the court ought to give a new judgment for the plaintiff," which is precisely the case before us. See, also, *Butcher* v. *Porter*, 1 Show. 400. And in *Mellor* v. *Moore*, 1 Bos. & P. 30, on the authority of these and other cases, the court of exchequer chamber held that when a judgment is reversed on demurrer in favor of plaintiff, the case is sent down and a writ of inquiry goes, but when it is upon a verdict they should give the same judgment that ought to have been given at first, and that judgment ought to be sent below. In *Gildart* v. *Gladstone*, 12 East, 668, on a case from the common pleas having been reversed on a special verdict, Lord Ellenborough said: "The court are bound, *ex officio*, to give a perfect judgment upon the record before them."

The provisions of the statute of 1789, already cited, show that the lawyers who framed it were familiar with the doubts which seemed at that time to beset the courts in England as to the precise judgment to be rendered in a court of errors on reversing a judgment, and they in plain language prescribed the rule which has since become the settled law of the English courts on the same subject.

The judgment will be reversed and a judgment certified to the circuit court for plaintiff against each of the defendants for the one fourth of amount of the plaintiff's damages, including interest, as ascertained by the verdict, and for a joint judgment against them all for the costs in that court.

Mr. Justice **Strong:** I concur in the judgment of reversal, but I think there should be a *venire de novo*. In my opinion, the verdict does not warrant the entry of such judgments as have been directed.

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*THE PHŒNIX INSURANCE COMPANY, *Plff. in Err.*, [*404
v.
W. A. SLAUGHTER, and Jacob Stewart, late Partners as W. A. Slaughter & Company.

(See S. C. 12 Wall. 404–407.)

Construction of policy—doubtful clause.

A clause in a policy of insurance excluded from the premises gunpowder, saltpeter, and other articles in the same class; held that the words "In quantities exceeding one barrel at any one time," are applicable alike to all the articles which are specified in the clause in controversy.

If insurance companies do not mean to take risks on property where gunpowder, saltpeter, and the like substances are kept, even for ordinary use, then good faith to the assured requires that they should declare their intention in terms which cannot admit of controversy.

The custom of inserting conditions of a policy in small type condemned.

[No. 268.]

Submitted Nov. 16, 1871 Decided Nov. 27, 1871.

IN ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

Suit was brought in the circuit court of Lauderdale county, Mississippi, by the defendants in error, upon a contract of insurance. Upon petition of the defendants the case was removed to the court below. Judgment having been given for the plaintiff, the defendants sued out this writ of error.

The case is fully stated by the court.

Mr. John D. Freeman, for plaintiffs in error:

The sentence containing the first class of articles referred to beginning with "gunpowder" and ending with "crude earth oils" concludes with the words "are kept on the premises;" while the second class of articles, beginning with "camphene" and ending with "refined coal or earth oils" concludes with the words "are kept for sale, stored or used on the premises, in quantities exceeding one barrel at any one time." So that there is no room left for doubt as to the true meaning of the terms of the policy in this respect, nor as to the distinction made between the two classes of articles referred to, to wit: that the first class, beginning with gunpowder, is not to be kept on the premises in any quantity without special permission; while the second or latter class, beginning with "camphene" is not to be kept in quantities "exceeding one barrel at any one time."

Messrs. W. P. Harris, **W. W. Boyce,** and *W. T. Withers,* for defendants in error:

By reference to the policy, it will be found that a number of clauses, each separated from the other by a semicolon, are set out in the 4th subdivision. Commas and "ors" frequently occur in these several clauses, but all the articles and stipulations in each separate clause go together as a class. In the clause quoted, there is no semicolon after the word "premises," but a comma only, and we insist that on a fair construction of the entire clause, the restriction on keeping gunpowder, saltpeter, etc., are precisely the same as to quantity, as to keeping camphene, burning fluid, etc. This is certainly the correct grammatical construction of the sentence. The entire clause embraced between the semicolons is governed by the language, "in quantities exceeding one barrel at any one time."

Besides, a rational construction of the clause in question, leads to precisely the same result as the proper grammatical construction. What reason is there, that the smallest quantity of saltpeter, which is by no means a dangerous substance, and is kept in nearly every farmhouse in the country, should be held to vacate a policy, while an entire barrel of camphene, or burning fluid, or coal oil, which are notoriously dangerous and inflammable, may be kept without objection.

Mr. Justice **Davis** delivered the opinion of the court:

This suit was brought to recover for a loss by fire, and the only question presented by the record for decision relates to the sufficiency of the third plea, to which the circuit court sustained a demurrer. Whether the plea be good or bad, depends upon the proper construction to be given to one of the conditions attached to the policy of insurance, which the assured were required to observe. This condition applies to the keeping of gunpowder on the premises. It is contended by the insurance company that keeping gunpowder in a store, in any quantity, vacated the policy; while the insured insist that the policy is not defeated if they did not keep more than one barrel at a time. The clause of the policy out of which this difference in opinion arises, is as follows: "Or if gunpowder, phosphorus, saltpeter, naphtha, benzine, benzine varnish, benzole, petroleum, or crude earth oil, are kept on the premises, or if camphene, burning fluid or refined coal or earth oils, are kept for sale, stored or used on the premises, in quantities exceeding one barrel at any time without written permission or indorsed upon the policy; then, and in every such case, the policy shall be void."

If this clause were detached from other parts of the instrument, there might be some question as to its proper grammatical construction. But such is not the case. It is the last clause in the 4th subdivision of the conditions embraced in the body of the policy, and in this subdivision a number of clauses are set forth which shall operate to avoid the policy. These causes are all embraced in separate clauses; each class being separated from the others by a semicolon. If there were in the clause in dispute a semicolon where the word "premises" is first used, it may be, in view of the punctuation adopted in reference to the other clauses, that this clause would be complete in itself, and exclude wholly from the premises gunpowder, saltpeter, and the other articles in the same class. But in the absence of the semicolon, it is manifest that no greater restriction can be applied to gunpowder and saltpeter than to camphene and burning fluid and that, therefore, the words "in quantities exceeding one barrel at any one time," are applicable alike to all the materials which are specified in the clause in controversy. This construction is fortified by the nature of the forbidden articles. Saltpeter is not a dangerous substance; and yet, according to the view of the counsel for the plaintiff in error, it is prohibited altogether, while a barrel of camphene and burning fluid, which are inflammable, can be stored with impunity. A construction that would lead to such a result cannot be adopted, unless the language employed leaves no other alternative.

Besides, if the contract is as contended for, it would impeach the good faith and fair dealing of the insurance company, for it would be deceptive, and calculated to mislead those who are not well informed on matters of this kind. *It is well known that the agencies of [*407 this company are located in all parts of the country, and that in many places where they are established, housekeepers generally keep on hand, for their own use, in small quantities, gunpowder, saltpeter, benzine and, perhaps, other interdicted articles. It would never occur to this class of persons, on making application at one of these agencies for insurance, that they were forbidden to keep these things in their houses, and unless their attention was particularly called to the subject, which would be an unusual occurrence they would take out their policies in the belief that they could keep and use the substances required for their necessities as they had been in the habit of doing; and, if they should happen to read over the schedule of conditions annexed to the policy, usually printed in the smallest type, not being accustomed to a critical examination of the structure of sentences, they would naturally conclude, as saltpeter and gunpowder are classed together, and as saltpeter is comparatively harmless, while camphene and burning fluid are quite dangerous, that the restriction at the end of the enumerated articles was intended to be applied to all of them alike.

This, too, is the rational construction of the clause in question, and we cannot suppose the company which framed this policy intended it to be interpreted differently.

If insurance companies do not mean to take risks on property where gunpowder, saltpeter and the like substances are kept, even for ordinary use, then good faith to the assured requires that they should declare their intention in terms which cannot admit of controversy; and, in order to avoid just cause of complaint, it would be better for them to employ type, in relation to this important subject, large enough to arrest the attention of an interested party.

In our opinion the circuit court did not err in sustaining the demurrer to the third plea, and the judgment of that court is, accordingly, affirmed.

The motion for damages is disallowed.

PATRICK H. HENNESSY, *Plff. in Err.*,
v.
HENRY K. SHELDON *et al.*

(See S. C. 12 Wall. 440.)

Judgment, when affirmed with ten per cent damages.

Where there is nothing in the record which tends to show error, or to repel the conclusion that the writ of error is prosecuted merely for delay, the judgment will be affirmed with ten per cent damages.

[No. 276.]

Submitted Nov. 23, 1871. Decided Nov. 27, 1871.

IN ERROR to the Circuit Court of the United States for the Eastern District of Texas.

Suit was brought in the court below by the defendants in error upon a certain promissory note. Judgment having been given for the plaintiffs, the defendant sued out this writ of error.

The case is sufficiently stated by the court.

Mr. L. A. Thompson for plaintiffs in error.

Messrs. **Albert Pike** and **Robert W. Johnson**, for defendants in error:

There is no bill of exceptions. No error appears by the record. The writ of error was manifestly frivolous, vexatious, and for delay.

We have vainly waited for the counsel of the plaintiff in error to assign errors, or, by brief or otherwise, to inform us upon what ground the writ of error was sued out and is here to vex the court. We now ask affirmance and damages at the rate of ten per centum, under the 23d rule of the court, and submit the case.

Mr. Chief Justice **Chase** delivered the opinion of the court:

There is no bill of exceptions in this case: nothing but a petition for the recovery of the amount of a promissory note; an answer denying generally the liability of the defendant, and judgment.

There is nothing in the record which tends to show error in this judgment or to repel the conclusion that the writ is prosecuted merely for delay. *The judgment must, therefore, be affirmed, with ten per cent damages.*

SAMUEL A. COOLEY *et al.*, *Plffs. in Err.*,
v.
MARY O'CONNOR.

(See S. C. 12 Wall. 391-400.)

Majority of public board may act—evidence in trespass—sales for taxes, when valid—question for jury.

An authority given to several for public purposes, may be executed by a majority of their number.

A certificate of sale is not void or inoperative because signed by only two of three commissioners.

In trespass to real property, a mere possessory right in the defendant may be given in evidence under the general issue.

The act of 1862 contemplates a certificate of sale in cases where the United States becomes the purchaser.

Whether the demands of the statute respecting notice of sale have been complied with is a mixed question of law and fact, and it should be submitted to the jury.

[No. 236.]

Submitted Nov 14, 1871. Decided Nov. 27, 1871.

IN ERROR to the Circuit Court of the United States for the District of South Carolina.

Suit in the nature of trespass to try title, was brought by the defendant in error, in the court of common pleas for Beaufort county, South Carolina. Upon petition of the defendants, the case was removed to the court below. Judgment having been given for the plaintiff, the defendants sued out this writ of error.

The case is further stated by the court.

Messrs. **B. H. Bristow**, *Solicitor General*, and **C. H. Hill**, *Asst. Atty. Gen.*, for plaintiffs in error:

The court erred in holding that the tax sale certificate, being signed by only two commissioners, was void on that account.

This ruling is contrary to a familiar principle of law, *viz.:* that where a body or board of officers is constituted by law to perform a trust for the public, or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done, but that the act of the majority is the act of the body.

Williams v. *School Dist., etc.*, 21 Pick. 82; *Sloo* v. *Law*, 3 Blatchf. 472; *King* v. *Beeston*, 3 T. R. 592.

When nothing appears to the contrary, it will be presumed that the officer who did not join in the act done, met and consulted with those who did.

Doughty v. *Hope*, 3 Den. 249; *McCoy* v. *Curtice*, 9 Wend. 17.

Besides, it is in direct conflict with a positive provision of the legislature. For by the 3d section of the act of Mar. 3, 1865 (13 Stat. 502), Congress declares "that a majority of a board of tax commissioners shall have full authority to transact all business and to perform all duties required by law to be performed by such board, and no proceeding of any board of tax commissioners shall be void or invalid in consequence of the absence of any one of said commissioners." This enactment, it will be observed, was in force when the certificate was issued.

The record shows that a board of three direct tax commissioners had been appointed for the state of South Carolina; that all members of the board had entered upon the discharge of their duties, and that they were all present at the meeting of the board, Mar. 13, 1863, when the sale of the premises took place. Two of these commissioners afterwards, to wit, Mar. 13, 1865, issued the certificate mentioned, and the record is entirely silent as to the other commissioner at this period. But the presumption is, in the absence of anything appearing in the record to the contrary, that a full board then existed, it being shown to have existed a comparatively short time previous. So that, even if the section quoted above should be regarded as requiring a full board to be in existence, and as providing only that a majority of that board can act, the present case must be deemed to fall within its purview.

It was as much the duty of the commissioners to issue a certificate in case of a sale to the United States, as it was in the case of a sale to a private party. Under the statute, a sale of the property for unpaid taxes, etc., was authorized to be made:

1. To the highest bidder, for a sum not less than the taxes, penalty, costs, etc.; or,

2. To a purchaser, at request of owner, for

a less sum than two thirds of assessed value; and in the absence of such request,

3. To the United States at a sum not exceeding two thirds of assessed value, unless some person should bid more; and in that event, then,

4. To the highest bidder.

The next succeeding clause in the same act says: "Which said certificate shall be received in all courts and places as prima facie evidence, etc., of the title of the said purchaser or purchasers under the same."

Practically, the admission of the certificate was of great importance to the defendants, as it rendered unnecessary the preliminary proof of statutory requirements relating to the proceedings of the officers engaged in executing the law, for the purpose of making out a title.

The court erred in instructing the jury that the advertisement was not such a notice as the law requires.

The impression with the court seems to have been that, inasmuch as the advertisement failed to state that "the whole town of Beaufort was to be sold," it did not contain such notice as would make the owner aware that his particular property had been assessed and was up for sale.

There is enough in the records to show that the provisions of the statute were fully complied with in respect to the mode, place, and time of advertising, and the advertisement itself appears to contain as particular a description of the several tracts or lots as it was possible under the circumstances to give. This, it is conceived, entirely satisfied the requirements of the law as to notice.

Messrs. **W. W. Boyce** and **M. P. O'Connor,** for defendant in error:

The tax certificate was signed by only two of the three commissioners.

The correct principle on this point is laid down by Mr. Justice Miller, in the case of *Schenck* v. *Peay* (1869), circuit court, East District of Arkansas. Pamphlet Rep. p. 6.

"Where an authority of this kind is conferred on three or more persons, in order to make the exercise of that authority valid, all must act so far as to be present and take part in the proceedings, although some may dissent from the action determined on; or, at least, all must have an opportunity to participate."

"The action of two out of three commissioners, to all of whom was confided a power to be exercised, cannot be upheld, when the third commissioner took no part in the transaction, and was ignorant of what was done, when he gave no implied consent to the action of the other."

Idem. p. 6.

See further on this point:

2 Kent, Com. § 193, p. 337, 7th Am. ed. note *a*, and § 633, p. 813, note *a; Com.* v. *Canal Comm'rs*, 9 Watts, 466; *Green* v. *Miller*, 6 Johns. 39.

The act of March 3, 1865, 13 Stat. at L. 502, which gives the majority of a board power to transact all business, is not retrospective. Per Mr. Justice Miller, *Schneck* v. *Peay*, Pamphlet R. p. 7.

The certificate of sale, if admitted, would have been only prima facie evidence, because the proviso at the end of the 7th section of the act of June 7, 1862, was repealed by § 6 of the Resolution of February 25, 1867, 14 Stat. at L. 568, and the certificate is made only prima facie evidence. The certificate was offered as conclusive evidence of the regularity of the sale, and the judge below properly refused to receive it as such.

The act of 1862 does not provide for a certificate when the land is bid in by the United States.

The tax title set up in this case cannot be sustained and, therefore, it would be idle to send back the case.

I submit, as a preliminary proposition:

That to support a tax sale, it must be proved that everything necessary to authorize the sale was done.

To sustain a tax title, it must be shown, affirmatively, that every substantial requisite of the law has been complied with.

Lyon v. *Hunt*, 11 Ala. 295; *Reeds* v. *Morton*, 9 Mo. 878; *Turney* v. *Yeoman*, 16 Ohio, 24; *Brown* v. *Veazie*, 25 Me. 359; *Judevine* v. *Jackson*, 18 Vt. 470; *Scott* v. *Detroit's Y. M. S.* 1 Doug. (Mich.) 119; *Sharp* v. *Speir*, 4 Hill, 76; *Sharp* v. *Johnson*, 4 Hill, 92; *Foust* v. *Ross*, 1 Watts & S. 501; *Garrett* v. *Doe*, 1 Scam. 335; *Williams* v. *State*, 6 Blackf. 36; *Ronkendorff* v. *Taylor*, 4 Pet. 349; *Stead* v. *Course*, 4 Cranch, 403; *Williams* v. *Peyton*, 4 Wheat. 77; *Thatcher* v. *Powell*, 6 Wheat. 119; Blackw. Tax Titles, pp. 33, 50, 71, 74, 251; *Brown* v. *Veazie*, 25 Me. 362.

Where unimproved lands of nonresident proprietors in Maine are sold for taxes, the names of the owners, if known, must be stated in the notice of sale.

Treat v. *Orono*, 26 Me. 217.

All provisions for security for citizens, to enable each to know for what real estate he is taxed, are essential and must be observed.

Cooley, Const. L. 77, 531, and note 3.

The advertisement in this case is insufficient, and vitiates the sale.

Such description must be given as will enable owners to know that the lands advertised are theirs.

Brown v. *Veazie*, 25 Me. 362; *Tallman* v. *White*, 2 N. Y. 66; *Dike* v. *Lewis*, 4 Den. 237.

In describing the land in his advertisement, the collector must give a particular and certain description, so that the owner may know that it is his land.

Blackw. Tax Titles, 226, and authorities cited in note 5; also pp. 226-230, 233.

Mr. Justice **Strong** delivered the opinion of the court:

This was an action brought by Mary O'Connor, against the plaintiffs in error, to recover damages for an alleged trespass upon a lot of ground in Beaufort, Beaufort county, South Carolina, and also to try the title to the lot. The defense set up was that the defendants entered and held the property as tenants of the United States, and that the United States had become the owners, by virtue of a tax sale made on the 13th of March, 1863, by the direct tax commissioners for the district of South Carolina. Whether this tax sale was valid and effective to devest the ownership of Mrs. O'Connor, and to vest the property in the United States, was the single object of the contest in

the court below. The sale purported to have been made under the act of Congress of June 7, 1862, entitled "An Act for the Collection of Direct Taxes in Insurrectionary Districts within the United States, and for Other Purposes." 12 Stat. at L. 422. To most of the provisions of that act, it is unnecessary now to refer. The proper decision of this case does not demand such a reference. It is enough to note, it enacted that a board of three tax commissioners might be appointed for each of the states in insurrection, who were required, in case the tax charged, by the 1st section of the act, upon the land, and apportioned to each parcel or lot, should not be paid, to sell at public sale, those lots, the tax upon which remained unpaid, after giving notice prescribed by the 7th section. It then provided that purchasers at such sales after paying the purchase money, should be entitled to receive from the commissioners their certificate of sale; and it enacted that "the certificate shall be received in all courts and places as prima facie evidence of the regularity and validity of such sale, and of the title of said purchaser or purchasers under the same." Under this act, three commissioners were appointed for South Carolina, who, after having made assessments, exposed the delinquent property to public sale, and on the 13th day of March, 1863, all of them having been present on that day, sold the lot now in dispute to the United States. A certificate of such sale was afterwards made out, signed by two of the commissioners, dated March 13, 1865, and given to the purchasers. It set forth that, at a sale made under the act of Congress above noted, held pursuant to notice at Beaufort in the state of South Carolina, on the 13th of March, 1863, the tract or parcel of land, the title to which is now in controversy, was sold to the United States for the sum of $125, the receipt of which it acknowledged.

But when the certificate of sale was given in evidence by the defendants below, the circuit court ruled it to be void, because it was signed by only two commissioners, and this decision of the court is now assigned for error. It is obvious that the ruling was hurtful to the defendants. Had the certificate been admitted it would, by force of the statute, have amounted to prima facie evidence as well of the regularity and validity of the sale as of the title of the purchasers. It would, therefore, have cast upon the plaintiff the burden of showing affirmatively that the sale was irregular and invalid, and that the title was not in the United States. And we think it was erroneously excluded. It is true that when an authority is given jointly to several persons they must generally act jointly, or their acts are invalid. This is a general rule for private agencies, though it is not universal in its application. But the rule is otherwise when the authority is of a public nature, as it was in this case. The commissioners were public agents, clothed with public authority. They were created a board to perform a governmental function, and it is a familiar principle that an authority given to several for public purposes may be executed by a majority of their number. *Com.* v. *Canal Com'rs*, 9 Watts, 471; *Jewett* v. *Alton*, 7 N. H. 253; *Caldwell* v. *Harrison*, 12 Ala. N. S. 755; *Williams* v. *School Dist.* 21 Pick. 82; *Doe* v. *Godwin*, 1 Dowl. & Ry. 259; *King* v. *Beeston*, 3 T. R. 592; *McCoy* v. *Curtice*, 9 Wend. 19. In this last case it was held that two of three trustees of a school district might issue a warrant for the collection of a tax, and that the presence of the third trustee at the issuing thereof would be presumed until the contrary was shown. The authorities cited are enough to show that the certificate of sale was not void or inoperative because signed by only two of the commissioners.

*In addition to this there is also the [*399 act of Congress of March 3, 1865 (13 Stat. at L. 502) in force when this certificate was given, under which, certainly, the validity of the certificate of sale is beyond doubt.

It has been argued, however, on behalf of the defendant in error, that inasmuch as the plea was only that of the general issue, the defendants were not at liberty to set up that the United States were the owners, and that they entered as tenants or licensees of the United States. It is doubtless true that a license from the plaintiff, or a justification under an incorporeal right, or an excuse of the trespass founded on fault of the plaintiff, or an entry by authority of law, with or without process, must be pleaded specially to an action of trespass. The reason is that these defenses all admit the trespass and the possession of the plaintiff. But in trespass to real property, a freehold, or mere possessory right in the defendant, may be given in evidence under the general issue, though it is often advisable to plead *liberum tenementum*. *Prop. of Monumoi Beach* v. *Rogers*, 1 Mass. 160; 1 Chit. Plead. 437 and 440. And there is a double reason for this when, as in this case, the action is brought by a plaintiff out of possession professedly to try the title. The action has then the nature of an ejectment, the plaintiff, if recovering at all, recovering possession as well as damages.

It has been further argued that the act of 1862 does not contemplate a certificate of sale in cases where the United States becomes the purchaser; but we are clearly of opinion that it does as fully as in any other.

The second assignment of error is that the court instructed the jury the advertisement of sale was not such a notice as the law requires. The act of Congress required the board of commissioners to advertise for sale the parcels or lots, the taxes upon which were not paid within sixty days after the amount of the tax had been fixed, in a newspaper published in the town, parish, district, or county where the property was situated, and also by posting notices in at *least three public places in [*400 the town, parish, district, or county. The evidence given at the trial tended to prove that such advertisement had been made, and that such notices had been posted; nor was this contested. But the court held, and so instructed the jury, that the notice was not such as the law required. The reasons assigned for this ruling were that the advertisement did not state that the whole town of Beaufort was to be sold, and that, being a notice published within military lines, it was like a notice only in a fortified camp, and could not, in fact, be supposed to reach a citizen. We think, however, that neither of these reasons, nor any other not referred to, justified the court in

ruling, as a legal conclusion, that the notice given in this case was not such as the law required. Whether the demands of the statute respecting notice of sale had been complied with was a mixed question of law and of fact, and it should have been submitted to the jury. Undoubtedly, the advertisement must have been such as to inform persons who read it what property was intended to be exposed for sale. Any description that gave such information was sufficient. Whether the advertisement gave it or not depended not alone upon its contents. It was necessary to compare the description with the property described, and that was the province of the jury.

The judgment is reversed and a venire de novo awarded.

ELIAS WARD, *Plff. in Err.*,
v.
STATE OF MARYLAND.

(See S. C. 12 Wall. 418-433.)

State statute requiring license for sale of goods by nonresidents, unconstitutional.

A statute of a state which prohibits the sale, within a certain district of the state, of goods other than agricultural products and articles manufactured in the state, by persons not residents in the state, without first obtaining a license and paying therefor, is unconstitutional.

It is repugnant to the 2d section of the 4th article of the Constitution, which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.

[No. 34.]

Argued Nov. 21, 1871. Decided Dec. 11, 1871.

IN ERROR to the Court of Appeals of the State of Maryland.

The plaintiff in error was indicted in the criminal court of Baltimore for violating a statute of Maryland, by selling by sample in the city of Baltimore certain articles of merchandise without obtaining a license so to do, he not being a permanent resident of the state of Maryland.

The statute assigning the offense and its punishment is found in the Laws of Maryland, ch. 413, §§ 37-40.

The case came before the court upon an agreed statement of facts, showing a violation of the statute by the defendant below, and that he was, at the time of the commission of the offense and up to the trial, a citizen of the United States and of the state of New Jersey, and resident in said state. The facts so agreed raised only the question, whether the Maryland statute was invalid for repugnancy to the Constitution of the United States.

The criminal court found the defendant guilty, and inflicted the fine of the statute, $400, and condemned him in costs. Upon appeal to the court of appeals, this judgment was affirmed.

The defendant brought the case to this court by writ of error.

A further statement appears in the opinion.

Mr. **Wm. M. Evarts,** for plaintiff in error.

First. The provisions of the Maryland act, in their application to the case of the defendant below, are "a regulation of commerce between the states" and in their nature and on their face repugnant to that power as confided to Congress by art. 1, § 8, of the Constitution of the United States.

It is the doctrine of this court, that this clause of the Constitution does not exclude all occupation by state legislation of the ground covered by it, in the absence of legislation by Congress, within the premises of the state legislation.

Cooley v. *Wardens*, 12 How. 319; *Gilman* v. *Phila.* 3 Wall. 713, 18 L. ed. 96; *Crandall* v. *Nevada*, 6 Wall. 42, 18 L. ed. 746.

But this attempted regulation, by a state, of the manner in which trading within it may be carried on by citizens of other states, and in respect of merchandise to be introduced from other states, touches the main affirmative power of regulation of ordinary active commerce between the states. For such an exercise of state authority there is no warrant. The deposit of the power with the general government is inconsistent with any such authority in a state, and the absence of legislation by Congress is equivalent to a declaration that this direct and active trade in commodities between the states shall remain free from all regulation.

The recent cases in this court seem to assume that, if the subject of state taxation and regulation, presented therein, had been to commerce the legislation complained of would have been beyond the authority of the state.

Paul v. *Va.* 8 Wall. 168, 19 L. ed. 357; *Ins. Co.* v. *Mass.* 10 Wall. 567, 19 L. ed. 1029; *Ducat* v. *Chicago*, 10 Wall. 410, 19 L. ed. 972.

Second. This regulation of commerce attempted by state authority, is a direct discrimination between the citizens of Maryland and citizens of other states, in respect of an ordinary and extensive branch of mercantile dealing.

1. It makes that which is lawful, within the state of Maryland for all persons resident therein, unlawful for citizens of other states, unless upon onerous conditions not imposed upon its own citizens or persons resident within it.

2. It punishes the refusal to submit to their conditions, by indictment and fine.

3. It makes the discrimination rest upon the very fact which alone determines, in the case of citizens of the United States, whether a person is or is not a citizen of one state or another, to wit, permanent residents in a state.

Third. Serious as are the actual features of this regulation of commerce, as found in the statute of Maryland, and conclusive to condemn the legislation, the potency of the principle asserted needs but to be considered, to remove all controversy on the subject.

"The power to tax," says Ch. J. Marshall, "is the power to destroy." This tax and the punishment for its non-payment, are intended to be prohibitory of the freedom of trade in Baltimore by citizens of other states, which is thus proscribed.

NOTE.—*State licenses and power of state to tax commerce*—see notes, 6 L. ed. U. S. 23; 6 L. ed. U. S. 678; 8 C. C. A. 492; 24 C. C. A. 21.

Fourth. The statute of Maryland is also flatly repugnant to art. IV. § 2, of the Constitution, which declares that "The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states."

It is difficult to see what "privilege" is secured by this clause, if the privilege of trade is not, and what "immunity" is safe under it, if trading in the ordinary method, permitted to citizens of any state at home, is punished by indictment and fine when exercised by citizens of other states while within the state borders.

See *Paul* v. *Va. supra; Ins. Co.* v. *Mass. supra; Ducat* v. *Chicago, supra.*

Mr. **Isaac D. Jones,** *Atty Gen.* of Maryland, for defendant in error:

The law of Maryland in question is a part of the license system of that state. Licenses are a mode of taxation upon certain business and occupations carried on within the state, whereby it raises revenue to support its government. It is a law to regulate contracts in a particular mode of traffic within its own territory, passed in the exercise of the state's right to regulate all persons, property, occupations, contracts, and transactions within its own limits, in matters not prohibited to the state by the Constitution of the United States, or not subject to regulation by Congress; or in cases of concurrent powers, not regulated by acts of Congress made in pursuance with the Constitution, and with which the state law is in conflict.

The policy of the state is shown by the general law, which declares "that no person or corporation within the state, except the grower or manufacturer, shall barter or sell goods, etc., without first having obtained the license in the manner prescribed." Md. Code of Gen. Pub. Laws, art. 56, § 41.

These licenses are obtainable by anyone, whether resident or nonresident. The contract of sale is not made void by the law, even if made without the license. The contract is allowed to stand and to be enforced; but the violator of the law shall, on conviction, be punished by a fine. *Harris* v. *Runnels,* 12 How. 80.

The law in question regulates a peculiar kind of internal traffic and describes how that particular traffic may be legally carried on. Such regulation is not within the power of Congress over commerce, but belongs to the "completely internal commerce of the state."

"Commerce among the several states" is not an apt phrase to indicate the mere interior traffic of a single state. The completely internal commerce of a state may be properly considered as reserved to the state itself.

Gibbons v. *Ogden,* 6 Wheat. 448; *Brown* v. *Md.* 12 Wheat. 446; *License Cases,* 5 How. 575; *Nathan* v. *La.* 8 How. 80; *Pervear* v. *Com.* 5 Wall. 475, 18 L. ed. 608.

"Over the internal commerce or domestic trade of the state, Congress has no power of regulation, nor any direct control. This power belongs exclusively to the state."

License Tax Cases, 5 Wall. 462, 18 L. ed. 497; R. N. Charlton, 26; Ch. J. Taney in *License Cases,* 5 How. 529.

The law in question is not repugnant to the clause in the 2d section of the 4th article of the Constitution, which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

The object and purpose of the law is clearly stated in the opinion of the court of appeals of Maryland, as follows: "There is nothing in this or any other law of the state, which prohibits or restrains non-resident merchants, manufacturers, or traders or their agents from bringing their goods here and selling them in the same mode and under the same license as residents of the state. A custom, however, has grown up in recent times with merchants and manufacturers in the large manufacturing and commercial cities and states, of traveling, or sending agents or runners through other states and cities, with samples, cards, catalogues, or trade lists of their goods, and thereby selling, by retail or wholesale, large quantities of merchandise located beyond the limits of the states where they thus sell, and not subject to the local, state, county, or municipal taxation, as are like goods, in the hands of resident merchants or traders, to the great detriment of the business and trade of the latter. Large sales are thus made and an extensive and lucrative business is thus transacted, within the limits of the principal city of the state. It is, therefore, a tax upon a particular business or trade, carried on in a particular mode within the limits of a state, by a particular class of persons, and not a tax upon goods or merchandise imported into the state, either from foreign countries or from other states.

See *Campbell* v. *Morris,* 3 Har. & McH. 535; 3 Story, Const. § 1800; *Conner* v. *Elliott,* 18 How. 591, 15 L. ed. 497; *Bank* v. *Earle,* 13 Pet. 519.

Mr. Justice **Clifford** delivered the opinion of the court:

Power to re-examine final judgments of the state courts rendered in criminal prosecutions, as well as those rendered in civil suits, is conferred upon the supreme court when it appears that the judgment was rendered in the highest court of law in which a decision in the case could be had, and *that there was [*424 drawn in question the validity of a statute of a state, on the ground of its being repugnant to the Constitution of the United States, and that the decision of the state court was in favor of the validity of the statute. 1 Stat. at L. 85.

Persons not permanent residents in the state are prohibited by the laws of Maryland from selling, offering for sale, or exposing for sale, within a certain district of the state, any goods whatever, other than agricultural products and articles manufactured in the state, either by card, sample, or other specimen, or by written or printed trade list or catalogue, whether such person be the maker or manufacturer or not, without first obtaining a license so to do. Licenses may be granted by the proper authorities of the state for that purpose, on the payment of $300, "to run one year from date."

Both residents and non-residents of that district are also forbidden to suffer or permit any person, not a permanent resident of the state, and not in their regular employment or service, to sell any goods in that way under their name or the name of their firm, or at their store, warehouse, or place of business.

Offenders against either of those prohibitions are made liable to indictment, and, upon conviction, may be fined not less than $400 nor more than $600 for each offense. Sess. Acts, 1868, p. 786.

Ward, the defendant, is a citizen of New Jersey, and not a permanent resident of Maryland, and the record shows that he, on the day therein named, at a place within the prohibited district, sold to the persons therein named, "by specimen, to wit, by sample," certain goods other than agricultural products or articles manufactured in the state, without first obtaining a license so to do, and that he was indicted for those acts in the proper criminal court, and was arraigned therein and pleaded not guilty to the indictment. Apart from the plea of not 425*] guilty is the further statement *in the record, that the defendant "puts himself upon the judgment of the court here, according to the act of assembly in such cases made and provided," and that the attorney for the state doth the like.

All matters of fact having been agreed, the parties submitted the case to the court, to the end that the judgment of the court might be obtained, whether the statute of the state was or was not constitutional and valid. Judgment was rendered for the state, and the criminal court sentenced the defendant to pay a fine of four hundred dollars and costs, and the court below, upon appeal, affirmed the judgment.

Adjudged constitutional, as the state law was by that decision, the defendant, as he had a right to do, sued out a writ of error and removed the record into this court for re-examination.

Congress possesses the power to regulate commerce among the several states as well as commerce with foreign nations, and the Constitution also provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, and the defendant contends that the statute of the state under consideration, in its practical operation, is repugnant to both of those provisions of the Constitution, as it either works a complete prohibition of all commerce from the other states in goods to be sold by sample within the limits of the described district, or at least creates an unjust and onerous discrimination in favor of the citizens of the state enacting the statute, in respect to an extensive and otherwise lucrative branch of inter-state commerce, by securing to the citizens of that state, if not the exclusive control of the market, very important special privileges and immunities by exemption from burdensome requirements, and onerous exactions imposed upon the citizens of the other states desirous of engaging in the same mercantile pursuits in that district.

Attempt is made, in argument, to show in behalf of the state, that the statute in question 426*] does not make any such *discrimination against the citizens of the other states, as is supposed by the defendant; that the citizens of the state are in fact subjected to substantially the same requirements and exactions as are imposed upon the citizens of other states, but it is too clear for argument, in a judicial opinion, that the articles of the Code referred to as establishing that theory do not support the proposition, nor do they give it any countenance whatever. Those enactments forbid resident traders, other than the grower, maker or manufacturer, to barter or sell any goods or chattels without first obtaining a license in the manner therein prescribed, and they also point out the steps to be taken by the applicant to obtain it, and what he must state in his application for that purpose.

Small traders, whose stock generally kept on hand at the principal season of sales does not exceed one thousand dollars, and are not engaged in selling spirituous or fermented liquors, are required to pay for the license the sum of twelve dollars. If more than one thousand dollars, and not more than fifteen hundred dollars, they are required to pay the sum of fifteen dollars, and so on through ten other gradations, the last of which requires the applicant to pay the sum of one hundred and fifty dollars, where his stock generally kept on hand at the principal season of sale exceeds forty thousand dollars, which is the largest exaction made of any resident trader, not engaged in the sale of spirituous or fermented liquors. Compare one set of the regulations with the other, and comment is unnecessary, as the comparison shows to a demonstration that the statute in question does discriminate in favor of the citizens of the state, and that the opposite theory finds no support from the articles of the Code which forbid resident traders from bartering or selling goods or chattels without first obtaining a license for that purpose, as therein prescribed.

State power to lay and collect taxes may reach every subject over which the unrestricted power of the state extends, but the states cannot, without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing their inspection *laws; nor can they, [*427 without the consent of Congress, lay any duty of tonnage, as they are expressly prohibited from so doing by the Constitution.

Implied prohibitions restricting the power of the states to lay and collect taxes also exist, which are as effectual to that end as those which are express. Undoubtedly, the states may tax every subject of value, within the sovereignty of the state, belonging to the citizens as mere private property, but the power of taxation does not extend to the instruments of the Federal government, nor to the constitutional means employed by Congress to carry into execution the powers conferred in the Federal Constitution. *McCulloch* v. *Maryland*, 4 Wheat. 424.

Power to tax for state purposes is as much an exclusive power in the states as the power to lay and collect taxes to pay the debts and provide for the common defense and general welfare of the United States is an exclusive power in Congress. Both are subject, however, to certain prohibitions and restrictions, but in all other respects they are supreme powers possessed by each government entirely independent of the other. Congress may lay and collect taxes, duties, imposts and excises, to pay the debts and to provide for the common defense and general welfare, but direct taxation must be apportioned among the several states according to their respective numbers, and all duties, imposts and excises must be uniform.

Articles exported from any state cannot be

dents. *State* v. *North*, 27 Mo. 467; *Fire Dep.* v. *Wright*, 3 E. D. Smith, 478; *Paul* v. *Virginia*, 8 Wall. 177, 19 L. ed. 359.

Grant that the states may impose discriminating taxes against the citizens of other states, and it will soon be found that the power conferred upon Congress to regulate inter-state commerce is of no value, as the unrestricted **431***] power of *the states to tax will prove to be more efficacious to promote inequality than any regulations which Congress can pass to preserve the equality of right contemplated by the Constitution among the citizens of the several states. Excise taxes, it is everywhere conceded, may be imposed by the states, if not in any sense discriminating; but it should not be forgotten that the people of the several states live under one common Constitution, which was ordained to establish justice, and which, with the laws of Congress, and the treaties made by the proper authority, is the supreme law of the land; and that that supreme law requires equality of burden, and forbids discrimination in state taxation when the power is applied to the citizens of the other states. Inequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system.

Evidence to show that the framers of the Constitution intended to remove those great evils in the government is found in every one of the sections of the Constitution already referred to, and also in the clause which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another, showing that Congress, as well as the states, is forbidden to make any discrimination in enacting commercial or revenue regulations. Strong support to the same view is also derived from the succeeding clause in the same section of the Constitution, which provides that vessels bound to or from a state shall not be obliged to enter, clear or pay duties in another.

Important as these provisions have been supposed to be, still it is clear that they would become comparatively valueless if it should be held that each state possesses the power in levying taxes for the support of its own government to discriminate against the citizens of every other state of the Union.

Much consideration was given to those **432***] clauses of the Constitution *in the *Passenger Cases*, 7 How. 400-414, and they were there regarded as limitations upon the power of Congress to regulate commerce, and as intended to secure entire commercial equality, and also as prohibitions upon the states to destroy such equality by any legislation prescribing any conditions upon which vessels bound from one state to another shall be permitted to enter the ports of another state. Congress, said Mr. Justice Grier, has regulated commerce by willing that it shall be free and it is, therefore, not left to the discretion of each state either to refuse a right of passage through her territory or to exact a duty for permission to exercise such a privilege.

Viewed in any light the court is of the opinion that the statute in question imposes a discriminating tax upon all persons trading in the manner described in the district mentioned in the indictment, who are not permanent residents in the state, and that the statute is repugnant to the Federal Constitution, and invalid for that reason.

Judgment reversed and the cause remanded, with directions to the court below to conform its judgment to the opinion of this court.

Mr. Justice **Bradley:**

I concur in the opinion of the court, that the act of the legislature of Maryland, complained of in this case, discriminates in favor of residents and against non-residents of the state and, consequently, is in violation of the 4th article of the Constitution of the United States and, therefore, *pro tanto* void. But I am further of opinion that the act is in violation of the commercial clause of the Constitution, which confers upon Congress the power to regulate commerce among the several states; and it would be so, although it imposed upon residents the same burden for selling goods by sample as is imposed on nonresidents. Such a law would effectually prevent the manufacturers of the manufacturing states from selling their goods in other states unless they established commercial houses therein, or sold to resident merchants who chose to send them orders. It is, in fact, a *duty upon importation from [*433 one state to another, under the name of a tax. I therefore dissent from any expression in the opinion of the court which in any way implies that such a burden, whether in the shape of a tax or a penalty, if made equally upon residents and non-residents, would be constitutional.

JAMES P. THOMAS, William Evans, and Morris A. Thomas, Partners under the Firm and Style of Thomas, Evans & Co., *Plffs. in Err.*,

v.

CITY OF RICHMOND.

(See S. C. 12 Wall. 349-358.)

Notes issued as currency by corporation, illegal —money paid for them not recoverable—ultra vires—pari delicto—law of state in rebellion invalid.

The issue of notes as currency by the common council of the city of Richmond, in Apr. 1861, was against the law and policy of Virginia.

A clause in the city charter which authorizes the council to borrow money and to issue bonds or certificates of the city therefor, does not confer the right to issue notes or bills as currency.

The issuing of bills as a currency by such corporation being contrary to positive law, and *ultra vires*, no recovery can be had against the city, either on the bills themselves or for the money paid to the city for such bills.

The cases in which parties are *in pari delicto* considered.

Laws which authorized and required the city to redeem these bills, passed by a legislature not

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NOTE.—*Illegal contracts, what are, how far fraud or illegal consideration will avoid contract*—see note to Armstrong v. Toler, 6 L. ed. U. S. 468.

What contracts are void as against public policy or as illegal. Illegal consideration, when a defense; agreement not to bid; for lobby services; for contingent fees; to prevent competition—see note to Bartle v. Nutt, 7 L. ed. U. S. 825.

Whether when parties are in pari delicto or particeps criminis equity will relieve—see note to Sample v. Barnes, 14 L. ed. U. S. 330; and note to Mobile & O. R. Co. v. Dismukes, 17 L. R. A. 113.

recognized by the United States, and in aid of the Rebellion, did not make such bills valid.

[No. 22.]

Argued Oct. 25, 1871. Decided Dec. 11, 1871.

IN ERROR to the Circuit Court of the United States for the District of Virginia.

The case is stated by the court.

***Mr.* Conway Robinson,** for plaintiffs in error:

The city of Richmond is, by its charter, a corporation which "may contract or be contracted with," and generally has "all the rights, franchises, capacities and powers appertaining to municipal corporations."

Jones v. *Richmond*, 18 Gratt. 523; act, Mar. 30, 1852, p. 262, § 23; act Mar. 18, 1861, p. 154, § 4.

Under these powers it is clear the city might receive the amount now in question from those who would lend or advance it, and might agree to refund it.

The amount now in question has been actually received by the defendants, in money or its equivalent.

This money the city is under an obligation to refund, and there is a right of action for it, as money lent or money received.

Hamilton v. *McCoun*, 2 Hall (N. Y.) p. 522 of 1st, p. 560 of 2d ed.; *Catts* v. *Phalen*, 2 How. 376; *Nash* v. *Towne*, 5 Wall. 702, 18 L. ed. 530; *Merch. Bk.* v. *State Bk.* 10 Wall. 644, 19 L. ed. 1018.

Even if it could avail in defense to show that what was so received was used by the defendant for improper purposes, yet this does not appear as a fact found.

The demand against the defendant for money advanced to and received by it, is not affected by the use which defendant made of that money.

Hodgson v. *Temple*, 5 Taunt. 181; *Cheney* v. *Duke*, 10 Gill & J. 25; *Kreiss* v. *Seligman*, 8 Barb. 449; *Dater* v. *Earl*, 3 Gray, 482; *Tracy* v. *Talmage*, 14 N. Y. 169.

When the money was advanced and received, the plaintiffs did not know what use would be made of it, nor did this appear from the ordinances, even if they had been looked to. If there be doubt about the plaintiffs' knowledge, the court must give them the benefit of this doubt, and presume that they did not intend to violate the law.

Fee v. *Gonegal*, 19 La. Ann. 263; *Steele* v. *Curle*, 4 Dana, 389; *Tenant* v. *Elliott*, 1 Bos. & P. 3; *Farmer* v. *Russell*, 1 Bos. & P. 298; *Armstrong* v. *Toler*, 11 Wheat. 273; *Barker* v. *Parker*, 23 Ark. 395; *Bousfield* v. *Wilson*, 16 Mees. & W. 188; *Sharp* v. *Taylor*, 2 Phil. 818; *McBlair* v. *Gibbes*, 17 How. 236, 15 L. ed. 134; *Brooks* v. *Martin*, 2 Wall. 81, 17 L. ed. 735; *Berkshire* v. *Evans*, 4 Leigh, 223; *Bone* v. *Ekless*, 5 H. & N. (Exch.) 927.

Whether the notes be valid or void, the holders may recover on the money count.

4 Rob. Pr., chap. 87, p. 547, *et seq.*; *Barjeau* v. *Walmsley*, 2 Str. 1249; *Robinson* v. *Bland*, 2 Burr. 1081; *Sutton* v. *Toomer*, 7 Barn. & C. 416; *Insurance Co.* v. *Scott*, 19 Johns. 6; *Insurance Co.* v. *Kipp*, 8 Cow. 24, 3 Wend. 302, 14 N. Y. 189.

Whatever may be the structure of the statute of Virginia of March 3, 1854, in respect to prohibition and penalty or penalty alone, it is not to be taken for granted that the legislature meant that contracts in contravention of it were to be void in the sense that they were not to be enforced in a court of justice.

Harris v. *Runnels*, 12 How. 84; *Sortwell* v. *Hughes*, 1 Curt. 247; *Wilson* v. *Spencer*, 1 Rand. 99; *Snyder* v. *Dailey*, 1 Rand. 101; *Berkshire* v. *Evans*, 4 Leigh, 223.

Since *Ex parte Bulmer*, 13 Ves. 316, it has become settled that two parties may concur in an illegal act without being deemed to be *in pari delicto*.

Osborne v. *Williams*, 18 Ves. 382; *Catts* v. *Phalen*, 2 How. 376.

Unless the parties are *in pari delicto*, as well as *particeps criminis*, the courts, although the contract be illegal, will afford relief, when equity requires it, to the more innocent party. 5 Rob. Prac., chap. 52, § 2, p. 534, and cases there cited, especially *Tracy* v. *Talmage*, 14 N. Y. 181.

Courts avoid making such decisions as would secure to the defendant the fruits of an illegal transaction, and would operate as a temptation to corporations to violate the statute by taking advantage of the unwary, and of those who may have no actual knowledge of the existence of the prohibition of the statute, and who may deal with a corporation without any suspicion of the illegality of the transaction on his part.

White v. *Bank*, 22 Pick. 188, 14 N. Y. 186.

The act of March 3, 1854, is repealed by that of March 19, 1862, so far as in conflict therewith; and by the latter there is a release of forfeitures and penalties incurred before its passage.

***Messrs. R. T. Daniels* and John A. Meredith,** for defendants in error:

The defense is that these notes are void because issued in violation of:

I. The charter of the city.

II. The general laws of the state.

III. The laws of the United States.

IV. The Constitution of the state of Virginia.

I. Under the charter of the city.

The rule for the interpretation of charters, municipal and private is, that they shall be construed strictly. Corporations are to be considered as having only such powers as are specifically granted by the act of incorporation, or as are necessary for carrying into effect the powers expressly granted, and as not having any others.

2 Kent, Com., 298; Grant, Corp., 7, 8; 13 Hayw. 71; *Dartmouth Coll.* v. *Woodward*, 4 Wheat. 578; *Head* v. *Insurance Co.* 2 Cranch, 127; *Bank* v. *Dandridge*, 12 Wheat. 64; *Gossler* v. *Georgetown*, 6 Wheat. 593; *Thompson* v. *Lee Co.* 3 Wall. 330, 18 L. ed. 178; *Frewin* v. *Lewis*, 4 Myl. & Cr. 249.

All powers not expressly granted by the charter of a municipal corporation, or necessary to carry out those powers, are denied. The corporation can take nothing by mere implication.

Kyle v. *Malin*, 8 Ind. 34; *Hooper* v. *Emery*, 14 Me. 375; *Ex parte Burnett*, 30 Ala. 461; *Leavenworth* v. *Norton*, 1 Kan. 432; *Booth* v. *Woodbury*, 32 Conn. 118; *Alley* v. *Edgcombe*, 53 Me. 446.

Nor is it the case of a negligent or careless exercise of a granted power, by which an innocent party is injured, as in *De Voss* v. *Richmond*, 18 Gratt. 338; but it is the want of an

express grant of such power, which makes the act *ultra vires*. There is no power in the charter of the city of Richmond to issue such notes and, therefore, the contract which they express upon their face is void.

Nor can there be any subsequent act of ratification by the council that can impart validity to these notes, as contracts binding on the city. If the act be one which the corporation has no authority to perform, no subsequent act by the council can ratify it, because the act of ratification is as much *ultra vires* as the original act creating the obligation. Sedg. Stat. & Const. Law, 467; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 544; *Supervisors* v. *Schenck*, 5 Wall. 772, 18 L. ed. 556.

II. Under the general laws of the state. Code of Va., chap. 198, § 16.

It is a principle of the common law, that an action cannot be supported upon a contract, the consideration of which is illegal, as being against either the positive prohibitions or the policy of the law, and the courts have applied this principle to prohibitions flowing from statutes. Upon principle, there can be no distinction between the cases. The only ground upon which a difference can be supposed to exist is that when the legislature prohibits an act under a penalty, without vacating the contract in terms, it may be deemed that it did not intend the contract should be void.

But the argument, however specious, has not been allowed to prevail (*Bartlett* v. *Vinor*, Carth. 252) "that every contract made for or about any matter or thing, will be prohibited or made unlawful by statute, is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender, because the penalty implies a prohibition, though there are no prohibitory words in the statute."

In *Holman* v. *Johnson*, Cowp. 343, the Chief Justice thus states the law: "The principle of public policy is this: '*Ex dolo malo non oritur actio.*' No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiffs' own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, then the court says he has no right to be assisted." This principle is sustained by the following authorities:

Pow. Cont., 196; *Ribbans* v. *Crickett*, 1 Bos. & P. 264; *Lightfoot* v. *Tenant*, 1 Bos. & P. 552; *Parkin* v. *Dick*, 11 East, 502; *Langton* v. *Hughes*, 1 Maule & S. 596; *Aubert* v. *Maze*, 2 Bos. & P. 373; *Cannan* v. *Bryce*, 3 Barn. & Ald. 179.

The same principle has been recognized in Virginia. *Middleton* v. *Arnolds*, 13 Gratt. 489.

And this court has affirmed the same principle.

Mitchell v. *Smith*, 4 Dall. 269; *Maybin* v. *Coulon*, 4 Dall. 298; *Bank* v. *Owens*, 2 Pet. 527; *Hannay* v. *Eve*, 3 Cranch, 242; *Armstrong* v. *Toler*, 11 Wheat. 258; *Marshall* v. *Railroad Co.* 16 How. 334; *Mayer* v. *White*, 24 How. 317, 16 L. ed. 657.

If the court shall declare these notes void, the holders of them cannot complain. If they suffer loss, it is due to their own neglect. Every person dealing in these notes is chargeable with a knowledge of the charter of the city under which they were issued, and as the council was acting under delegated authority, the holder must show that the authority existed.

Royal British Bk. v. *Turquand*, 5 El. & Bl. 248; *Smith* v. *Hull Glass Co.* 73 Eng. C. L. 926; *Ridley* v. *Ply. Grind. & Baking Co.* 2 Exch. 711; *Ernest* v. *Nicholls*, 6 H. of L. Cas. 401; *Knox Co.* v. *Aspinwall*, 21 How. 539, 16 L. ed. 208.

But it is insisted that these notes were rendered valid by subsequent legislation; that there was a subsequent act of the legislature which gave them the force and obligation of contracts.

In answer to this proposition I shall insist:

1. That no legislature can, by a subsequent statute, render valid a contract made by a corporation, which, at the time it was entered into, the corporation had no power to make.

2. That the act of the legislature, relied on for this purpose, does not attempt to give validity to the notes already issued; but merely provides, under certain penalties, for the redemption of the notes that have been issued before the passage of the act, and confers authority to issue a certain class of notes in the future.

3. That the legislature, which passed this act was not the rightful legislature of the state and, therefore, had no authority to pass such an act.

Cæsar Griffin Case, 8 Am. Law Reg. (N. S.), 358; *Texas* v. *White*, 7 Wall. 700, 19 L. ed. 227.

III. These notes are void under the laws of the United States. They were issued in aid of the Rebellion and to overthrow the laws of the United States, and if such was the object they are void.

IV. Under the Constitution of the state of Virginia. The Constitution of the state declares these notes invalid, and forbids their payment. Sec. 10, art. 10, of the Const.

Mr. Justice **Bradley** delivered the opinion of the court:

This was an action of assumpsit, brought by the plaintiffs below, who are the plaintiffs in error, against the city of Richmond, to recover the amount of 842 two-dollar notes and 418 one-dollar notes, issued by the city council in April, 1861. The declaration contained a special count on the notes and the common money count. The defendants pleaded the general issue and the statute of limitations. A jury being waived, the case was tried by the court, which found:

(1) That the notes were void when they were issued, because they were issued to circulate as currency, in violation of the law and policy of the state of Virginia; and (2) that the said notes were not made valid or recoverable by the acts of the 19th of March, 1862, and 29th March, 1862, or either of them, because the said acts were passed by a legislature not recognized by the United States, and in aid of the Rebellion. The court, accordingly, gave judgment for the defendant.

*First, the court finds as a fact that [*353 the notes upon which the present action is brought were issued to circulate as currency; and, as matter of law, that this was in violation of the law and policy of Virginia, and that, therefore, the notes were void.

The first question is whether the issue of

notes as currency by the common council of the city of Richmond, in April, 1861, was against the law and policy of Virginia. The issue of notes as a common currency, or circulating medium, is guarded with much jealousy by all governments as touching one of its most valuable prerogatives, and as deeply affecting the common good of the people. Almost every state has stringent laws on the subject, and it may be said to be against the public policy of the country to allow individuals or corporations to exercise this prerogative without express legislative sanction. The state of Virginia, like all the other states, had a law of this kind in operation at the time the notes in question were issued.

By that law, § 15, "all members of any association or company, that shall trade or deal as a bank, or carry on banking, without authority of law, and their officers and agents therein, shall be confined in jail not more than six months, and fined not less than $100, nor more than $500." By § 16, "every free person" (and "person" includes "corporation") "who, with intent to create a circulating medium, shall issue without authority of law, any note or other security, purporting that money or other thing of value is payable by, or on behalf of, such person, and every officer and agent of such person therein, shall be confined in jail," etc. By § 17, "If a free person pass or receive in payment any note or security, issued in violation of either of the two preceding sections, he shall be fined not less than $20 nor more than $100." By § 19, where a note of a less denomination than $5 is offered or issued as money, whether by a bank, corporation, or by individuals, they shall pay a fine of $10.

The issue of the notes in question was clearly in violation of this law; and it will be perceived that the 17th section makes the receipt of such notes in payment, as well as the issue and passing of them, a penal offense.

But the charter of the city of Richmond has been referred to for the purpose of showing that the common council had power to issue such notes. One of the grants of power relied on is that the city is made a corporation with power to contract and be contracted with, and generally with "all the rights, franchises, capacities, and powers appertaining to municipal corporations." In a community in which it is against public policy, as well as express law, for any person or body corporate to issue small bills to circulate as currency, it is certainly not one of the implied powers of a municipal corporation to issue such bills. Such a corporation "can exercise no power which is not, in express terms, or by fair implication, conferred upon it." *Thompson* v. *Lee Co.* 3 Wall. 330, 18 L. ed. 354*] 178. Another clause *of the charter to which reference has been made authorizes the council to borrow money and to issue the bonds or certificates of the city therefor. But this cannot be seriously urged as conferring the right to issue such bills as those now in suit. Such city securities as those authorized by the charter are totally different from bills issued and used as a currency or circulating medium. The distinction is well understood and recognized by the whole community. A power to execute and issue the one class cannot, without doing violence to language, be deemed to include

tum at all between the parties, and the party so protected by the law, or so acting under compulsion, may, at any time, resort to the law for his remedy, though the illegal transaction be completed. See the cases collected in 2 Com. Cont. 108–131; 1 Selw. N. P. 87–100; 3 Phill. Ev. 119; 2 Greenl. Ev. § 121, p. 12; Chit. Cont. 550, 552, 553, and notes.

356*] *Now, in cases of bills or other obligations illegally issued by a banking or other private corporation, which has received the consideration therefor, it would enable them to commit a double wrong to hold that they might repudiate the illegal obligations, and also retain the proceeds. Hence where the parties are not *in pari delicto*, actions are sustained to recover back the money or other consideration received for such obligations, though the obligations themselves, being against law, cannot be sued on. The corporation issuing the bills contrary to law, and against penal sanctions, is deemed more guilty than the members of the community who receive them whenever the receiving of them is not expressly prohibited. The latter are regarded as the persons intended to be protected by law; and, if they have not themeselves violated an express law in receiving the bills the principles of justice require that they shall be able to recover the money received by the bank for them. But if the parties are *in pari delicto*, as, if the consideration as well as the bills or other obligation is tainted with illegality or immorality, as it would be if loaned or advanced for the purpose of aiding in any illegal or immoral transaction, or if the receiving as well as the passing or issuing of the bills is forbidden by law, then the holder is without legal remedy, and the parties are left to themselves.

But, in the case of municipal and other public corporations, another consideration intervenes. They represent the public, and are themselves to be protected against the unauthorized acts of their officers and agents, when it can be done without injury to third parties. This is necessary in order to guard against fraud and peculation. Persons dealing with such officers and agents are chargeable with notice of the powers which the corporation possesses, and are held to be responsible accordingly. The issuing of bills as a currency by such a corporation without authority is not only contrary to positive law, but, being *ultra vires*, is an abuse of the public franchises which have been conferred upon it; and the receiver of the bills, being chargeable with notice of the wrong, is *in pari delicto* with the officers, and **357***] should *have no remedy, even for money had and received, against the corporation upon which he has aided in inflicting the wrong. The protection of public corporations from such unauthorized acts of their officers and agents is a matter of public policy in which the whole community is concerned. And those who aid in such transactions must do so at their peril.

According to these principles no recovery could have been had against the city, either on the bills themselves or on a claim for money had and received. It was against the law of the state to issue them. It was a penal offense in both the person who paid and the person who received them and they were issued by a municipal corporation which had no power, and which was known to have no power to issue them.

It was insisted further, however, that the legislature, in March, 1862, passed laws which authorized and even required the city to redeem these bills. But,

Secondly. The court found that these laws were passed by a legislature not recognized by the United States and in aid of the Rebellion and, therefore, that these notes were not made valid thereby.

The fact thus found, that the laws referred to were passed in aid of the Rebellion, is conclusive on the subject. We have already decided, in *Texas* v. *White*, 7 Wall. 700, 19 L. ed. 227, and just now in the case of *Hanauer* v. *Doane*, *ante*, 439, that a contract made in aid of the Rebellion is void, and cannot be enforced in the courts of this country. The same rule would apply, with equal force, to a law passed in aid of the Rebellion. Laws made for the preservation of public order, and for the regulation of business transactions between man and man, and not to aid or promote the Rebellion, though made by a mere *de facto* government not recognized by the United States, would be so far recognized as to sustain the transactions which have taken place under them. But laws made to promote and aid the Rebellion can never be recognized by or receive the sanction *of [*358 the courts of the United States as valid and binding laws. To recognize them as such would be derogatory to the dignity and authority of the government of the United States, and would be setting too light an estimate upon so great an offense.

The judgment is affirmed.

THE STEAMER PATAPSCO, her Tackle, etc., James A. Borland, *Claimant*,
v.
JAMES BOYCE.

(See S. C. 12 Wall. 451, 452.)

When interest will be added to make jurisdictional amount.

Where the decree of the circuit court was for $1,982 and interest from a prior date, the interest to the date of the decree must be added, in determining the jurisdictional amount necessary in this court.

[No. 140.]

Argued Dec. 15, 1871. Decided Dec. 18, 1871.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

For a full statement of this case see the decision on the merits, *post*, 696.

On motion to dismiss.

Messrs. D. McMahon and **Orville Horwitz**, for appellee:

This court has not jurisdiction to entertain said appeal or review the decree below, because it was not for $2,000 in amount, unless by adding interest to the claim made in the libel, or

NOTE.—*Jurisdiction of U. S. Supreme Court depending on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy*—see note to Gordon v. Ogden, 7 L. ed. U. S. 592.

to the amount reported to be due in the United State circuit court.

Udall v. *The Ohio*, 17 How. 17, 15 L. ed. 42; *Olney* v. *The Falcon*, 17 How. 19, 15 L. ed. 43; *Wilson* v. *Daniel*, 3 Dall. 401; *Gordon* v. *Ogden*, 3 Pet. 33; *Smith* v. *Honey*, 3 Pet. 469; *Grant* v. *McKee*, 1 Pet. 248; *Scott* v. *Lunt*, 6 Pet. 349.

Where the libelant below appeals, the measure of his right to appeal is the claim in his libel.

Where the claimant below appeals, the sum in the decree appealed from, tests his right to appeal. In the case at bar, that sum is $1,982.07, and interest from the date of the report. The sum of $2,000 is only made up by adding interest. This is fatal to the appeal.

Mr. **C. Donohue**, for appellant:

The decree from which this appeal is taken, gives the libelant judgment for the amount reported, with interest from the date of the report. That report finds that there is due the libelant, at the date of the report, $1,982,-07, and the report is dated July 15, 1868. The date of the final decree is Feb. 11, 1870, being one year, six months and twenty-six days; and the amount of the decree, as payable on the day of its date, was $2,200 and upwards.

The question of how much is in dispute is open to proof here by affidavit, if it should be doubtful in the record. Although it is not doubtful in the record, we have made the proof that the amount exceeds the jurisdictional amount. The moving affidavit nowhere pretends that the amount collectible under the decree is not over $2,000.

See *The Grace Girdler*, 6 Wall. 441, 18 L. ed. 790, 3 Pet. 33, 7 Pet. 453.

Mr. Chief Justice **Chase** delivered the opinion of the court:

This is a motion to dismiss the appeal for want of jurisdiction.

The reason assigned in support of the motion is, that the sum for which the decree was rendered was insufficient to give jurisdiction on appeal.

On looking at the record, we find that the decree of the circuit court was for the amount reported due the libelants on the 15th July, 1868, $1,982.07, and interest from the date of the report. We think that interest to the date of the decree must be computed as a part of the sum for which the decree was rendered. The sum thus computed exceeds $2,000, and *the motion must, therefore, be denied.*

HALL *et al.*, *Appts.*,
v.
JOHN A. ALLEN, Assignee of William Downing, Bankrupt.

(See S. C. 12 Wall. 452–454.)

Appeal in bankrupt cases.

No appeal can be taken to this court from the decision of the circuit court in the exercise of its superintending and revising jurisdiction under the bankrupt act.

[No. 74.]

Argued Nov. 23, 1871. Decided Dec. 18, 1871.

APPEAL from the Circuit Court of the United States for the District of Missouri.

The case is sufficiently stated by the court.

Messrs. **Edward Avery**, *J. O. Broadhead*, and *B. Sanford* for appellants.

Messrs. **Henry Hitchcock**, *Geo. W. Lubke*, and *Preston Player* for appellee.

Mr. Chief Justice **Chase** delivered the opinion of the court:

It appears in this case that Downing having been declared a bankrupt, and the bankrupt cause having been referred to a register in bankruptcy, a question arose which was certified by the register to the judge of the district court for his opinion; that this opinion being unsatisfactory to the assignee, he appealed to the circuit court, which reversed the decision of the district court. An appeal has been taken to this court from the decision of the circuit court, and we are asked to dismiss this appeal for the want of jurisdiction.

It is quite evident that the decision of the circuit court was made in the exercise of its superintending and revising jurisdiction, and this court decided at the last term, in *Morgan* v. *Thornhill*, *ante*, 64, that no appeal can be taken from the decision of the circuit court in the exercise of that jurisdiction.

The appeal, therefore, is dismissed.

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*THE PEOPLE OF THE STATE OF [*455
NEW YORK, *Plffs. in Err.*,
v.
THE CENTRAL RAILROAD COMPANY. OF NEW JERSEY.

(See S. C. 12 Wall. 455, 456.)

When this court has no jurisdiction as to boundary line between states.

A question arising in a state court in regard to the construction of a compact between two states as to the boundary line between them, is one of which this court has no jurisdiction under the 25th section of the judiciary act.

[No. 71.]

Argued Dec. 22, 1871. Decided Jan. 22, 1872.

IN ERROR to the Supreme Court of the State of New York.

Motion to dismiss.

The case is stated by the court.

Messrs. **Fred'k T. Frelinghuysen** and **J. C. Dimick**, for defendant in error:

The act of Congress is in no way in question here. The plaintiffs claim that, by virtue of an agreement entered into by the commissioners for New York and for New Jersey, which was confirmed by the respective legislatures of those states, and which the Congress of the United States afterwards assented to, the state of New York has jurisdiction over the wharves and improvements on the New Jersy shore, to low-water mark. The defendant insists that, under the agreement, the jurisdiction of New York does not extend west

of the middle of Hudson river and New York bay.

The construction of the Constitution is not involved.

The case does not arise under any treaty made by the authority of the United States.

The agreement in question is not a treaty. A state cannot, with or without the consent of the United States, make a treaty.

The construction of no statute in the United States is brought into controversy.

The preamble to the statute (4 Stat. at L. 708) sets forth the agreement between the states, and the statute enacts "that the Congress of the United States" gives its consent to the said agreement, provided that nothing therein contained shall be construed to impair or in any manner affect any right of jurisdiction of the United States in and over the lands or waters which form the subject of the said agreement. The fact or nature of the consent or the jurisdiction of the United States, is in no manner drawn into controversy; the construction of the agreement made by New York and New Jersey is the only matter involved.

Is that agreement a part of the statute in any such sense that its construction invokes the appellate jurisdiction of this court?

Is the agreement a part of the statute, giving consent to the agreement?

A statute, a law, is a "rule;" it is a command, in contradistinction to an agreement; just what an agreement is not, is a part of a statute; a statute over the construction of which this court, by virtue of the 25th section of the judiciary act, has appellate jurisdiction, is an enactment made by Congress, by virtue of the legislative power delegated to Congress.

There is no legislative power delegated to Congress to enact an agreement by New York and by New Jersey and, therefore, the agreement is, in no such sense as contemplated by the judiciary act, a part of the statute.

Bouv. Tit. Statute, defines the term "statute" to be, "a law established by the act of legislative power." The state had the inherent power to make agreements, because it had every power not surrendered by the Constitution of the United States. It did surrender power to make treaties, but the power to make agreements it did not surrender, and was not called upon to do so.

These states may make the agreement by virtue of the inherent power existing in them.

Poole v. *Fleeger*, 11 Pet. 209; *R. I.* v. *Mass.* 12 Pet. 724.

Consent being given, the states are as if there was no limitation. The states can make the agreement; the statutes in question say they had made it; the United States cannot make the agreement or confer jurisdiction. Can it be insisted that, because the agreement is cited in the statute of consent, it is a part of the statute, so as to invoke the jurisdiction of this court? The recital of the preamble is without legislative import.

Potter's Dwarr. Stat. 265.

If it is without legislative import, no right, title, privilege, or exemption can be given by it as a statute. It is the legislative will, that courts of the United States are to see it rightly construed, and if this recital has no force in a legislative sense (as Sedgw. Stat. and Const. Law, pp. 54, 55, says) how can it give any title? Smith, Stat. Const. 700, and Dwarris, 655, say the preamble is no part of the act. Story, Const. § 462, says the preamble, even of the Constitution of the United States, cannot confer any power *per se;* yet it is only such part, such clauses of the statute as can give "title, right, privilege, or exemption" as can be reconstrued on appeal by the Supreme Court of the United States. The statute only consents to a grant of title, and so far from granting anything at all, it specifically reserves everything that could be granted by it, and assumes that everything that is granted is granted by the states respectively. Judge Curtis, in his Digest, p. 92, pt. 13, says: "The power, though it can only be exercised with the consent of Congress, still resides with the several states."

Messrs. M. R. Champlin and **Amasa J. Parker** for plaintiffs in error.

Mr. Chief Justice **Chase** delivered the opinion of the court:

This is a motion to dismiss the writ of error, heretofore allowed to the supreme court of New York for want of jurisdiction.

It is said that in the decision of that court, there was not drawn in question the construction of any statute of the United States, and that the decision was not against the title, right and privilege, or exemption specially set up or claimed under any such statute.

The record shows the nature of the controversy. It relates wholly to the extent of the jurisdiction of New York over the land and water in the rivers and bay of New York.

It appears that, in 1833 an agreement was made between New York and New Jersey, relative to the boundary line between the two states, to which Congress gave its assent by an act approved June 28, 1834.

Suit was brought by the people of the state of New York against the Central Railroad Company, for nuisance committed by taking possession without license from the state, of about eight hundred acres of land and water, and erecting docks, wharves, piers, and other improvements within the alleged jurisdiction of New York under this agreement.

The railroad company claimed that, under the agreement, the land and water were within the jurisdiction of the state of New Jersey, by whose authority they committed the acts complained of. This presented a question of construction of the agreement. It was decided by the highest tribunal of the state of New York, in favor of the claim of the railroad company *in behalf of the state [*456 of New Jersey. It is insisted that this decision was against the rights of New York, as defined by the agreement, and that this court has jurisdiction, because of the act giving the assent of Congress to it.

We think that the statement of the case shows that the question arose under the agreement and not under any act of Congress. The assent of Congress did not make the act giving it a statute of the United States, in the sense of the 25th section of the judiciary act. The construction of the act was in no

way drawn in question, nor has any title or right been set up under it and denied by the state court. It had no effect beyond giving the consent of Congress to the compact between the two states.

The writ of error to the Supreme Court of New York must, therefore, be dismissed.

687*] *FRANK TREBILCOCK, *Plff. in Err.*,
v.
BENJAMIN WILSON and Elizabeth Wilson.

(See S. C. 12 Wall. 687-700.)

Jurisdiction over state judgments—note payable in specie is payable in gold and silver —legal tender acts do not apply to such note —judgment for coined dollars.

*1. Where a plaintiff in error claimed in the court below, that he was entitled to have a note held by him, made by the defendant in error, paid in gold or silver coin, under the Constitution upon a proper construction of various clauses of that instrument, and the decision of the court below was against the right thus claimed, this court has appellate jurisdiction, under the 25th section of the judiciary act of 1867, to review the decision. The case of Roosevelt v. Meyer, 17 L. ed. 500, overruled.

2. Where a note is for dollars, payable by its terms in specie, the terms "in specie" are merely descriptive of the kind of dollars in which the note is payable, there being more than one kind of dollars current, recognized by law; and mean that the designated number of dollars shall be paid in so many gold or silver dollars of the United States.

3. The act of February 25, 1862, in declaring that the notes of the United States shall be lawful money and a legal tender for all debts, only applies to debts which are payable in money generally, and not to obligations payable in commodities or obligations of any other kind.

4. When a contract for money is, by its terms, made payable in specie or in coin, judgment may be entered thereon for coined dollars. Bronson v. Rodes, 19 L. ed. 141, affirmed.

[No. 46.]

Submitted Feb. 6, 1871. Decided Jan. 22, 1872.

IN ERROR to the Supreme Court of the State of Iowa.

The case is stated by the court.

Mr. **Geo. W. McCrary**, for plaintiff in error:

The main question presented for the determination of the court in this case, is precisely the same as that decided by this court in the case of *Bronson* v. *Rodes*, 7 Wall. 229, 19 L. ed. 141, and in *Butler* v. *Horwitz*, 7 Wall. 258, 19 L. ed. 149. It is also within the principle settled by *Hepburn* v. *Griswold*, 8 Wall. 603, 19 L. ed. 513.

In reply to so much of the argument of counsel for defendant in error, as raises the question of the jurisdiction of this court, I beg leave to submit the following suggestions:

It is only necessary that it should appear from the record, that some one of the questions embraced in the 25th section of the judiciary act of 1789 was relied on by the plaintiff in error, and "that the right he claimed it gave him was denied him by the state court."

Furman v. *Nichol*, 8 Wall. 44, 19 L. ed. 370.

In the case at bar, the record clearly shows that the plaintiff in error claims his right to payment of the debt due him in specie, under and by virtue of the Constitution of the United States, which he averred guaranteed this right to him, the Legal Tender Act to the contrary notwithstanding.

Mr. **Geo. B. Corkhill** and *H. Strong*, for defendant in error:

This cause should be dismissed for want of jurisdiction of this court. The claim of the defendant in error in this case is based upon a statute of the United States; and the decision of the highest judicial tribunal in the state of Iowa, to which the writ of error herein was brought was in favor of the validity of the statute of the United States, and the "rights, privileges, and exemptions specially set up and claimed" under said statute. This question is no new one in this court.

Gordon v. *Caldcleugh*, 3 Cranch, 268 (*Fulton* v. *McAffee*, 16 Pet. 149; *Roosevelt* v. *Meyer*, 1 Wall. 512, 17 L. ed. 500), is identical in the point presented to the one now before the court; and in accordance with the principles there determined, we ask that this writ be dismissed.

Mr. Justice **Field** delivered the opinion of the court:

In June, 1861, Benjamin Wilson, one of the plaintiffs in the court below, gave to the defendant his promissory note for $900, due one year after date, with ten per cent interest, payable in specie; and at the same time, to secure its payment, executed, in connection with his wife and delivered to the defendant, a mortgage upon certain real property in the state of Iowa. This mortgage was duly recorded in the office of the recorder of the county where the land was situated.

In February, 1863, Wilson offered to pay the defendant the amount due on the note, principal and interest, and for that purpose tendered to him such amount in United States notes, declared by the act of Congress of February 25, 1862 (12 Stat. at L. 345) to be a legal tender for all debts, public and private, with certain exceptions, but the defendant refused to receive them, claiming that the note was payable in gold or silver coin of the United States.

*In July, 1865, the plaintiffs, who [*688 were then residents of Iowa, presented to one of the district courts of that state their petition setting forth the alleged tender, and praying that the defendant might be required by its decree to release and discharge the mortgage upon the proper book of record, as required by law upon the payment of a mortgage debt, averring that they had kept the money tendered and ready to pay the defendant, and that they had brought the money into court for that purpose.

The defendant demurred to the petition on several grounds, but the only one presented for our consideration is, that the tender was not a good and sufficient tender, because not made in gold and silver coin, in which alone the note was payable.

The court overruled the demurrer, and in September, 1866, gave its decree for the plaintiff, that the mortgage be canceled, *and [*689 that the defendant enter satisfaction of it upon the record, holding that the tender was legal and sufficient.

On appeal to the supreme court of the state,

*Headnotes by Mr. Justice FIELD.

NOTE.—*Obligations payable in gold and silver or in specie*—see notes, 19 L. ed. U. S. 141; 29 L. R. A. 512.

this decree was in October, 1857, affirmed, and the defendant brings the case here on writ of error.

The principal question presented for our 692*] consideration *is whether a promissory note of an individual, payable by its terms in specie, can be satisfied, against the will of the holder, by the tender of notes of the United States declared by the act of Congress of February 25, 1862, to be a legal tender in payment of debts.

There is, however, a preliminary question of jurisdiction raised, which must be first disposed of. The state court, in holding the tender legal and sufficient, sustained the validity and constitutionality of the act of Congress declaring the notes a legal tender. Its decision was, therefore, in favor of, and not against, the right claimed by the plaintiffs under the act of Congress, and hence it is contended that the appellate jurisdiction of this court does not arise under the 25th section of the judiciary act of 1789. Some support is given to this view by the decision of this court in *Roosevelt* v. *Meyer*, 1 Wall. 512, 17 L. ed. 500, where it was held that, as the validity of the Legal Tender Act was drawn in question in that case, and the decision of the state court was in favor of it, and of the right set up by the defendant, this court had no jurisdiction to review the judgment, and a dismissal of the case was accordingly ordered. The court in that case confined its attention to the first clause of the 25th section of the judiciary act and, in its decision, appears to have overlooked the third clause. That section provides for the review of the final judgments and decrees of the highest court of a state in which decisions could be had in three classes of cases:

First. Where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity;

Second. Where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; and,

Third. Where is drawn in question the construction of any clause of the Constitution, 693*] or of a treaty or statute of, *or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party under such clause of the Constitution, treaty, statute, or commission.

Under this last clause the appellate jurisdiction of this court in the case of *Roosevelt* v. *Meyer* might have been sustained. The plaintiff in error in that case claimed the right to have the bond of the defendant paid in gold or silver coin under the Constitution, upon a proper construction of that clause which authorizes Congress to coin money and regulate the value thereof and of foreign coin; and of those articles of the amendments which protect a person from deprivation of his property without due process of law; and declare that the enumeration of certain rights in the Constitution shall not be construed as a denial or disparagement of others retained by the people; and reserve to the states or the people the powers not delegated to the United States or prohibited to the states.

The decision of the court below being against the right of the plaintiff in error claimed under the clauses of the Constitution, the construction of which was thus drawn in question, he was entitled to have the decision brought before this court for re-examination.

In the present case, as the defendant claimed a similar right upon a construction of the same and other clauses of the Constitution, and a like adverse decision of the court below was made, he is equally entitled to ask for a re-examination of the decision.

But the defendant also claimed a right to demand coin in payment of the note of the plaintiff by the acts of Congress regulating the gold and silver coins of the United States, and making them a legal tender in payment of all sums according to their nominal or declared values, contending that the act of 1862, making notes of the United States a legal tender for debts, did not apply to the contract in suit. He thus claimed in fact, although he did not state his position in this form, that, upon a proper construction of the several acts together, he was entitled to payment in coin. This *right having been denied by an [*694 adverse decision, he was clearly in a condition to invoke the appellate jurisdiction of this court for a review of the decision.

Nor is the appellate jurisdiction of this court, in this case, affected by the change in the language of the third clause of the 25th section of the judiciary act of 1789, by the 2d section of the amendatory judiciary act of February 5th, 1867. By this clause in the latter act the judgment or decree of the highest court of a state can be reviewed "where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority." The section came incidentally before the court at the last term, in *Stewart* v. *Kahn*, *ante*, 177, but it was not deemed necessary to determine whether it had superseded the 25th section of the judiciary act of 1789. As there observed, it is to a great extent a transcript of that section; and several of the alterations of phraseology are not material. The principal addition is found in the second clause, and the principal omission is at the close of the section. But in this case, as in that, there is no occasion to express any opinion as to the effect of the new section upon the original. Under the new section, as under the old, if that be superseded, the plaintiff in error can seek a review of the decision made against the right claimed by him.

We proceed, then, to consider the merits of the case. The note of the plaintiff is made payable, as already stated, in specie. The use of these terms, "in specie," does not assimilate the note to an instrument in which the amount stated is payable in chattels; as, for example, to a contract to pay a specified sum in lumber, or in fruit or grain. Such contracts are generally made because it is more convenient for *the maker to furnish the articles [*695

designated than to pay the money. He has his option of doing either at the maturity of the contract, but if he is then unable to furnish the articles or neglects to do so, the number of dollars specified is the measure of recovery. But here the terms, "in specie," are merely descriptive of the kind of dollars in which the note is payable, there being different kinds in circulation, recognized by law. They mean that the designated number of dollars in the note shall be paid in so many gold or silver dollars of the coinage of the United States. They have acquired this meaning by general usage among traders, merchants and bankers, and are the opposite of the terms, in currency, which are used when it is desired to make a note payable in paper money. These latter terms, in currency, mean that the designated number of dollars is payable in an equal number of notes which are current in the community as dollars. *Paup* v. *Drew*, 10 How. 218.

This being the meaning of the terms in specie the case is brought directly within the decision of *Bronson* v. *Rodes*, 7 Wall. 229, 19 L. ed. 141, where it was held that express contracts, payable in gold or silver dollars, could only be satisfied by the payment of coined dollars, and could not be discharged by notes of the United States declared to be a legal tender in payment of debts.

The several coinage acts of Congress make the gold and silver coins of the United States a legal tender in all payments, according to their nominal or declared values. The provisions of the act of January 18, 1837, and of March 3, 1849, in this respect, were in force when the act of February 25, 1862, was passed, and still remain in force. As the act of 1862 declares that the notes of the United States shall also be lawful money and a legal tender in payment of debts, and this act has been sustained, by the recent decision of this court, as valid and constitutional, we have, according to that decision, two kinds of money, essentially different in their nature, but equally lawful. It follows, from 696*] *that decision, that contracts payable in either or for the possession of either, must be equally lawful and, if lawful, must be equally capable of enforcement. The act of 1862 itself distinguishes between the two kinds of dollars in providing for the payment in coin of duties on imports and the interest on the bonds and notes of the government. It is obvious that the requirement of coin for duties could not be complied with by the importer, nor could his necessities for the purchase of goods in a foreign market be answered, if his contracts for coin could not be specifically enforced, but could be satisfied by an offer to pay its nominal equivalent in note dollars.

The contemporaneous and subsequent legislation of Congress has distinguished between the two kinds of dollars. The act of March 17, 1862 (12 Stat. at L. 370), passed within one month after the passage of the first Legal Tender Act, authorized the Secretary of the Treasury to purchase coin with bonds or United States notes, at such rates and upon such terms as he might deem most advantageous to the public interest, thus recognizing that the notes and the coin were not exchangeable in the market according to their legal or nominal values.

The act of March 3, 1863 (12 Stat. at L. 719, § 4), amending the internal revenue act, required contracts for the purchase or sale of gold or silver coin to be in writing, or printed, and signed by the parties, their agents or attorneys, and stamped; thus impliedly recognizing the validity of previous contracts of that character without this formality. The same act also contained various provisions respecting contracts for the loan of currency secured by a pledge or deposit of gold or silver coin, where the contracts were not to be performed within three days.

Legislation of a later date has required all persons making returns of income, to declare "whether the several rates and amounts therein contained are stated according to their values in legal tender currency, or according to their values *in coined money" and if [*697 stated "in coined money" it is made the duty of the assessor to reduce the rates and amounts "to their equivalent in legal tender currency, according to the value of such coined money in said currency for the time covered by said returns." 14 Stat. at L. 147.

The practice of the government has corresponded with the legislation we have mentioned. It has uniformly recognized in its fiscal affairs the distinction in value between paper currency and coin. Some of its loans are made payable specifically in coin whilst others are payable generally in lawful money. It goes frequently into the money market, and at one time buys coin with currency, and at another time sells coin for currency. In its transactions it every day issues its checks, bills and obligations, some of which are payable in gold, while others are payable simply in dollars. And it keeps its accounts of coin and currency distinct and separate.

If we look to the act of 1862, in the light of the contemporaneous and subsequent legislation of Congress, and of the practice of the government, we shall find little difficulty in holding that it was not intended to interfere in any respect with existing or subsequent contracts payable by their express terms in specie; and that when it declares that the notes of the United States shall be lawful money, and a legal tender for all debts, it means for all debts which are payable in money generally, and not obligations payable in commodities, or obligations of any other kind.

In the case of *Cheang-Kee* v. *U. S.* 3 Wall. 320, 18 L. ed. 72, a judgment for unpaid duties, payable in gold and silver coin of the United States, rendered by the circuit court for the district of California, was affirmed by this court.

It is evident that a judgment in any other form would often fail to secure to the United States payment in coin, which the law requires, or its equivalent. If the judgment were rendered for the payment of dollars generally it might, according to the recent decision of this court, be paid in *note dollars, [*698 and, if they were depreciated, the government would not recover what it was entitled to receive. If, on the other hand, the value of the coin was estimated in currency and judgment for the amount entered, the government, in

case of any delay in the payment of the judgment, by appeal or otherwise, would run the risk of losing a portion of what it was entitled to receive by the intermediate fluctuations in the value of the currency. From considerations of this kind this court felt justified in sustaining the judgment of the circuit court for California, requiring its amount to be paid specifically in coin, as being the only mode by which the law could be fully enforced.[1] The same reasoning justified similar judgments upon contracts that stipulated specifically for the payment of coin. The 20th section of the act of 1792 (1 Stat. at L. 250, § 20) establishing a mint and regulating the coins of the United States, in providing that the money of account of the United States shall be expressed in dollars, dimes, cents and mills, and that all proceedings in the courts of the United States shall be kept in conformity with this regulation, impliedly, if not directly, sanctions the entry of judgments in this form. The section has reference to the coins prescribed by the act, and when by the creation of a paper cur-
699*] rency, another kind of money, *expressed by similar designations, was sanctioned by law and made a tender in payment of debts, it was necessary, as stated in *Bronson* v. *Rodes*, to avoid ambiguity and prevent a failure of justice, to allow judgments to be entered for the payment of coined dollars, when that kind of money was specifically designated in the contracts upon which suits were brought.

It follows from the views expressed, that the judgment of the supreme court of Iowa must be reversed and that court directed to remand the cause to the proper inferior court of the state for further proceedings in conformity with this opinion; *and it is so ordered.*

Mr. Justice **Bradley**, dissenting:

I dissent from the opinion of the court in this case for reasons stated in my opinion delivered in the cases of *Knox* v. *Lee* and *Parker* v. *Davis*, *ante*, 287. In all cases where the contract is to pay a certain sum of money of the United States, in whatever phraseology that money may be described (except cases specially exempted by law), I hold that the Legal Tender Acts make the Treasury notes a legal tender. Only in those cases in which gold and silver are stipulated for as bullion can they be demanded in specie, like any other chattel. Contracts for specie made since the Legal Tender Acts went into operation, when gold became a commodity subject to market prices, may be regarded as contracts for bullion. But all contracts for money made before the acts were passed must, in my judgment, be regarded as on the same platform. No difficulty can arise in this view of the case in sustaining all proper transactions for the purchase and sale of gold coin.

Mr. Justice **Miller**, dissenting:

In the case of *Bronson* v. *Rodes* I expressed my dissent on the ground that a contract for gold dollars in terms, was in no respect different, in legal effect, from a contract for *dollars without the qualifying words, [*700 "specie or gold," and that the legal tender statutes had, therefore, the same effect in both cases.

I adhere to that opinion, and dissent from the one just delivered by the court.

THE NORTHWESTERN UNION PACKET CO., *Plff. in Err.*,
v.
HOME INSURANCE COMPANY OF NEW YORK.

Allowance of writ of error, when necessary.

An allowance of a writ of error to a state court is necessary.

[No. 467.]

Motion submitted Jan. 19, 1872. Decided Jan. 29, 1872.

IN ERROR to the Supreme Court of Iowa. On motion.

The grounds of the motion to dismiss sufficiently appear in the opinion.

Mr. L. Allis for plaintiff in error.

Mr. **Geo. W. McCrary** for defendant in error.

Mr. Chief Justice **Chase** delivered the opinion of the court:

On looking at the record we find no allowance of a writ of error, either by a justice of this court or by a judge of the state court. We have repeatedly decided that such an allowance was necessary, upon a writ of error addressed to the highest court of the state, by which the judgment or decree could be rendered. *Callan* v. *May*, 2 Black, 543, 17 L. ed. 282; *Twitchell* v. *Com.* 7 Wall. 321, 19 L. ed. 223; *Gleason* v. *Florida*, 9 Wall. 779, 19 L. ed. 730. The case of *Davidson* v. *Lanier*, 4 Wall. 453, 18 L. ed. 379, referred to by counsel for the plaintiff in error, was a writ of error addressed to an inferior court of the United States, and is therefore inapplicable.

The writ before us must be dismissed.

WILLIAM A. FREEBORN *et al.*, *Appts.*,
v.
THE SHIP PROTECTOR, J. C. Bell, *Claimant*, etc.

(See S. C. 12 Wall. 700-702.)

When the Civil War commenced and closed—dates—statute of limitations.

The proclamation of intended blockade by the President gives the date when the Civil War began.

1.—The 12th section of the act of Congress of March 3d, 1865, entitled, "AN Act Amendatory of Certain Acts Imposing Duties Upon Foreign Importations," enacts "that in all proceedings brought by the United States in any court for due recovery, as well of duties upon imports alone as of penalties for the non-payment thereof, the judgment shall recite that the same is rendered for duties, and such judgment, interest and costs shall be payable in coin by law receivable for duties, and the execution issued on such judgment shall set forth that the recovery is for duties, and shall require the marshal to satisfy the same in the coin by law receivable for duties; and, in case of levy upon and sale of the property of the judgment debtor, the marshal shall refuse payment from any purchaser at such sale in any other money than that specified in the execution."

It appears, from the examination of the record in Cheang-Kee v. The United States, that the judgment of the circuit court in that case, affirmed by the Supreme Court, was rendered before this act was passed, namely, on the 8th of August, 1864.

and the proclamation that the war had closed gives the date of its ending.

The war did not begin or close at the same time in all the states.

There were two proclamations of intended blockade: The first, Apr. 19, 1861, embracing certain states; the second, Apr. 27, 1861, embracing other states; and there were two proclamations declaring that the war had closed. One, issued Apr. 2, 1866, embracing certain states; and the other, issued Aug. 20, 1866, embracing the state of Texas.

Where more than five years had elapsed from the close of the war till the time when an appeal was brought, the case will be dismissed.

[No. 431.]

Argued Dec. 22, 1871. Decided Jan. 29, 1872.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is sufficiently stated by the court.

Mr. **F. S. Blount,** for appellants:

We contend that Congress by its legislation recognized Aug. 20, 1866, as the date when the war closed, and that that should control. *Levy* v. *Stewart, ante,* 86; *U. S.* v. *Anderson,* 9 Wall. 56, 19 L. ed. 615, 11 Am. Law Reg. N. S. 419.

Mr. **P. Phillips,** for appellee:

First. We have the determination of this court in the *Prize Cases,* "where the regular course of justice is interrupted by revolt, rebellion, or insurrection so that the courts of justice cannot be kept open, then civil war exists." The corollary of this is that, when the courts can be kept open, civil war does not exist. Hale, P. C., 499.

Second. We have the action of this court in hearing and determining, in 1865, the causes which, prior to the war, had been brought up from the south. Suitors were then held to a strict prosecution of their legal remedies.

Third. The proclamation of Aug. 16, 1861, which forbade intercourse, at the same time declared that intercourse should only remain unlawful until the insurrection ceased. As soon as it ceased, or was suppressed, all the rights of intercourse immediately revived, by virtue of the proclamation itself.

Fourth. Immediately after the cessation of hostilities, postoffices were re-opened, mail contracts entered into, and the revenue system extended throughout these states.

Fifth. We have the proclamation of May 10, 1865, that armed resistance was to be regarded as virtually at an end.

Sixth. We have the proclamations of May 22 and 29, restoring foreign commerce, and granting amnesty and pardon.

Seventh. We have the proclamation of June 13, 1865, removing "all restrictions upon internal and domestic intercourse and trade."

Eighth. We have the proclamation of June 21, 1865, declaring the opening of the courts of the United States in Alabama.

Ninth. We have the proclamation of Apr. 2. 1866, declaring that the insurrection had ceased to exist in the state of Alabama and other states "and is henceforth so to be regarded."

It would seem impossible to hold, in the presence of these facts, that the appellant was not free to act after the date of these transactions.

Judge Busteed was appointed in Jan., 1864, and the clerk's office was opened as soon as the city of Mobile was occupied by the Federal forces. Court was opened at the December term, 1865, and from that time onward, regular sessions have been held. The appellant could have applied for his appeal, either to this judge or to any justice of the Supreme Court, and this might have been done without even going to Mobile for this purpose. It was only necessary to send the citation there for service, and this could have been accomplished as soon as the city had surrendered. The war, for all practical purposes in reference to intercourse and commerce, was then at an end. *Semmes* v. *Ins. Co.* 6 Blatchf. 458.

Mr. Chief Justice **Chase** delivered the opinion of the court:

This is a motion to dismiss an appeal from the decree of the circuit court of the United States for the southern district of Alabama. A motion to dismiss an appeal from the same decree, for the reason that it was not brought within one year from the passage of the act of March 2, 1867 (14 Stat. at L. 545), was made and denied at the December term, 1869. 9 Wall. 689, 19 L. ed. 812. The appeal was subsequently dismissed on another ground (*ante,* 47). The ground of the present motion is, that more than five years, excluding the time of the Rebellion, elapsed after the rendering of the decree before the appeal was brought.

By the act of 1789, it is provided that writs of error shall not be brought but within five years from the rendering or passing the judgment or decree complained of. By the act of 1803, appeals from decrees were allowed, subject to the same rules, regulations, and restrictions as writs of error. 2 Stat. 244. As a writ of error is not brought (*Brooks* v. *Norris,* 11 How. 204) until it is filed in the court where the judgment was rendered, so an appeal is not brought until it is rendered or filed in the same way.

The decree in this case was rendered on the 5th of April, 1861, and the present appeal was allowed on the 6th of May, 1871, and filed in the clerk's office of the proper court, or brought on the 17th of May, 1871.

In *Hanger* v. *Abbott,* it was held that the statute of limitations did not run during the Rebellion, against citizens of states adhering to the national government, having demands against citizens of the insurgent states. 6 Wall. 532, 18 L. ed. 939; *The Protector,* 9 Wall. 689, 19 L. ed. 812.

The question in the present case is, When did the Rebellion begin and end? In other words, what space of time must be considered as excepted from the operation of the statute of limitations by War of the Rebellion?

Acts of hostility by the insurgents occurred at periods so various, and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and the close of the late Civil War, that it *would be difficult, if not [*702 impossible, to say on what precise day it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken.

The proclamation of intended blockade by the President may, therefore, be assumed as marking the first of these dates, and the proclamation that the war had closed, as marking the second. But the war did not begin or close at the same time in all the states. There were two proclamations of intended blockade: The first, of the 19th of April, 1861 (12 Stat. at L. 1258), embracing the state of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas; the second, of the 27th of April, 1861 (12 Stat. at L. 1259), embracing the states of Virginia and North Carolina; and there were two proclamations declaring that the war had closed: One issued on the 2d of April, 1866 (14 Stat. at L. 811), embracing the states of Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana, and Arkansas; and the other issued on the 20th of August, 1866 (14 Stat. at L. 814), embracing the state of Texas.

In the absence of more certain *criteria*, of equally general application, we must take the dates of these proclamations as ascertaining the commencement and the close of the war in the states mentioned in them. Applying this rule to the case before us, we find that the war began in Alabama on the 19th of April, 1861, and ended on the 2d of April, 1866. More than five years, therefore, had elapsed from the close of the war till the 17th of May, 1871, when this appeal was brought.

The motion to dismiss, therefore, must be granted.

END OF VOLUME 79.

XII WALLACE.

12 Wall. 1-18, 20 L. 272, THE COLLECTOR v. HUBBARD.

Internal revenue.— Suits to recover moneys illegally exacted as internal revenue duties cannot be commenced in Circuit Courts except where taxpayer and collector are citizens of different States, p. 8.

Courts.— Supreme Court has jurisdiction to re-examine judgment of State court drawing in question acts of Congress imposing revenue duties, p. 9.

Internal revenue.— Collectors of internal revenue being required to pay all moneys collected by them into treasury of United States, the law, in absence of statutory regulations, implies no promise on his part to repay a taxpayer, even when the assessment was erroneous or illegal, p. 12.

Internal revenue.— Under acts of Congress, a taxpayer may, if revenue tax is illegal, maintain an action against collector to recover the amount, p. 13.

Internal revenue.— Under act of 1866, suits to recover taxes, paid under illegal assessment, are absolutely prohibited until taxpayer shall appeal to commissioner of internal revenue, p. 14.

Followed on precise point in Commissioners of Sinking Fund v. Buckner, 48 Fed. 541, and Hubbard v. Kelley, 8 W. Va. 48, 49.

Internal revenue.— Provision of act of 1866, requiring appeal to be made to commissioner of internal revenue before suit, applies to all suits commenced after passage of act, in State as well as Federal courts, p. 15.

Courts.— Fact that a suit was pending at time jurisdiction was taken away from Circuit Court, cannot affect a new suit brought in the court to which jurisdiction has been transferred, p. 15.

Constitutional law.— A party has no vested right to a remedy conferred by act of Congress, so as to prevent Congress from modifying it or adding new conditions to its exercise, p. 16.

Taxation.— There is no vested right at common law for the recovery of money paid, under protest, for illegally collected taxes, pp. 14-16.

Cited in Railroad Co. v. Commissioners, 98 U. S. 544, 25 L. 197, taxes paid under protest are not necessarily paid involuntarily;

Wright v. Blakeslee, 101 U. S. 179, 25 L. 1050, there must be protest in some form when payment is involuntary.

Internal revenue.— Under act of June, 1864, annual gains of corporation, whether divided or not, are taxable as part of income of shareholders, p. 18.

Internal revenue.— Under act of 1866, taxpayer had until after appeal to commissioner was decided in which to sue for taxes paid under protest, but, if decision was postponed longer than six months, he might sue within one year from time the appeal was taken, p. 14.

Cited in Cheatham v. United States, 92 U. S. 90, 23 L. 563, reviewing practice on appeals of this character. Followed in Francis v. Slack, 4 Cliff. 189, F. C. 5,041, holding suit barred for failure to sue in one year.

12 Wall. 19–30, 20 L. 255, STURGES v. THE COLLECTOR.

Customs duties.— Money paid for import duties, illegally levied, may be recovered back, in assumpsit against the collector, if party paid under written protest, and failed to obtain redress by appeal seasonably taken to secretary of treasury, p. 24.

Customs duties.— Where act provided that all goods, the growth or product of countries east of Cape of Good Hope, excepting certain named, were, when imported from places west of the Cape of Good Hope, to be taxed 10 per cent. ad valorem in addition to the duties imposed when imported directly from the place of production, a commodity which was free from duty when imported from Persia, was taxable 10 per cent. ad valorem when imported from London, p. 30.

Followed on precise point in Russell v. Williams, 106 U. S. 627, 27 L. 222, 1 S. Ct. 412. Approved in Powers v. Cornly, 101 U. S. 790, 25 L. 806, holding opium imported from Persia, via England, subject to additional duty.

12 Wall. 31–47, 20 L. 251, THE MARIA MARTIN.

Admiralty.— Appeals in admiralty are subject to same rules, regulations and restrictions as in case of writs of error, p. 40.

Admiralty.— Where both parties appeal, both may assign error, p. 40.

Admiralty.— Where only one party appeals the other cannot be heard except in support of decree from which appeal is taken, p. 41.

Affirmed in The Mabey, 13 Wall. 741, 20 L. 474.

Collision.— Where officers and crew of vessel in tow, as well as officers and crew of tug participate in navigation of vessels, and

a collision with another vessel ensues, the tug alone or tow alone, or both jointly, may be liable according as one or both are deficient in skill, negligent or inattentive, p. 44.

Followed in The Imperial, 13 Sawy. 643, 38 Fed. 617, 3 L. R. A. 237, and n., holding tug not liable for injury caused by collision of tow with another vessel; The Frank Moffat, 2 Flipp. 294, F. C. 5,060, and Westhoff v. The Bark Oluf, 3 Woods, 669, F. C. 17,449, both holding tow not liable where collision occurred through fault of tug; The Express, 46 Fed. 861, holding both tug and tow liable. Cited in note on liability for injury caused by towed vessel, 25 Am. Dec. 354.

Collision.— When a tug is under charge of her own master and crew, and in the usual and ordinary course of her employment undertakes to transport another vessel which for the time being has neither master nor crew on board, from one point to another, over waters where such accessory motive power is necessary, or usually employed, she is legally responsible for the navigation of both vessels, p. 44.

Cited in The W. H. Clark, 5 Biss. 307, F. C. 17,482, ordinarily tug is responsible for both tug and tow. Cited obiter in The Chickasaw, 38 Fed. 361.

Collision.— Where both vessels are at fault damages must be apportioned between them, p. 43.

Followed in The Pegasus, 22 Blatchf. 10, 19 Fed. 48, The Columbia, 23 Blatchf. 270, 25 Fed. 845, French v. The Victoria, 9 Fed. Cas. 804, and The Oregon, 14 Sawy. 450, 45 Fed. 68.

Collision.— In this case the court affirmed a decree directing damages to be divided between the offending vessels and requiring each to pay its own costs, p. 47.

Cited and relied upon in The Columbia, 23 Blatchf. 270, 25 Fed. 845, The Hercules, 51 Fed. 453, 454, and Vanderbilt v. Reynolds, 16 Blatchf. 86, 90, 91, F. C. 16,839, where the aggregate costs were divided; The Pegasus, 22 Blatchf. 10, 19 Fed. 48, where the court divided the damages but disallowed the costs below.

Collision.— Even flagrant fault committed by one of two approaching vessels does not excuse the other from adopting every precaution, and if collision results through its failure so to do, damage must be apportioned between the two, p. 47.

Followed in The Sunnyside, 91 U. S. 214, 23 L. 304, The America, 92 U. S. 438, 23 L. 727, The Mary C., 1 Hask. 485, F. C. 9,201, The Oregon, 14 Sawy. 450, 45 Fed. 68, The Pegasus, 22 Blatchf. 10, 19 Fed. 48, The Columbia, 23 Blatchf. 270, 25 Fed. 845, French v. The Victoria, 9 Fed. Cas. 804, The Express, 46 Fed. 861, and The Hercules, 51 Fed. 453, 454, all holding damages must be divided

equally between offending vessels though much greater blame attach to one than to the other; The J. W. Everman, 2 Hughes, 24, F. C. 7,591, holding neglect of one vessel to show light at night does not absolve another vessel from moving cautiously in the harbor. Cited in 75 Am. Dec. 602, in note on rights and duties not founded in contract of vessels in navigable waters.

Collision.— Errors committed by one of two approaching vessels, do not excuse other, from adopting every precaution required by special circumstances of case to prevent collision, p. 47.

Quoted and affirmed in The Sunnyside, 91 U. S. 214, 23 L. 304, holding sailing vessel approaching steamer must use every necessary precaution to prevent collision; The Mary C., 1 Hask. 485, F. C. 9,201, holding both vessels at fault if either could have prevented collision. Followed on precise point in The Oregon, 14 Sawy. 450, 45 Fed. 68, The America, 92 U. S. 438, 23 L. 726, The Pegasus, 22 Blatchf. 10, 19 Fed. 48, The Columbia, 23 Blatchf. 270, 25 Fed. 845, French v. The Victoria, 9 Fed. Cas. 804, The Express, 46 Fed. 861, and The Louise, 52 Fed. 888, 8 U. S. App. 138, all holding vessel guilty of contributory negligence for continuing at full speed; The Oceanic, 61 Fed. 359, 360, holding vessel guilty for failure to reverse her engines as soon as she perceived approaching vessel was not answering her helm; The City of Chester, 78 Fed. 189, 42 U. S. App. 366, holding vessel guilty for proceeding after failing to get answer to signal; The Bowden, 78 Fed. 652, 42 U. S. App. 374, for failure to sound danger signal when approached while lying in harbor without steam up; New York, etc., Towboat Co. v. New York, etc., Ry. Co., 148 N. Y. 580, 42 N. E. 1088, for failure to stop and reverse engines upon approaching danger; The Steamer State of Texas, 20 Fed. 256, for failure of lookout to notice approaching tug; The Sam Rotan, 20 Fed. 336, for failure of lookout to notice manœuvre of approaching tug and tow; The Victory, 68 Fed. 399, 25 U. S. App. 271, for failure to take any other precautions than to repeat signals that she saw were disregarded.

Miscellaneous.— Cited incidentally in The City of Hartford, 97 U. S. 328, 24 L. 931, and The Barque Kallisto, 2 Hughes, 144, F. C. 7,600, to no decided point.

12 Wall. 47–65, 20 L. 265, RAILROAD CO. v. DUBOIS.

Patents.— A claim in a patent for "building and setting piers by means of a floating coffer-dam substantially as set forth," is a claim for a device, not a process, p. 60.

Cited in Dederick v. Cassell, 9 Fed. 312, construing patent claim for method to be for a method of operating in connection with a particular machine.

Patents.— It is not evidence of fraud in obtaining patent that before making application patentee explained his invention orally

to several persons, and when another person devised and perfected the same thing and discussed it in presence of patentee, he had made no claim to it, p. 63.

Patents.— Action of an inventor in remaining silent while another person is engaged in perfecting and preparing to use the same device which he has invented does not amount to an estoppel in pais, p. 63.

Patents.— One sued for infringement may not set up as a defense that patent was fraudulently obtained, no fraud appearing on its face, p. 64.

Estoppel.— A party is not estopped by silence unless he has misled another to his hurt, p. 64.

Quoted, arguendo, in Anderson v. Walker, — Tex. Civ. App. —, 49 S. W. 947, discussing equitable estoppel.

Patents.— Novelty of a patented invention cannot be assailed by any other evidence than that of which notice has been given, p. 65.

Followed in La Baw v. Hawkins, 14 Fed. Cas. 897.

Patents.— Evidence of state of an art at time an invention is patented, is proper for the court in construing the patent and determining what invention was claimed, p. 65.

Followed in Grier v. Wilt, 120 U. S. 429, 30 L. 718, 7 S. Ct. 729, holding evidence of condition of fruit-drying art admissible to aid construction of patent; Britton v. White Mfg. Co., 61 Fed. 96, admitting evidence of state of coachmaker's art to construe patent for coach lamp; La Baw v. Hawkins, 14 Fed. Cas. 897, ruling similarly as to mitre-machine industry.

Patents.— Evidence of state of an art at time an invention was patented has no legitimate bearing upon question whether patentee was first inventor, p. 65.

Followed in Grier v. Wilt, 120 U. S. 429, 30 L. 718, 7 S. Ct. 729, holding evidence of state of fruit-drying art inadmissible to show want of novelty; Union Paper Bag Co. v. Pultz, etc., Co., 15 Blatchf. 164, F. C. 14,392, refusing to admit evidence of prior experiments to show want of novelty; La Baw v. Hawkins, 14 Fed. Cas. 897, holding evidence of prior public use of mitre-machines inadmissible to show want of novelty.

12 Wall. 65–86, 20 L. 354, RAILROAD CO. v. HARRIS.

Corporations.— Where a corporation was organized in Maryland to construct a railroad in Maryland and Virginia, the charter granted by the latter State, being a re-enactment of the original charter, did not create a new corporation, but was a mere license, p. 81.

Affirmed in Goodlett v. Louisville, etc., R. R., 122 U. S. 402, 30 L. 1231, 7 S. Ct. 1255, holding, on similar facts, charter of Kentucky

514, 12 Fed. 362, holding consequently that want of proper service on defendant corporation cannot be raised by demurrer to complaint; Wilson Packing Co. v. Hunter, 8 Biss. 431, 432, F. C. 17,852, holding corporation doing business in foreign State is liable to suit there, even though there be no express statute authorizing it; Fonda v. British American, etc., Co., 9 Fed. Cas. 354, holding appointment of agent for service amounts to agreement with State that corporation may be sued there; Ehrman v. Teutonia Ins. Co., 1 McCrary, 128, 129, 1 Fed. 476, 477, holding foreign corporation bound by service on auditor, although it had never filed its written consent thereto as required by statute; Brownell v. Troy, etc., R. R. Co., 18 Blatchf. 244, 3 Fed. 762, holding appointment of agent upon whom statute provides service may be made amounts to consent that service shall be made upon him; Mohr Distilling Co. v. Insurance Cos., 12 Fed. 476, holding foreign insurance companies doing business through agents may be served in State where such agent is found doing business; Merchants' Mfg. Co. v. Grand Trunk Ry. Co., 21 Blatchf. 111, 13 Fed. 359, right to object to service of process is waived by foreign corporation, which avails itself of comity of State to transact business therein; Gray v. Quicksilver Min. Co., 10 Sawy. 263, 21 Fed. 289, and Consolidated Store-Service Co. v. Lamson Cons. Store-Service Co., 41 Fed. 834, both holding similarly; Van Dresser v. Oregon Ry., etc., Co., 48 Fed. 205, holding State law providing for service upon agents of foreign corporations doing business in the State is binding upon all foreign corporations doing business there; Mooney v. Buford, etc., Mfg. Co., 72 Fed. 41, 34 U. S. App. 581, holding foreign corporation, which has complied with statute, requiring appointment of agent for service, may be sued on contracts made without the State; Sullivan v. Sullivan Timber Co., 103 Ala. 375, 15 So. 942, 25 L. R. A. 544, holding under local statute that foreign corporation can only be sued in county in which it does business; Colorado Iron Works v. Sierra Grande M. Co., 15 Colo. 508, 22 Am. St. Rep. 437, 25 Pac. 328, holding single purchase made by foreign corporation is doing business within rule sufficient to give jurisdiction in action for purchase money; Williams v. East Tenn., etc., Ry. Co., 90 Ga. 522, 16 S. E. 304, holding under rule foreign railway corporation is bound by implied assent to conditions imposed as to the bringing of actions; Wall v. Chicago, etc., Ry. Co., 69 Iowa, 500, 29 N. W. 427, holding foreign railway doing business in a State is a resident thereof within meaning of statute of limitations; German Bank v. American Fire Ins. Co., 83 Iowa, 495, 32 Am. St. Rep. 319, 50 N. W. 54, holding foreign corporation, which has appointed agent for service of process, becomes a domestic corporation within the meaning of the attachment laws; Fred Miller Brewing Co. v. Council Bluffs Ins. Co., 95 Iowa, 35, 63 N. W. 506, holding foreign corporation doing insurance business within State implies consent to statutory condition that broker shall be deemed

agent of insurer; Sparks v. National Masonic Accident Assn., 100 Iowa, 466, 69 N. W. 681, holding insurance company which does business in State cannot question validity of service upon agent upon the ground that it has not filed written authority as required by law; German Ins. Co. v. Hall, 1 Kan. App. 46, 41 Pac. 70, presumption that corporation has complied with condition precedent to doing business is conclusive; McNichol v. United States Mercantile Reporting Co., 74 Mo. 473, holding State may authorize rendition of personal judgment against foreign corporation, doing business therein, by service of process upon agent; Smith v. Pilot Mining Co., 47 Mo. App. 417, legal residence of corporation is place where it exercises its corporate functions; King v. National, etc., Co., 4 Mont. 7, 1 Pac. 730, foreign corporation within the benefit of the statute of limitations, even though it has not complied with the law regarding appointment of agent for service of process; Humphreys v. Newport News, etc., Co., 33 W. Va. 137, 10 S. E. 40, holding foreign corporation, doing business within a State, becomes subject to process, even in action upon cause arising without the State; State v. Milwaukee, etc., R. Co., 45 Wis. 599, applying rule where proceeding was quo warranto. Affirmed, arguendo, in Philadelphia Fire Assn. v. New York, 119 U. S. 123, 30 L. 348, 7 S. Ct. 115, dissenting opinion in Stout v. Sioux City, etc., R. R. Co., 3 McCrary. 6, 8 Fed. 797, and Reyer v. Odd Fellows' Accident Assn., 157 Mass. 372, 34 Am. St. Rep. 292, 32 N. E. 471.

Cited also generally in Mahany v. Kephart, 15 W. Va. 622. Cited in note on service on foreign corporations, 66 Am. Dec. 121. Cited obiter in Moch v. Virginia, etc., Ins. Co., 4 Hughes, 120, 10 Fed. 706. But held in Queensbury v. People's B. & L. Assn., 44 W. Va. 516, 30 S. E. 74, that mere appointment of agent for service of process does not make corporation domestic.

But see Boston Electric Co. v. Electric Gas, etc., Co., 23 Fed. 839, holding Massachusetts Circuit Court had no jurisdiction of action against Maine corporation doing business in Massachusetts in absence of statute permitting foreign corporations to do business in latter State. Distinguished in United States v. Am. Bell Telephone Co., 29 Fed. 35, 37, holding corporation having extensive property interests in State, through operations of licensee of its patents, is not doing business in such State within the rule; St. Louis Wire Mill Co. v. Consolidated Barb-Wire Co., 32 Fed. 804, holding service on officer of foreign corporation in State on pleasure trip, where such corporation had no officer or agent within the State, and its only business therein consisted in making occasional purchase of raw material, was not sufficient to give jurisdiction to render judgment against such foreign corporation; Maxwell v. Atchison, etc., R. Co., 34 Fed. 288, discussing question of the character or amount of business which a foreign corporation must do within a State to subject its agent to service of process, and hold-

ville Trust Co. v. Louisville, etc., R. Co., 75 Fed. 442, 447, 43 U. S. App. 550, holding corporation of Indiana may also be corporation of Kentucky; Meyer v. Johnston, 53 Ala. 321, holding corporations identical, even where incorporated under different names; Meyer v. Johnston, 64 Ala. 657, affirming doctrine of preceding citation; Grangers' Life, etc., Ins. Co. v. Kamper, 73 Ala. 345, holding corporation may be created by State having as one of its constituents a foreign corporation; Central R. & Banking Co. v. Carr, 76 Ala. 392, 52 Am. Rep. 342, holding railroad corporation incorporated in two States has a legal residence in each of them; Angier v. East Tenn., etc., R. Co., 74 Ga. 638, 641, holding corporation may become domestic corporation of another State by purchasing franchise and assuming obligations of domestic corporation; State Board v. Morris, etc., R. Co., 49 N. J. L. 219, 7 Atl. 839, holding State legislature may confer franchise upon foreign corporation without making it a local corporation; Hall v. Bank of Virginia, 14 W. Va. 623, corporation having charters from two States is domestic corporation of both; Baltimore, etc., R. Co. v. Pittsburgh, etc., R. Co., 17 W. Va. 872, 875, 876, 878, to same effect. Cited in note on interstate consolidation of corporations, 79 Am. Dec. 427; note, 3 Dill. 274, F. C. 17,728, on this point; note on domicile of corporations, 65 Am. Dec. 264.

Distinguished in Chicago, etc., Ry. Co. v. Auditor-General, 53 Mich. 88, 18 N. W. 590, holding a corporation may not be created by joint act of several States except by compact or treaty.

Corporations.— A State may make a corporation of another State a corporation of its own as to any property within its territorial jurisdiction, p. 82.

Affirmed in Clark v. Barnard, 108 U. S. 452, 27 L. 786, 2 S. Ct. 886, and Graham v. Boston, etc., R. R., 118 U. S. 168, 30 L. 201, 6 S. Ct. 1013, both holding railroad company of Massachusetts, which had acquired franchises of railroad corporation, became, quoad the property in the latter State, a corporation thereof; Louisville, etc., Ry. v. Louisville Trust Co., 174 U. S. 562, 19 S. Ct. 821, collecting cases, and holding corporation organized under laws of Indiana may become corporation of Kentucky; Copeland v. Memphis, etc., R. R. Co., 3 Woods, 662, F. C. 3,209, Tennessee corporation may become corporation of Alabama; Stout v. Sioux City, etc., R. R. Co., 3 McCrary, 6, 8 Fed. 797, holding railway corporation of Iowa a citizen of Nebraska under act of legislature; Young v. South Tredegar Iron Co., 85 Tenn. 194, 4 Am. St. Rep. 756, 2 S. W. 204, holding stock of corporation may be attached in foreign State in which it has its principal place of business; Horne v. Boston, etc., R. Co., 62 N. H. 455, holding railroad operating in three States under charters from each has no right of removal of cause when sued in either State. Cited in dissenting opinion in St. Louis, etc., Ry. v. James, 161 U. S. 568, 40 L. 810, 16 S. Ct. 629, arguing corporation may be so far corporation of another State as to defeat right of re-

moval of causes; Boston, etc., R. R. v. New York, etc., R. R., 13 R. I. 279, discussing power of State to impart sovereign powers to foreign corporation. Cited, arguendo, in Martin v. Baltimore, etc., R. R. Co., 151 U. S. 683, 38 L. 315, 14 S. Ct. 537, discussing railroad corporations formed in one State and licensed to operate in another.

Distinguished in Baltimore, etc., R. Co. v. Wightman, 29 Gratt. 435, 26 Am. Rep. 385, holding foreign corporation, leasing and operating railroad of domestic corporation in State, cannot remove cause to Federal courts.

Courts — Process.— Where statute provided that person against whom action was brought must be an inhabitant of or found within the district at the time of serving the writ, it is satisfied if the defendant is a corporation doing business there at the time of commencement of the suits, pp. 82–84.

Affirmed in Ex parte Schollenberger, 96 U. S. 375, 378, 24 L. 854, 855, holding, in action against foreign insurance companies, that it is sufficient if they were found in district at time of commencement of action; Hat-Sweat Mfg. Co. v. Davis Sewing-Machine Co., 31 Fed. 296, Blackburn v. Selma, etc., R. R. Co., 2 Flipp. 535, 536, F. C. 1,467, Wotherspoon v. Mass. Ben. Assn., 38 Fed. 625, Dinzy v. Ill. Cent. R. Co., 61 Fed. 51, Williams v. Empire Transp. Co., 29 Fed. Cas. 1364, Hayden v. Androscoggin Mills, 1 Fed. 95, Uphoff v. Chicago, etc., Ry., 5 Fed. 547, Eaton v. St. Louis, etc., Smelting Co., 2 McCrary, 365, 7 Fed. 141, Robinson v. Nat. Stock-Yard Co., 20 Blatchf. 514, 12 Fed. 362, Mohr v. Insurance Cos., 12 Fed. 476, and Sayles v. Erie Ry. Co., 21 Fed. Cas. 605, all holding a corporation doing business in a State is "found" there within the rule; Runkle v. Lamar Ins. Co., 2 Fed. 12, 13, holding that corporation which has consented to be served in a State is found within the district in which the State is situated; Miller v. Eastern Oregon Gold Min. Co., 45 Fed. 347, holding foreign corporation may be an "inhabitant" of another State within meaning of judiciary act; Gilbert v. New Zealand Ins. Co., 49 Fed. 886, 15 L. R. A. 127, holding similarly.

Corporations of one State may exercise their faculties in another so far and on such terms as may be permitted by latter, p. 83.

Cited in Fonda v. British American Assurance Co., 9 Fed. Cas. 354, holding State may require appointment of agent for service as condition precedent; Commonwealth v. New York, etc., R. Co., 129 Pa. St. 478, 15 Am. St. Rep. 729, 18 Atl. 413, holding State act requiring corporations to deduct taxes in certain cases applicable to foreign corporations; Ins. Co. of N. A. v. Commonwealth, 87 Pa. St. 182, 30 Am. Rep. 354, discussing State power of taxation of foreign corporation.

Pleading.— Where defect in declaration is one of form, not of substance, it cannot be reached by subsequent demurrer to replication, p. 84.

Cited in Park v. Kelly Axe Mfg. Co., 49 Fed. 622, 6 U. S. App. 26.

Pleading.— Plea in bar waives all pleas and right to plead in abatement, p. 84.

Followed in Cuthbert v. Galloway, 35 Fed. 468, holding plea to the merits waives plea to the jurisdiction; Cruzen v. McKaig, 57 Md. 459, to same effect. Cited in Provisional Municipality v. Lehman, 57 Fed. 330, 13 U. S. App. 411, holding, where party desires to bring up judgment on demurrer for review, he must stand by the demurrer and not plead over in bar; dissenting opinion in Tise v. Shaw, 68 Md. 9, 11 Atl. 583, arguing plea of infancy in suspension of action is waived by plea in bar.

Railroads.— Where the several coupons of a traveller's ticket confine each company's liability to the portion of the route covered by the coupon, and entire route is owned by one corporation, though operating as two, the limitation is ineffective, p. 85.

Cited in Pouilin v. Canadian Pacific Ry. Co., 47 Fed. 859, as between company and passenger, ticket is not regarded as conclusive evidence of the contract, but as a mere token or voucher to the carrier's servants, who have conduct of the train that the holder has paid his fare. Cited in note in 62 Am. Dec. 129, on power of common carrier to limit liability by notice; and in note to 62 Am. Dec. 130, on common carrier's power to limit liability by express agreement; and in note to 83 Am. Dec. 688, to same effect.

Appearance.— If a corporation appear and defend in a foreign State, it is bound by the judgment, p. 86.

Followed in Gray v. Quicksilver Min. Co., 10 Sawy. 263, 21 Fed. 289, holding corporation by appearing waives question of jurisdiction; Blackburn v. Selma, etc., R. R. Co., 2 Flipp. 535, 536, F. C. 1,467, holding foreign corporation, by filing answer, waives right to be sued only in the districts of the State creating it.

Pleading.— Insufficient declaration may be cured by averments in the replication, p. 86.

12 Wall. 86–102, 20 L. 270, FRENCH v. SHOEMAKER.

Appeal and error.— Decree is final and appealable where it conclusively settles all legal rights of parties involved in the pleadings, p. 98.

Followed in Tuttle v. Claflin, 66 Fed. 8, 26 U. S. App. 678, holding decree final which awarded damages, unless one party should elect to refer matter to master within sixty days for further proofs; Andrews v. National Foundry, etc., Works, 73 Fed. 518, 34 U. S. App. 632, holding decree final in creditors' suit adjudging liens, etc.; Standard Elevator Co. v. Crane Elevator Co., 76 Fed. 772, 46 U. S. App. 411, decree adjudging validity of patent, and granting injunc-

tion against infringement, is final; Holland v. State, 15 Fla. 551, applying rule to judgment sustaining general demurrer to answer. Cited in 60 Am. Dec. 427, in note on this point.

Appeal and error.— Decree enjoining defendants from exercising disputed rights and adjudging that equities are with complainant, is final, p. 98.

Appeal and error.— Where judgment is for recovery of money not otherwise secured, the indemnity on appeal must be for whole amount of the decree, including damages for delay and costs and interest on appeal, p. 99.

Appeal and error.— It seems that after allowance of appeal, question of sufficiency of supersedeas bond becomes cognizable in Supreme Court, p. 99.

Cited in Morrin v. Lawler, 91 Fed. 694, when appeal is perfected, substitution must be made in appellate court. Followed in Richardson v. Richardson, 82 Mich. 307, 46 N. W. 671, the court taking a new supersedeas bond in the appellate court. Referred to in Rose v. Richmond Min. Co., 17 Nev. 77, 27 Pac. 1118, holding, in any event, supersedeas bond should be ample.

Denied in Jerome v. McCarter, 21 Wall. 31, 22 L. 517, holding discretion of lower judge will not be interfered with by Supreme Court.

Appeal and error.— Power to issue supersedeas to a decree in a subordinate court does not exist in Supreme Court, where appeal was not taken and proper bond filed within ten days from date of decree, p. 100.

Followed in First Nat. Bank v. McAndrews, 7 Mont. 438, 17 Pac. 556. Cited in Kitchen v. Randolph, 93 U. S. 89, 23 L. 811, reviewing history of supersedeas statutes; Bond v. South Carolina Ry. Co. 55 Fed. 188, refusing to postpone foreclosure sale where no supersedeas bond had been given on appeal from decree of foreclosure.

Appeal and error.— Where matter in controversy was possession of railroad, interest of defendant in which had been pledged as security for $5,000, upon decree for complainant, supersedeas bond for $500 is not necessarily insufficient, p. 100.

Cited in Kountze v. Omaha Hotel Co., 107 U. S. 389, 27 L. 613, 2 S. Ct. 921, holding, upon appeal from decree of foreclosure, supersedeas only covers waste and deterioration of mortgaged property.

Appeal and error.— Unless record shows the contrary, it will be presumed that amount of supersedeas bond is sufficient, p. 100.

Appeal from a decree enjoining defendant from certain proceeding will not prevent the courts ordering defendant to desist from another suit in another Federal court, even though there has been

given an indemnity bond on the appeal, and there are new parties in the second suit, p. 102.

Cited in May v. Printup, 59 Ga. 135, approvingly; also in Ex parte Dunn, 6 S. C. 309, discussing effect of writ of error as stay of proceedings.

12 Wall. 102–121, 20 L. 281, FOWLER v. RATHBONES.

Shipping.— Where several parties are engaged in same sea-risk, and one, in a moment of imminent peril, makes a sacrifice to avoid impending danger, or incurs extraordinary expenses to promote safety of all, the sacrifice and expenses must be assessed proportionately upon the interests which were exposed and saved, p. 114.

Cited in Hobson v. Lord, 92 U. S. 400, 23 L. 616, holding the greater and more imminent the peril, the more meritorious the claim; Sonsmith v. The J. P. Donaldson, 21 Fed. 675, holding propeller which cuts loose its tow in time of peril must contribute by general average; N. W. Transp. Co. v. Continental Ins. Co., 24 Fed. 174, holding damage from voluntary stranding recoverable under policy of insurance against loss and general average; The L'Amerique, 35 Fed. 841, holding expense of unloading cargo of stranded vessel is subject of general average; N. W. Transp. Co. v. Boston, etc., Ins. Co., 41 Fed. 805, allowing general average where damage resulted from storm which arose after vessel had stranded; The Roanoke, 46 Fed. 299, holding damage by water poured on cargo to extinguish fire is subject of general average. And see 14 Am. Dec. 613, 614, note.

Distinguished in Ralli v. Troop, 157 U. S. 395, 39 L. 747, 15 S. Ct. 660, holding scuttling of vessel by port wardens in port to prevent her burning, is not case for general average; Shoe v. Low Moor Iron Co., 46 Fed. 128, no general average is permitted where voluntary stranding is no benefit to either vessel or cargo; Emery v. Huntington, 109 Mass. 436, 12 Am. Rep. 730, holding expenses for repairs occasioned by collision, made intentionally, to avoid collision in a different part of the vessel, are not properly subject of general average.

Shipping.— Repairs rendered necessary to the vessel by the ordinary perils of navigation, to enable her to prosecute her voyage to her port of destination, must be borne by the owners, p. 117.

Cited in Hobson v. Lord, 92 U. S. 407, 23 L. 619, allowing services of crew in general average.

Shipping.— Where ship and cargo are in imminent peril, and ship is voluntarily stranded to save the whole adventure, cargo saved must contribute by general average to expense of getting her off, p. 118.

Shipping.— Stranding of vessel in shoal water to prevent her sinking in deep water, thereby increasing danger to ship in favor

of safety of cargo, is a voluntary stranding, entitling ship to general average, p. 118.

Appeal and error.—Facts found by a jury cannot be re-examined in Supreme Court, p. 119.

Shipping.— Where it was impossible to tell how much of damage to vessel resulted from voluntary stranding and how much from swelling of her cargo, jury may not assume that one-half was occasioned by each, p. 120.

Shipping.— Whether a cargo was damaged by voluntary stranding or by antecedent peril of the sea is a question of fact for the jury, p. 120.

Shipping.— Damage by water to cargo from holes cut in the vessel by ice are not ground for contribution by general average, p. 120.

Shipping.— Where a general average bond made certain provisions relating to adjustment, jury may be instructed to render verdict for plaintiff if they find adjustment to have been according to those provisions, p. 121.

Cited in Conrad v. De Montcourt, 138 Mo. 323, 39 S. W. 803, generally.

12 Wall. 121-129, 20 L. 279, NOONAN v. BRADLEY.

Executors and administrators.— Foreign administrators may appear on appeal in defense of decree rendered in favor of decedent in his lifetime even in absence of statutory authority, p. 128.

Appeal and error.— Supreme Court possesses no power to review its own final judgments or decrees at a term subsequent to the term when rendered, p. 129.

Cited in Tyler v. Magwire, 17 Wall. 285, 21 L. 584, holding jurisdictional question cannot be raised after case has been decided and cause remanded to State Supreme Court for final judgment; Ex parte Friday, 43 Fed. 918, a sentence given at one term cannot be set aside and a more severe one imposed at a subsequent term; Klever v. Seawall, 65 Fed. 378, 22 U. S. App. 458, rule applies to Circuit Court; Hart v. Stribling, 25 Fla. 445, 6 So. 456, whatever has been decided upon appeal cannot be re-examined upon subsequent appeal between the same parties; Goodrich v. Wilson, 135 Mass. 33, upon motion to affirm in accordance with mandate of Supreme Court, question of effect of intermediate insolvency may not be tried.

Appeal and error.— Where judgment has been rendered on appeal it cannot be attacked after lapse of nine terms by a motion to certify that the appeal had abated before the rendition, p. 129.

will be cancelled although a lien on the land is claimed by judgment against the grantee, pp. 157, 158.

Cited with approval in Snyder v. Martin, 17 W. Va. 300, 41 Am. Rep. 672, collecting authorities, and holding purchaser of land by parol in possession will be protected in equity against subsequent judgment creditor of vendor. See valuable note in 93 Am. Dec. 347.

Contracts.— Actual violence is not necessary to constitute duress; moral compulsion by threats of injury by imprisonment, etc., is sufficient to invalidate a contract, p. 158.

Cited with approval in Hartford Fire Ins. Co. v. Kirkpatrick, 111 Ala. 467, 20 So. 654, collecting authorities, and holding settlement of claim under policy, procured by threats of imprisonment, void; Kennedy v. Roberts, 105 Iowa, 528, 75 N. W. 365, refusing recovery on note procured by threats of arrest; Hatch v. Barrett, 34 Kan. 235, 8 Pac. 137, holding note procured by duress void in hands of bona fide holder; Tillman v. Ryan, 168 Pa. St. 492, 32 Atl. 90, granting recovery of money obtained by arrest of party. See note in 4 Am. Dec. 172.

Distinguished in United States v. Huckabee, 16 Wall. 432, 21 L. 464, holding no duress in sale of iron works to Confederacy after consultation and refusing recovery for seizure; Mason v. United States, 17 Wall. 74, 21 L. 566, holding change in contract for muskets, by government, without duress, and refusing recovery; Wood v. Craft, 85 Ala. 263, 4 So. 650, refusing to set aside conveyance for duress by third party where price was adequate, deed duly acknowledged, etc.

Judgments were not liens at common law, but by United States statutes judgments of Federal courts have the same effect as judgments of State courts in the respective Federal districts, p. 158.

Cited with approval in Cooke v. Avery, 147 U. S. 387, 37 L. 213, 13 S. Ct. 345, holding Federal court has jurisdiction to try title to land, resting on validity of lien acquired by judgment of Federal court; Thompson v. Avery, 11 Utah, 234, 39 Pac. 835, holding judgment of fine in criminal action recovered by United States creates a lien, subject to statute of limitations.

Judgment liens confer a right to levy on land to the exclusion of other adverse interests subsequently acquired, but constitute no property or right in the land itself, p. 158.

Cited with approval in Meier v. Kelly, 22 Or. 139, 29 Pac. 267, holding lien attaches only to actual interest of judgment debtor in land, and determining rights in land; Borst v. Nalle, 28 Gratt. 433, collecting authorities, and holding land transferred to agent to facilitate sale, not liable for agent's debts. See valuable note in 93 Am. Dec. 346.

12 Wall. 159–162, 20 L. 259, MILLER v. THE STATE.

Courts.— A motion to advance a cause on Supreme Court calendar, is not granted as of course even when both parties concur; the case must be one given such preference by law, p. 161.

Courts.— Quo warranto to try title of railroad directors brought in name of State will not be advanced on Supreme Court calendar, under statute of 1870 giving preference to causes wherein a State is a party, p. 162.

Followed in Spratt v. City of Jacksonville, 29 Fla. 178, 10 So. 735, reviewing authorities, and refusing to advance a case not within the provisions of the court rules.

12 Wall. 163–164, 20 L. 260, WARD v. MARYLAND.

Courts.— On error to State court after conviction for trading without a license where party is not in jail, cause will not be advanced on Supreme Court calendar, under statute of 1870 or thirtieth rule of court, on motion of plaintiff in error, p. 164.

Cited, arguendo, in Miller v. Texas, 153 U. S. 539, 38 L. 814, 14 S. Ct. 876, dismissing writ of error where Federal question was first raised on motion for rehearing in appellate State court.

Miscellaneous.— Cited to points subsequently decided in this case in Machine Co. v. Gage, 100 U. S. 678, 679, 25 L. 755, 756, Range Co. v. Carver, 118 N. C. 335, 24 S. E. 354, and Miller v. Texas, 153 U. S. 539, 38 L. 814, 14 S. Ct. 876, all holding State tax on all peddlers valid.

12 Wall. 164–166, 20 L. 364, INSURANCE CO. v. HUCHBERGERS.

Appeal and error.— Where writ of error having been taken out for delay, judgment below was affirmed with 10 per cent. damages in addition to interest, p. 166.

Not cited.

12 Wall. 167–173, 20 L. 382, THE STEAMER SYRACUSE.

Collision.— A towboat is liable for a collision caused by its negligence although by special agreement a canal-boat is being towed at her own risk, p. 171.

Cited with approval in Compania, etc., v. Brauer, 168 U. S. 120, 42 L. 405, 18 S. Ct. 16, collecting authorities, and holding steamship company liable for negligent loss of cattle notwithstanding exemption by bill of lading; The John G. Stevens, 170 U. S. 126, 42 L. 974, 18 S. Ct. 549, applying rule and enforcing lien for damages; Deems v. Albany & Canal Line, 14 Blatchf. 478, F. C. 3,736, applying rule; The James Jackson, 9 Fed. 616, holding tug liable for negligent loss of oil barge by fire; The American Eagle, 54 Fed. 1013,

holding tug liable for loss of tow negligently tied up to dock during night. See valuable note in 45 Am. Dec. 56.

Towage.— Although the law has not imposed on a towboat the obligations of a common carrier, it does require care, caution and maritime skill, p. 171.

Cited with approval in The John G. Stevens, 170 U. S. 126, 42 L. 974, 18 S. Ct. 549, holding towboat liable for negligently bringing tow into collision with third vessel; The Adelia, 1 Hask. 508, F. C. 79, holding towboat liable for injury to tow by striking rocks; Deems v. Albany & Canal Line, 14 Blatchf. 478, F. C. 3,736, holding towboat liable for loss of tow through negligent collision; The Stranger, 1 Brown, 284, F. C. 13,525, holding tug not liable for injury by sudden unexplained sheering of tow; The James Jackson, 9 Fed. 616, holding tug liable for negligent loss of oil barge by fire; The American Eagle, 54 Fed. 1013, holding tug liable for loss of tow negligently tied up to dock during night; The Minnie, 87 Fed. 784, holding tug liable for injury to vessel at anchor by bringing her tow into collision; Brady v. Jefferson, 5 Houst. 81, collecting authorities, and holding tugowners liable for injury to third vessel by collision with long tow; dissenting opinion in Brady v. Jefferson, 5 Houst. 86, majority holding tug liable for injury to third vessel by collision with long tow.

Collision.— Although the master of a vessel could not have prevented a collision at the moment it occurred, this will not excuse him if he could have avoided it by timely measures of precaution, p. 172.

Approved in Deems v. Albany & Canal Line, 14 Blatchf. 478, F. C. 3,736, holding towboat liable for loss of tow through negligent collision.

Collision.— A towboat is liable for collision in attempting to tow a long string of canal-boats through a crowded harbor when a strong tide was running, p. 173.

Cited with approval in The Brooklyn, 2 Ben. 550, F. C. 1,938, holding towboat liable for loss of tow in harbor when strong wind was blowing.

Admiralty.— In admiralty an omission to state some facts which prove to be material, but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to libellant if he had no design in omitting them, p. 173.

Cited with approval in The Stephen Morgan, 94 U. S. 603, 24 L. 267, applying rule and dividing damages for collision where both vessels were at fault; The Cambridge, 2 Low. 25, F. C. 2,334, collecting authorities, and holding libellant for collision can rely on faults not alleged; The Coleman, 1 Brown, 461, F. C. 2,981, applying rule and holding tug and tow jointly liable for collision with third

vessel; Holmes v. O. & C. Ry., 6 Sawy. 265, 5 Fed. 76, awarding damages for negligent death of passenger on railway ferry-boat; The Maryland, 19 Fed. 557, holding tug and third vessel jointly liable for damage to tow by negligent collision.

Admiralty.—There is no doctrine of mere technical variance in admiralty, and it is duty of court to extract whole case from record and decide accordingly, p. 173.

Cited with approval in The Gazelle, etc., 128 U. S. 487, 32 L. 500, 9 S. Ct. 143, applying rule in cross-libels for breaches of charter-party; The Cambridge, 2 Low. 24, F. C. 2,334, collecting authorities, and holding libellant for collision can rely on faults not alleged; The Maryland, 19 Fed. 557, holding tug and third vessel jointly liable for damages to tow through negligent collision.

Collision.— In action for collision, an omission herein to state failure of towboat to stop as a fault, held not injurious, p. 173.

12 Wall. 173–175, 20 L. 365, HANDLIN v. WICKLIFFE.

States.— Appointment of a judge by a military governor during the Rebellion, was subject to revocation by such governor or his successor, p. 174.

Cited with approval in Pennywit v. Eaton, 15 Wall. 384, 21 L. 114, dismissing writ of error prosecuted for delay.

States.— Authority of a judge appointed by a military governor during Rebellion ceased of necessity on the adoption of a new State Constitution, without military control, p. 175.

Cited in dissenting opinion in Mechanics, etc., Bank v. Union Bank, 22 Wall. 306, 22 L. 877, majority holding court established in captured Confederate territory by military authority, presumed to have been authorized by president. Cited, arguendo, in Betz v. Illinois Cent. R. R., 52 La. Ann. —, 24 So. 656.

12 Wall. 175–176, 20 L. 384, UNITED STATES v. CRUSELL.

Continuance.— Application for continuance of an appeal from Court of Claims, founded on fact that a motion for new trial has been made, will be granted when not for purpose of indefinite postponement, p. 176.

Approved in United States v. Young, 94 U. S. 259, 24 L. 153, dismissing appeal where Court of Claims has granted a new trial.

New trial.— An objection that the statutory limitation of the time for moving for a new trial has elapsed, should be addressed to the lower court, and not to the appellate court, in opposition to an application for the continuance of an appeal on the ground of such motion, p. 176.

Cited in Belknap v. United States, 150 U. S. 591, 37 L. 1192, 14 S. Ct. 184, collecting authorities, and refusing recovery to Indian agent accepting salary appropriated by Congress, but less than amount allowed by general law.

12 Wall. 177-181, 20 L. 381, UNITED STATES v. ALEXANDER.

Statutes are to be construed as operating prospectively, unless a contrary intent appears beyond doubt, p. 179.

Pensions.— Where act of 1848 provided for pensions to widows of revolutionary soldiers married before 1800, and act of 1853 gave pensions to those married after 1800 "in the same manner," the latter were entitled to pensions only from date of later act, p. 181.

Cited, arguendo, in Northern Pacific R. R. v. Barnes, 2 N. Dak. 360, 51 N. W. 401.

Statutes.— In construing a statute, long-standing construction given by department whose duty it was to act under it, is entitled to great weight, p. 181.

Cited with approval in Hahn v. United States, 107 U. S. 406, 27 L. 529, 2 S. Ct. 497, refusing recovery to customs officer seeking to share in fines and penalties under treasury regulations; Brown v. United States, 113 U. S. 571, 28 L. 1080, 5 S. Ct. 650, collecting authorities, and applying rule in holding act relating to retirement of naval officers applicable to warrant officers; Schell v. Fauché, 138 U. S. 572, 34 L. 1043, 11 S. Ct. 380, holding protest valid, and granting recovery of duties illegally exacted.

12 Wall. 181-193, 20 L. 366, HOFFMANN v. BANK OF MILWAUKEE.

Bills and notes.— By acceptance of a bill, the signatures of drawers, and their competency is admitted, pp. 186, 193.

Cited with approval in Jarvis v. Wilson, 46 Conn. 92, 33 Am. Rep. 21, collecting cases, acceptor cannot set up want of funds in defense; First Nat. Bank v. Ricker, 71 Ill. 440, 22 Am. Rep. 105, collecting cases, cannot recover for forged check; Johnson v. Commercial Bank, 27 W. Va. 357, 55 Am. Rep. 324, collecting cases, payment of forged check purported to be made by payor, not recoverable.

Bills and notes.— An acceptor agrees to pay to lawful holder the full amount of bill, if duly presented when due, according to tenor of acceptance, p. 186.

Bills and notes.— Drawers are not liable to holders unless there is due presentation and a refusal to pay by acceptor, p. 187.

Bills and notes.— Payment by acceptor cannot be recovered back, unless fraud or no consideration in its inception, and such fact were known to holder at time he became such, p. 189.

Cited with approval in Grumbach v. Hirsch, 17 Tex. Civ. App. 620, 43 S. W. 1032, acceptor cannot rescind for mistake in believing he held funds of drawer.

Bills and notes.— Where a bill, accompanied by bill of lading, is accepted and paid to innocent holders for value, in due course of business, the amount cannot be recovered back, though bill of lading is a forgery, p. 190.

Cited with approval in Randolph v. Merchants' Bank, 7 Baxt. 462, collecting cases, but allowing recovery of amount guaranteed by payee. Cited, arguendo, in Robinson v. Memphis, etc., R., 9 Fed. 135, railroad not liable for draft paid in reliance on fraudulent bill of lading; Morse v. Chicago, etc., Ry., 73 Iowa, 233, 34 N. W. 828, and Landa v. Lattin, — Tex. Civ. App. —, 46 S. W. 53.

Bills and notes.— As between drawer and acceptor, or payee and drawer, failure of consideration is a good defense, p. 191.

Bills and notes.— As between remote parties, e. g., acceptor and payee, who takes without notice and before maturity, failure of consideration or fraud is no defense, unless there is a failure in both transfers, pp. 191, 192.

Cited with approval in Goetz v. Bank, 119 U. S. 556, 30 L. 517, 7 S. Ct. 320, acceptor bound to pay forged bill; Bank v. Ellis, 6 Sawy. 100, F. C. 859, accommodation party can only show want of consideration against accommodated; Heuertematte v. Morris, 101 N. Y. 71, 54 Am. Rep. 661, 4 N. E. 4, collecting cases, payee, without notice, acquiring before acceptance, though fraudulent, may recover; Randolph v. Merchants' Bank, 7 Baxt. 462, collecting cases, allowing recovery for sum guaranteed by payee; Bank v. Evants, 2 Tex. Civ. App. 668, acceptor, after plaintiff acquired bill, cannot raise absence of consideration.

Bills and notes.— In suit by remote indorsee against acceptor, if any intermediate holder gave value, it sustains holder's title, p. 191.

Cited with approval in Bank v. Ellis, 6 Sawy. 100, F. C. 859, accommodation party can only show want of consideration against accommodated; Levy v. Ford, 41 La. Ann. 879, 6 So. 674, taker of a reissued note, before maturity, may recover, if intervening party took in good faith. See note, 68 Am. Dec. 766.

Bills and notes.— One discounting a bill for drawer is a stranger to acceptor in respect to consideration of acceptance, whether accepted before or after payee receives it, p. 193.

Cited with approval in American, etc., Bank v. Gluck, 68 Minn. 134, 70 N. W. 1086, collecting cases, rights of bona fide holder are same, whether acquired before or after acceptance.

Bills and notes.— Payment to payees of a bill in pursuance of a legal obligation, cannot be recovered back, p. 193.

commerce; Webb v. Dunn, 18 Fla. 724, holding State statute allowing harbor master to charge a fee to every vessel entering port, unconstitutional; Benedict v. Columbus Construction Co., 49 N. J. Eq. 41, 23 Atl. 491, holding State legislation preventing transportation of natural gas beyond the State limits, void. See note in 29 Am. St. Rep. 713.

Taxation.— Authority of Congress to tax does not supersede power of States to tax for support of their own governments, p. 214.

Commerce.— Levying and collecting taxes, duties, imposts and excises is a branch of the taxing power and not of the power to regulate commerce, p. 215.

Commerce.— Congress has power to impose tonnage duties, p. 216.

Statutes.— Legislative enactments where the language is unambiguous, cannot be changed by construction, nor can the language be divested of its plain and obvious meaning, p. 217.

Commerce.— State tax on steamboats plying in navigable waters of State, at a certain rate per ton of registered tonnage, is not a property tax but a duty of tonnage and unconstitutional, p. 218.

Cited and principle followed in Peete x. Morgan, 19 Wall. 584, 22 L. 202, holding State cannot impose tonnage tax on vessels owned in foreign port; Cannon v. New Orleans, 20 Wall. 581, 22 L. 420, holding city tonnage tax on all vessels mooring in port void; Inman Steamship Co. v. Tinker, 94 U. S. 244, 24 L. 122, collecting authorities, and holding State statute imposing tonnage tax on all vessels entering harbor void; Machine Co. v. Gage, 100 U. S. 678, 25 L. 755, holding State tax on all sewing-machine peddlers valid; Booth v. Lloyd, 33 Fed. 598, holding State tonnage tax on oyster boats void; Ferrari v. Board of Health, etc., 24 Fla. 413, 5 So. 4, holding quarantine charges based on tonnage invalid; Board of Harbor Commrs. v. Pashley, 19 S. C. 320, holding tax on vessels based on "length over all" in feet void; St. Louis v. Schulenberg, etc., Lumber Co., 13 Mo. App. 60, holding city cannot collect wharfage for goods landed beyond its wharf; dissenting opinion in Norfolk, etc., R. R. v. Commonwealth, 88 Va. 109, 13 S. E. 344, 13 L. R. A. 112, and n., majority holding State statute prohibiting running of trains on Sunday void as applied to interstate traffic. See exhaustive note in 27 Am. St. Rep. 556.

Distinguished in Sherlock v. Alling, 93 U. S. 103, 23 L. 820, holding State statute allowing recovery for death or injury by marine torts valid (affirming S. C., 44 Ind. 195); Packet Co. v. Keokuk, 95 U. S. 86. 24 L. 380, holding city can charge wharfage proportioned to tonnage of vessels; Transportation Co. v. Wheeling, 99 U. S. 284, 25 L. 415, holding registered steamboats may be taxed

as property of their home port (affirming S. C., 9 W. Va. 178, 27 Am. Rep. 554); Wiggins Ferry Co. v. East St. Louis, 107 U. S. 376, 27 L. 423, 2 S. Ct. 266, holding license tax on interstate ferry valid; Morgan S. S. Co. v. Louisiana, etc., 118 U. S. 462, 30 L. 241, 6 S. Ct. 1118, collecting authorities and holding fees imposed on vessels by State quarantine laws valid, affirming S. C., 36 La. Ann. 669.

Taxation.— Usually injunction will not be granted to restrain collection of illegal taxes, but party is required to pay tax and seek redress in assumpsit against collector, p. 223.

Appeal and error.— Where no objection is taken to form of remedy employed, Supreme Court will assume that it was regarded in court below as appropriate, p. 223.

12 Wall. 226-232, 20 L. 385, JUNCTION R. R. CO. v. BANK OF ASHLAND.

Evidence.— Agreement under seal for payment of money cannot be received to support common money counts, p. 229.

Usury.— Determination whether a contract is or is not usurious depends on law of place where the money is made payable, but parties may stipulate in accordance with law of place where contract is made, p. 229.

Cited with approval in Dygert v. Vermont L. & Trust Co., 94 Fed. 914, holding note not usurious where payable, valid; Commissioners etc. v. Atlantic, etc., R. R., 77 N. C. 294, enjoining payment on usurious railroad bonds. Cited, arguendo, in Atkinson v. Allen, 71 Fed. 59, 36 U. S. App. 255. See notes in 46 Am. St. Rep. 202, 55 Am. St. Rep. 778.

Usury.— By New York law of 1850, no corporation can interpose defense of usury, p. 229.

Cited in Hubbard v. Tod, 171 U. S. 501, 19 S. Ct. 24, applying rule in determining title to railroad bonds in bankruptcy proceedings; Commissioners, etc. v. Atlantic, etc., R. R., 77 N. C. 294, holding rule not applicable to North Carolina corporation sued in North Carolina on bonds delivered and payable in New York.

Courts.— Federal courts take judicial notice of laws of every State, pp. 229, 230.

Cited and principle applied in Hanley v. Donoghue, 116 U. S. 6, 29 L. 537, 6 S. Ct. 245, collecting authorities, and applying rule in action in one State to enforce a judgment procured in another; Union Pacific Ry. v. Wyler, 158 U. S. 296, 39 L. 990, 15 S. Ct. 882, applying rule in action for injury to railroad employee; Swann v. Swann, 21 Fed. 300, enforcing promissory note made on Sunday, valid by law of State where made. Cited, arguendo, in Cluck v.

The State, 40 Ind. 273. See note in 11 Am. Dec. 781, 782, 89 Am. Dec. 676.

Usury.— Statute authorizing railroads to sell their bonds or notes at rates and prices in the discretion of the directors is tantamount to a repeal of the usury laws as to such companies, p. 230.

Approved in Metropolitan Trust Co., etc. v. Columbus, etc., R. R., 93 Fed. 704, applying rule in construing contract for purchase of railroad equipment. See note in 46 Am. St. Rep. 202.

Appeal and error.— Although demurrer to plea was wrongly sustained, judgment will not be reversed where same defense was put in issue under different plea, p. 231.

See note in 4 McCrary, 465.

Trial.— Question whether a negotiation of bonds was a sale or a loan is ordinarily one of fact; but it is a question of law if some fact is admitted or proved which is irreconcilable with one conclusion or the other, p. 231.

Bonds.— A party can sell its own obligations to pay money when authorized by law to do so, p. 231.

Sales.— Exaction of collateral security for payment of bonds is not irreconcilable with a sale, p. 231.

Sales.— Negotiation of bonds by a railroad where payment is guaranteed by third parties is a sale and not a loan, p. 232.

12 Wall. 232-246, 20 L. 360, UNITED STATES v. CHILD.

United States.— Where claimants present their claims to a special commission which does not allow the full amount, but claimants receive the reduced amount and give a receipt in full therefor, without objection, they cannot recover the difference, p. 243.

Approved in United States v. Clyde, 13 Wall. 37, 20 L. 480, Mason v. United States, 17 Wall. 78, 21 L. 566, Sisson, etc. v. Baltimore, 51 Md. 98, and Board of County Commrs., etc. v. Seawell, 3 Okla. 287, 41 Pac. 594, all applying rule; United States v. Justice, 14 Wall. 550, 20 L. 756, refusing recovery, although no receipt in full was given; Savage v. United States, 92 U. S. 388, 23 L. 662, refusing recovery to one who surrendered United States treasury notes for depreciated legal-tender notes; United States v. Martin, 94 U. S. 404, 24 L. 129, refusing recovery to laborer who has accepted allowance for work in excess of eight hours a day; Pray v. United States, 106 U. S. 595, 27 L. 265, 1 S. Ct. 484, refusing recovery to occasional weigher of customs, after receipt of regular compensation; De Arnaud v. United States, 151 U. S. 494, 38 L. 248, 14 S. Ct. 378, refusing recovery on claim, after acceptance of money as payment in full; Pacific R. R. v. United States, 158 U. S. 122, 39 L. 919, 15 S. Ct. 767, refusing recovery of interest on judgment after acceptance

of appropriation as payment in full; United States v. Galinger, 169 U. S. 322, 42 L. 764, 18 S. Ct. 366, holding payment presumed to be in full, and refusing recovery for extra services to night customs inspector.

Distinguished in Platt v. United States, 22 Wall. 509, 22 L. 862, allowing recovery on reduced claim where payment was not in full.

United States.— There is no duress in the compromise of a controverted claim, and in the absence of fraud or constraint on the part of the government, it is valid, p. 244.

Cited with approval in Mason v. United States, 17 Wall. 74, 21 L. 566, refusing recovery after settlement of claim by government commission; Boffinger v. Tuyes, 120 U. S. 205, 30 L. 652, 7 S. Ct. 533, refusing recovery against sureties on appeal bond after settlement under a compromise; The Cayuga, 59 Fed. 486, 16 U. S. App. 577, holding compromise of claim arising out of collision of vessels, valid; Springfield, etc., R. R. v. Allen, 46 Ark. 221, holding settlement and receipt in full of unliquidated demand a bar to subsequent action; Bull v. Bull, 43 Conn. 469, collecting authorities, and holding compromise a valid accord and satisfaction; Tanner v. Merrill, 108 Mich. 62, 62 Am. St. Rep. 690, 65 N. W. 665, 31 L. R. A. 173, refusing recovery to laborers after settlement and receipt in full; Treat v. Price, 47 Neb. 883, 66 N. W. 836, holding creditor bound by receipt in full given for payment of disputed debt. Cited, arguendo, in United States v. Old Settlers, 148 U. S. 473, 37 L. 526, 13 S. Ct. 669, determining Indian claims under treaty; Tucker v. State, 72 Ind. 245, holding sureties cannot plead duress of principal, and awarding damages against trustee and sureties for loss of funds.

Distinguished in Chicago, etc., R. R. v. Clark, 92 Fed. 977, holding payment of liquidated debt not sufficient consideration for release by creditor of other unliquidated claims.

United States.— After compromise of a claim by a special commission, question whether whole claim is just and payable is no longer open to inquiry, p. 245.

12 Wall. 246–254, 20 L. 388, UNITED STATES v. BURNS.

Army and navy.— Contract entered into on behalf of United States with an army officer for privilege of making patented tents, is valid, p. 251.

Army and navy.— Army regulations prohibiting profitable contracts between army officers for purchase of supplies, etc., does not apply to contracts with the secretary of war, p. 251.

United States.— Army contracts which require approval of secretary of war to bind United States, although negotiated by subordinate officers, are in fact and law the acts of the secretary, p. 251.

United States.— Secretary of war, though head of war department, is not strictly "in the military service," but is a civil officer, p. 252.

Army and navy.— A United States army officer, not specially employed to make experiments, is entitled to a patent for an improvement in war material, p. 252.

Patents.— The government cannot make use of a patented improvement any more than a private individual, without license of the inventor or making him compensation, p. 252.

Cited with approval in Cammeyer v. Newton, 94 U. S. 235, 24 L. 75, holding patent for improved dam not infringed herein; Fletcher v. Blake, 131 U. S. cxcvii (appendix), 26 L. 156, holding internal revenue stamps used by defendant no infringement of plaintiff's patent; Belknap v. Schild, 161 U. S. 16, 40 L. 601, 16 S. Ct. 444, collecting authorities, and awarding damages against United States for unauthorized use of patented caisson gates; Brady v. Atlantic Works, 4 Cliff. 416, F. C. 1794, awarding damages for infringement of patented dredging-boat, although built under contract with government; Campbell v. James, 17 Blatchf. 54, F. C. 2,361, holding postmaster liable for infringement of patented cancelling stamps; Colgate v. International Ocean Tel. Co., 17 Blatchf. 311 F. C. 2,993, enjoining unlicensed use of invention by party having exclusive right to operate telegraph cable; Head v. Porter, 48 Fed. 487, holding United States officer in charge of armory liable for infringement of patent, although acting under orders of government.

United States.— Withholding of payments accruing under a contract with United States does not show an intention to terminate the contract, p. 253.

United States.— Where United States contracted for privilege of making patented tents with army officer who assigned half his interest, and subsequently joined Confederate army, assignee can recover his own moiety from the United States, p. 254.

Approved in Belknap v. Schild, 161 U. S. 17, 40 L. 601, 16 S. Ct. 445, awarding damages against United States for unauthorized use of patented caisson gates.

Court of Claims in deciding upon rights of claimants, is not bound by any special rules of pleading, p. 254.

Approved in United States v. Palmer, 128 U. S. 269, 32 L. 444, 9 S. Ct. 106, collecting authorities, and holding Court of Claims has jurisdiction of claims of patentees for use of inventions by United States by consent; Wisconsin, etc., R. R. v. United States, 164 U. S. 212, 41 L. 407, 17 S. Ct. 52, holding claim of government against railroad for money illegally paid, need not be set up as counterclaim in action by railroad to recover for carrying mails.

12 Wall. 254-259, 20 L. 390, HOLLADAY v. KENNARD.

Carriers are not responsible for loss of goods by act of public enemy, if they use due diligence to prevent it; but they are liable for ordinary negligence; fraud, or collusion with the enemy, or willful negligence is not necessary, pp. 257, 258.

Cited with approval in Odd Fellows, etc., Assn. v. James, 63 Cal. 607, 49 Am. Rep. 112, collecting authorities, and holding secretary and his sureties liable for theft of money received and not diligently turned over to treasurer; Hubbard v. Harnden Express Co., 10 R. I. 251, holding defendant not liable for loss of goods seized by Confederate officer. See valuable note in 61 Am. St. Rep. 385.

Carriers.— An express agent must use ordinary care to prevent loss of goods, i. e., such care as he naturally would have taken of his own goods, p. 258.

Carriers.— Express carriers must provide cool, self-possessed, prudent men, of good judgment and forethought, as agents to carry goods on perilous journeys, p. 258.

Cited with approval in Anderson v. New York, etc., S. S. Co., 47 Fed. 39, awarding damages for injury by negligence of incompetent winchman; Memphis, etc., Packet Co. v. McCool, 83 Ind. 398, 43 Am. Rep. 72, collecting authorities, and awarding damages for negligent injury to passenger on steamboat.

Negligence.— Ordinary diligence is a relative term, to be judged of by nature of subject to which it is directed, p. 258.

Carriers.— Ordinary diligence is all that is required of a carrier to avoid or remedy the effects of an overpowering cause, p. 259.

12 Wall. 259-261, 20 L. 392, GERMAIN v. MASON.

Appeal and error.— All parties to an original joint judgment must be brought before appellate court on a writ of error, and this is not done by a writ which does not give their names, p. 261.

Cited with approval in Simpson v. Greeley, 20 Wall. 157, 22 L. 339, applying rule and dismissing writs; St. Louis Elevator Co. v. Nichols, 91 Fed. 833, dismissing appeal from deficiency decree against mortgagor and its grantee, where the latter appeals alone.

Appeal and error.— In an action to enforce a mechanic's lien, where other creditors are made co-defendants with the debtor, and a personal judgment is rendered against debtor alone, he can prosecute a writ of error in his own name without joining his co-defendants, p. 261.

Cited with approval in Basket v. Hassell, 107 U. S. 608, 27 L. 502, 1 S. Ct. 417, collecting authorities, and refusing to dismiss appeal where omitted parties have no interest; Hill v. Chicago, etc., R. R.,

140 U. S. 54, 35 L. 332, 11 S. Ct. 691, holding second decree in a case, on severable matter, appealable; Mercantile Trust Co. v. Kanawha, etc., Ry. 58 Fed. 13, 16 U. S. App. 37, holding railroad after foreclosure sale, not a necessary party to appeal from decree distributing proceeds; Louisville, etc., Ry. v. Pope, 74 Fed. 5, 6, 46 U. S. App. 25, allowing appeal by railroad from decree establishing lien for construction without joining trustee under mortgage; Guarantee Trust, etc., Co. v. Buddington, etc., 23 Fla. 518, holding party aggrieved in separate interests may appeal separately; Town of Albuquerque v. Zeiger, 5 N. Mex. 520, 25 Pac. 787, holding in proceeding by taxpayer against a town and the sheriff to enjoin collection of tax, the town may prosecute a writ of error alone.

12 Wall. 262–275, 20 L. 423, HANNIBAL R. R. v. SWIFT.

Carrier of passengers is bound, unless there is reasonable ground for refusal, to take all persons who apply for passage and their baggage, and a carrier of goods must take all property offered for transportation, p. 270.

Approved in Camblos v. Philadelphia, etc., R. R., 4 Fed. Cas. 1109, refusing preliminary injunction against railroad for interference with express company's business.

Carriers are responsible for safe conveyance of baggage and other property to destination or end of road, unless prevented by inevitable accident or public enemy, p. 270.

Carriers' obligation to take all offered for transportation, is not dependent upon the contract of the parties, although it may be modified or limited by contract, p. 270.

Cited with approval in De Menacho v. Ward, 23 Blatchf. 509, 27 Fed 533, holding carrier may make discriminations in rates, but not against shippers refusing to patronize him exclusively; Central Trust Co. v. East Tennessee, etc., R. R., 70 Fed. 766, collecting authorities, and holding railroad liable for burning of goods in station, not delivered with due diligence; Shea v. Chicago, etc., R. R., 66 Minn. 107, 68 N. W. 609, awarding damages for injury to lemons shipped in ordinary box car; The George Dumois, 88 Fed. 540, allowing recovery for damaged bananas, delayed in transport. See note, 54 Am. Rep. 865.

Carriers.— If reasonable ground exists for refusing to carry passengers or goods, but carrier does not insist upon it and transports them, its liability is not modified, p. 271.

Cited with approval in Louisville, etc., Packet Co. v. Rogers, 20 Ind. App. 602, 49 N. E. 973, holding carrier liable for loss of goods agreed to be carried on certain boat, but burned on another; Beard v. Illinois Central R. R., 79 Iowa, 522, 18 Am. St. Rep. 384, 44 N. W. 802, 7 L. R. A. 282, holding railroad liable for damage to butter

by heat, notwithstanding it did not have necessary cars to transport it safely; Railway Co. v. Bowler, etc., Co., 57 Ohio St. 57, 63 Am. St. Rep. 703, 47 N. E. 1040, holding railroad liable for loss of merchandise in drummer's trunks, knowingly accepted as baggage.

Carriers.— Liability of common carrier attaches when the property passes, with his assent, into his possession, and is not affected by the car in which it is transported, or manner in which car is loaded, p. 273.

Cited with approval in Shea v. Chicago, etc., R. R., 66 Minn. 107, 68 N. W. 609, awarding damages for injury to lemons shipped in ordinary box car; Southwestern R. R. v. Webb, 48 Ala. 587, holding jury must decide whether delivery of goods on station platform is receipt by railroad; Galveston, etc., Ry. v. Parsley, 6 Tex. Civ. App. 157, 25 S. W. 67, holding railroad liable for death of soldier on troop-train. See note in 47 Am. Dec. 651.

Carriers.— A common carrier is an insurer of property carried, and upon him the duty rests to see that the packing and conveyance are such as to secure its safety, p. 273.

Approved in Shea v. Chicago, etc., R. R., 66 Minn. 107, 68 N. W. 609, awarding damages for injury to lemons shipped in ordinary box car.

Carriers. Where no interference is attempted it is no ground for limiting responsibility of carrier that owner of property accompanies it and looks out for its safety, p. 273.

Distinguished in Roderick v. Railroad Co., 7 W. Va. 61, holding railroad not liable for injury to horse, caused by interference of plaintiff with management of car.

Railroads.— Where a railroad receives for transportation on passenger trains property other than personal baggage, in absence of fraud or concealment, it is considered to assume liability of common carriers of merchandise, p. 274.

Cited with approval in Humphreys v. Perry, 148 U. S. 646, 37 L. 595, 13 S. Ct. 718, holding railroad not liable for loss of contents of jewelry drummer's trunk carried as baggage; Kansas City, etc., Ry. v. McGahey, 63 Ark. 350, 58 Am. St. Rep. 115, 38 S. W. 661, 36 L. R. A. 785, and n., collecting authorities, and holding railroad not liable for burning of baggage not called for within reasonable time; Waldron v. Chicago, etc., R. R., 1 Dak. 344, 46 N. W. 457, holding railroad liable for loss of box received with baggage; Stoneman v. Erie R. R., 52 N. Y. 433, holding railroad liable for loss of boxes containing baggage and merchandise; Sloman v. Great Western R. R., 67 N. Y. 212, holding railroad liable for loss of drummer's sample trunks, on which "excess baggage" was paid; Mo. Pac. Ry. v. Slater, 3 Tex. App. Civ. 26, applying rule.

Modified in Blumantle v. Fitchburg R. R., 127 Mass. 325, 34 Am. Rep. 378, holding railroad not liable for loss of such property, without agreement to carry it as freight.

Railroad may refuse to receive on passenger trains property other than baggage of passenger, p. 274.

Cited with approval in Pfister v. Central Pacific R. R., 70 Cal. 175, 59 Am. Rep. 409, 11 Pac. 689, collecting authorities, and holding railroad not liable for refusal to allow county treasurer to carry large sums of money to State treasurer.

Carriers.— Contract to carry the person only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travellers of equal station for their personal use and convenience, p. 274.

Cited with approval in Railroad Co. v. Fraloff, 100 U. S. 29, 25 L. 534, awarding damages for loss of baggage, including valuable laces stolen from passenger's trunk (affirming S. C., 12 Blatchf. 489, F. C. 5,026); The Majestic, 60 Fed. 630, 20 U. S. App. 503, 23 L. R. A. 752, and n., awarding damages for injury to baggage, notwithstanding exemption printed on back of ticket; Kansas City, etc., Ry. v. McGahey, 63 Ark. 346, 58 Am. St. Rep. 112, 38 S. W. 660, 36 L. R. A. 782, and n., holding railroad not liable for burning of baggage not called for within reasonable time; Kansas City, etc., Ry. v. State, 65 Ark. 366, 67 Am. St. Rep. 935, 46 S. W. 422, 41 L. R. A. 334, holding merchandise samples not "baggage;" Metz v. California So. R. R., 85 Cal. 330, 20 Am. St. Rep. 230, 24 Pac. 610, 9 L. R. A. 431, refusing recovery for loss of lady's jewelry stolen from man's trunk while travelling alone; Staub v. Kendrick, 121 Ind. 230, 23 N. E. 80, 6 L. R. A. 621, and n., holding carrier liable for loss of valise and contents, including travelling salesman's catalogue; Oakes v. N. P. R. R., 20 Or. 396, 23 Am. St. Rep. 127, 26 Pac. 232, 12 L. R. A. 319, awarding damages for loss of trunks containing theatrical company's effects; Kansas, etc., Ry. v. McGahey, 63 Ark. 347, 349, 58 Am. St. Rep. 113, 38 S. W. 660, 36 L. R. A. 783, 784, and n., defining baggage and carriers' liability thereon at destination. See note, 71 Am. Dec. 158.

Carriers.— Surgical instruments, belonging to an army surgeon, travelling with troops, may properly be regarded as part of his baggage, p. 274.

Cited with approval in Runyan v. Central R. R., 61 N. J. L. 541, 68 Am. St. Rep. 712, 41 Atl. 369, 43 L. R. A. 287, reviewing authorities, in determining rights of passenger to take small packages of merchandise with him. See note, in 71 Am. Dec. 162.

Railroad is liable for loss of personal and household effects of an army surgeon, travelling on special troop-train, by burning of special car in which goods had been packed by the soldiers, p. 275.

12 Wall. 275-285, 20 L. 395, KEARNEY v. CASE.

Appeal and error.— In absence of bill of exceptions, a statement of facts, signed by both parties after suing out a writ of error, is no part of record, and will be disregarded, p. 280.

Approved in Bethell v. Matthews, 13 Wall. 3, 20 L. 556, applying rule. Cited, arguendo, in In re Scaife, 87 Fed. 311, 59 U. S. App. 38, issuing mandamus to trial judge to settle bill of exceptions.

Appeal and error.— Case in appellate court must be tried on rulings of lower court, as they appear by the record, p. 280.

Appeal and error.— If facts are to be considered by higher court, they must appear by bill of exceptions, or by an agreed statement submitted to court, or by finding of court under statute, p. 280.

Approved in Trustees, etc. v. Browne, 39 Md. 162, dismissing appeal where facts and law do not appear on the record.

Appeal and error.— Parties cannot by consent make up a case for higher court, after it has passed from control of court below, p. 280.

Trial of issues of fact in Circuit Courts must be by jury, except in cases of equity, admiralty, maritime jurisdiction, and where the parties waive a jury, p. 281.

Cited with approval in Sulzer v. Watson, 39 Fed. 415, holding action on book account must be tried by jury; Thomas v. American, etc., Mortgage Co., 47 Fed. 559, 12 L. R. A. 689, and n., applying rule in holding no Federal jurisdiction of action on note.

Trial.— In Federal courts jury trial may be waived by the parties, and judgment of court in such a case is valid, and in absence of statute there can be no review of findings of fact, p. 281.

Cited with approval in Boogher v. Insurance Co., 103 U. S. 95, 26 L. 311, applying rule to judgment on findings of referee in action on bond; Rogers v. United States, 141 U. S. 556, 35 L. 856, 12 S. Ct. 94, collecting authorities, and affirming judgment of lower court; Perego v. Dodge, 163 U. S. 166, 41 L. 118, 16 S. Ct. 974, holding objection of trial without jury cannot be first taken in appellate court; Grayson v. Lynch, 163 U. S. 472, 41 L. 232, 16 S. Ct. 1066, holding findings of fact by court have same effect as verdict of jury; Thistle v. Hamilton, 4 Dill. 164, F. C. 13,884, holding parties can waive jury on appeal from judgment of District Court in bankruptcy; Rush v. Newman, 58 Fed. 160, 12 U. S. App. 635, holding appellate court can consider only sufficiency of declaration to support judgment; Walker v. Miller, 59 Fed. 870, 19 U. S. App. 403, holding appellate court will only consider the sufficiency of pleadings and findings; United States v. Arnold, 69 Fed. 990, 34 U. S. App. 177, applying rule in appeal from denial of habeas corpus.

Courts.— In Federal courts, where juries are called from a great distance, and detained at a heavy sacrifice, jury trials are usually given preference, p. 283.

Appeal and error.— Under act of 1865 there can be no review of a judgment on issues of fact submitted to Circuit Court unless a jury was waived by written agreement filed with clerk, and this fact must affirmatively appear in record, pp. 283, 284.

Cited with approval in Gilman v. Illinois, etc., Tel. Co., 91 U. S. 614, 23 L. 409, Boogher v. Insurance Co., 103 U. S. 96, 26 L. 312, and Madison County v. Warren, 106 U. S. 623, 27 L. 311, 2 S. Ct. 86, collecting authorities; Bond v. Dustin, 112 U. S. 607, 28 L. 836, 5 S. Ct. 297, United States v. Arnold, 69 Fed. 992, 34 U. S. App. 177, and Duncan v. Atchison, etc., R. R., 72 Fed. 811, 44 U. S. App. 427, all applying rule and affirming judgment of lower court; Stepp v. National Life, etc., Assn., 37 S. C. 436, 16 S. E. 140, holding party at whose demand issues are withdrawn from jury cannot question it on appeal. Cited, arguendo, in Phillips v. Moore, 100 U. S. 213, 25 L. 604.

Trial.— Where a party is present by counsel and goes to trial without objection, he thereby waives his right to a jury, p. 284.

Cited with approval in Ryan v. Carter, 93 U. S. 81, 23 L. 808, holding findings of fact by court have same effect as verdict of jury; Perego v. Dodge, 163 U. S. 166, 41 L. 118, 16 S. Ct. 974, holding objection to trial without jury cannot be made for first time in appellate court, affirming S. C., 9 Utah, 7, 33 Pac. 222. Cited, arguendo, in United States v. Harris, 106 U. S. 635, 27 L. 292, 1 S. Ct. 606.

Trial.— Where issues of fact are presented and there is nothing to show that party complaining of error was present by himself or counsel at trial, and no jury was called, it is error for court to try those issues without a jury, p. 285.

Approved in Morgan v. Gay, 19 Wall. 83, 22 L. 100, applying rule, and reversing judgment.

Appeal and error.— Where there is no error of which court can take cognizance judgment below will be affirmed, p. 285.

Approved in Rogers v. United States, 141 U. S. 556, 35 L. 856, 12 S. Ct. 94, applying rule.

12 Wall. 285-304, 20 L. 398, MILLER v. LIFE INSURANCE CO.

Trial.— Issues of fact in civil cases in Circuit Court may be tried by court without a jury whenever the parties file written stipulation with clerk, waiving a jury, p. 295.

Approved in Rhodes v. U. S. Nat. Bank, 66 Fed. 515, 24 U. S. App. 607, 34 L. R. A. 744, refusing to review a general finding.

Trial.— When issues of fact are tried without a jury in Circuit Courts, finding may be general or special, and it has same effect as verdict of jury, p. 295.

Cited with approval in Insurance Co. v. Folsom, 18 Wall. 250, 21 L. 833, overruling exceptions to refusal of court to make special findings; Ryan v. Carter, 93 U. S. 81, 23 L. 808, refusing to review questions of fact; The Abbotsford, 98 U. S. 443, 25 L. 169, Grayson v. Lynch, 163 U. S. 473, 41 L. 232, 16 S. Ct. 1066, Bowden v. Burnham, 59 Fed. 753, 19 U. S. App. 448, Key West v. Baer, 66 Fed. 442, 30 U. S. App. 140, and Rhodes v. U. S. Nat. Bank, 66 Fed. 515, 24 U. S. App. 607, 34 L. R. A. 744, all refusing to review evidence after findings by court.

Appeal and error.— In a case tried by Circuit Court without a jury, exceptions, if duly taken at time rulings are made, and properly presented by a bill of exceptions, may be reviewed in Supreme Court, p. 296.

Cited with approval in Richmond v. Smith, 15 Wall. 438, 21 L. 202, reviewing ruling sustaining demurrer to plea; Insurance Co. v. Folsom, 18 Wall. 248, 21 L. 833, overruling exceptions to refusal of court to make special finding; Crews v. Brewer, 19 Wall. 72, 22 L. 64, dismissing appeal in absence of authorized statement of facts in record; Insurance Co. v. Lea, 21 Wall. 161, 22 L. 512, collecting authorities, and affirming judgment where exceptions were not specific; Tyng v. Grinnell, 92 U. S. 469, 23 L. 734, refusing to review question of fact; The Abbotsford, 98 U. S. 443, 25 L. 169, Grayson v. Lynch, 163 U. S. 473, 41 L. 232, 16 S. Ct. 1066, and Rhodes v. U. S. Nat. Bank, 66 Fed. 515, 24 U. S. App. 607, 34 L. R. A. 744, both refusing to review evidence; British, etc., Mining Co. v. Baker, etc., Mining Co., 139 U. S. 223, 35 L. 147, 11 S. Ct. 523, affirming judgment where no exceptions to rulings were presented; Miller v. Houston, etc., Ry., 55 Fed. 369, 13 U. S. App. 57, and Key West v. Baer, 66 Fed. 442, 30 U. S. App. 140, both applying rule in United States Circuit Court of Appeals; Trustees, etc. v. Browne, 39 Md. 162, affirming judgment in absence of bill of exceptions or agreed statement of facts.

Appeal and error.— In case tried by Circuit Court without jury, when finding is special, Supreme Court may determine whether facts found are sufficient to support the judgment, p. 296.

Cited with approval in Tyng v. Grinnell, 92 U. S. 469, 23 L. 734, and Ryan v. Carter, 93 U. S. 81, 23 L. 808, both applying rule, and affirming lower judgments; British, etc., Mining Co. v. Baker, etc., Mining Co., 139 U. S. 223, 35 L. 147, 11 S. Ct. 523, collecting authorities, and holding statement of court's reasons for its conclusions does not render finding special; Miller v. Houston, etc., Ry., 55 Fed. 369, 13 U. S. App. 57, Key West v. Baer, 66 Fed. 442, 30 U. S. App. 140, Rhodes v. U. S. Nat. Bank, 66 Fed. 515, 24 U. S. App. 607,

34 L. R. A. 744, and Sayward v. Dexter, 72 Fed. 769, 44 U. S. App. 376, all applying rule in United States Circuit Court of Appeals; Trustees, etc. v. Browne, 39 Md. 162, affirming judgment in absence of bill of exceptions; Lynch v. Grayson, 7 N. Mex. 40, 32 Pac. 153, applying rule under territorial statute.

Appeal and error.— In case tried by Circuit Court without a jury, if finding is general, and no exceptions have been taken to rulings of court, there can be no review, p. 297.

Cited with approval in Insurance Co. v. Folsom, 18 Wall. 248, 21 L. 833, overruling exceptions to refusal of court to make special findings; Crews v. Brewer, 19 Wall. 72, 22 L. 64, dismissing appeal in absence of authorized statement of facts in record; Martinton v. Fairbanks, 112 U. S. 673, 28 L. 863, 5 S. Ct. 322, refusing to review single exception to general finding; Bowden v. Burnham, 59 Fed. 753, 19 U. S. App. 448, Rhodes v. U. S. Nat. Bank, 66 Fed. 515, 24 U. S. App. 607, 34 L. R. A. 744, and Sayward v. Dexter, 72 Fed. 769, 44 U. S. App. 376, all refusing to review evidence; Stepp v. Nat. Assn., 37 S. C. 436, 16 S. E. 140, applying rule under State statute.

Trial.— At common law facts tried by a jury could only be reexamined by granting of a new trial by trial court or court to which record was returnable, or by award of a venire facias de novo by appellate court for some error of law, p. 300.

Approved in Capital Traction Co. v. Hof, 174 U. S. 9, 19 S. Ct. 584, collecting authorities, and construing statute regulating Justice Court trials in District of Columbia.

Trial.— In case tried by Circuit Court without a jury finding must be sufficient in itself, and must contain a statement of ultimate facts which the evidence is intended to establish, and not the evidence itself, p. 301.

Approved in Rhodes v. U. S. Nat. Bank, 66 Fed. 515, 24 U. S. App. 607, 34 L. R. A. 744, refusing to review a general finding.

Trial.— Where findings of fact by a Circuit Court are special they should be separate, p. 301.

Insurance.— Where a policy is delivered without requiring payment, presumption is that credit was intended, and policy is valid, p. 303.

Cited with approval in Bang v. Farmville, etc., Ins. Co., 1 Hughes, 293, F. C. 838, holding company liable where brokers were charged with premium; Frankle v. Pennsylvania Fire Ins. Co., 9 Fed. Cas. 708, Smith v. Provident, etc., Assur. Soc., 65 Fed. 770, 31 U. S. App. 163, and Willey v. Fidelity, etc., Co., 77 Fed. 961, S. C., 80 Fed. 499, 39 U. S. App. 599, affirmed; American, etc., Ins. Co. v. Fordyce, 62 Ark. 571, 54 Am. St. Rep. 308, 36 S. W. 1054, White v. Conn. Ins. Co., 120 Mass. 333, Jones v. New York Life Ins. Co., 168 Mass. 243,

47 N. E. 93, Stepp v. Nat. Assn., 37 S. C. 441, 16 S. E. 142, East Texas Fire Ins. Co. v. Mims, 1 Tex. App. Civ. 772, Wytheville Ins., etc., Co. v. Teiger, 90 Va. 280, 18 S. E. 196, Mason v. Citizens, etc., Ins. Co., 10 W. Va. 578, and Eagan v. Ætna, etc., Ins. Co., 10 W. Va. 589, all applying rule, and holding company liable on policy. See note in 27 Am. Rep. 602, and 57 Am. Rep. 514.

Distinguished in Davis v. Mass. Life Ins. Co., 13 Blatchf. 467, F. C. 3,642, holding credit given by agent, not binding on company where policy makes payment a condition precedent; Carter v. Cotton, etc., Ins. Co., 56 Ga. 243, refusing recovery where agent contracted for payment of premium in medical services; Busby v. North Am. Life Ins. Co., 40 Md. 589, 17 Am. Rep. 642, holding agent cannot revive lapsed policy by receipt of overdue premium.

Insurance.— Where credit is given by general agent and premium is charged to him by company, transaction is equivalent to payment, and policy is binding, p. 303.

Cited with approval in Bang v. Farmville, etc., Ins. Co., 1 Hughes, 293, F. C. 838, and Ball, etc., Wagon Co. v. Aurora Fire, etc., Ins. Co., 20 Fed. 235, collecting authorities; Smith v. Provident, etc., Assur. Soc., 65 Fed. 770, 31 U. S. App. 163, and Willey v. Fidelity, etc., Co., 77 Fed. 961, S. C., 80 Fed. 499, 39 U. S. App. 599, affirmed; Mutual Life Ins. Co. v. Logan, 87 Fed. 645, 57 U. S. App. 36, Mound, etc., Ins. Co. v. Huth, 49 Ala. 538, American, etc., Ins. Co. v. Fordyce, 62 Ark. 570, 54 Am. St. Rep. 307, 36 S. W. 1053, Griffith v. New York Life Ins. Co., 101 Cal. 640, 40 Am. St. Rep. 102, 36 Pac. 117, White v. Conn. Ins. Co., 120 Mass. 333, Western Home Ins. Co. v. Richardson, 40 Neb. 8, 58 N. W. 599, Union Life Ins. Co. v. Haman, 54 Neb. 617, 74 N. W. 1096, Stepp v. Nat. Assn., 37 S. C. 441, 16 S. E. 142, and Wytheville Ins., etc., Co. v. Teiger, 90 Va. 281, 18 S. E. 196, all applying rule and holding insurance companies liable on policies. See note in 84 Am. Dec. 219.

Insurance.— Where a policy is delivered by an agent and premium notes given, which are not paid, company is bound, p. 304.

Cited with approval in Mutual Life Ins. Co. v. Logan, 87 Fed. 645, 57 U. S. App. 36, American, etc., Ins. Co. v. Fordyce, 62 Ark. 570, 54 Am. St. Rep. 307, 36 S. W. 1053, Griffith v. New York Life Ins. Co., 101 Cal. 640, 40 Am. St. Rep. 102, 36 Pac. 117, Stewart v. Union Mutual Life Ins. Co., 155 N. Y. 269, 49 N. E. 880, 42 L. R. A. 152, Stepp v. Nat. Assn., 37 S. C. 439, 440, 16 S. E. 142, and East Texas Fire Ins. Co. v. Mims, 1 Tex. App. Civ. 772, all applying rule and holding companies liable on policies. Cited, arguendo, in Westchester Fire Ins. Co. v. Earle, 33 Mich. 151, holding oral consent of agent to additional insurance, binding on company, notwithstanding policy contra; Cobbs v. Fire Assn., 68 Mich. 464, 36 N. W. 225, holding forfeiture of policy waived and company liable thereon; New York Life Ins. Co. v. Stone, 42 Mo. App. 387, enforcing payment of premium after delivery of policy.

12 Wall. 304–307, 20 L. 405, AVERY v. UNITED STATES.

War.— During Rebellion, a house seized by Federal forces could be leased under "captured and abandoned property act," if owner was voluntarily absent and engaged in Rebellion, p. 306.

Judgment.— No one can be relieved against a judgment, however unjust he may consider it, if he had a defense and through his own fault failed to present it, p. 306.

Cited with approval in Mason v. Pearson, 118 Mass. 63, collecting authorities, and refusing to vacate judgment or stay execution after entry of final judgment.

Distinguished in United States v. Millinger, 17 Blatchf. 452, 7 Fed. 850, opening judgment after eight years to credit payments inadvertently omitted.

Judgment.— Where a party had a liquidated demand against United States for rent of his property during the Rebellion, which he neglected to plead as a set-off in an action against him by the government, he cannot subsequently gain relief against the judgment, p. 307.

Audita Querela does not lie where the party complaining has had a legal opportunity of defense and has neglected it, p. 307.

Approved in Radclyffe v. Barton, 161 Mass. 331, 37 N. E. 374, collecting authorities, and applying rule after default judgment on promissory note. See valuable note in 23 Am. St. Rep. 107.

Audita Querela is regular suit in which parties may plead and take issue on the merits and cannot, therefore, be sued against United States, p. 307.

Cited, arguendo, in Stroheim v. Deimel, 77 Fed. 804, 46 U. S. App. 639, holding Circuit Court order discharging imprisoned debtor is final and appealable; People, etc. v. State Auditors, 42 Mich. 427, 4 N. W. 277, holding State cannot be sued on a claim in its own courts, and granting mandamus.

12 Wall. 307–315, 20 L. 402, WADSWORTH v. WARREN.

Appeals and error.— On writ of error, only errors of law apparent on record will be examined, p. 313.

Landlord and tenant.— Evidence conflicting, whether lease was delivered and accepted, is for jury, p. 314.

Deeds.— A verbal agreement at time of or previous to delivery of deed, cannot release a party from covenants therein, p. 315.

Deeds.— There can be no conditional delivery of deed to the grantee or covenantee, therein named, p. 315.

Not cited.

12 Wall. 315–316, 20 L. 412, PERRIN v. UNITED STATES.

Courts.— Claim for destruction of property by naval bombardment is not within jurisdiction of Court of Claims, p. 316.

Not cited.

12 Wall. 317–322, 20 L. 417, ROGERS v. RITTER.

Appeals and error.— Validity of a grant not being objected to below is not considered on appeal, p. 320.

Cited, arguendo, in United States v. Bell Tel. Co., 167 U. S. 263, 42 L. 162, 17 S. Ct. 819, collecting cases.

Common law.— Evidence by comparison of hands is not admissible on genuineness of handwriting, witness having no previous knowledge thereof, p. 321.

Cited with approval in Hickory v. United States, 151 U. S. 305, 38 L. 173, 14 S. Ct. 335, disallowing comparison with paper prepared for purpose; Davis v. Fredericks, 3 Mont. 264, disallowing testimony; Durnell v. Sowden, 5 Utah, 223, 14 Pac. 335, parties previously examining exhibits before trial may testify as to genuineness of note compared therewith.

Modified in United States v. Chamberlain, 12 Blatchf. 391, F. C. 14,778, and United States v. Mathias, 36 Fed. 893, both allowing comparison with papers properly in evidence.

Witnesses.— One seeing a person sign once or receiving letter from him may testify as to handwriting, p. 322.

Cited with approval in Thomas v. State, 103 Ind. 429, 2 N. E. 814, allowing recipient of letters; Pepper v. Barnett, 22 Gratt. 408, allowing one who has seen signature but once.

Distinguished in Flowers v. Fletcher, 40 W. Va. 107, 20 S. E. 871, recipient of letter not otherwise shown genuine cannot testify.

Witnesses.— Proper knowledge of another's handwriting to qualify one as witness, is obtainable by any mode which court believes will enable him to judge of genuineness, p. 322.

Approved in Durnell v. Snowden, 5 Utah, 224, 225, 14 Pac. 335, 336, allowing evidence of those examining exhibit admitted correct; Tucker v. Kellogg, 8 Utah, 12, 28 Pac. 870, administrator having seen many papers of deceased may give opinion.

12 Wall. 323–342, 20 L. 406, VILLA v. RODRIGUEZ.

Vendor and purchaser.— Vendee under optional contract of sale, bill to redeem from an unrecorded mortgage of the property being filed before actual purchase, is not a bona fide purchaser without notice, p. 338.

Vendor and purchaser.— Doctrine of bona fide vendees without notice only applies where legal title conveyed and purchase money paid, p. 338.

Cited with approval in Taylor v. Weston, 77 Cal. 538, 20 Pac. 64. assignee of certificate of purchase of lieu land not bona fide purchaser; Kitteridge v. Chapman, 36 Iowa, 350, collecting cases, actual payment, not mere obligation to pay, is necessary.

Distinguished in Dewey v. Whitney, 93 Fed. 537, held not to apply; Tilton v. Cofield, 2 Colo. 405, attachment lien cannot be enlarged against other creditors and subsequent vendees. But see dissent, S. C., 2 Colo. 410, following cited case.

Vendor and purchaser.— Title conveyed and payment made, the vendee holds adversely to whole world and may disclaim title of vendor, p. 338.

Vendor and purchaser.— Vendee under quitclaim deed cannot claim as a bona fide purchaser without notice of unrecorded mortgage, p. 239.

Cited and approved but stated to be dictum in Runyon v. Smith, 18 Fed. 582, disallowing quitclaim grantee to claim as bona fide purchasers. Cited with approval in United States v. Sliney, 21 Fed. 895, and Dodge v. Briggs, 27 Fed. 167, to same effect; Woodward v. Jewell, 25 Fed. 691, grantee charged with defects of title, not to see to application of purchase money; Hastings v. Nissen, 31 Fed. 600, 601, grantee of heirs takes notice of unrecorded grant of ancestor; Johnson v. Williams, 37 Kan. 181, 1 Am. St. Rep. 245, 14 Pac. 538, not bona fide as to title shown by records or discoverable by reasonable diligence; dissenting opinion in United States v. Cal., etc., Land Co., 49 Fed. 504, 7 U. S. App. 128, majority holding deed not a mere quitclaim; arguendo, in Battershall v. Stephens, 34 Mich. 74. See note, 53 Am. Rep. 751.

Overruled in United States v. Cal., etc., Land Co., 148 U. S. 45, 37 L. 361, 13 S. Ct. 463, quitclaim grantee may be a bona fide purchaser. Disapproved in Wilhelm v. Wilken, 149 N. Y. 451, 52 Am. St. Rep. 745, 44 N. E. 83, 32 L. R. A. 372, quitclaim grantee takes without notice of unrecorded grant. Limited in White v. M'Garry, 2 Flipp. 574, 47 Fed. 421, not applied where registry of mortgage is required to make it a lien against subsequent purchaser.

Mortgages.— On sale of redemption to mortgagee, he must show good faith and payment of full value; all doubts are construed against him, p. 339.

Cited with approval in De Martin v. Phelan, 47 Fed. 764, Walker v. Farmers' Bank, 6 Del. Ch. 94, 8 Houst. 264, 10 Atl. 99; affirmed in S. C., 8 Houst. 293, 310, 14 Atl. 828, 837, and Shaw v. Walbridge, 33 Ohio St. 6, collecting cases, no unfairness herein, redemption disallowed; Brownlee v. Martin, 21 S. C. 400. and Bradbury v. Davenport, 114 Cal. 600, 55 Am. St. Rep. 96, 46 Pac. 1063,

Jones v. Franks, 33 Kan. 503, 6 Pac. 793, and McCleod v. Bullard, 86 N. C. 215, burden is on mortgagee to show fairness; Niggeler v. Maurin, 34 Minn. 125, 24 N. W. 372, redemption allowed for unconscientious advantage; Morrow v. Jones, 41 Neb. 877, 60 N. W. 372, deed may be shown a mortgage by parol; Macauley v. Smith, 132 N. Y. 531, 30 N. E. 998, agreement that mortgage becomes absolute deed if not paid is ineffectual; Tant v. Guess, 37 S. C. 510, 16 S. E. 479, holding leases herein security for debt; Rockwell v. Humphrey, 57 Wis. 417, 15 N. W. 396, collecting cases, relation of creditors existing, instrument herein is a chattel mortgage. See extensive note, 55 Am. St. Rep. 105.

Distinguished in Bridges v. Lender, 60 Iowa, 195, 14 N. W. 219, as being essentially different from absolute conveyance with agreement to reconvey.

Mortgages.— Where confidential relations and means of oppression exist, the scrutiny of sale of redemption to mortgagee is severer, p. 339.

Cited obiter in Bradbury v. Davenport, 114 Cal. 600, 55 Am. St. Rep. 96, 46 Pac. 1063, Walker v. Farmers' Bank, 6 Del. Ch. 94, S. C., 8 Houst. 264, 10 Atl. 99, Jones v. Franks, 33 Kan. 503, 6 Pac. 793, and Vangilder v. Hoffman, 22 W. Va. 33, 34.

Mortgages.— Mortgagee, purchasing equity of redemption, must reconvey, if any vice exists in the transaction, irrespective of form of instrument, though his debt, with interest, will be secured to him, p. 339.

Cited with approval in Walker v. Farmers' Bank, 8 Houst. 310, 14 Atl. 837, being fair herein, redemption disallowed; Vangilder v. Hoffman, 22 W. Va. 35, deed may be shown to be mortgage by parol. Cited obiter in Bradbury v. Davenport, 114 Cal. 600, 55 Am. St. Rep. 96, 46 Pac. 1063, Walker v. Farmers' Bank, 6 Del. Ch. 94, 8 Houst. 264, 10 Atl. 99, and Jones v. Franks, 33 Kan. 503, 6 Pac 793.

Mortgages.— Mortgagee having made assurances that an absolute deed given was a mortgage, redemption will be allowed, p. 341.

Miscellaneous.— Cited in Partee v. Thomas, 11 Fed. 773, without application.

12 Wall. 342-349, 20 L. 439, HANAUER v. DOANE.

War.— Contracts in aid of Rebellion are void, p. 345.

Cited with approval in Thomas v. Richmond, 12 Wall. 357, 20 L. 457, applied to statutes; Dewing v. Perdicaries, 96 U. S. 195, 24 L. 655, sequestration and sale of stock by Confederacy is void; Keith v. Clark, 97 U. S. 464, 24 L. 1075, party asserting invalidity must

set up and prove; Confiscation Cases, 1 Woods, 226, F. C. 3,097, letter of credit to Confederate agent abroad is void; Whitis v. Polk, 36 Tex. 628, and Alexander v. Lewis, 47 Tex. 490, contract for sale of cotton beyond United States is void; Isaacs v. City of Richmond, 90 Va. 33, 17 S. E. 761, notes in aid of Rebellion void; dissenting opinion in Milner v. Patton, 49 Ala. 428, arguendo.

Distinguished in Pfeuffer v. Maltby, 54 Tex. 463, allowing accounting for completed partnership.

Bills and notes.— Any portion of consideration being illegal, notes are void in toto, p. 345.

Cited with approval in Snyder v. Willey, 33 Mich. 495, collecting cases, note given to stop criminal prosecution is void; Bick v. Seal, 45 Mo. App. 478, note partly illegal, mortgage not enforced. Cited, arguendo, in Cooper Mfg. Co. v. Ferguson, 113 U. S. 733, 28 L. 1138, 5 S. Ct. 741, collecting cases, contracts in violation of law not enforceable; Higgins v. McCrea, 116 U. S. 685, 29 L. 769, 6 S. Ct. 564, same: Branch v. Haas, 4 Woods, 589, 16 Fed. 55, and Murray v. Chicago, etc., Ry., 62 Fed. 41.

Distinguished in Keith v. Clarke, 4 Lea, 730, bank notes issued after 1861 are receivable as taxes from innocent holder.

Contracts.— Money borrowed to redeem illegal due bills may be recovered, though purpose was known, p. 345.

Contracts.— Redemption of due bills given in aid of Rebellion is not good consideration for a note, p. 346.

Treason.— He who sells goods to an agent of Confederates, knowing purpose of purchase, is guilty of treason or misprision thereof, p. 347.

Cited with approval in Carlisle v. United States, 16 Wall. 150, 21 L. 428, amnesty of president includes aliens; Sprott v. United States, 20 Wall. 463, 22 L. 372, one buying cotton of Confederacy aids Rebellion; Whitis v. Polk, 36 Tex. 627, applied to sale of cotton without United States.

Contracts.— One must be taken to intend the consequences of his own voluntary act, p. 347.

Cited with approval in Sprott v. United States, 20 Wall. 463, 22 L. 372, one purchasing cotton from Confederacy gives money in aid of Rebellion; Whitfield v. United States, 92 U. S. 170, 23 L. 707, one selling cotton to rebels and accepting bonds, aids Rebellion; Ware v. Jones, 61 Ala. 295, one selling goods to be used by Confederates intends to aid them. Cited obiter in Carlisle v. United States, 16 Wall. 150, 21 L. 428.

Contracts.— One knowing that goods sold or money lent are to be used for a criminal purpose, cannot recover, though he does not give it for that purpose, pp. 346, 347, 348, 349.

Cited with approval in Sprott v. United States, 20 Wall. 463, 22 L. 372, purchaser of cotton from Confederacy cannot recover if it is captured and sold; Kahn v. Melcher, 43 Fed. 644, 10 L. R. A. 441, no recovery for liquor sold to be retailed when forbidden by law; Milner v. Patton, 49 Ala. 426, no recovery for goods sold to be made into uniforms for Confederates (but see as explained in dissenting opinion, S. C., 49 Ala. 430); Ware v. Jones, 61 Ala. 294, to same effect; Lee v. Boyd, 86 Ala. 288, 5 So. 491, bonds pledged by guardian to secure loan for cotton futures, recoverable by infant; Hunstock v. Palmer, 4 Tex. Civ. App. 461, 23 S. W. 295, disallowing recovery of rent for bawdy-house; dissenting opinion in Sprott v. United States, 20 Wall. 466, 22 L. 373, and distinguished; Hubbard v. Moore, 24 La. Ann. 593, majority allowing recovery for furniture sold to prostitute. Cited arguendo, in Gatton v. Chicago, etc., Ry., 95 Iowa, 142, 63 N. W. 599, 28 L. R. A. 566, and Harris v. Harris, 23 Gratt. 755. Cited obiter in Carlisle v. United States, 16 Wall. 150, 21 L. 428. See note, 32 Am. Rep. 127, 32 Am. St. Rep. 453.

Distinguished in Anheuser-Busch v. Mason, 44 Minn. 320, 20 Am. St. Rep. 582, 46 N. W. 558, 9 L. R. A. 507, and n., collecting cases, allowing recovery for beer sold to brothel with notice; Wallace v. Lark, 12 S. C. 579, 32 Am. Rep. 517, note for horse to be used in Confederate service is valid.

12 Wall. 349-358, 20 L. 453, THOMAS v. CITY OF RICHMOND.

Municipal corporations.— It being against public policy to allow the issue of currency by individuals or corporations, it cannot be one of the implied powers of a municipality, p. 353.

Cited with approval in Lindsey v. Rottaken, 32 Ark. 632, 644, disallowing issue; arguendo, in Gatton v. Chicago, etc., Ry., 95 Iowa, 142, 63 N. W. 599, 28 L. R. A. 566.

Municipal corporation can exercise no power not in express terms, or by fair implication, conferred upon it, p. 353.

Cited with approval in Lindsey v. Rottaken, 32 Ark. 632, disallowing issue of currency; State v. Blaser, 36 La. Ann. 367, collecting cases, disallowing tax on sales in public market, not being necessary for police or revenue; State v. Eason, 114 N. C. 792, 41 Am. St. Rep. 813, 19 S. E. 89, 23 L. R. A. 524, and n., jurisdiction of town on river not below low-water mark; Kirkham v. Russell, 76 Va. 961, acts in derogation of rights of voters are void. See note, 34 Am. Dec. 628.

Municipal corporations.— Power to borrow money and to issue bonds or certificates therefor does not authorize the issue of bills to circulate as currency, p. 354.

Cited with approval in Lindsey v. Rottaken, 32 Ark. 632, disallowing city to issue currency.

Contracts.— Where illegality exists in a contract itself, not yet executed, it may be rescinded by either party and money recovered, p. 355.

Cited with approval in Draper v. Springport, 104 U. S. 504, 26 L. 814, bonds issued by town, without seal, amount may be recovered; Sring Co. v. Knowlton, 103 U. S. 49, 26 L. 350, Knowlton v. Congress, etc., Co., 14 Blatchf. 366, F. C. 7,903, and Douglas v. Kavanaugh, 90 Fed. 378, 62 U. S. App. 48, collecting cases, all allowing recovery of payment for illegal increase of stock; McCutcheon v. Merz Capsule Co., 71 Fed. 795, 37 U. S. App. 586, 31 L. R. A. 421, corporation agreeing to sell its property to another, and hold its stock, may have it cancelled. Cited, arguendo, in Murray v. Chicago, etc., Ry., 62 Fed. 41, collecting cases; St. Louis, etc., R. R. v. Terre Haute R., 145 U. S. 407, 36 L. 754, 12 S. Ct. 957, and Cincinnati, etc., R. v. M'Keen, 64 Fed. 45, 24 U. S. App. 218.

Contracts.—Where a transaction made illegal for the protection of one party, or where one is the principal offender and the other only through constrained acquiescence, the innocent party may recover, though it be executed, p. 355.

Cited with approval in West Virginia Transp. Co. v. Sweetzer, 25 W. Va. 449, shipper compelled to agree to illegal rates may recover.

Cited obiter in McCutcheon v. Merz, etc., Co., 71 Fed. 795, 37 U. S. App. 586, 31 L. R. A. 421, St. Louis, etc., R. R. v. Terre Haute R., 145 U. S. 407, 36 L. 754, 12 S. Ct. 957, and Cincinnati, etc., R. v. M'Keen, 64 Fed. 45, 24 U. S. App. 218. See note, 51 Am. Rep. 824.

Distinguished in Birkett v. Chatterton, 13 R. I. 303, 43 Am. Rep. 31, minor forbidden to work in factory cannot recover.

Banks illegally issuing paper are liable to repay amounts received thereon, unless issued to aid an illegal purpose, or if the receiving is also prohibited by law, p. 356.

Cited, arguendo, in Mayor v. Moog, 53 Ala. 569.

Contracts.— Parties, being in pari delicto, are left without remedy, p. 356.

Cited with approval in St. Louis, etc., R. v. Terre Haute R., 145 U. S. 407, 36 L. 754, 12 S. Ct. 957, executed illegal lease not set aside; Central, etc., R. v. W. U. Tel. Co., 1 McCrary, 555, 3 Fed. 420, possession taken and suit brought to rescind illegal contract, defendant cannot compel restitution; Cincinnati, etc., R. R. v. M'Keen, 64 Fed. 45, 24 U. S. App. 218, collecting cases, executed contract not set aside; Dougherty v. Seymour, 16 Colo. 291, 26 Pac. 823, lease for bawdy-house not enforceable; Naglebaugh v. Harder, etc., Min. Co., 21 Ind. App. 554, 51 N. E. 429, no recovery on brass checks, given for labor, against statute; Knowlton v. Congress, etc., Co., 57 N. Y. 539, payment in part performance of illegal increase of stock not recoverable; Gourley v. Tyler, 4 Tex. App. Civ. 331, cred-

itor agreeing to accept assignment, with secret agreement to be paid in full, cannot recover; dissenting opinion in Peavu v. Foote, 113 Ill. 244, majority allowing recovery of money paid on grain options.

Distinguished in Detroit v. Detroit, etc., Ry., 60 Fed. 163, grant of illegal franchise in good faith, by city, may be denied; Pullman, etc., Co. v. Central Transp. Co., 65 Fed. 161, contract repudiated, consideration returned in absence of moral turpitude; Bond v. Montgomery, 56 Ark. 571, 35 Am. St. Rep. 123, 20 S. W. 527, homestead, illegally purchased at probate sale, subrogated to creditor whose debt was paid.

Municipal corporations.— Persons dealing with municipal officers take with notice of the corporate powers, and are bound thereby, p. 356.

Cited with approval in Agawam, etc., Bank v. South Hadley, 128 Mass. 508, money borrowed by treasurer, in unauthorized manner, cannot be recovered, though used in payment of debts; Town of Plainview v. Winona, etc., R. R., 36 Minn. 512, 32 N. W. 746, town illegally issuing bonds in aid of railroad may resist payment; Cheeney v. Inhabitants, 60 Mo. 54, town may refuse to pay warrant for debt, given without authority; Lebcher v. Board of Commrs., 9 Mont. 320, 23 Pac. 714, no recovery for services not authorized to be engaged; Weismer v. Village, 64 N. Y. 106, 21 Am. Rep. 596, municipality not estopped by conduct of officers or inhabitants from contesting invalidity of bonds; Goose, etc., Bank v. Willow, 1 N. Dak. 29, 26 Am. St. Rep. 607, 44 N. W. 1002, collecting cases, teacher illegally serving, without certificate, cannot recover on quantum meruit; Austin v. Coggeshall, 12 R. I. 332, 34 Am. Rep. 651, payment of bills for banquet illegally ordered may be enjoined, though expense incurred; Black v. City of Columbia, 19 S. C. 420, 45 Am. Rep. 789, no recovery on unauthorized contract by officers insuring adequate supply of water; Nashville v. Sutherland, 92 Tenn. 344, 36 Am. St. Rep. 93, 21 S. W. 676, 19 L. R. A. 621, and n., no recovery on guarantee by officers that water will not flow back from sewer; Mayor v. Moog, 53 Ala. 569, invalidity of ultra vires contracts more strictly maintained in favor of municipal than of private corporations. Cited, arguendo, in Knowlton v. Congress, etc., Co., 57 N. Y. 539.

Municipal corporation — Money received.— A receiver of municipal bills, issued without authority, cannot recover even on money received, pp. 356, 357.

Cited with approval in Isaacs v. Richmond, 90 Va. 39, 17 S. E. 763, similar to cited case. Cited obiter in Nashville v. Sutherland, 92 Tenn. 344, 36 Am. St. Rep. 93, 21 S. W. 676, 19 L. R. A. 621, and n., and Mayor v. Moog, 53 Ala. 569.

Distinguished in Chapman v. County of Douglas, 107 U. S. 356, 27 L. 381, 2 S. Ct. 69, lands sold to county for payment irrespective

of amount in treasury is void, but vendor may recover lands or value.

War.— Contracts and statutes in aid of Rebellion are equally void, p. 357.

Cited with approval in Isaacs v. Richmond, 90 Va. 31, 33, 39, 17 S. E. 761, 763, involving notes similar to cited case.

States.— Laws for preservation of public order and regulation of business transactions, and not in aid of Rebellion, sustain a transaction, though made by unrecognized de facto government, p. 357.

Cited with approval in Dinwiddie County v. Buchanan, 28 Gratt. 539, 545, 551, collecting cases, contracts for purchase of salt for sale to people under State statute is valid.

12 Wall. 358-362, 20 L. 430, SMITH v. SHEELEY.

Principal acquiring legal title, after executing power to sell, cannot claim that agent exceeded his authority, where he is allowed to make deed and receive price, p. 361.

Cited with approval in Brush Electric Co. v. Cal., etc., Light Co., 52 Fed. 964, 7 U. S. App. 409, license given for exclusive right before issue of patent, validity cannot be denied after large business acquired; Hatch v. Ferguson, 66 Fed. 672, 29 U. S. App. 540, principal is estopped to deny power of attorney, improvements being made; Beatty v. Sweeney, 26 Mich. 221, collecting cases, one ignorantly disclaiming ownership is estopped to claim title.

Distinguished in Reed v. Crapo, 127 Mass. 40, persons present at sale by collector, and receiving payment, may waive informality, but not for their co-owners; Mobile, etc., Ry. v. Jay, 65 Ala. 116, principal receiving no direct benefit and other not injured by absence of prompt repudiation, ratification not presumed from mere silence.

Corporation.— Defect in constitution of corporation cannot be taken advantage of collaterally, p. 361.

Cited with approval in Jones v. Habersham, 107 U. S. 188, 27 L. 406, 2 S. Ct. 348, heirs cannot object that corporation cannot hold devised property; Fritts v. Palmer, 132 U. S. 292, 33 L. 321, 10 S. Ct. 96, corporate right to hold land cannot be raised in ejectment by grantor or successors; McBroom v. Scottish, etc., Co., 153 U. S. 326, 38 L. 732, 14 S. Ct. 855, debtor cannot object to repayment of legal amount, where usurious interest is forbidden; Farmers, etc., Trust Co. v. Green B., etc., 11 Biss. 339, 12 Fed. 776, corporation may recover for injury to land it is not authorized to hold; Sherwood v. Alvis, 83 Ala. 118, 3 Am. St. Rep. 696, 3 So. 308, collecting cases, one benefited by contract cannot object to right of corporation; Merchants, etc., Bank v. Stone, 38 Mich. 782, those lending to corporation cannot deny its existence and charge members as partners; Crolley v.

Minneapolis, etc., Ry., 30 Minn. 544, 16 N. W. 424, plaintiff whose land is condemned and transferred cannot question capacity of either company; Society Perun v. Cleveland, 43 Ohio St. 496, 3 N. E. 363, collecting cases, a judgment of ouster is not retroactive and cannot affect parties who have dealt with corporation; Wright v. Lee, 2 S. Dak. 617, 51 N. W. 713, the election of de facto directors cannot be disputed by creditors; Building, etc., Assn. v. Chamberlain, 4 S. Dak. 279, 56 N. W. 899, collecting cases, contractor receiving benefits cannot object that the incorporation law is unconstitutional. Cited, arguendo, in Citizens, etc., Bank v. Hawkins, 71 Fed. 371, 34 U. S. App. 423, and American, etc., Co. v. Moore, 2 Dak. 292, 8 N. W. 135, prohibition to do business does not prevent suit; The Board v. Lafayette, etc., R. R., 50 Ind. 107, collecting cases.

Distinguished in Grand, etc., Bridge Co. v. Prange, 35 Mich. 403, 24 Am. Rep. 588, one sued for tolls may claim the right to collect has expired; Douthitt v. Stinson, 63 Mo. 278, deed to corporation having no existance is an absolute nullity; Estate of McGraw, 111 N. Y. 99, 100, 19 N. E. 250, 2 L. R. A. 394, and n., heirs may object that institution cannot take devise.

Corporation.— One selling land to a corporation de facto, and receiving consideration, cannot question its capacity to take, unless there is a judgment of ouster by government, p. 362.

Cited with approval in Myers v. Croft, 13 Wall. 295, 20 L. 563, Fritts v. Palmer, 132 U. S. 292, 33 L. 321, 10 S. Ct. 96, Broadwell v. Merritt, 87 Mo. 101, 102, Reinhard v. Virginia, etc., Mining Co., 107 Mo. 627, 28 Am. St. Rep. 446, 18 S. W. 19, Myers v. Croft, 2 Neb. 481, and Jones v. Hale, 32 Or. 470, 52 Pac. 313, all disallowing grantor or those under him to question corporate capacity to hold land; Chattanooga, etc., R. Co. v. Evans, 66 Fed. 815, 31 U. S. App. 432, collecting cases, creditors cannot question corporate right to dispose of land, which it was prohibited to acquire; Sherwood v. Alvis, 83 Ala. 118, 3 Am. St. Rep. 696, 3 So. 308, one benefited by contract cannot object to corporate rights; South, etc., R. R. v. Highland, etc., R., 119 Ala. 117, 24 So. 118, right to hold acquired property can only be raised by State; Cowell v. Colorado, etc., Co., 3 Colo. 92, vendee of land from corporation cannot question its right; Weber v. Fickey, 52 Md. 516, land sold to corporation and stock issued, vendor cannot claim it overvalued in defense to suit for contribution; White Oak, etc., Society v. Murray, 145 Mo. 629, 47 S. W. 502, though company was not yet incorporated; Wright v. Lee, 2 S. Dak. 617, 51 N. W. 713, election of de facto directors cannot be questioned by creditors.

Distinguished in McCormick v. Market Bank, 165 U. S. 552, 41 L. 822, 17 S. Ct. 437, lease to national bank not authorized to do business is void, and will only support action for what was received; Davis v. Old Colony R. R., 131 Mass. 273, 41 Am. Rep. 236, money subscribed for a purpose beyond power cannot be recovered; Estate

of McGraw, 111 N. Y. 99, 100, 19 N. E. 250, 2 L. R. A. 394, and n., heirs may object that institution cannot take devise.

12 Wall. 362-365, 20 L. 434, UNITED STATES v. NEW ORLEANS R. R.

Mortgages.— Court, in foreclosure, determines priorities of liens as between parties to suit and those they lawfully represent, p. 364.

Mortgages.— Reference to master is proper method of settling priorities of liens, but, in case of omission, parties may agree to submit it to court, on statement of facts, after decree, p. 364.

Mortgages covering after-acquired property only attach to it in the condition in which it comes into mortgagor's hands, p. 365.

Cited with approval in Fosdick v. Schall, 99 U. S. 251, 25 L. 342, trustee takes, subject to claim of maker, under agreement; Bear, etc., Irrigation Co. v. Garland, 164 U. S. 16, 41 L. 333, 17 S. Ct. 11, mechanic's lien for ditch is superior; Western, etc., Tel. Co. v. Burlington, etc., Ry., 3 McCrary, 140, 11 Fed. 7, mortgagee takes subject to rights of a telegraph company in line; Hardesty v. Pyle, 15 Fed. 779, not covering rolling stock of another placed on road under contract; Loomis v. Davenport, etc., R. R., 3 McCrary, 495, 17 Fed. 305, collecting cases, is subject to vendor's lien on real estate; Frank v. Denver, etc., Ry., 23 Fed. 126, subject to mortgage of rolling stock given to vendor; Central Trust Co. v. Marietta, etc., Ry., 48 Fed. 870, 874, 2 U. S. App. 95, subject to reservation of title under sale though not recorded; Holly Mfg. Co. v. Newchester, etc., Co., 48 Fed. 888, affirmed in Newchester, etc., Co. v. Holly Mfg. Co., 53 Fed. 30, 3 U. S. App. 264, grantee of land with notice of lien on pumping engines thereon, takes subject thereto; Fidelity, etc., Co. v. Norfolk, etc., R. R., 72 Fed. 706, 707, receiver, under foreclosure, takes a spur track, subject to an agreement in regard to payment therefor; St. Joseph, etc., Depot Co. v. Chicago, etc., Ry. Co., 89 Fed. 654, 60 U. S. App. 686, and St. Joseph, etc., Depot Co. v. Chicago, etc., Ry., 131 Mo. 310, 31 S. W. 913, both holding purchaser, under mortgage, takes, subject to rental payments for depot; Harris v. Youngstown Bridge Co., 90 Fed. 828, 62 U. S. App. 123, 124, one advancing money and receiving mortgage for improvements, not contemplated at time of prior mortgage, covering after-acquired property, is superior thereto; Evans v. Kister, 92 Fed. 834, 836, collecting cases, holding failure of payee to register mortgage did not discharge surety; Wood v. Holly Mfg. Co., 100 Ala. 351, 46 Am. St. Rep. 65, 13 So. 954, bondholders subject to contract lien on machinery affixed to land; Warren v. Liddell, 110 Ala. 247, 20 So. 93, collecting cases, mortgagee taking deed is subject to claim of conditional vendor of machinery, removable without injury, though affixed; Jarvis v. State Bank, 22 Colo. 318, 55 Am. St. Rep. 136, 45 Pac. 509, mechanic's lien on

flume superior; Binkley v. Forkner, 117 Ind. 185, 19 N. E. 757, 3 L. R. A. 36, and n., collecting cases, general mortgage subordinate to chattel mortgage on machinery removable without injury; Russell v. Grant, 122 Mo. 178, 43 Am. St. Rep. 569, 26 S. W. 961, purchase-money mortgage of land precedes mechanic's lien simultaneously attaching; Williamson v. New Jersey, etc., Ry., 28 N. J. Eq. 298, reversed on another point in S. C., 29 N. J. Eq. 317, mortgage of after-acquired property subordinate to mechanic's lien; United, etc., Canal Co. v. Long Dock Co., 42 N. J. Eq. 551, 9 Atl. 588, collecting cases, mortgage by a co-owner, before partition, is subject to lien of costs of protecting title by agreement between owners; Campbell v. Roddy, 44 N. J. Eq. 252, 6 Am. St. Rep. 896, 14 Atl. 283, vendor's mortgage on affixed chattels is superior to general mortgage, so far as it does not diminish its security; Daly v. New York, etc., Ry., 55 N. J. Eq. 602, 38 Atl. 205, purchase-money mortgage for land is superior; General Electric Co. v. Transit, etc., Co., 57 N. J. Eq. 474, 476, 42 Atl. 106, 107, general mortgage subordinate to conditional contract of sale; Zorn v. Railroad Co., 5 S. C. 95, purchase-money mortgage superior to trustees' or bondholders'; dissenting opinion in Kilpatrick v. Kansas, etc., R., 38 Neb. 644, 645, 57 N. W. 672, majority holding promoter's mortgage inferior to liens for labor and materials.

Cited, arguendo, in Beall v. White, 94 U. S. 387, 24 L. 175, collecting cases; Barnard v. Norwich, etc., R., 4 Cliff. 365, F. C. 1007, mortgage of after-acquired property covers a railroad leased; Harris v. Youngstown Bridge Co., 90 Fed. 328, 62 U. S. App. 123, 124, collecting cases; First Nat. Bank v. Turnbull, 32 Gratt. 704, 34 Am. Rep. 797, Judge v. Jones, 99 Tenn. 22, 42 S. W. 4, Williams v. Briggs, 11 R. I. 478, and Williamson v. New Jersey R., 26 N. J. Eq. 403, collecting cases, that mortgage on after-acquired property is valid; National Bank v. Goodyear, 90 Ga. 728, 16 S. E. 964, Edwards v. Peterson, 80 Me. 371, 6 Am. St. Rep. 209, 14 Atl. 937, and Brown v. Phillips, 40 Mich. 270, collecting cases. Cited obiter in New York, etc., Trust Co. v. Capital Ry. Co., 77 Fed. 531, Hamlin v. Jerrard, 72 Me. 75, collecting cases; United States Trust Co. v. Territory, 8 N. Mex. 689, 47 Pac. 729. See note, 46 Am. Dec. 717, 22 Am. Rep. 654, and note, 41 Am. St. Rep. 759.

Distinguished in McGourkey v. Toledo, etc., Ry., 146 U. S. 551, 552, 36 L. 1085, 1086, 13 S. Ct. 174, 175, affirming Central Trust Co. v. Ohio, etc., R. R., 36 Fed. 536, collecting cases, where collusive arrangement is made to defeat mortgagees, claim disallowed.

Mortgages covering after-acquired property are subject to purchase-money mortgage, though not recorded, p. 365.

Cited with approval in Central Trust Co. v. Marietta, etc., Ry., 48 Fed. 874, 2 U. S. App. 95, applied to similar case; Evans v. Kister, 92 Fed. 836, collecting cases, failure of payee of note to

register mortgage does not excuse surety; Daly v. New York, etc., Ry., 55 N. J. Eq. 602, 38 Atl. 205, applied to purchase of land; Zorn v. Railroad Co., 5 S. C. 95, sale of land to railroad. Cited obiter in Wood v. Holly Mfg. Co., 100 Ala. 351, 46 Am. St. Rep. 65, 13 So. 954, and Warren v. Liddell, 110 Ala. 247, 20 So. 93.

Distinguished in Taylor v. Burlington, etc., R., 4 Dill. 583, F. C. 13,783, agreement, not being recorded, not valid against mortgagee, by Iowa statutes.

Records are intended for the protection of subsequent, not prior, purchasers and creditors, p. 365.

Cited with approval in Central Trust Co. v. Marietta, etc., Ry., 48 Fed. 874, 2 U. S. App. 95, applied to prior general mortgage subordinate to retention of title by vendor; Daly v. New York, etc., Ry., 55 N. J. Eq. 602, 38 Atl. 205, applied to non-registry of purchase-money mortgage as against prior general mortgage; obiter in Wood v. Holly Mfg. Co., 100 Ala. 351, 46 Am. St. Rep. 65, 13 So 954, and Warren v. Liddell, 110 Ala. 247, 20 So. 93.

Mortgages.— The rule that general mortgage is subordinate to purchase-money mortgage does not apply where thing sold becomes affixed to principal thing, p. 365.

Cited with approval in Porter v. Pittsburgh Steel Co., 122 U. S. 283, 30 L. 1211, 7 S. Ct. 1208, collecting cases, applied to rails; Boston, etc., Co. v. Bankers, etc., Tel. Co., 36 Fed. 297, applied to telegraph poles, etc., but not to wires; New York, etc., Trust Co. v. Capital Ry. Co., 77 Fed. 531, collecting cases, an agreement that it shall not be part of realty cannot affect third parties; Phœnix Iron Works Co. v. New York, etc., Trust Co., 83 Fed. 759, 54 U. S. App. 414, collecting cases, rule applied to machinery to run street railroad; Evans v. Kister, 92 Fed. 836, collecting cases, holding failure of payee to register does not excuse surety; dissenting opinion in Kilpatrick v. Kansas, etc., R. R., 38 Neb. 644, 645, 57 N. W. 672, arguendo. Cited, arguendo, in New Mexico v. United States Trust Co., 172 U. S. 185, 19 S. Ct. 133, collecting cases, and United States Trust Co. v. Territory, 8 N. Mex. 689, 47 Pac. 729. Cited obiter in Holly Mfg. Co. v. Newchester, etc., Co., 48 Fed. 888.

Mortgages covering after-acquired property of a railroad are subject to a lien reserved by United States selling it property and imposing a condition of non-alienation until payment, p. 365.

12 Wall. 366-368, 20 L. 286, THE SPRAY.

Collision.— Vessel attempting to race into harbor ahead of another is liable for a resultant collision, p. 367.

Not cited.

12 Wall. 369-378, 20 L. 432, SHOEMAKER v. KINGSBURY.

Carriers.— Constructors running train with caboose, wherein passengers are sometimes carried for hire, are not common carriers, p. 375.

Carriers.— Common carriers undertake, for hire, to carry all persons indifferently who apply for passage, p. 376.

Carriers.— Common carriers of passengers must provide their safe conveyance so far as practicable by the exercise of human care and foresight, p. 376.

Cited with approval in Holmes v. Oregon, etc., Ry., 6 Sawy. 288, 5 Fed. 538, boat and landing must be well lighted, and guards to prevent premature landing; Ladd v. Forster, 12 Sawy. 552, 31 Fed. 830, and Holland v. Brown, 13 Sawy. 289, 35 Fed. 47, both holding carrier liable for injury to passenger for negligent handling of ferry-boat.

Carriers.— A passenger of private carrier, with notice of the defects in the road, assumes the risks therefrom, p. 377.

Cited with approval in separate opinion in Lucas v. Milwaukee, etc., Ry., 33 Wis. 63, same rule should apply to freight train.

Distinguished in Rosenbaum v. St. Paul, etc., R. R., 38 Minn. 175 8 Am. St. Rep. 655, 36 N. W. 449, one in construction train injured by unspiked rails, may recover.

Carriers.— Private carriers, for hire, need only use such care and skill as prudent and cautious men under circumstances, p. 377.

Cited with approval in East Tennessee, etc., R. R. v. Johnson, 75 Ala. 604, 51 Am. Rep. 492, collecting cases, applied where shipper agrees to load cattle, cannot hold company liable for absence of bedding.

Carriers.— Whether private carriers used requisite care is for jury, p. 378.

Carriers.— It need not be shown that servants of a private carrier had competent skill and good habits, besides that they acted with care and skill at time of accident, p. 378.

12 Wall. 379-384, 20 L. 414, KNOX v. EXCHANGE BANK.

Appeals and error.— The assignee of plaintiff, declared bankrupt, is proper party to ask for reinstatement and substitution, on writ of error, p. 382.

Cited with approval in Jenkins v. Greenbaum, 95 Ill. 18, assignee of bankrupt should sue out writ of error after adjudications, or be substituted if already out; arguendo, in Mayhew v. Pentecost, 129 Mass. 335.

Constitutional law.— A provision in bank charter making its notes receivable for debts due it, is a contract, p. 382.

Constitutional law — Courts.— Supreme Court cannot review judgment of State courts, refusing to give effect to valid contracts, or impairing their obligation, but only when State Constitution or statute impair it, it must appear that the State court judgment rested upon the statute, not merely that counsel assailed the statute as impairing the contract, p. 383.

Reaffirmed in Northern R. R. v. People, 12 Wall. 388, 20 L. 413. Cited with approval in Chicago, etc., Ins. Co. v. Needles, 113 U. S. 582, 28 L. 1087, 5 S. Ct. 685, inquiry is limited to whether statutes infringe Federal rights; Lehigh Water Co. v. Easton, 121 U. S. 392, 30 L. 1060, 7 S. Ct. 919, collecting cases, decision by State court that an exclusive franchise did not apply against city having right under previous statutes, affirmed; New Orleans, etc., Co. v. Louisiana, etc., Co., 125 U. S. 30, 31 L. 612, 8 S. Ct. 748, construction of rights of corporation, under its charter, gives Federal court no jurisdiction; St. Paul, etc., Ry. v. Todd County, 142 U. S. 287, 35 L. 1016, 12 S. Ct. 283, State statute construed as not including certain property in exemption from taxation, not reviewable; Morley v. Lake, etc., Ry., 146 U. S. 172, 36 L. 930, 13 S. Ct. 58, statute reducing interest on judgment already obtained does not impair Federal right; Central Land Co. v. Laidley, 159 U. S. 110, 40 L. 94, 16 S. Ct. 82, where State statute is admitted valid, the construction thereof not reviewable; Ray v. West, etc., Gas Co., 138 Pa. St. 591, 21 Am. St. Rep. 928, 20 Atl. 1067, 12 L. R. A. 293, and n., and Storrie v. Cortes, 90 Tex. 288, 38 S. W. 156, 35 L. R. A. 668, collecting cases, change of decision of court invalidating a contract is not a prohibited impairment. Cited, arguendo, in Denny v. Bennett, 128 U. S. 495, 32 L. 493, 9 S. Ct. 136, holding State statutes limiting rights of creditors do not impair subsequent contracts; Canal Companies Case, 83 Md. 626, 35 Atl. 365, in separate opinion.

Distinguished in University v. People, 99 U. S. 320, 25 L. 388, collecting cases, subsequent statute construed as limiting exemption from taxation, under prior statute, raises Federal question; Saginaw Gas-Light Co. v. Saginaw, 28 Fed. 533, two corporations of State, with conflicting grants from a municipality, raises a Federal question.

Constitutional law.— State law authorizing bank to assign for benefit of creditors does not impair contract, by which bank receives its notes in payment of debts, p. 384.

12 Wall. 384-388, 20 L. 412, NORTHERN R. R. v. PEOPLE.

Courts.— Error to State court dismissed, where defendant claims nothing under State statute, and its validity is not involved in judgment, p. 388.

Cited with approval in Marqueze v. Bloom, 16 Wall. 352, 21 L. 280, no Federal question in record or opinion, writ dismissed; dissenting opinion in Underwood v. McVeigh, 131 U. S. cxxiii (appendix), 21 L. 954, majority dismissing writ of error not directed to State Court of Appeals.

12 Wall. 389-390, 20 L. 394, THE WESTERN METROPOLIS.

Admiralty.— Appellant, in libel for collision, having filed affidavits that, since appeal, he has learned that two witnesses for respondent were promised a contingency on result of suit, a commission was ordered by Supreme Court to take testimony as to alleged agreement, p. 390.

Cited, arguendo, in The Venezuela, 52 Fed. 875, 1 U. S. App. 314, collecting cases.

12 Wall. 390-391, 20 L. 404, PARKER v. LATEY.

Appeals and error.— Record not showing affirmatively that jurisdictional amount is involved, writ is dismissed, p. 391.

Cited with approval in Fuller v. Montague, 59 Fed. 214, 16 U. S. App. 391, bill not showing amount, but this being remedial in fact, court required necessary showing made and filed, and retained the case.

12 Wall. 391-400, 20 L. 446, COOLEY v. O'CONNOR.

Appeal and error.— Where admission of an instrument would have thrown burden on other party, its erroneous exclusion is harmful error, p. 398.

Officers.— When authority is given to several, all must, generally, unite, but a board created to perform a public purpose may act by a majority of its members, p. 398.

Cited with approval in People v. Lothrop, 3 Colo. 458, collecting cases, allowing majority at meeting of board of equalization to act, all being notified; Hall v. Vanderpool, 15 Fla. 129, two commissioners sufficient, under act of 1862; State v. McMillan, 52 S. C. 72, 29 S. E. 545, applied to commissioners to apportion debts between counties; Cowan v. Murch, 97 Tenn. 598, 37 S. W. 395, 34 L. R. A. 540, collecting cases, majority of appellate court may act, in absence of statute; Ferris v. Kimble, 75 Tex. 479, 12 S. W. 690, majority of equalization board may act; First Nat. Bank v. Town of Mount Tabor, 52 Vt. 98, 36 Am. Rep. 739, collecting cases, applied to bond commissioners; dissenting opinion in Carolina, etc., Bank v. Evans, 28 S. C. 528, 6 S. E. 324, majority holding majority of appraisers may lay off homestead.

Internal revenue.— Certificate of tax sale, under acts of Congress of June 7, 1862, and March 3, 1865, providing for taxation of lands

in southern States, is valid, though signed by only two commissioners, p. 399.

Followed in Hill v. Vanderpool, 15 Fla. 129, and Billings v. Stark, 15 Fla. 303.

Internal revenue.— Certificate of sale for taxes, under act of Congress of 1862, is prima facie evidence of validity and regularity of sale, p. 398.

Cited to this point in Billings v. McDermott, 15 Fla. 63, and Hill v. Vanderpool, 15 Fla. 129.

Trespass.— License from plaintiff, excuse founded on fault of plaintiff, or an entry by authority of law, with or without process, must all be specially pleaded in an action of trespass, p. 399.

Trespass to try title.— A freehold, or mere possessory right in defendant, may be evidenced under general issue, though often advisable to plead liberum tenementum, p. 399.

Cited with approval in Rawson v. Finlay, 27 Mich. 271, collecting cases, under general issue in Michigan. See note, 89 Am. Dec. 428.

Trespass to try title.— In this action defendant may set up title in United States and his tenancy, under general issue, p. 399.

Cited, arguendo, in Lee v. Kaufman, 3 Hughes, 134, 138, F. C. 8,191, and King v. La Grange, 61 Cal. 228, 230, collecting cases.

Internal revenue.— Act of Congress of 1862, respecting levy of direct taxes in insurrectionary States, contemplates a certificate of sale when United States becomes purchaser, p. 399.

Cited and reaffirmed in De Treville v. Smalls, 98 U. S. 523, 25 L. 175, and United States v. Lee, 106 U. S. 204, 27 L. 176, 1 S. Ct. 246, such certificate to United States may be impeached; Collins v. Pettitt, 124 N. C. 730, 32 S. E. 977, county may purchase on tax sale. Cited in Lee v. Kaufman, 3 Hughes, 150, F. C. 8,192, and King v. La Grange, 61 Cal. 228, 230, to point that case is not overruled by dictum in Carr v. United States, 98 U. S. 433, 25 L. 200.

Taxation.— Whether a notice of sale for taxes is sufficient, under statute, is a mixed question of law and fact, and whether it shows what property was intended to be sold is for jury, p. 400.

Taxes.— Notice of sale for taxes must show what property is to be sold, and any description which does so is sufficient, p. 400.

Cited in Buck v. Williams, 10 Heisk. 281, court will go behind certificate to determine sufficiency of advertisement.

12 Wall. 400-403, 20 L. 393, BARTH v. CLISE.

Habeas corpus.— The production of the body supersedes the original commitment and, thereafter, its custody is subject to control of court to which return is made, pp. 402, 403.

Cited with approval in United States v. Doss, 25 Fed. Cas. 893, State judge conspiring to release a prisoner committed by United States commission, is guilty of obstructing Federal process; In re Ebanks, 84 Fed. 314, State order directing death penalty, pending appeal from District Court, denying habeas corpus, is invalid; Matson v. Swanson, 131 Ill. 265, 23 N. E. 596, habeas corpus supersedes capias ad satisfaciendum and bail may be allowed, though forbidden for civil arrest.

Sheriff who has custody, under writ of ne exeat, is not liable for escape after making return on habeas corpus, p. 403.

Appeal and error.— When a case is inherently and incurably defective, though not noticed in court below or brought to this court's attention by counsel, it is decisive, p. 403.

Cited with approval, and other errors disregarded as immaterial, in Meguire v. Corwine, 101 U. S. 112, 25 L. 901, contract being void; Whitney v. Wyman, 101 U. S. 397, 25 L. 1052, applied to suit against agent of disclosed principal; West v. Camden, 135 U. S. 521, 34 L. 258, 10 S. Ct. 841, collecting cases, an agreement by director to keep one in permanently as officer; United States v. Barnes, 6 Ben. 185, F. C. 14,523, goods forfeited by use of false entry in customhouse; Butler v. Pittsburgh, etc., Ry., 18 Ind. App. 663, 46 N. E. 94, suit against carrier for negligence, without alleging ownership of freight; Lockhart v. Wills, — N. Mex. —, 54 Pac. 342, ejectment on void mining location; Mehurin v. Stone, 37 Ohio St. 54, when, on conceded facts, verdict should be for respondents, errors in instruction disregarded; dissenting opinion in Cahill v. Chicago, etc., Ry., 74 Fed. 295, 46 U. S. App. 85, majority sending back for new trial, though it clearly appeared plaintiff was guilty of contributory negligence.

12 Wall. 404–407, 20 L. 444, INSURANCE CO. v. SLAUGHTER.

Insurance.— A policy wherein "saltpetre, etc., are not to be kept on premises, or burning fluid, etc., not exceeding one barrel," there being no semicolon in entire clause, the saltpetre, etc., are not entirely forbidden, but only as they exceed one barrel, p. 406.

Cited with approval in Atlantic Ins. Co. v. Manning, 3 Colo. 226, applying same rule in stipulation against vacancy or increase of risk qualified by a subsequent clause.

Insurance.— A construction putting greater restrictions on less dangerous articles is not to be adopted, unless language leaves no alternative, p. 406.

Insurance.— Risks not taken on articles in ordinary use should be declared in unambiguous terms and in large type, p. 407.

Cited with approval in Kelley v. Home Ins. Co., 14 Fed. Cas. 243, a provision against vacancy means abandonment, and not mere

Taxation.— Implied prohibitions restricting State power of taxation exist in United States Constitution, and these are as effectual as those expressed, p. 427.

Taxation.— Power to tax for State purposes is as exclusive in States as power to tax for general welfare is in Congress, p. 427.

Taxation.— Congress cannot tax salaries of judges of State courts, as exercise of such a power is repugnant to right of States to create courts and appoint and compensate judges, p. 427.

Cited in dissenting opinion in Legal-Tender Cases, 12 Wall. 613, 20 L. 332, majority holding legal-tender acts valid as applicable to contracts made before or after their passage.

States.— The powers granted to Congress are not exclusive unless so provided or necessarily implied by the Constitution, p. 428.

Cited with approval in Hollida v. Hunt, 70 Ill. 113, 22 Am. Rep. 66, holding State regulations of sales of patent rights void. See note, 27 Am. St. Rep. 550.

Taxation.— Power to tax may be exercised at same time and upon same subjects of private property by United States and by States, p. 428.

Taxation.— States may enact reasonable regulations for collection of taxes levied for support of their own governments, whether property taxed belongs to residents or non-residents, p. 428.

Taxation.— State license tax on non-resident traders higher than that on residents is repugnant to constitutional provision that citizens of each State shall be entitled to all privileges and immunities of citizens in the several Sates, p. 429.

Cited with approval in Walling v. Michigan, 116 U. S. 454, 29 L. 694, 6 S. Ct. 457, holding tax on non-resident liquor sellers invalid; Robbins v. Shelby County, etc., 120 U. S. 492, 30 L. 696, 7 S. Ct. 594, holding tax on non-resident drummers invalid; Ex parte Touchman, 1 Hughes, 603, F. C. 14,108, Ex parte Thornton, 4 Hughes, 230, 12 Fed. 546, McGuire v. Parker, 32 La. Ann. 834, Bliss's Petition, 63 N. H. 135, State v. Lancaster, 63 N. H. 270, Sinclair v. State, 69 N. C. 48, and Commonwealth v. Myer, 92 Va. 815, 23 S E. 917, 31 L. R. A. 381, all applying rule; In re Watson, 15 Fed. 512, holding State law denying peddler's license to non-residents invalid; Booth v. Lloyd, 33 Fed. 598, holding State requirement of year's residence as prerequisite to obtaining license for oyster-boat void; Graffty v. Rushville, 107 Ind. 510, 57 Am. Rep. 134, 8 N. E. 612, and Fecheimer v. Louisville, 84 Ky. 309, 2 S. W. 67, both applying rule to city license tax; dissenting opinion in Slaughter-House Cases, 16 Wall. 100, 21 L. 416, majority holding exclusive State grant of slaughter-house privileges valid; New York v. Roberts, 171 U. S. 669, 672, 674, 19 S. Ct. 72, 73, 74, majority holding

State tax on foreign and domestic corporations valid. Cited, arguendo, in Royall v. Virginia, 116 U. S. 582, 29 L. 738, 6 S. Ct. 515, holding attorney's license tax payable in bond coupons under statute; Mestayer v. Corrizé, 38 La. Ann. 712, holding city tax on sales outside market place invalid; Parish, etc., v. Levy, 40 La. Ann. 333, 4 So. 310, holding parish license tax invalid under statute; Burbank v. McDuffee, 65 Me. 137, holding purchaser liable for price of goods sold by unlicensed travelling agent; Keyser v. Rice, 47 Md. 214, 28 Am. Rep. 453, enjoining attachment of wages; Kinneen v. Wells, 144 Mass. 498, 59 Am. Rep. 106, 11 N. E. 919, holding statute prohibiting registration, within thirty days of naturalization, contrary to State Constitution; Commonwealth v. Jones, 82 Va. 795, 1 S. E. 88, holding statute prohibiting acceptance of tax-receivable coupons for licenses, until judicial determination of genuineness, valid. See note, 52 Am. Dec. 334; exhaustive note in 59 Am. Rep. 280; 27 Am. St. Rep. 563.

Distinguished in Osborne v. Mobile, 16 Wall. 482, 21 L. 473, holding city license tax on interstate express company valid; Machine Co. v. Gage, 100 U. S. 678, 25 L. 755, and State v. Richards, 32 W. Va. 350, 9 S. E. 246, 3 L. R. A. 707, and n., both holding State tax on all sewing-machine peddlers valid; Transportation Co. v. Parkersburg, 107 U. S. 705, 27 L. 589, 2 S. Ct. 744, holding city ordinance prescribing wharfage fees valid; Emert v. Missouri, 156 U. S. 315, 39 L. 435, 15 S. Ct. 372, reviewing authorities, and holding State tax on all peddlers valid; Corson v. Maryland, 57 Md. 263, holding statute imposing uniform rate of license tax on citizens and non-residents valid; People v. Walling, 53 Mich. 270, 18 N. W. 810, holding tax on wholesale importation of liquors from other States valid; People v. Phippin, 70 Mich. 14, 15, 37 N. W. 892, 893, holding statute prescribing conditions for practice of medicine valid; State v. Welton, 55 Mo. 290, holding license tax on peddlers selling goods from other States valid; Territory v. Farnsworth, 5 Mont. 313, 5 Pac. 872, Ex parte Robinson, 12 Nev. 271, 28 Am. Rep. 798, and State v. Long, 95 N. C. 585, 59 Am. Rep. 265, all holding license tax on commercial travellers valid; Pleuler v. State, 11 Neb. 559, 10 N. W. 482, holding license tax for selling liquors valid; State v. Harrington, 68 Vt. 630, 35 Atl. 518, 34 L. R. A. 102, holding law requiring State and local licenses of peddlers valid; Nease v. Capehart 15 W. Va. 310, holding law requiring security for costs by non-resident valid.

Taxation.— A State may tax uniformly all sales within the State, whether of foreign or domestic goods; but a tax discriminating against commodities of other States is unconstitutional, p. 429.

Cited with approval in Broeck v. Barge J. M. Welch, 18 Blatchf. 72, 2 Fed. 381, holding State law charging additional wharfage to boats coming from without the State invalid; American Harrow Co. v. Shaffer, 68 Fed. 754, holding State license tax on sales of

machines valid; Ames v. People, 25 Colo. 511, 55 Pac. 726, collecting authorities, and holding statute requiring license for selling goods manufactured outside the State void; Corson v. Maryland, 57 Md. 263, 265, holding statute imposing uniform rate of license tax on citizens and non-residents valid; Territory v. Farnsworth, 5 Mont. 313, 5 Pac. 872, and State v. Long, 95 N. C. 585, 59 Am. Rep. 265, both holding license tax on commercial travellers valid; Range Co. v. Carver, 118 N. C. 335, 24 S. E. 354, holding license tax on all peddlers valid; dissenting opinion in New York v. Roberts, 171 U. S. 669, 19 S. Ct. 72, majority holding State tax on foreign and domestic corporations valid; New Orleans v. Graves, 34 La. Ann. 843, majority holding city license tax on travelling agents invalid.

Taxation.— State license tax on non-resident traders is equivalent to a direct tax upon the goods, and discriminating and void, p. 429.

Cited with approval in Ex parte Thornton, 4 Hughes, 230, 233, 12 Fed. 546, 548, holding license tax discriminating against drummers from other States invalid; Gould v. Mayor, etc., 55 Ga. 685, holding city tax on peddlers who are non-residents of the city void; dissenting opinion in New York v. Roberts, 171 U. S. 669, 19 S. Ct. 72, majority holding State tax on foreign and domestic corporations valid.

Distinguished in Ex parte Hanson, 11 Sawy. 659, 28 Fed. 129, holding city license tax on all drummers valid.

Constitutional law.— "Privileges and immunities" guaranteed to citizens by section 2, article IV of the Constitution secures right of citizen of one State to pass unmolested into any other State for lawful commerce; to acquire and hold real and personal property, to maintain actions in the courts, and to be exempt from higher taxes than are imposed by the State on its own citizens, p. 430.

The following citing cases affirm and rely upon this holding: Slaughter-House Cases, 16 Wall. 76, 21 L. 408, holding exclusive State grant of slaughter-house privileges valid; Williams v. Bruffy, 96 U. S. 183, 24 L. 717, holding statute of Confederacy, sequestrating debt due a loyal citizen, void; Guy v. Baltimore, 100 U. S. 439, 25 L. 744, holding wharfage fees applying only to vessels from other States invalid; Brown v. Houston, 114 U. S. 631, 29 L. 260, 5 S. Ct. 1096, holding coal sent from one State into another taxable by the latter, although exported without landing; Blake v. McClung, 172 U. S. 251, 19 S. Ct. 170, holding State statute, giving priority to resident creditors of foreign corporations, invalid; United States v. Petersburg Judges, 1 Hughes, 507, F. C. 16,036, determining validity of statute providing punishment for preventing negroes from voting; United States v. Anthony, 11 Blatchf. 204, F. C. 14,459, holding restriction of voting privilege to males valid; In re Parrott,

6 Sawy. 373, 382, 1 Fed. 505, 514, holding State constitutional prohibition against employment of Chinese by corporations invalid; In re Watson, 15 Fed. 512, 513, holding State requirement of one year's residence before obtaining peddler's license invalid; Stockton Laundry Case, 11 Sawy. 475, 26 Fed. 613, holding city ordinance prohibiting laundries within habitable portion of city unconstitutional; Farmers' Loan & T. Co. v. Chicago, etc., Ry., 27 Fed. 149, holding State statute confining trusts to residents void; Swift v. Sutphin, 39 Fed. 636, 640, In re Barber, 39 Fed. 646, and Harvey v. Huffman, 39 Fed. 648, all holding statute prohibiting sale of meat, unless inspected before slaughter, by State officers, void; Mercantile Nat. Bank v. Shields, 59 Fed. 956, holding non-resident bank shareholder entitled to all tax reductions allowed residents; Joseph v. Randolph, 71 Ala. 505, 46 Am. Rep. 349, holding act forbidding any person to induce laborers to leave the State, without paying license tax, unconstitutional; State, etc. v. Board of Ins. Commrs., 37 Fla. 575, 20 So. 775, 33 L. R. A. 291, holding statute imposing conditions on foreign insurance companies void; Sears v. Board of Commrs., 36 Ind. 275, 10 Am. Rep. 62, holding State license tax on non-resident traders selling foreign goods valid; Cory v. Carter, 48 Ind. 345, 17 Am. Rep. 749, holding statute providing separate schools for negro children valid; Roby v. Smith, 131 Ind. 346, 31 Am. St. Rep. 442, 30 N. E. 1095, 15 L. R. A. 795, holding statute requiring trustee to be resident of State unconstitutional; State v. Stucker, 58 Iowa, 498, 12 N. W. 484, holding statute prohibiting sale of wines made from fruits grown outside the State valid; Daniel v. Trustees, etc., 78 Ky. 544, holding city tax on sales by non-resident auctioneers invalid; Higgins v. Rinker, 47 Tex. 390, holding tax on sales of liquors manufactured outside the State void; Frasher v. State, 3 Tex. App. 269, 30 Am. Rep. 135, holding State statute prohibiting marriages between whites and negroes valid; Steed v. Harvey, 18 Utah, 374, 54 Pac. 1012, holding non-resident may sue in any county in State; Sprague v. Fletcher, 69 Vt. 78, 37 Atl. 242, 37 L. R. A. 843, holding statute denying non-residents the deductions from taxes allowed residents void; Eingartner v. Illinois Steel Co., 94 Wis. 76, 59 Am. St. Rep. 861, 68 N. W. 666, 34 L. R. A. 505, refusing to dismiss action between non-residents on cause arising in another State; dissenting opinion in Civil Rights Cases, 109 U. S. 47, 27 L. 851, 3 S. Ct. 47, majority holding civil rights act unconstitutional as applied to the States; Geer v. Connecticut, 161 U. S. 542, 40 L. 801, 16 S. Ct. 609, majority holding statute prohibiting shipping of certain game outside the State valid. See note in 25 Am. St. Rep. 873.

Distinguished in Kohn v. Melcher, 29 Fed. 435, holding State statute limiting liquor licenses and preventing sales from other States valid; People v. Phippin, 70 Mich. 15, 37 N. W. 893, reviewing authorities, and holding statute prescribing conditions for practice

of medicine valid; Chambers v. Church, 14 R. I. 400, 401, 51 Am. Rep. 412, holding State statute prohibiting non-residents from catching fish for manufacture into manure and oil valid.

Commerce.— State tax discriminating against citizens of other States is repugnant to constitutional power of Congress to regulate interstate commerce, p. 430.

Cited with approval in Railroad Co. v. Husen, 95 U. S. 470, 24 L. 530, holding State statute prohibiting bringing into State Texas cattle, during certain season, invalid; Ex parte Thornton, 12 Fed. 546, 4 Hughes, 230, holding license tax discriminating against drummers from other States void; In re Watson, 15 Fed. 512, holding State requirement of one year's residence before obtaining peddler's license invalid; Swift v. Sutphin, 39 Fed. 636, In re Barber, 39 Fed. 646, and Harvey v. Huffman, 39 Fed. 650, holding statute prohibiting sale of meat, unless inspected by State officers before slaughter, void; Ames v. People, 25 Colo. 511, 55 Pac. 726, collecting authorities, and holding statute requiring license to sell foreign manufactured goods void; State v. Saunders, 19 Kan. 130, 27 Am. Rep. 100, holding statute prohibiting exportation of prairie chickens from State void; People v. Hawkins, 157 N. Y. 16, 68 Am. St. Rep. 747, 51 N. E. 261, 42 L. R. A. 497, holding statute requiring labelling of "convict-made" goods unconstitutional; Sinclair v. State, 69 N. C. 48, holding additional license tax on non-residents selling liquors void; State v. Rankin, 11 S. Dak. 149, 76 N. W. 801, holding license tax on drummers void, although not discriminating between residents and non-residents; Arkansas v. Kansas Coal Co., 96 Fed. 360, refusing to restrain the importation of alleged lawless armed men. Cited, arguendo, in Keyser v. Rice, 47 Md. 214, 28 Am. Rep. 453, enjoining prosecution of attachment of wages; Bagg v. Wilmington, etc., R. R., 109 N. C. 280, 26 Am. St. Rep. 571, 14 S. E. 80, 14 L. R. A. 597, holding law requiring railroads to ship freight within five days valid. See exhaustive note in 59 Am. Rep. 269, 27 Am. St. Rep. 550.

Distinguished in Transportation Co. v. Parkersburg, 107 U. S. 702, 27 L. 588, 2 S. Ct. 741, holding ordinance prescribing wharfage fees valid; Ex parte Hanson, 28 Fed. 129, 11 Sawy. 659, holding city license tax on all drummers valid; Kohn v. Melcher, 29 Fed. 435, holding State statute limiting liquor licenses and preventing sales from other States valid; Sears v. Board of Commrs., 36 Ind. 275, 10 Am. Rep. 62, holding State license tax on non-resident traders selling foreign goods valid; State v. Stucker, 58 Iowa, 498, 12 N. W. 484, holding statute prohibiting sale of wines made from fruits grown outside the State valid; People v. Walling, 53 Mich. 270, 18 N. W. 810, holding tax on wholesale importation of liquors from other States valid; State v. Addington, 12 Mo. App. 226, reviewing authorities, and holding State statute prohibiting manufacure and sale of oleaginous foods valid; Montana v. Farnsworth,

5 Mont. 313, 5 Pac. 872, holding statute imposing license tax on commercial travellers valid.

Commerce.— Excise taxes may be imposed by States, if not discriminating, p. 431.

Commerce.— Both Congress and the States are forbidden to make any discrimination in enacting commercial or revenue regulations, p. 431.

Cited with approval in Williams v. The Lizzie Henderson, 29 Fed. Cas. 1375, holding State statute exempting vessels owned wholly in the State from pilotage void; Railroad Tax Cases, 8 Sawy. 307, 13 Fed. 778, holding clause of State Constitution providing different mode of assessing railroads from other property void; Ames v. People, 25 Colo. 511, 55 Pac. 726, collecting authorities, and holding State statute requiring license to sell goods manufactured outside the State void; St. Louis v. Spiegel, 75 Mo. 146, holding city license tax on butchers, varying in different parts of city, void.

Miscellaneous.— Cited incidentally in People v. Moore, 1 Idaho, 507.

12 Wall. 433–439, 20 L. 442, INSURANCE COS. v. BOYKIN.

Appeal and error.— A general exception to an elaborate charge is insufficient, p. 436.

Insurance.— An affidavit of proof of loss by an insane party is sufficient if it contains the required information, p. 436.

Cited with approval in Manufacturers, etc., Indemnity Co. v. Fletcher, 5 Ohio C. C. 636, excusing notice during delirium.

Insurance.— An affidavit of proof of loss is excused where insured is too insane to make an intelligent statement, p. 436.

Cited with approval in Peele v. Provident, etc., Society, 147 Ind. 552, 44 N. E. 664, and Trippe v. Provident, etc., Society, 140 N. Y. 28, 37 Am. St. Rep. 532, 35 N. E. 317, 22 L. R. A. 434, both holding notice required in ten days, with full particulars, is excused until party has knowledge thereof: Kentzler v. American, etc., Assn., 88 Wis. 596, 43 Am. St. Rep. 937, 60 N. W. 1004, collecting cases, notice required immediately need not be given till death is known; Manufacturers, etc., Indemnity Co. v. Fletcher, 5 Ohio C. C. 636, excusing notice during delirium, after accident; Gerling v. Agricultural Ins. Co., 39 W. Va. 699, 20 S. E. 694, where making deed void a policy, it does not apply where party is insane; McCall v. Merchants' Ins. Co., 33 La. Ann. 144, holding imprisonment insufficient excuse, under the circumstances.

Actions resting on same evidence and issues may be joined by plaintiff, with consent of various defendants, p. 437.

Cited, arguendo, in Rogers v. Ætna Ins. Co., 76 Fed. 571, a defendant who excepts to joinder, after expiration of time when suit must be commenced, a new libel may nevertheless be filed.

Judgment.— A consent to joinder of actions does not authorize a joint judgment, p. 437.

Judgment.— Where several actions are joined by consent, the judgment should be several, with joint judgment for costs, p. 437.

Distinguished in Chils v. Gronlund, 41 Fed. 505, in joint tort, there is but one judgment.

Appeal and error.— When pleading, trial and verdict are correct, but judgment entered is incorrect, Supreme Court, in reversing, will enter proper judgment, unless reversal is in favor of plaintiff below, and damages or matter decreed is uncertain, p. 438.

Cited with approval in Cragin v. Lovell, 109 U. S. 200, 27 L. 905, 3 S. Ct. 135, collecting cases, judgment, given by default, on declaration showing no cause of action, is arrested; Idler v. Borgmeyer, 65 Fed. 927, 28 U. S. App. 332, question of law reserved non obstante veredicto, proper judgment ordered by Court of Appeals; Isler v. Brown, 67 N. C. 177, proper judgment given on appeal of agreed case; Rush v. Halcyon, etc., Co., 68 N. C. 76, judgment against plaintiff, on appeal bond, reversed on error, the court enters proper judgment.

12 Wall. 440, 20 L. 446, HENNESSY v. SHELDON.

Appeal and error.— Writ of error, being prosecuted merely for delay, judgment affirmed, with 10 per cent. damages, p. 440.

Not cited.

12 Wall. 440-443, 20 L. 429, WALKER v. DREVILLE.

Mortgages.— By equity rule 92, a personal judgment may be given in foreclosure cases in Federal courts, p. 442.

Cited with approval in Idaho, etc., Land Co. v. Bradbury, 132 U. S. 515, 33 L. 437, 10 S. Ct. 179, collecting cases, foreclosure of mechanic's lien, with personal judgment, is in equity.

Courts.— Even in Louisiana the distinction between law and equity must be preserved in Federal courts, p. 442.

Cited with approval in Hayward v. Andrews, 106 U. S. 678, 27 L. 273, 1 S. Ct. 549, assignee of chose in action cannot proceed in equity to enforce legal right merely because he could not sue at law in his own name; obiter in Fleitas v. Richardson, 147 U. S. 547, 37 L. 275, 13 S. Ct. 433, collecting cases, Stevens v. Clark, 62 Fed. 323, 18 U. S. App. 584, collecting cases, and Nelson v. Lowndes, 93 Fed. 541.

Appeal and error.— Decisions of Federal courts in equity are reviewed by appeal, and at law by writ of error, p. 442.

Cited with approval in Land Trust v. Hoffman, 57 Fed. 336, 13 U. S. App. 399, collecting cases, writ of error on decree to remove cloud should be dismissed, but examined herein as per stipulation; Stevens v. Clark, 62 Fed. 323, 18 U. S. App. 584, collecting cases, applied to case at law to Court of Appeals; Muhlenberg v. Dyer, 65 Fed. 635, 31 U. S. App. 109, collecting cases, application for mandamus can only be reviewed by writ of error; Nelson v. Lowndes, 93 Fed. 541, collecting cases, decree in equity cannot be brought to Court of Appeals by writ of error.

Appeal and error.— Foreclosure suit, being brought from Circuit Court in Louisiana by writ of error, instead of appeal, is dismissed, p. 443.

Cited with approval in Marin v. Lalley, 17 Wall. 18, 21 L. 596, refusing to dismiss appeal from executory process in Louisiana; Fleitas v. Richardson, 147 U. S. 544, 37 L. 275, 13 S. Ct. 432, collecting cases, and Benjamin v. Cavaroc, 2 Woods, 172, F. C. 1300, both holding executory process in Louisiana, though summary, is in equity.

12 Wall. 443–445, 20 L. 438, SCOTT v. UNITED STATES.

Contracts.— An agreement, giving a government contractor exclusive right to transport troops and goods by river between A. and B., does not include right to transport goods coming from a more remote point, over the route covered by the exclusive agreement, p. 444.

Contracts.— When terms are doubtful or obscure, there is no surer guide to intent than to assume the situation occupied by parties, when made, p. 444.

Cited with approval in Cravens v. Eagle, etc., Co., 120 Ind. 11, 16 Am. St. Rep. 302, 21 N. E. 982, considering circumstances attending a subscription to corporation; Nevada Nickel Syndicate v. National, etc., Co., 96 Fed. 155, applying the rule.

Contracts by parol, attempted to be entered into, are not binding contracts when there is a misunderstanding as to terms, p. 445.

Cited obiter in Hume v. United States, 132 U. S. 412, 33 L. 396, 10 S. Ct. 137, collecting cases.

Contracts in writing, whose terms are misunderstood, will not be executed in equity, p. 445.

Cited obiter in Hume v. United States, 132 U. S. 412, 32 L. 396, 10 S. Ct. 137, collecting cases.

Contracts.— Where contract is unreasonable or unconscionable, but not void for fraud, a court of law gives damages, not according to letter, but only as party is equitably entitled thereto, p. 445.

Cited with approval in Hume v. United States, 132 U. S. 412, 33 L. 396, 10 S. Ct. 137, collecting cases, applied to similar case; Nevada Nickel Co. v. National, etc., Co., 96 Fed. 155, enforcing contract in modified form.

12 Wall. 446–451, 20 L. 415, EDWARDS v. TANNERET.

Courts.— Act of Congress of July 28, 1866, transferring cases from Provisional Court of Louisiana to Federal courts, did not enlarge their jurisdiction, but such as could not be acted upon remained in District Court, without further action, p. 449.

Courts.— Where jurisdiction of Circuit Court is invoked for citizenship of parties, the diversity must appear on the record, p. 450.

Courts.— Where complaint describes parties as residents of Louisiana, and the citation describes them as citizens thereof, the Circuit Court has no jurisdiction, p. 450.

Not cited.

12 Wall. 451–452, 20 L. 457, THE PATAPSCO.

Appeal and error.— In decree for amount reported due by master, with interest from date of report, interest must be added to date of decree, to determine jurisdictional amount for appeal, p. 452.

Cited with approval in The Rio Grande, 19 Wall. 189, 22 L. 62, applied to interest allowed on claim in admiralty; N. Y., etc., R. R. v. Fifth Nat. Bank, 118 U. S. 610, 30 L. 260, 7 S. Ct. 24, all interest accruing before judgment is included, without regard to amount of verdict; Zeckendorf v. Johnson, 123 U. S. 618, 31 L. 278, 8 S. Ct. 262, interest included up to time of judgment of highest court, when that comes up for review; District of Columbia v. Gannon, 130 U. S. 228, 32 L. 922, 9 S. Ct. 509, interest not added in judgment for personal injury, affirmed in Supreme Court, without allowing interest; Keller v. Ashford, 133 U. S. 617, 33 L. 671, 10 S. Ct. 495, collecting cases, suit on contract, all interest accrued at time of judgment or decree is added; Massachusetts, etc., Assn. v. Miles, 137 U. S. 692, 34 L. 835, 11 S. Ct. 235, suit on insurance policy and interest, interest is added to time of judgment; Hall v. Grogan, — Ky. —, 50 S. W. 258, interest accruing after judgment not included; arguendo, in Griffiths v. Baltimore, etc., R., 44 Fed. 585, collecting cases, interest is allowed from verdict to judgment, where proceedings are stayed.

12 Wall. 452–454, 20 L. 458, HALL v. ALLEN.

Bankruptcy.— An adjustment by Circuit Court of priorities and conflicting interest, being an exercise of superintending and revising jurisdiction, no appeal lies, p. 454.

Cited with approval in Mead v. Thompson, 15 Wall. 638, 21 L. 243, and Colt v. Robinson, 19 Wall. 286, 22 L. 155, both dismissing appeal from decree of Circuit Court affirming discharge of bankrupt; Sandusky v. National Bank, 23 Wall. 293, 23 L. 156, bankrupt asking for vacation of order declaring him such, in Circuit Court, no appeal allowed; Stickney v. Wilt, 23 Wall. 160, 23 L. 53, case wrongly taken into Circuit Court, under supervisory power, no appeal on merits lies to Supreme Court, but if it reverses District Court, case will be remanded, with directions to dismiss; Wiswall v. Campbell, 93 U. S. 348, 23 L. 923, collecting cases, rejecting creditor's claim, no appeal. Cited, arguendo, in Sherman v. Bingham, 3 Cliff. 557, F. C. 12,762, to point that Circuit Court has supervisory jurisdiction.

12 Wall. 455–456, 20 L. 458, PEOPLE v. CENTRAL R. R.

Courts.— Construction, by State court, of an agreement between two States, sanctioned by Congress, is not the construction of United States statute, and cannot be reviewed by Supreme Court, on error to State court, p. 456.

Not cited.

12 Wall. 457–681, 20 L. 287, THE LEGAL-TENDER CASES.

Introduction.— The questions involved in these cases had already been before the court in Hepburn v. Griswold, 8 Wall. 603, 19 L. 513, and a decision adverse to the validity of the legal-tender provisions of the acts of 1862, so far as concerned debts incurred prior to their enactment, was there made, the court standing five to three. One of the justices (Grier) participating in that decision having resigned, and two being appointed (Strong and Bradley), the question came up again in the Legal-Tender Cases. Those remaining of the majority in the Hepburn case still held to their opinion, but were now overruled, five to four. Among the dissenting opinions was that of the chief justice, who, as secretary of the treasury, had advised the ways and means committee that the clause was valid, but had thereafter felt constrained to change his views. The majority opinion, of course, prevailed throughout the State courts, not, however, without strong expressions of dissent in many instances.

Constitutional law.— Irrespective of consequences, if there be a clear incompatibility between the Constitution and the legal-tender acts, they are void, p. 531.

Cited with approval in State v. Wrightson, 56 N. J. L. 212, 28 Atl. 66, 22 L. R. A. 560, holding election law void; dissenting opinion in Fesler v. Brayton, 145 Ind. 93, 44 N. E. 43, 32 L. R. A. 584, majority dismissing action to declare an apportionment act for legislature invalid.

Constitutional law.— Courts must presume, unless the contrary is clearly shown, that an act of Congress is constitutional, p. 531.

Cited with approval in United States v. Boyer, 85 Fed. 430, collecting cases, holding void act of Congress for slaughter-house inspection; Languille v. State, 4 Tex. App. 322, holding act valid, though not entirely satisfied as to its validity.

United States.— The government may freely, in its discretion, employ any means not prohibited, which are necessary and proper for its preservation or in fulfillment of its duties, pp. 534, 539, 542, 544, 561.

Cited with approval in In re Reiman, 7 Ben. 466, F. C. 11,673, collecting cases, holding constitutional statute providing for compositions with creditors; In re Jackson, 14 Blatchf. 250, F. C. 7,124, acts punishing the sending of lottery matters through mail valid; United States v. Boyer, 85 Fed. 429, act of Congress for slaughter-house inspection is void; Jamieson v. Indiana, etc., Co., 128 Ind. 562, 579, 28 N. E. 78, 84, 12 L. R. A. 654, 660, prohibiting the use of natural gas at more than specified pressure is valid; State v. Kolsem, 130 Ind. 442, 29 N. E. 598, 14 L. R. A. 570, and n., legislature may provide for municipal board of police; State v. Wrightson, 56 N. J. L. 212, 28 Atl. 66, 22 L. R. A. 560, holding election law invalid; Hancock v. Yaden, 121 Ind. 373, 16 Am. St. Rep. 401, 23 N. E. 255, 6 L. R. A. 579, holding valid an act making void all waiving of coin payments by laborers; State v. Haworth, 122 Ind. 467, 23 N. E. 948, 7 L. R. A. 242, legislature may prescribe course of study in schools; dissenting opinion in United States v. Reese, 92 U. S. 253, 23 L. 577, majority holding sections 3 and 4, 16 Stat. 140 (election laws) invalid; arguendo, in Forsyth v. City of Hammond, 71 Fed. 446, 34 U. S. App. 552, and Newman v. Reed, 50 Ala. 302.

Limited in Matter of Jacobs, 98 N. Y. 112, 50 Am. Rep. 645, whether the act is of such a character is for court.

United States.— Congress has powers not specified, or even clearly traceable to one of the specified powers, but fairly deduced from the aggregate of power or the sovereignty created, pp. 534, 535.

Cited in United States v. Boyer, 85 Fed. 429, and explained as meaning no more than that Congress may use appropriate means.

United States.— A power may exist as an aid to the execution of a power or the aggregate of powers, though there is another express power given relating, in part, to the same subject, but less extensive, p. 536.

Constitutional law.— Certain acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times, p. 540.

The argument that the power of making notes legal tender arose from the exigencies of the war was repudiated in Legal-Tender

Case, 110 U. S. 438, 28 L. 211, 4 S. Ct. 124, holding it may be done in time of peace.

United States.— The Constitution was intended to frame a paramount government, sovereign in its sphere, as distinguished from a league or compact, pp. 533, 545.

United States.— To obtain a uniform currency, all power is vested in Congress, which may coin money, while power to emit bills of credit is denied the States, p. 545.

States.— Some powers of sovereignty belong neither to States nor United States, and have been extinguished, but this is not left to inference, p. 546.

United States.— The clauses granting Congress power to coin money, and denying to States right to emit bills of credit, do not impliedly prohibit Congress from making treasury notes legal tender, p. 547.

Contracts.— There is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed, p. 548.

Cited with approval in Maryland v. Railroad Co., 22 Wall. 112, 22 L. 714, and Baltimore, etc., R. v. State, 36 Md. 542, both holding the implication to pay in gold must be in the language of contract, and not merely in expectation of parties.

Contracts — Tender.— The obligation of a contract to pay money is to pay that which the law shall recognize as money when payment is to be made, p. 548.

Cited with approval in Legal-Tender Case, 110 U. S. 449, 28 L. 215, 4 S. Ct. 130, reaffirming the doctrine; Baltimore, etc., R. R. v. State, 36 Md. 542, holding interest guaranteed on bonds may be paid in paper.

Tender.— Principle that a contract to pay money means only to pay such as shall be lawful money at the time of payment, is not asserted as respects contracts to pay in some defined species of money, p. 548.

Cited in Belford v. Woodward, 158 Ill. 130, 41 N. E. 1099, 29 L. R. A. 598, and n., Jones v. Childs, 8 Nev. 126, and Baltimore, etc., R. v. State, 36 Md. 541, all holding principle inapplicable to contracts to pay in some specific kind of money; Bridges v. Reynolds, 40 Tex. 214, may be paid in gold or its equivalent in currency, at debtor's option; dissenting opinion in Baltimore, etc., R. R. v. State, 36 Md. 550, majority holding interest on bonds payable in paper; Bridges v. Reynolds, 40 Tex. 216, majority holding debts payable in gold may be so paid, or in currency equivalent, at debtor's option· Bridges v. Reynolds, 40 Tex. 217, arguendo.

Constitutional law.— Legal-tender acts, as applied to pre-existing contracts, did not impair the obligation of contracts, p. 549.

Constitutional law.— The United States may impair the obligation of contracts by legislation, p. 550.

Cited with approval in In re Wyllie, 2 Hughes, 453, F. C. 18,112, In re Smith, 2 Woods, 460, F. C. 12,996, and In re Smith, 8 N. B. R. 407, 22 Fed. Cas. 401, all holding valid 17 Stat. 334, as to homestead exemptions of bankrupts; Lamb v. Chamness, 84 N. C. 384, holding revised statutes, section 5045, protected bankrupt's homestead irrespective of date of judgment lien.

Constitutional law.— Contracts are always made in reference to the possible exercise of the rightful authority of the government, and no obligation of contract can extend to defeat its exercise, p. 551.

Cited in dissenting opinion in Lake View v. Rose, etc., Cemetery Co., 70 Ill. 203, majority holding an act prohibiting interment by this company void.

Constitutional law.— The prohibition of the taking of property without just compensation or due process, refers only to a direct taking and not to consequential injuries resulting from the exercise of lawful power, p. 551.

Constitutional law.— Courts cannot hold an act of Congress invalid merely because harsh and unjust, p. 552.

Constitutional law.— The legal-tender acts are constitutional as to debts contracted before or after passage, p. 553.

The following cases reaffirm the constitutionality of the acts and hold currency sufficient to discharge contracts: Dooley v. Smith, 13 Wall. 606, Legal-Tender Case, 110 U. S. 438, 28 L. 211, 4 S. Ct. 124, McElderry v. Jones, 67 Ala. 205, People v. Cook, 44 Cal. 640, Black v. Lusk, 69 Ill. 76, Belford v. Woodward, 158 Ill. 129, 41 N. E. 1099, 29 L. R. A. 598, and n., and Bowen v. Clark, 46 Ind. 410, collecting cases; Wells v. Bobb, 9 Bush, 32, Baltimore, etc., R. R. v. State, 36 Md. 540. Also cited in State v. Wrightson, 56 N. J. L. 212, 28 Atl. 66, 22 L. R. A. 560, Phillips v. Dugan, 21 Ohio St. 469, 8 Am. Rep. 68, Longworth v. Mitchell, 26 Ohio St. 342, Bridges v. Reynolds, 40 Tex. 213, Townsend v. Jennison, 44 Vt. 318, 8 Am. Rep. 385, Bigler v. Waller, 14 Wall. 308, 20 L. 894, Railroad Co. v. Johnson, 15 Wall. 195, 21 L. 178, and Munter v. Rogers, 50 Ala. 292, in all of which judgments, made payable in gold, are reversed; Glover v. Robbins, 49 Ala. 222, 20 Am. Rep. 274, and Brassell v. McLemore, 50 Ala. 478, debts payable "in specie" are held to be satisfied by legal-tender notes; Baldwin v. Baker, — Mich. —, 80 N. W. 36, act of 1878, making silver dollar full legal tender, is constitutional; The Vaughan, 14 Wall. 268, 20 L. 809, and

Simpkins v. Low, 54 N. Y. 184, both holding jury, in assessing damages, may consider it will be paid in paper and allow therefor; Bissell v. Heyward, 96 U. S. 587, 24 L. 680, decree for contract in Confederate notes should be for sum equal to currency of United States at time and place payable and not to gold; In re Dunham, 8 Fed. Cas. 38, Woodruff v. Woodruff, 52 N. Y. 57, Troy v. Bland, 58 Ala. 199, Doll v. Earle, 59 N. Y. 639, and Proctor v. Heaton, 114 Ind. 253, 15 N. E. 23, all disallowing recovery of premiums for gold payments made in reliance on Hepburn case; dissenting opinions in Baltimore, etc., R. R. v. State, 36 Md. 540, and State v. Baltimore, etc., R. R., 48 Md. 90. Cited, arguendo, in Hancock v. Yaden, 121 Ind. 372, 16 Am. St. Rep. 401, 23 N. E. 255, 6 L. R. A. 578, and Klauber v. Biggerstaff, 47 Wis. 560, 32 Am. Rep. 778, 3 N. W. 361, collecting cases. See note, 87 Am. Dec. 125.

Distinguished in Crain v. McGoon, 86 Ill. 435, 29 Am. Rep. 41, and Harris v. Jex, 55 N. Y. 423, 14 Am. Rep. 287, both holding a refusal to accept paper, before this decision, does not discharge mortgage.

States.— Confiscation and sale, by an insurrectionary State, of the property of a loyal citizen are void, and the purchaser acquires no title. Texas v. White, 7 Wall. 700, 19 L. 227, affirmed, p. 554.

Cited with approval in Dewing v. Perdicaries, 96 U. S. 195, 24 L. 655, collecting cases, holding sale of stock of alien enemies, by South Carolina, void; Vance v. Burtis, 39 Tex. 91, confiscation of debts is no defense against original creditor.

United States.— The United States is the national government, with power over general subjects of legislation to deal with foreign nations and to preserve peace, per Bradley, J., concurring, p. 555.

Cited with approval in The Chinese Exclusion Case, 130 U. S. 605, 32 L. 1075, 9 S. Ct. 629, and Fong Yue Ting v. United States 149 U. S. 706, 37 L. 910, 13 S. Ct. 1019, both holding aliens may be excluded; In re Debs, 158 U. S. 579, 39 L. 1101, 15 S. Ct. 904, United States has jurisdiction to enjoin strikers.

Constitutional law.— The power to make notes legal tender is not given by the clause to coin money; that provision, as distinguished from power to issue notes, is not necessary to war power, nor to borrow money; it is a deprivation of property without due process of law, and it impairs obligation of contracts, which United States can only do in case of bankruptcy, per Chase, Ch. J., dissenting, pp. 570–587.

Cited to point that even dissents hold the United States may make its notes receivable for debts in Legal-Tender Case, 110 U. S. 445, 28 L. 213, 4 S. Ct. 128, holding acts valid. Approved in dissenting opinion in Railroad Co. v. Johnson, 15 Wall. 196, 21 L. 178, majority hold with majority opinion.

Constitutional law.— Congress may only impair the obligation of contracts in cases of bankruptcy, per Field J., and Chase, Ch. J., dissenting, pp. 581, 663.

Cited to effect that United States may impair contracts by bankrupt acts in In re Kean, 2 Hughes, 323, F. C. 7,630, In re Wyllie, 2 Hughes, 453, F. C. 18,112, and In re Smith, 8 N. B. R. 407, 22 Fed. Cas. 401, all holding 17 Stat. 577, regarding State homestead exemptions, valid; dissenting opinion in Sinking-Fund Cases, 99 U. S. 763, 25 L. 517, majority holding sinking fund, for Pacific railroads, valid.

Constitutional law.— Congress may issue paper, but making it legal tender is not an appropriate means to any power and is repugnant to the power to coin money; it is against contemporary exposition; it impairs the obligation of contracts, which is not within the power of Congress. The act is also void as to debts subsequently contracted, per Field, J., dissenting, pp. 634–681.

Approved in dissenting opinion in People v. Cook, 44 Cal. 641, majority holding with majority opinion.

Miscellaneous.— Cited in Legal-Tender Case, 110 U. S. 448, 28 L. 214, 4 S. Ct. 130, historically; Lane v. Kolb, 92 Ala. 655, 9 So. 880, without application; Woodruff v. Woodruff, 52 N. Y. 60, incidentally; United States v. Boyer, 85 Fed. 429, citing Field, J., opinion to point that majority do not agree as to what clause this power is traceable; dissenting opinion in Orr v. Quimby, 54 N. H. 634, without application; Smith v. Ontario, 17 Blatchf. 243, F. C. 13,086, and Wadhams v. Gay, 73 Ill. 423, both citing to illustrate res judicata.

12 Wall. 681–686, 20 L. 436, BRONSON v. CHAPPELL.

Principal and agent.— Agents are special, general, or universal, p. 683.

Cited with approval in Abraham v. North, etc., Ins. Co., 40 Fed. 721, holding company bound by agent herein.

Principal and agent.— Where written evidence of appointment is not required, it may be implied from circumstances, p. 683.

Cited with approval in Abraham v. North, etc., Ins. Co., 40 Fed. 721, holding company bound by agent herein.

Principal and agent.— One allowing another to act, apparently by his authority, or by his conduct, adopts such acts thereafter, is bound as if authority were formally given, p. 683.

Cited with approval in Abraham v. North, etc., Ins. Co., 40 Fed. 721, holding company bound by agent herein; Bank v. Bright, 77 Fed. 951, 39 U. S. App. 483, having retained fruits, may be presumed to have sanctioned action; McElroy v. British, etc., Assur. Co., 94 Fed. 998, collecting cases, accepting premiums and issuing policy

ratifies agency, though, by policy, agents only authorized in writing; United States Express Co. v. Rawson, 106 Ind. 217, 6 N. E. 339, collecting cases, agent, contrary to rule, receives part payment and converts, company is liable if ratifying such receipt; Swofford, etc., Co. v. Berkowitz, 7 Kan. App. 26, 51 Pac. 797, agency cannot be proved by declarations of agent; McNeil v. Boston, 154 Mass. 285, 28 N. E. 248, acts of directors openly done over long period, without objection, are authorized. Cited, arguendo, in Hatch v. Ferguson, 66 Fed. 672, 29 U. S. App. 540, allowing improvement made, one is estopped from claiming title.

Principal and agent.— One justifying belief of third person, that apparent agent is authorized to act, cannot say that no authority was given or that it did not reach so far, p. 683.

Cited with approval in Mammoth, etc., Co. v. Salt Lake, etc., Co., 151 U. S. 450, 38 L. 230, 14 S. Ct. 385, allowing lien for materials furnished; Wilcox v. Carr, 37 Fed. 135, payment discharges though agent embezzles; Abraham v. North, etc., Ins. Co., 40 Fed. 721, holding company bound by agent herein; M'Elroy v. British, etc., Assur. Co., 94 Fed. 998, collecting cases, accepting premium and issuing policy ratifies agency, though, by policy, agents only authorized in writing; Wilson v. Beardsley, 20 Neb. 451, 30 N. W. 530, collecting cases, liable for original amount of raised draft, allowed drawn by agent. Cited, arguendo, in American, etc., Co. v. Van Nortwick, 52 Fed. 756, 9 U. S. App. 25, licensee of patent allowing it to be delivered to corporation of which he is the head, is estopped to claim it should be to himself; Hatch v. Ferguson, 66 Fed. 672, 29 U. S. App. 540.

Principal and agent.— Everything within the scope of powers exercised in past may be inferred to be still authorized until notice of revocation or disclaimer reaches those interested, p. 683.

Cited with approval in Steelsmith v. Union Pac. Ry., 1 Kan. App. 13, 40 Pac. 993, collecting cases, previous hiring of physician, and payment by company, is evidence of authority of station agent.

12 Wall. 687-700, 20 L. 460, TREBILCOCK v. WILSON.

Courts.—Supreme Court has jurisdiction, on error to State court, where a Federal statute is declared unconstitutional or is construed against right set up by plaintiff in error, p. 692.

Cited with approval in Woodruff v. Mississippi, 162 U. S. 298, 40 L. 975, 16 S. Ct. 823, and Churchman v. Martin, 54 Ind. 384, both holding United States Supreme Court has jurisdiction over State decision determining the kind of money to discharge contract; dissenting opinion in Merchants' Bank v. Union Bank, 22 Wall. 301, 22 L. 874, majority holding that question of jurisdiction of Provost Court, between local banks, is for State court; Woodruff v. Mississippi, 162 U. S. 310, 40 L. 979, 16 S. Ct. 827, and distinguished, majority taking jurisdiction.

Tender.— A note payable in specie means coined dollars and cannot be discharged by legal-tender notes, pp. 695, 697.

Cited with approval in Maryland v. Railroad Co., 22 Wall. 111, 22 L. 714, and Baltimore, etc., R. R. v. State, 36 Md. 541, both holding such stipulation must be in language of contract, not expectation of parties; Pollard v. Pleasant Hill, 3 Dill. 197, F. C. 11,253, interest on bonds payable in notes may be made payable in gold; Hittson v. Davenport, 4 Colo. 174, applied to note payable in gold; Whitaker v. Dye, 56 Ga. 383, note for equivalent amount in currency gives payor benefit of appreciation up to maturity but not after default; Atkinson v. Lanier, 69 Ga. 463, not payable in gold, or its equivalent, due in 1867, judgment can only be for gold at time of payment and not for currency value of gold in 1867; Belford v. Woodward, 158 Ill. 130, 131, 41 N. E. 1099, 29 L. R. A. 598, and n., and Phillips v. Dugan, 21 Ohio St. 470, 8 Am. Rep. 68, must be paid in gold, and not its equivalent, at option of payor; Churchman v. Martin, 54 Ind. 384, gold must be paid after maturity, where note provided currency may be paid, if paid at maturity, otherwise gold; State v. Hays, 50 Mo. 36, 11 Am. Rep. 404, mandamus does not lie against State board to compel payment of gold for gold bonds; Isett v. Caldwell, 101 Pa. St. 35, note payable in gold or equivalent, interest paid in equivalent, excess cannot be recouped at maturity; Bridges v. Reynolds, 40 Tex. 213, 214, notes payable in gold or equivalent, may be satisfied in either at option of debtor; Cooke v. Davis, 53 N. Y. 320, within power of parties to contract for either currency. Cited in dissenting opinion in Woodruff v. Mississippi, 162 U. S. 309, 40 L. 979, 16 S. Ct. 826, majority holding court had jurisdiction; Baltimore, etc., R. R. v. State, 36 Md. 549, majority holding payment for gold not herein implied.

Tender.— A judgment for a note payable in specie may be entered for coined dollars, p. 699.

Cited with approval and applied in Jones v. Childs, 8 Nev. 126, Smith v. Woods, 37 Tex. 621, The Emily Souder, 17 Wall. 672, 21 L. 685, and Bridges v. Reynolds, 40 Tex. 213, 214, may be for gold, where note is for gold or its equivalent; Atkinson v. Lanier, 69 Ga. 464, being equal in value, kind of money need not be specified; Stringer v. Coombs, 62 Me. 165, 16 Am. Rep. 418, suit for commission, on contract for Spanish dollars, execution should issue specifically for coin; dissenting opinion in The Vaughan and Telegraph, 14 Wall. 270, 20 L. 809, majority holding a decree in notes of gold value, at date of shipment, correct. Disapproved in Bridges v. Reynolds, 40 Tex. 216, holding all judgments should be for dollars generally, but giving gold equivalent. See note, 87 Am. Dec. 127.

Tender — Constitutional law.— Contracts, specifically payable in gold, may be paid in legal-tender notes, per Bradley, J., dissenting, p. 699.

Cited in Legal-Tender Cases, 12 Wall. 566, 20 L. 317, concurring in opinion that acts were valid.

12 Wall. 700-702, 20 L. 463, THE PROTECTOR.

War.—Proclamations of president mark the beginning and end of the Civil War, p. 702.

Cited with approval in Masterson v. Howard, 18 Wall. 105, 21 L. 766, but suit could be brought in Circuit Court as soon as open, though no proclamation issued; McElrath v. United States, 102 U. S. 438, 26 L. 191, army officers could be dismissed by president till August 20, 1866; McStea v. Matthews, 50 N. Y. 170, partnership with rebel not terminated till proclamation of blockade.

Questioned in Walker v. Beauchler, 27 Gratt. 524, whether all intercourse stopped at the blockade proclamation or only such as was contemplated in blockade.

War.—The Civil War did not begin or end at same time in all States, and, in absence of other criteria, the various proclamations designating these dates in various States are decisive, p. 702.

Cited with approval in Brown v. Hiatts, 15 Wall. 183, 21 L. 30, Williams v. Bruffy, 96 U. S. 198, 24 L. 720, Walker v. Beauchler, 27 Gratt. 524, Portsmouth Ins. Co. v. Reynolds, 32 Gratt. 628, Isaacs v. Richmond, 90 Va. 38, 17 S. E. 763, and Simmons v. Trumbo, 9 W. Va. 364, stating limits in Virginia; Adger v. Alston, 15 Wall. 560, 21 L. 236, Hall v. Connecticut, etc., Ins. Co., 68 Ill. 360, Aby v. Brigham, 28 La. Ann. 841, and Hall v. Denckla, 28 Ark. 511, in Louisiana; Batesville v. Kauffman, 18 Wall. 155, 21 L. 777, Ross v. Jones, 22 Wall. 587, 22 L. 733, stating limits in Arkansas; Burke v. Miltenberger, 19 Wall. 525, 22 L. 159, Provisional Court of Louisiana ceased to exist after July 28, 1866; Raymond v. Thomas, 91 U. S. 714, 23 L. 435, order, by military officer, in 1868, annulling decree of local court is void; Lamar v. Browne, 92 U. S. 198, 23 L. 653, cotton taken after cessation of hostilities, but before proclamation, is legitimate subject of capture; Carrol v. Green, 92 U. S. 511, 23 L. 739, in South Carolina; United States v. Muhlenbrink, 1 Woods, 570, F. C. 15,831, and Hubbard v. Harnden Express Co., 10 R. I. 253, stating end of war in Georgia; Healy v. Mothershed, 11 Fed. Cas. 961, in Mississippi; Bishop v. Knowles, 53 Iowa, 272, 5 N. W. 142, Hammond v. Johnston, 93 Mo. 221, 6 S. W. 91, in Tennessee; Grigsby v. Peak, 57 Tex. 145, in Texas; Hubbard v. Harnden, 10 R. I. 253, goods taken from express company, after proclamation, are taken by public enemy; Portsmouth Ins. Co. v. Reynolds, 32 Gratt. 628, destruction of property by United States before this date not act of hostile invader; Isaacs v. Richmond, 90 Va. 38, 17 S. E. 763, ordinance for notes, passed before Rebellion, but in its aid, is void, the notes being issued thereafter; Simmons v. Trumbo, 9 W. Va. 364, a surrender of bond for Confederate notes is not payment by

duress because considered disloyal to refuse. Cited in dissenting opinion in Coleman v. Tennessee, 97 U. S. 533, 24 L. 1128, majority holding soldier convicted during war, by court-martial, for murder, could not be tried by State court after war. See note, 9 Am. Rep. 676.

Distinguished in Turner v. Patton, 49 Ala. 411, mails being in operation before proclamation, notice to indorser cannot be delayed.

Limitations of actions.— Statutes of limitation are suspended during war, p. 702.

Cited with approval, stating and applying rule, in Brown v. Hiatts, 15 Wall. 183, 21 L. 130, Williams v. Bruffy, 96 U. S. 193, 24 L. 720, Aby v. Brigham, 28 La. Ann. 841, Batesville v. Kauffman, 18 Wall. 155, 21 L. 777, Bird v. Louisiana State Bank, 93 U. S. 99, 23 L. 819, and Randolph v. Ward, 29 Ark. 245, collecting cases; Ahnert v. Zaun, 40 Wis. 629, and Ross v. Jones, 22 Wall. 587, 22 L. 733, applied to those in southern States as well as others; Harrison v. Myer, 92 U. S. 115, 23 L. 607, where defendant could be served, and suit is between citizens of same State, a State decision that statute did not stop is decisive; United States v. Muhlenbrink, 1 Woods, 570, F. C. 15,831, statute not suspended after proclamation of end, though court not in session; Healy v. Mothershed, 11 Fed. Cas. 961, citizen of Massachusetts not entitled to this bar plus the suspension, under State's law, of action in ejectment.

Distinguished in Seymour v. Bailey, 66 Ill. 299, statutes allowing suit by publication for property in State, not suspended by war against non-resident in southern State; Hall v. Connecticut, 68 Ill. 360, not suspended in favor of one who leaves to fight in southern army. Questioned in Amiss v. McGinniss, 12 W. Va. 397, 398, as to effect in stopping statute between citizens of the same State, there being a special State statute, but not decided.

Appeal and error.— More than five years elapsing from end of war to filing writ of error, it is dismissed, p. 702.

13 Wall.	Title.	Here in.
605	Dooley v. Smith,	548
605–607	" "	549
607–608	" "	550
608	Paige v. Banks,	709
614	" "	710
614–616	" "	711
616	Insurance Company v. Bailey,	501
618–620	" "	502
620–623	" "	503
623–627	United States v. Russell,	474
627–630	" "	475
630–632	" "	476
633–635	Pugh v. United States,	711
635	" "	712
636	United States v. Kimbal,	503
642–644	" "	504
644–646	" "	505
646	White v. Hart,	685
647–649	" "	686
649–652	" "	687
652–654	" "	688
654	Osborn v. Nicholson *et al.*,	680
656–658	" "	693
658–659	" "	694

13 Wall.	Title.	Here in.
659–662	Osborn v. Nicholson *et al.*,	695
662–664	" "	696
664	*Ex parte* Russell,	632
668	" "	633
668–671	" "	634
671–672	" "	635
672	Insurance Company v. Thwing,	607
674–675	" "	608
675–678	" "	609
678–679	" "	610
679	Watson v. Jones,	666
713–714	" "	670
714–717	" "	671
717–720	" "	672
720–722	" "	673
722–723	" "	674
723–726	" "	675
726–729	" "	676
729–732	" "	677
732–735	" "	678
735–738	" "	679
738–741	The Mabey,	473
741–742	" "	474

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(See S. C. *"The Mabey,"* 13 Wall. 738-742.)

Commission to take testimony, when refused—insufficient excuse—none but parties to the appeal can be heard in appellate court.

Commission to take testimony is not allowed in this court, under the twelfth rule, as of course. Satisfactory excuse for failure to examine the witnesses in the court below must be shown.

The excuse that the party agreed that he would not introduce any testimony in the court below and therefore did not is not sufficient.

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[No. 377.]

Argued Feb. 24, 1871. Decided Feb. 27, 1871.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

On motion for commission to take testimony.

This case arose upon a libel in admiralty, filed in the district court of the United States for the southern district of New York. Judgment was given for the libelants in that court, and affirmed upon appeal to the circuit court. Whereupon the claimants took a further appeal to this court.

The case is sufficiently stated by the court.

Messrs. **W. W. Goodrich** and *T. M. Wheeler* for appellants.

Mr. **E. C. Benedict** for appellees.

Mr. Justice **Clifford** delivered the opinion of the court:

Motion for a commission to take the testimony of certain witnesses filed by the appellants.

Damages are claimed by the owners of the ship Isaac F. Chapman, for injuries which the ship received in a collision that occurred between the ship, while she was lying at a dock in the port of New York, and the steam tug R. S. Mabey, and the ship Helen R. Cooper, which, at the time of the collision, was in tow of the steam tug, as more fully set forth in the libel filed in the district court. Serious injury resulted to the ship of the libelants, and they alleged that the steam tug and the ship Helen R. Cooper were both in default.

Separate answers were filed by the claimants of the tug and tow, and both, it seems, made preparation for defense; but, before the day for the hearing arrived, they entered into the following stipulation, which is an exhibit in the motion before the court. Omitting the names of the parties to the suit and the signatures of the proctors, the stipulation reads as follows:

It is hereby stipulated by and between the parties representing the claimants of the vessel respondent in the above action, that said ship, Helen R. Cooper, shall and does hereby assume the conduct of the defense, and that all and any judgment ordered against the said vessels, or either of them, shall be assumed and paid by said Helen R. Cooper.

Application for the same purpose as that described in the motion was made to this court by the appellants, on a prior occasion during the present term of the court; but it was refused, as no excuse was shown, in the petition or accompanying papers, why the witnesses were not examined either in the district or circuit courts, and the court said some excuse *should [*741 be shown, satisfactory to this court, for the failure to examine them in the courts below; such as that the evidence was discovered when it was too late to procure such examination, or that the witnesses had been subpœnaed and failed to appear, and could not be reached by attachment, and the like. 19 L. ed. 963.

Commissions for such a purpose cannot be allowed, as of course under the 12th rule, as it would afford an inducement to parties to keep back their testimony in the subordinate courts, and the effect would be to convert this court into a court of original jurisdiction. Admonished to that effect by the prior decisions of this court, the parties have filed with the present application an affidavit, as a compliance with that requirement. Unsettled as the practice was prior to that decision, the parties are right in supposing that this court would entertain a second application in the same case.

Governed by these views, the court has examined the affidavit and the reasons given why the testimony was not taken prior to the hearings in one of the subordinate courts; but the court is constrained to say that the reasons given are not satisfactory, as they show that the witnesses were in court, and that they were not examined because the party now asking for the commission agreed that they would not introduce any testimony in the case, and the affidavit shows that they did not introduce any in

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

DECEMBER TERMS, 1870, 1871,

AND REPORTED HEREIN,

VOLUME 80,

AS HAVE ALSO BEEN REPORTED IN

13 WALLACE.

13 Wall.	Title.	Herein.
1–3	Bethell v. Mathews,	556
3	Norwich Trans. Co. v. Flint,	556
6	" "	557
6	Yeager v. Farwell,	476
11–12	" "	477
12–13	" "	478
14–16	Webb, Trustee v. Sharp, Marshall	478
16–17	" "	479
17	Boyden et al. v. United States,	527
21–24	" "	529
24–25	" "	530
25	United States v. Wormer,	530
28–29	" "	531
29	Low et al. v. Austin,	517
32	" "	518
32–35	" "	519
35	United States v. Clyde,	479
37	" "	480
37–38	" "	481
38	Clyde v. United States,	479
39	" "	481
46	Toof et al. v. Martin, Assignee, etc.,	481
46–47	" "	482
47–50	" "	483
50–51	" "	484
51–56	Wheeler v. Harris,	531
56	Bevans, Receiver, v. U. S.,	531
60–61	" "	532
61–63	" "	533
63	Halliburton, Marshall, v. U. S.,	533
65	" "	534
66–68	Rice v. Houston, Administrator,	484
68	Curtis v. Whitney,	513
70–72	" "	514
72	Johnson v. Towsley,	485
80–83	" "	486
83–86	" "	487
86–89	" "	488
89–91	" "	489
91	Samson v. Smiley,	489
92	" "	490
92	Gibson v. Choteau,	534
99–100	" "	536
100–103	" "	537
103–104	" "	538

13 Wall.	Title.	Herein.
104	Norwich Company v. Wright,	585
114–117	" "	589
117–120	" "	590
120–123	" "	591
123–126	" "	592
126–128	" "	593
128	United States v. Klein,	519
136–138	" "	522
138–141	" "	523
141–144	" "	524
144–147	" "	525
147–150	" "	526
150	" "	527
151	Carroll v. United States,	565
152–153	" "	566
154	Armstrong v. United States,	614
155–156	" "	615
156–158	Pargoud v. United States,	646
158	Semmes v. Hartford Ins. Co.,	490
160–162	" "	491
162–164	Reiche v. Smythe, Collector,	566
164–165	" "	567
166	Pumpelly v. Green Bay Comp'ny	557
174–175	" "	559
175–179	" "	560
179–182	" "	561
182	" "	562
183	Steinbach v. Insurance Company	615
185	" "	616
185	" "	617
185	Philip et al. v. Nock,	567
187	" "	568
187–188	Hampton v. Rouse,	593
188–190	" "	594
190	Pennsylvania College Cases,	550
209	" "	551
209–212	" "	552
212–215	" "	553
215–218	" "	554
218–222	" "	555
222	" "	556
222	Insurance Company v. Wilkinson	617
230–231	" "	621
231–233	" "	622
233–236	" "	623
236–237	*Ex parte* McNiel,	624

13 Wall.	Title.	Here in.
605	Dooley v. Smith,	548
605–607	" "	549
607–608	" "	550
608	Paige v. Banks,	709
614	" "	710
614–616	" "	711
616	Insurance Company v. Bailey,	501
616–620	" "	502
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627–630	" "	475
630–632	" "	476
633–635	Pugh v. United States,	711
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642–644	" "	504
644–646	" "	505
646	White v. Hart,	685
647–649	" "	686
649–652	" "	687
652–654	" "	688
654	Osborn v. Nicholson *et al.*,	689
655–656	" "	693
656–659	" "	694

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659–662	Osborn v. Nicholson *et al.*,	695
662–664	" "	696
664	*Ex parte* Russell,	632
668	" "	633
668–671	" "	634
671–672	" "	635
672	Insurance Company v. Thwing,	607
674–675	" "	608
675–678	" "	609
678–679	" "	610
679	Watson v. Jones,	666
713–714	" "	670
714–717	" "	671
717–720	" "	672
720–722	" "	673
722–723	" "	674
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The case is sufficiently stated by the court.

Messrs. **W. W. Goodrich** and *T. M. Wheeler* for appellants.

Mr. **E. C. Benedict** for appellees.

Mr. Justice **Clifford** delivered the opinion of the court:

Motion for a commission to take the testimony of certain witnesses filed by the appellants.

Damages are claimed by the owners of the ship Isaac F. Chapman, for injuries which the ship received in a collision that occurred between the ship, while she was lying at a dock in the port of New York, and the steam tug R. S. Mabey, and the ship Helen R. Cooper, which, at the time of the collision, was in tow of the steam tug, as more fully set forth in the libel filed in the district court. Serious injury resulted to the ship of the libelants, and they alleged that the steam tug and the ship Helen R. Cooper were both in default.

Separate answers were filed by the claimants of the tug and tow, and both, it seems, made preparation for defense; but, before the day for the hearing arrived, they entered into the following stipulation, which is an exhibit in the motion before the court. Omitting the names of the parties to the suit and the signatures of the proctors, the stipulation reads as follows:

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Application for the same purpose as that described in the motion was made to this court by the appellants, on a prior occasion during the present term of the court; but it was refused, as no excuse was shown, in the petition or accompanying papers, why the witnesses were not examined either in the district or circuit courts, and the court said some excuse *should [*741 be shown, satisfactory to this court, for the failure to examine them in the courts below; such as that the evidence was discovered when it was too late to procure such examination, or that the witnesses had been subpœnaed and failed to appear, and could not be reached by attachment, and the like. 19 L. ed. 963.

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Governed by these views, the court has examined the affidavit and the reasons given why the testimony was not taken prior to the hearings in one of the subordinate courts; but the court is constrained to say that the reasons given are not satisfactory, as they show that the witnesses were in court, and that they were not examined because the party now asking for the commission agreed that they would not introduce any testimony in the case, and the affidavit shows that they did not introduce any in

the district court, and did not appeal from the decree, and, of course, they did not and could not introduce any in the circuit court, as it is well-settled law that the losing party in the subordinate court cannot be heard in the appellate court in opposition to the decree in the subordinate court, unless he himself also appeal from the decree. *The William Bagaley*, 5 Wall. 412, 18 L. ed. 591; *The Maria Martin, ante*, 251.

Instead of being satisfactory, the reasons set forth in the affidavit why the testimony was not introduced in the trials below, are persuasive and convincing that the motion ought not to be granted. Having accepted the bond 742'] *of indemnity and failed to make any defense, the risk as to the sufficiency of the sureties was upon the present appellants; and the fact that they misjudged or are disappointed in that behalf, furnishes no reason for the motion before the court.

Motion denied.

UNITED STATES, *Appt.*,
v.
JOHN H. RUSSELL.

(See S. C. 13 Wall. 623-632.)

Compensation for private property taken in time of war—steamboats impressed into public service—jurisdiction of court of claims.

1. Where the government, in time of public danger, takes private property for public purposes, it is bound to make full compensation to the owner.
2. Where steamboats were impressed into public service from imperative military necessity, the government is bound to make full compensation to the owner for the services rendered.
3. The employment and use of the steamboats raised an implied promise on the part of the United States to reimburse the owner for the services rendered and expenses incurred, and the court of claims has jurisdiction of such claims.

[No. 220.]

Argued Nov. 9, 1871. Decided Nov. 27, 1871.

APPEAL from the Court of Claims.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. A. T. Ackerman, Atty. Gen., **C. H. Hill**, *Asst. Atty. Gen.*, and **B. H. Bristow**, *Solicitor Gen.*, for appellant:

Under the act of July 4, 1864 (§ 1, 13 Stat. at L. 381), the court of claims had no jurisdiction of the claim of the appellee against the government.

The language of the section above referred to is as follows:

"That the jurisdiction of the court of claims shall not extend to or include any claim against the United States growing out of the destruction or the appropriation of or damage to property by the Army or Navy, engaged in the suppression of the Rebellion, from the commencement to the close thereof."

The construction put upon this section by the court is decisive of the present question. In the language of Mr. Justice Field: "The term 'appropriation' is of the broadest import; it includes all taking and use of property by the Army and Navy, in the cause of the war, not authorized by contract with the government."

Filor v. United States, 9 Wall. 45, 49, 19 L. ed. 549, 551.

That case was a temporary occupation of real property by the Quartermaster's Department, under a lease which was held to be invalid.

The subsequent return of the property did not render the action of the Quartermaster's Department any the less an appropriation. In the analogous case of trover the action would have lain at the moment of the taking, and the subsequent return of the steamer would not have defeated the action, but only mitigated the plaintiff's damages.

Vandrink v. *Archer*, 1 Leon. 221, 223; *Murray* v. *Burling*, 10 Johns. 172; *Lucus* v. *Trumbull*, 15 Gray, 306.

Messrs. Cooley & Clarke, R. M. Corwine, T. L. Dickey, and *J. J. Weed*, for appellee:

Chief Justice Marshall, in the case of *Gibbons* v. *Ogden*, 12 Wheat. 341, says:

"A great mass of human transactions depend upon implied contracts which are not written, but grow out of the acts of the parties. In such cases the parties are supposed to have made those stipulations which, as honest, fair and just men, they ought to have made."

There can be no more comprehensive definition of an implied contract. It applies to governments as well as individuals, and determines the liabilities of each, with the same regard to justice and reason.

Conrad v. *United States*, 3 Ct. Cl. 89; *Brooke* v. *United States*, 2 Ct. Cl. 80.

There is no question in issue in regard to the authority of the officers who acted for the United States in taking these steamboats into its service. That the use of said steamboats was necessary to the public service, is not denied. That their use was reasonably worth the amount found by the court of claims, is not questioned. That the officers taking these steamboats into the military service intended to compensate the appellee for their use, is admitted. Surely these facts justified the court of claims in deciding in favor of the appellee, and in its statement of the following legal conclusion: "That there was such an employment and use of claimant's property in the service of the United States, as raises an implied promise on the part of the United States to reimburse the claimant for the money expended by him for and on behalf of the United States, and also a fair and reasonable compensation for the services of the claimant and for the services of said steamers."

Mr. Justice **Clifford** delivered the opinion of the court:

Private property, the Constitution provides, shall not be taken for public use without just compensation, and it is clear that there are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in certain extreme cases, is a condition precedent annexed to the right of the government to deprive the owner of his property without his consent. 2 Kent, Com., 11th

NOTE.—*Eminent domain; payment for private property taken for public use generally recognized. Fifth Amendment to Constitution applies only to Federal government, and not to states*—see note to Withers v. Buckley, 15 L. ed. U. S. 816.

ed. 339; 2 Story, Const., 3d ed. 596. Extraordinary and unforeseen occasion arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized or appropriated to the public use, or may even be destroyed without the consent of the owner. Unquestionably, such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defenses for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or to transport troops, munitions of war, or clothing to reinforce or supply an army in a distant field, where the necessity for such reinforcement or supplies is extreme and imperative, to enable those in command of the post to maintain their position or to repel an impending attack, provided it appears that other means **628***] of transportation could not be *obtained, and that the transports impressed for the purpose were imperatively required for such immediate use. Where such an extraordinary and unforeseen emergency occurs in the public service in time of war no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate public exigency, but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply; and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed. Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown, the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner. *Mitchell* v. *Harmony*, 13 How. 134.

Three steamboats, owned by the appellee, during the Rebellion, were employed as transports in the public service for the respective periods mentioned in the record, without any agreement fixing the compensation to which the owner should be entitled. Certain payments for the services were made in each case by the government to the owner, but he claimed a larger sum, and the demand being refused, he instituted the present suit. Prior to the orders hereinafter mentioned, the steamboats were employed by the owner in carrying private freights, and the findings of the court below show that he quit that employment in each case and went into the public service in obedience to the military order of an assistant quartermaster of the army. Reference to one of the orders will be **629***] sufficient, as the others are not *substantially different. Take the second, for example, which reads as follows, as reported in the transcript: "Imperative military necessity requires the services of your steamer for a brief period; your captain will report at this office at once in person, first stopping the receipt of freight, should the steamer be so doing." Pursuant to that order, or one of similar import in substance and effect, the respective steamboats were impressed into the public service and employed as transports for carrying government freight for the several periods of time set forth in the findings of the court. Throughout the whole time the steamboats were so employed in the military service they were in command of the owner as master, or of some one employed by him and under his pay and control, and the findings of the court show that he manned and victualed the steamboats and paid all the running expenses during the whole period they were so employed. Unexplained and uncontradicted, the findings of the court show a state of facts which plainly lead to the conclusion that the emergency was such that it justified the officers in each case in ordering the steamboat into the service of the United States, as the orders purport to have been issued from an imperative military necessity, and if so, they show, beyond all doubt, that the officers who issued them were not trespassers, and that the government of the United States is bound to make full compensation to the owner for the services rendered.

Such a taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending; and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice.

*Beyond doubt, such an obligation [***630** raises an implied promise on the part of the United States to reimburse the owner for the use of the steamboats and for his own services and expenses, and for the services of the crews during the period the steamboats were employed in transporting government freight pursuant to those orders. *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what, in good conscience, he is bound to pay to the plaintiff, but the law will not imply a promise to pay unless some duty creates such an obligation, and it never will sustain any such implication in a case where the act of payment would be contrary to duty or contrary to law. *Curtis* v. *Fiedler*, 2 Black, 478, 17 L. ed. 276.

Tested by those rules it is quite clear that the obligation in this case to reimburse the owner of the steamboats was of a character to raise an implied promise on the part of the United States to pay a reasonable compensation for the service rendered, and if so, then it follows that the decree was properly made in favor of the plaintiff, unless it appears that the adjustment of the claim belonged to Congress or to the ex-

ecutive department, and not to the court of claims.

Jurisdiction is vested in the court of claims, by the act of Congress establishing the court, to hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract express or implied with the government of the United States, which may be suggested to it by a petition regularly filed in the court. 10 Stat. at L. 612. Express authority, therefore, is given to the court by that act to hear and determine claims founded upon a contract with the government of the United States, whether express or implied. Claims of the kind before the court would certainly be within the jurisdiction of that court were it not that Congress has passed a later act restricting to some extent the jurisdiction conferred by that provision. By the act of July 4, 1864, it is provided that the jurisdiction of the court of claims shall not **631*]** extend to or include *any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the Army or Navy, or any part of the Army or Navy, engaged in the suppression of the Rebellion, from the commencement thereof to the close. 13 Stat. at L. 381.

Special reference is made in behalf of the appellants to that provision, and the argument is that it is decisive to show that the decree in this case is erroneous. Support to that proposition is chiefly drawn from the signification attributed to the word "appropriation" and from certain remarks of this court in one of its recent decisions. *Filor* v. *United States*, 9 Wall. 48, 19 L. ed. 550. Those remarks were made in respect to a claim where a military order was issued for the seizure of certain real estate for the purpose of compelling a lease of the premises, and the findings of the court show that the agreement for the lease was concluded under the pressure of that order. Apart from that it also appeared that the premises belonged to an insurgent in the rebel army, and the court of claims also found that the contract was void on that account. Applied as those remarks must be to the case then under consideration, no doubt is entertained that they were correct, but they cannot be applied to the case before the court, as the conclusion to which they would tend would contradict the finding of the court below in matters of fact, which cannot be reviewed in this court.

Briefly stated, the findings of the court in that behalf are as follows: That the military officers did not intend to appropriate the steamboats to the United States, nor even their services; that they did intend to compel the masters and crews, with the steamers, to perform the services needed, and that the United States should pay a reasonable compensation for such services, and that such was the understanding of the owner; that the steamers, as soon as the services for which they were required had been performed, were returned to the exclusive possession and control of the owner. They were equipped, victualed, and manned by the owner, **632*]** *and he, or persons by him appointed, continued in their command throughout the entire period of their service. He yielded at once to the military order and entered into the service of the government, and the court here fully concurs with the court of claims that there was not such an appropriation of the steamboats or of the services of the masters and crews as prohibited the court below from taking jurisdiction of the case. On the contrary, the court is of the opinion that the findings of the court of claims show that the employment and use of the steamboats were such as raise an implied promise on the part of the United States to reimburse the owner for the services rendered and the expenses incurred, as allowed by the court of claims. Valuable services, it is conceded, were rendered by the appellee, and it is not pretended that the amount allowed is excessive. Neither of the steamers was destroyed nor is anything claimed as damages, and inasmuch as the findings show that an appropriation of the steamers was not intended and that both parties understood that a reasonable compensation for the services was to be paid by the United States, the court is of the opinion that the objection to the jurisdiction of the court of claims cannot be sustained, as the claim is not for "the destruction or appropriation of, or damage to, property by the Army or Navy, or any part of the Army or Navy engaged in the suppression of the Rebellion." Viewed in that light, the case is free of all difficulty, as the jurisdiction of the court, by the express words of the act of Congress, extends to claims founded upon an implied contract as well as upon that which is express.

Certain other acts of Congress have been passed in respect to property impressed or employed in the suppression of the Rebellion, but it is not necessary to refer to them, as they have no application to any question presented in this record.

Decree affirmed.

HENRY C. YEAGER *et al.*, *Plffs. in Err.*,
v.
ASA FARWELL *et al.*

(See S. C. 13 Wall. 6–13.)

Indorser, who liable as — what is waiver of demand and notice.

1. Where negotiations for a loan on a mortgage and note are pending, one who placed his name on the note at the lender's request, before the negotiations were closed or any money advanced, is liable as an indorser.

2. Where, on the last day of grace, the indorsers wrote to the holder of the note that the maker was unable to pay the note, but would be able to do so in a week or ten days, and added "but we hold ourselves responsible for its payment, and shall see it done at an early day," which letter did not reach the holder until after the note was due; *held*, that such letter was a waiver of demand and notice, and the indorsers were liable, without proof of demand and notice.

[No. 72.]

Submitted Nov. 21, 1871. Decided Dec. 11, 1871.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

This is an action of assumpsit brought by the defendants in error in the court below, against Yeager & Co., as indorsers of a promis-

NOTE.—*Promise to pay or acknowledgment of liability after maturity by indorser, with knowledge of the laches, is waiver of notice*—see note to Thornton v. Winn, 6 L. ed. U. S. 595.

sory note, dated St. Louis, Oct. 15, 1866, and payable one year from date at the office of Farwell & Co., Boston. The declaration stated that the note was made for $15,750 and ten per cent interest, by C. H. Kerckhoff, payable to his own order, and was indorsed by Kerckhoff and by Yeager & Co.; that when the note became due it was presented at the place named for payment, which was refused; that Yeager & Co. had due notice and, Oct. 18, 1867, expressly promised to pay the same; that the balance due on the note was $4,940.-44. The defendants pleaded the general issue. Verdict and judgment were in favor of the defendants in error, and the plaintiffs in error sued out this writ.

It appears that Yeager & Co. were commission merchants in St. Louis. Farwell & Co. were their correspondents, and commission merchants in Boston. In September, 1866, Yeager & Co. applied to their correspondents to lend Obermeyer & Co. (the Co. being Kerckhoff) $15,000 on the security of a farm lying about forty miles from St. Louis, belonging to Kerckhoff. After some negotiation, Farwell & Co. agreed to make the loan. Kerckhoff executed his notes for the amount and also a deed of trust of the above-named property, which was placed on record, and the notes and deed forwarded to Farwell & Co. Farwell & Co. returned this deed for clerical correction, and, at the same time, returned the notes with the request that Mr. Yeager would indorse them in his own or the firm name. The notes were indorsed by Yeager & Co., and returned with the deed. Farwell & Co. then advanced the $15,000 in different sums at different times, in accordance with an understanding between the parties. Part of this money loaned by Farwell & Co. went to Yeager & Co. to repay advances previously made by them to Obermeyer & Co. The notes were not paid at maturity. No evidence was given that they were presented for payment at the proper place and time, or notice of non-payment given to Yeager & Co. The facts by which the plaintiffs below sought to avoid this omission are fully stated in the opinion.

Messrs. **George P. Strong** and *Slayback & Haeussler*, for the plaintiffs in error:

Plaintiffs in error were merely indorsers at the request and for the accommodation of defendants in error, and without consideration, and consequently are not liable to said defendants upon this note.

Moore v. *Maddock*, 33 Mo. 575; *Dowe* v. *Schutt*, 2 Den. 624; *Corlies* v. *Howe*, 11 Gray, 127; *Slade* v. *Hood*, 13 Gray, 99; *Parish* v. *Stone*, 14 Pick. 201; *Schoomaker* v. *Roosa*, 17 Johns. 304; Pars. Mer. Law, 97.

Yeager & Co. were discharged by the failure to make demand of payment and to notify Yeager & Co. of nonpayment. The letter introduced in evidence does not amount to a waiver of demand, etc.

Freeman v. *Boynton* 7 Mass. 488; *Garland* v. *Bk.* 9 Mass. 408; *Low* v. *Howard*, 11 Cush. 268; *Kelley* v. *Brown*, 5 Gray, 108; *Bk.* v. *Dill*, 5 Hill, 404.

Mr. Thomas T. Gantt for defendants in error.

Mr. Justice **Davis** delivered the opinion of the court:

This case resolves itself into two points:

First. Were Yeager & Co. indorsers of the note in controversy?

Second. If so, were Farwell & Co. relieved from the necessity of proving on the trial that they demanded payment of the maker, and gave notice to the indorsers of the dishonor of the note?

It is very clear that Yeager & Co. were liable as indorsers, if they placed their names on the back of the note in question before Farwell & Co. closed the negotiations for the loan to Kerckhoff, or made any advances on it to him. And the condition of the parties is not altered by the fact that Yeager & Co., without consideration, indorsed the note at the request of Farwell & Co. after negotiations concerning the loan had been some time in progress, and when they had a right to suppose Farwell & Co. were satisfied with the landed security which Kerckhoff offered. It may be true that Farwell & Co. originally intended to let the money go on the security of the trust deed, but they were not legally bound to do so, and could alter their minds on the subject, and forbear to loan the money unless Yeager & Co. (who were the middlemen in the negotiation) should also indorse the note. If they choose to do this before the transaction *was completed or any portion of the [*12 money loaned was actually advanced to Kerckhoff, then their liability as indorsers is fixed, and so the learned court told the jury. Whether the indorsement was before or after the conclusion of the negotiations for the loan, or before or after the advancements to Kerckhoff, were questions of fact for the determination of the jury. As there was evidence tending strongly to support the finding of the jury on this point, and as they were correctly instructed in relation to it, the plaintiff in error cannot justly complain of the action of the jury.

The undertaking, however, of the indorser of a negotiable note is only to pay it in case the maker does not, and he is immediately notified of this default. The remaining defense set up in this action is that this was not done and, therefore, the indorsers were not chargeable. But the indorser can, by his own conduct, place himself in such a position that he is estopped from alleging want of demand and notice of non-payment. Although, accurately speaking, there can only be a waiver of demand and notice by the indorser before the note is due, yet after it is due he can waive proof of them; or, what is more to the purpose, he can so act towards the holder of the note as to render the fact that demand was not made or notice given wholly immaterial. 1 Pars. B. & N. chap. 13, p. 594. The inquiry is whether Yeager & Co. have, by their course of action, put themselves in this category. The court below held that they had; and, as the evidence on the subject was undisputed, took it from the jury and decided it as a question of law.

This evidence consists of a letter written by Yeager & Co. on the day the note matured, from St. Louis, where they and Kerckhoff resided, to Farwell & Co., who lived in Boston.

This letter substantially informed the Farwells that Kerckhoff was unable to pay his note, but would be able to do so in a week or ten days at farthest. After expressing the an-

noyance felt by the writers, on account of the dishonor of the paper, it concludes in these words: "But we hold ourselves responsible for the payment of the note, and shall see it is done at an early day."

13*] *Necessarily, this letter could not have reached its destination in due course of mail until after the note was due; but, for the purpose of holding the indorser, this is immaterial, for, as we have seen, he can dispense with the conditions for his benefit as well after as before the paper matures. It has been held by this court, in *Sigerson* v. *Mathews*, 20 How. 496, 15 L. ed. 989, that if the indorser, with full knowledge of the fact that no demand has been made or notice given, makes a subsequent promise, he is liable and cannot, when sued, set up as a defense the want of such demand and notice; and to the same effect are the decisions of the courts in this country generally. See 1 Pars. B. & N. p. 595, n. *m*. Applying the principle of these decisions to the admitted facts of this case there is no difficulty in charging the indorsers. Their promise to pay was expressly made after they knew of the laches of the maker of the note, and they cannot now be allowed to repudiate it.

The most formal demand and notice could have been of no service to them, for they knew the demand would be useless, and the notice could only tell them what they were advised of without it. Acting under the weight of the knowledge of Kerckhoff's default, they did not choose to wait in order to see whether Farwell & Co. had taken the requisite steps to charge them, but preferred at once to acknowledge their liability and, accordingly, made the direct promise to pay the note. Under these circumstances, this promise is binding and does not require for its enforcement the proof of demand and notice.

The judgment of the Circuit Court is affirmed.

14*] WILLIAM B. WEBB, Trustee, *Plff. in Err.*,

v.

ALEXANDER SHARP.

(See S. C. 13 Wall. 14–17.)

Lien for rent—bona fide purchaser—goods exempt from execution.

1. The lien of a landlord for rent in the District of Columbia is superior to that of a mortgage on a tenant's chattels, so long as they remain on the demised premises and continue to be the property of the tenant.
2. But the lien is not good as against a bona fide purchaser, without notice of the landlord's lien.
3. When the law imposes the lien only upon such goods of the tenant upon the premises as are subject to execution, it means to exclude goods which are exempt from execution by some general or special law.

[No 49.]

Submitted Nov. 13, 1871. Decided Dec. 11, 1871.

IN ERROR to the Supreme Court of the District of Columbia.

The case is stated by the court.

Mr. **Samuel S. Henkle** for plaintiff in error.

Mr. **William F. Mattingly** for defendant in error.

Mr. Justice **Bradley** delivered the opinion of the court:

This was an action of replevin for a printing-press, which was attached for rent by the landlord of the premises whereon it was found After the tenants had taken a lease of the said premises, which were a building in this city, they purchased and placed therein the printing-press in question; and, subsequently, on the 11th of December, 1867, they borrowed money and executed to the plaintiff in error a deed of the press, to secure the repayment of the loan. This debt, though it became due, was never paid. The rent for which the landlord attached the press accrued in 1869, within three months prior to the issuing of the attachment. Judgment being perfected on the attachment, a writ of fieri facias was issued to the marshal of the district, the new defendant in error, who levied on the press, which still remains on the premises.

The question is whether the lien of the landlord is or is not superior to that of the trustee. The supreme court of the district decided that it is, and in that opinion we concur.

By the act of Congress, passed February 22, 1867, § 12, 14 Stat. at L. 404, the old right of distress for rent was abolished, and, instead of it, it was enacted "that the landlord shall have a tacit lien upon such of the tenant's personal chattels upon the premises as are subject to execution for debt, to commence with the tenancy and continue for three months after the rent is due, and until the termination of any action for such rent brought within said two months. And this lien may be enforced: (1) By attachment, to be issued upon affidavit that the rent is due and unpaid; or, if not due, that the defendant is about to remove or sell all or some of said chattels; or (2) by judgment against the tenant, and execution to be levied on said chattels or any of them, in whosoever hands they may be found; or (3) by action against any purchaser of any of said chattels, with notice of the lien."

It will thus be seen that the act is clear and explicit that the landlord shall have a lien upon the tenant's chattels on the premises (liable to execution) "to commence with the tenancy and continue for three months after the rent is due." It also points out how, within the three months, the lien is to be enforced, namely, by attachment, etc. In this case the chattel was on the premises, it was attached within three months after the rent accrued, the suit on the attachment was regularly prosecuted to judgment, and the marshal took the chattel in execution. *The [*16 case is strictly within the language of the act, unless the press was not "such a chattel of the tenant as is subject to execution."

The plaintiff in error contends that the deed of trust, being a valid instrument, the property became vested in the trustee, and the press was not liable to be taken in execution for the debts of the tenant and, therefore, that the act does not give the landlord a lien, because the lien given by the act is only upon such chattels of the tenant as are subject to execution.

The deed of trust was, in effect and purpose, nothing but a mortgage. It was given to secure the payment of a loan. It was an express lien created by deed to secure the performance of a contract. The landlord's lien is

an implied or tacit lien, created by law to secure the performance of another contract and, of the two, the landlord's is the prior lien, and cannot be displaced by the other. The landlord's lien attached to the printing-press the moment it was placed upon the demised premises, before the mortgage was given, and as long as it remained on the premises the lien continued until each instalment of rent became due and for three months afterwards, and then ceased as to that instalment. Had the tenant made an absolute and bona fide sale of the press, the case would have been a different one. The law protects bona fide purchasers without notice of the landlord's lien. Goods sold in the ordinary course of trade undoubtedly become discharged from the lien; otherwise business could not be safely carried on. This was so decided by the supreme court of Iowa in giving construction to a similar law of that state. *Grant* v. *Whitwell*, 9 Iowa, 157. But neither the words nor the reason of the law call for a postponement of the landlord's lien to that of a subsequent mortgage or execution creditor, so long as the goods remain on the demised premises and continue to be the property of the tenant.

As to the suggestion that this press was not subject to execution, we apprehend that a deed 17*] of trust does not protect *goods from sale by execution. The owner has still an interest, or equity of redemption in them, which is subject to sale; and a purchaser at an execution sale would be entitled to redeem the goods from the deed of trust by paying the debt secured thereby. When the law imposes the lien only upon such goods of the tenant upon the premises as are subject to execution, it means to exclude goods which are exempt from execution by some general or special law, such as those which a man is entitled to retain, against all executions, for the use of his family or the practice of his trade.

The judgment is affirmed.

UNITED STATES, *Appt.*,
v.
THOMAS CLYDE;
and
THOMAS CLYDE, *Appt.*,
v.
UNITED STATES.

(See S. C. 13 Wall. 35-39.)

Receipt in full, when satisfaction of disputed claim—void rule of court of claims.

1. Where the amount of a claim against the government is disputed, the receiving by the claimant of the amount made out by the government as correct, and his giving a receipt in full, concludes him from making any further demand, and is a satisfaction of the claim.

2. A rule of the court of claims, which requires that the claimant should not only have such a claim as stated in the act creating the court, but should have first gone through the department which might have entertained it, before he would be permitted to prosecute in that court, establishes a jurisdictional requirement which Congress alone had the powers to establish, and is void.

NOTE.—*Payment of part of debt no satisfaction of the whole*—see notes, 9 L. ed. U. S. 1046; 26 L. ed. U. S. 1186.

Accord and satisfaction by part payment—see note, 20 L. R. A. 785.

[Nos. 43, 44.]

Argued Nov. 10, 1871. Decided Dec. 11, 1871.

APPEALS from the Court of Claims.

This was an action commenced in the court of claims, where Clyde claimed $9,880, a balance alleged to be due him on a contract of charter-party, for the hire of the steamboat Tallacca. He claimed further the sum of $5,000 damages for the loss of the barge W. E. Hunt, destroyed by the rebel enemies of the United States, while in the latter's service, under a similar contract.

By an amended petition, filed Apr. 3, 1869, the claim for the Tallacca was increased to $10,000.

The court of claims gave judgment for the first claim, the Tallacca, in the sum of $7,640, from which the United States has appealed.

And the court gave judgment as to the second claim, the Hunt, dismissing the same. The petitioner appealed from the whole judgment.

The facts are stated by the court.

Messrs. A. T. Akerman, Atty. Gen., **B. H. Bristow**, *Solicitor Gen.*, and **C. H. Hill**, *Asst. Atty. Gen.*, for United States:

In May, 1863, the Quartermaster General disapproved of the charter of the Tallacca. What his reason was for so doing does not appear; but it must be presumed that he had reasons which, whether they were sufficient or not, were deemed sufficient by him to justify his action. From that moment the claim of Clyde upon the government, under the charter-party, must be regarded as a claim disputed by the government, and the subsequent settlement in December, in accordance with an account in which he was credited with the use of the steamer, at the rate fixed by the Quartermaster General, and charged with the excess which had been paid to him previous to the end of February, and then received the amount thus found due, and gave a receipt in full, was a final satisfaction between the government and himself.

U. S. v. *Adams*, 7 Wall. 463, 19 L. ed. 249, and 9 Wall. 554, 19 L. ed. 584; *U. S.* v. *Child*, *ante*, 360, decided at the present term.

A fortiori must this be so of a settlement for any subsequent use of the steamer by the War Department.

The decision of the court, that the claim for the services of the William E. Hunt was prematurely brought, under their rules, because it had not been submitted to the proper department, was strictly correct. The rule is an eminently proper one, and one which the court of claims was authorized to adopt, and the decision of that court, that the rule has not been complied with, and that, therefore, the suit will not be entertained by it, is not one that this court will revise.

Messrs. N. P. Chipman & Hosmer, **Charles F. Peck**, and **Thomas J. Durant**, for Thomas Clyde:

The court below has well said that the Quartermaster General had no power to reduce the rate of compensation fixed by the charter-party. However, the court below erred in saying that the Quartermaster had a right to reduce the pay after the date of his notice to petitioner of his design to do so.

The price being an essential element of the contract could only be changed by consent of both parties; and so far from yielding his assent, the petitioner, as soon as the desire of the Quartermaster General to reduce the pay was made known to him, promptly refused to consent to the reduction.

Upon this proposal on the one side to make a new contract, and on the other a refusal to enter into such a one, what were the respective duties of the parties? About this it is not possible that there should be any difference of opinion.

The Quartermaster proposes; the petitioner rejects; therefore, there is no new contract.

The court below says that the petitioner assented to the proposal, though he had positively refused to do so, because "he has failed to show whether, on being notified of this order, he determined to allow his boat to remain in the service at the reduced rate, or sought to take her out of it, and terminate her employment by the government."

It is not incumbent on the petitioner to make such a showing, nor to do anything of the kind.

The charter-party expressly declares that "this contract is to remain in force for the full term of ten days from the above date, and as much longer as said vessel may be required by the United States War Department."

When, therefore, the petitioner rejected the proposal to reduce the rate of pay, it was the duty of the Quartermaster, if he did not wish to retain the Tallacca at the contract price, to give her up at once to the owner.

The court below erred in dismissing this claim for the loss of the barge, for the reason that it had not been presented and decided in one of the departments.

The act of Feb. 24, 1855, to establish a court for the investigation of claims against the United States, § 1, 10 Stat. at L. 612, declares that "the said court shall hear and determine" all claims founded "upon any contract, express or implied, with the government of the United States."

The 2d section of the act of Mar. 3, 1863, amendatory of the former, 12 Stat. at L. 675, uses the same language.

This act gives to every man having a claim founded on a contract, the right to bring his suit unconditionally, and the court below has consequently well said that "the court of claims has jurisdiction of a claim arising upon express contract for the charter of a vessel in the military service of the United States, notwithstanding that it has never been presented to any executive department for payment, and has never been allowed or rejected by the accounting officers of the government."

The lower court then had, by the statute, jurisdiction of this claim. Why, then, did it refuse to entertain it? On account of the rule which interposed a condition not found in the statute. The suitor whom the law admits the rule excludes. Which is to prevail? Can a court, by the adoption of a rule, restrict or enlarge its own jurisdiction? Certainly neither the one nor the other. This is elementary, and can scarcely need the citation of authorities; we refer, however, to *Wallace* v. *Clark*, 3 Wood. & M. 363 (top); *The St. Lawrence*, 1 Black, 526, 17 L. ed. 182.

Mr. Justice **Bradley** delivered the opinion on the court:

In the first of these cases the facts found were that, on the 16th of November, 1862, the ferry-boat Tallacca, owned by the claimant, was chartered by Captain Ferguson, an assistant quartermaster of the United States Army, at the rate of $115 per day for every day she might be employed in the service of the United States, and until returned to Alexandria, where she was lying; and that the said boat continued in the service of the government from the date of the charter-party until the 31st of July, 1863, and was paid at the agreed rate until the last of February, 1863, without objection; but that on the 13th of May, 1863, the Quartermaster General disapproved of the charter-party by the following order: "The charter of the Tallacca is disapproved by the Quartermaster General. She will be paid for only at the rate of $75 per day from the date of her charter, so long as she may be retained in the service. The excess of $40 per day already paid will be deducted on the present settlement for her services from March 1st, 1863," etc. The claimant was notified of the contents of this order during the month of May. He refused to consent to the reduction, but has not shown whether, on being notified of this order, he determined to allow his boat to remain in the service at the reduced rate, or sought to take her out. The boat, in fact, remained in the service until July 31, 1863. No further payment was made until December, 1863, when the Quartermaster stated the account at the reduced rate, deducted the excess of $40 per day paid on the former settlement, and paid the claimant the balance. The claimant receipted for this balance as "in full of the above account."

Upon these facts the court of claims decided that the claimant was entitled to be paid at the rate named in the charter-party until he received notice of the reduction made by the Quartermaster General, and after that at the reduced rate.

In this we think, on the principles determined by this court in the late case of *The U. S.* v. *Child*, *ante*, 360, the court of claims erred. From the time that the order of the Quartermaster General was made, disapproving of the charter-party and razeeing the rate for the whole period of the service, the case was clearly one of dispute at least, if not one of acquiescence on the part of the claimant. Notwithstanding this order, he permitted his boat to remain in the service until the 31st of July, knowing the change of terms which the Quartermaster General had made. It cannot be pretended that there were two lettings, or two charter-parties of the vessel. There was only one; and as to this one, the government determined to allow one rate, and the claimant insisted on another. The government stood on the order of the superior officer, and insisted that this should govern the contract; the claimant insisted the contrary. Under these circumstances, the final determination of the latter to take the balance of the account as made out on the basis contended for by the government, and his giving a receipt in full, is clear evidence that he agreed to take that balance in satisfaction of his claim; and this fact under the circumstances

of the case concludes him from making any further demand. The judgment is, therefore, reversed as to this count.

In the other appeal arising upon the second count, in which the claim was for the use of the barge William E. Hunt, the court of claims dismissed the claim, on the ground that it was not presented in conformity with a rule of practice which the court then had, but which has since been abrogated. This rule required that where the case was such as is ordinarily settled in any executive department, the petition should show that application for its allowance had been made to that department and without success, and its decision thereon.

However useful and proper such a rule as that complained of by the appellant may have been prior to the enactment of the law passed June 25th, 1868, 15 Stat. at L. 76, which requires the Attorney General to obtain from the proper department, and the department to furnish, such facts, circumstances and evidence as it might be in possession of in relation to any claim prosecuted in the court of claims, we are of opinion that it was not competent for the court of claims to impose it as a condition of presenting a claim in that court. Instead of being a rule of practice, it was really an additional restriction to the exercise of jurisdiction by that court. It required the claimant to do what the acts giving the court jurisdiction did not require him to do before it would assume jurisdiction of his case.

The act of 1855, which created the court, declares that it shall "hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein." The rule adopted by the court required that the claimant should not only have such a claim as stated in the act, but should have first gone through the department which might have entertained it, before he would be permitted to prosecute in that court. This was establishing a jurisdictional requirement which Congress alone had the power to establish.

The judgment of dismissal must, therefore, be reversed.

The judgment of the Court of Claims is reversed upon both appeals, and the record is 38*] *remitted, with directions *to enter a decree of dismissal as to the first count in the petition, and proceed to a hearing on the second count.*

Mr. Justice **Field**, dissenting:

I dissent from so much of the judgment of this court as decided against the claim of the appellant for the amount stipulated in the charter-party.

40*] *JOHN S. TOOF, Charles J. Phillips, and Frank M. Mahan, as Toof, Phillips & Co., *Appts.*,

v.

RUFUS W. MARTIN, Assignee in Bankruptcy of W. P. Haines & Co.

(See S. C. 13 Wall. 40-51.)

Insolvency, what is—transfer of property, when a preference of one creditor—notice to creditor—transfer in fraud of bankrupt act.

*1. By insolvency, as used in the bankrupt act when applied to traders and merchants, is meant inability of a party to pay his debts as they become due in the ordinary course of business.

2. The transfer by a debtor of a large portion of his property while he is insolvent, to one creditor, without making provision for an equal distribution of the proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such a case, and not upon the assignee or contestant in bankruptcy.

3. A creditor has reasonable cause to believe a debtor, who is a trader, to be insolvent when such a state of facts is brought to the creditor's notice, respecting the affairs and pecuniary condition of the debtor, as would lead a prudent business man to the conclusion that he is unable to meet his obligations as they mature in the ordinary course of business.

4. A transfer by an insolvent debtor with a view to secure his property, or any part of it, to one creditor, and thus prevent an equal distribution among all his creditors, is a transfer in fraud of the bankrupt act.

[No. 58.]

Submitted Nov. 14, 1871. Decided Dec. 11, 1871.

APPEAL from the Circuit Court of the United States for the District of Arkansas.

The case is stated by the court.

Messrs. **A. H. Garland,** *Brown & Collins,* for appellants:

The inability of Haines & Co. to pay their debts in money as they fell due, did not constitute insolvency on their part.

Burrill defines an insolvent to be one who cannot pay or who does not pay his debts; one who is unable to pay his debts or whose debts cannot be collected out of his means by legal process. 2 Burr. L. Dic. Insolvent.

Worcester, in his dictionary, adopts this definition. By the universal acceptation of the word "insolvent" in this country and in England, if a party's available means—means that he can use in paying his debts, exceed those debts, he has never been deemed insolvent.

James on Bankruptcy, Notes to § 35, 153, 183; Avery & H. Bankr. 261; Burr. Assignments, 38, 41; *Herrick* v. *Borst*, 4 Hill, N. Y. 652; *Buckingham* v. *McLean*, 13 How. 151; *Jones* v. *Howland*, 8 Met. 377.

If the question were a new one under the present bankruptcy act, I think the rule of construction, stated in connection with the received meaning of the word being discussed, would be conclusive that the law was improperly decided by the court below on this point. But how has it been held by the courts in which the question on this very act has arisen?

See *In re Randall, etc.* 3 Bk. Reg. 4, 5; *In re Drummond*, 1 Bk. Reg. 10, 11; *In Matter of Cowles*, 1 Bk. Reg. 43; *In re Black, etc.* 1 Bk. Reg. 82; *Opelousa, etc., R.* v. *Tucker*, 3 Bk. Reg. 31; *In re Graham* v. *Stark*, 3 Bk. Reg. 92; *In re Doan* v. *Compton*, 2 Bk. Reg. 182.

If the inability to pay in money constitutes insolvency, of course it is sufficient if, for one moment after the debt is due, the party is not able to pay it; but it is expressly held a temporary want of money to pay notes coming to maturity does not constitute insolvency, for this would be tantamount to holding that whenever a trader suffers a note to go to protest for want of funds in hand wherewith to

*Headnotes by Mr. Justice FIELD.

pay, he can, therefore, be judged insolvent; this would be an extreme view.

Hardy v. *Bininger*, 4 Bk. Reg. 77; *Potter* v. *Coggeshall*, 4 Bk. Reg. 19; Boston Law Review, Apr. 1870, p. 417, *et seq.*

Messrs. **Watkins** and **Rose** for appellee.

Mr. Justice **Field** delivered the opinion of the court:

This is a suit brought by the assignee in bankruptcy of Haines & Chetlain, to cancel certain conveyances alleged to have been made by them in fraud of the bankrupt act. As appears from the evidence in the case, Haines & Chetlain were in February, and had been for some years before, merchants doing business under the firm name of W. P. Haines & Company at Augusta, in the state of Arkansas. On the 29th of that month they filed a petition for the benefit of the bankrupt act, and on the 28th of May following they were adjudged bankrupts, and the complainant was appointed assignee of their estate. On the 18th of the previous January, which was about six weeks before filing their petition, they conveyed an undivided half interest in certain parcels of land owned by them at Augusta, to Toof, Phillips, & Company, a firm doing business as merchants in Tennessee, for the consideration of $1,876, which sum was to be credited on a debt due from them to that firm. At the same time they assigned to one Mahan, a member of that firm, a title bond which they held for certain other real property, upon which they had made valuable improvements. The consideration of this assignment was two drafts of Mahan to Phillips & Company, each for $3,034, one drawn to the order of Haines and the other the order of Chetlain. The amount of both drafts was credited on the indebtedness of Haines & Company, to Toof, Phillips, & Company, pursuant to an understanding to that effect made at the time. There was then due on the purchase money of the property for which the title bond was given, about $700. This sum Mahan paid and took a conveyance to himself from the obligor who held the fee.

The bill of complaint charges specifically that at the time these conveyances were made the bankrupts were insolvent or in contemplation of insolvency; that the conveyances were made with a view to give a preference to Toof, Phillips, & Company, who were the creditors of the bankrupts; that Toof, Phillips, & Company knew, or had reasonable cause to believe, that the bankrupts were then insolvent, and the conveyances were made in fraud of the provisions of the bankrupt act.

The bill also charges that the assignment of the title bond to Mahan was in fact for the use and benefit of Toof, Phillips, & Company, for the purpose of securing the property or its value to them, in fraud of the rights of the creditors, and that this purpose was known and participated in by Mahan.

The district court, by its decree, ordered that the conveyances be annulled, and that the title of the property be vested in the assignee, the latter to refund the amount of the purchase money advanced by Mahan to obtain the deed of the land described in the title bond, less any rents and profits received by him or Toof, Phillips, & Company from the property. This decree the circuit court affirmed, and from that affirmance the case is brought before us on appeal.

The bill presents a case within the provisions of the first clause of the 35th section of the bankrupt act. That clause was intended to defeat preferences to a creditor, made by a debtor when insolvent or in contemplation of insolvency It declares that any payment or transfer of his property made by him whilst in that condition, within four months previous to the filing of his petition, with a view to give a preference to a creditor, shall be void if the creditor has at the time reasonable cause to believe him to be insolvent, and that the payment or transfer was made in fraud of the provisions of the bankrupt act. And it authorizes in such case the assignee to recover the property or its value from the party who receives it.

Under this act it is incumbent on the complainant, in order to maintain the decree in his favor, to show four things:

1. That at the time the conveyances to Toof, Phillips, & Co. and Mahan were made the bankrupts were insolvent or contemplated insolvency;

2. That the conveyances were made with a view to give a preference to these creditors;

3. That the creditors had reasonable cause to believe the bankrupts were insolvent at the time; and,

*4. That the conveyances were made in [*47 fraud of the provisions of the bankrupt act.

1. The counsel of the appellants have presented an elaborate argument to show that inability to pay one's debts at the time they fall due, in money, does not constitute insolvency, within the provisions of the bankrupt act. The argument is especially addressed to language used by the district judge when speaking of the statement of the appellants in answer to one of the interrogatories of the bill, to the effect that at the time the transfers were made they did not believe the bankrupts were able to pay their debts in money, but were able to do so on a fair market valuation of their property and assets. The district judge held that this was a direct confession of a fact which in law constitutes insolvency, and observed that "if the bankrupts could not pay their debts in the ordinary course of business, that is, in money, as they fell due, they were insolvent."

The rule thus laid down may not be strictly correct as applied to all bankrupts. The term "insolvency" is not always used in the same sense. It is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and popular meaning. But it is also used in a more restricted sense, to express the inability of a party to pay his debts, as they become due in the ordinary course of business. It is in this latter sense that the term is used when traders and merchants are said to be insolvent, and as applied to them it is the sense intended by the act of Congress. It was of the bankrupts as traders that the district judge was speaking when he used the language which is the subject of criticism by counsel.

With reference to other persons not engaged in trade or commerce the term may, perhaps, have a less restricted meaning. The bank-

rupt act does not define what shall constitute insolvency, or the evidence of insolvency, in every case.

In the present case the bankrupts were insolvent in both senses of the term at the time the conveyances in controversy were made. They did not then possess sufficient property, even 48*] *upon their own estimation of its value as given in their schedules, to pay their debts. These exceeded the estimated value of the property by over $20,000. And for months previous the bankrupts had failed to meet their obligations as they matured. Creditors had pressed for payment without success; their stock of goods had been levied on, and their store closed by the sheriff under an execution on a judgment against one of them. It would serve no useful purpose to state in detail the evidence contained in the record which relates to their condition. It is enough to say that it abundantly establishes their hopeless insolvency.

2. That the conveyances to Toof, Phillips, & Co. were made with a view to give them a preference over other creditors, hardly admits of a doubt. The bankrupts knew at the time their insolvent condition. A month previous they had made up a balance-sheet of their affairs which showed that their assets were insufficient to pay their debts. They had contemplated going into bankruptcy in December previous, and were then pressed by numerous creditors for payment. Their indebtedness at the time exceeded $50,000, and except to Toof, Phillips, & Co. they did not pay, upon the whole of it, over $500 during the previous fall and winter. Making a transfer of property to these creditors, under these circumstances, was, in fact, giving them a preference, and it must be presumed that the bankrupts intended this result at the time. It is a general principle that everyone must be presumed to intend the necessary consequences of his acts. The transfer, in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy.

49*] *No such proof was made or attempted in this case. But, on the contrary, the evidence shows that the conveyances were executed upon the expectation of the bankrupts, and upon the assurance of Toof, Phillips, & Co., that in consequence of them they would continue to sell the bankrupts' goods on credit, as they had previously done; and that no arrangement was made by the bankrupts with any other of their creditors, either for payment or security, or for an extension of credit.

The fact that the title bond was assigned and the property for which it was given was conveyed to Mahan alone, and not to Toof, Phillips, & Co., does not change the character of the transaction. Mahan was a member of that firm, and the conveyance was made to him with the understanding that the sum mentioned as its consideration should be credited on the indebtedness of the bankrupts to them. Both of the bankrupts testified that such was the understanding at the time. The pretense that Mahan bought the lots as an investment on private account will not bear the slightest examination. It is in proof that the lots at the time were only worth $4,000 at the outside, yet the consideration given was nearly $7,000. Toof, Phillips, & Co. might well have been willing to credit this amount on their claim against insolvent traders in consideration of obtaining from them the possession of property of much less value, but it is incredible that an individual, seeking an investment of his money, would be careless as to the difference between the actual value of the property and the amount paid as a consideration for its transfer to him.

3. From what has already been said it is manifest not only that the bankrupts were insolvent when they made the conveyances in controversy, but that the creditors, Toof, Phillips, & Co., had reasonable cause to believe that they were insolvent. The statute, to defeat the conveyances, does not require that the creditors should have had absolute knowledge on the point, nor even that they should, in fact, have had any belief on the subject. It only requires that they should have had reasonable cause to believe that such was *the fact. [*50 And reasonable cause they must be considered to have had when such a state of facts was brought to their notice in respect to the affairs and pecuniary condition of the bankrupts as would have led prudent business men to the conclusion that they could not meet their obligations as they matured in the ordinary course of business. *Scammon, Assignee*, v. *Cole*, Nat. B. R., vol. 5, p. 257. That such a state of facts was brought to the notice of the creditors is plainly shown. Chetlain, one of the bankrupts, testifies that previous to the execution of the conveyances he had several conversations with Mahan respecting their finances, and told him the amount or near the amount of their indebtedness, and that they could not pay it. Mahan advised them to get extensions, and said that he would help them to get through. Chetlain also testifies that such was the state of the finances of the bankrupts that on one occasion, in conversation with Mahan, they offered to turn over to him their entire assets if he would assume their liabilities and give them a receipt, and that he declined the offer.

It also appears in evidence that the levy by the sheriff upon the stock of goods of the bankrupts, already mentioned, which was made in January, 1868, caused a temporary suspension of their business, and that Mahan was in Augusta at the time and had an interview with the bankrupts on the subject of the levy.

It also appears that about the last of December, 1867, or the 1st of January, 1868. Toof, Phillips, & Co. sent notes of the bankrupts which they held to an agent in Augusta for collection. The agent presented the notes for payment to the bankrupts and was told by them that they could not pay the notes at that time. The agent then wrote to Toof, Phillips, & Co. that they had better look to their interests, as his conviction was that it was doubtful whether they would be able to collect their

debts. Shortly after this Mahan went to Augusta to look after the matter, and whilst there the conveyances in controversy were made.

It is impossible to doubt that Mahan ascertained while thus in Augusta, the actual condition of affairs of the bankrupts. The facts 51*] recited were sufficient to justify the *conclusion that they were insolvent, or at least furnished reasonable cause for a belief that such was the fact.

4. It only remains to add that the creditors, Toof, Phillips, & Co., had also reasonable ground to believe that the conveyances were made in fraud of the provisions of the bankrupt act. This, indeed, follows necessarily from the facts already stated. The act of Congress was designed to secure an equal distribution of the property of an insolvent debtor among his creditors, and any transfer made with a view to secure the property, or any part of it, to one, and thus prevent such equal distribution, is a transfer in fraud of the act. That such was the effect of the conveyances in this case, and that this effect was intended by both creditors and bankrupts, does not admit, upon the evidence, of any rational doubt. A clearer case of intended fraud upon the act is not often presented.

Decree affirmed.

Mr. Justice **Bradley** was absent from the court when this case was submitted and, consequently, took no part in its decision.

66*] J. L. RICE, Admr. of W. J. Turbiville, Deceased, and G. W. Cunningham, *Plffs. in Err.*,

v.

RUSSELL HOUSTON, Admr. of Anthony W. Vanleer, Deceased;

and

JOHN H. EWIN, and J. L. Rice, Admr. of W. J. Turbiville, Deceased, *Plffs. in Err.*,

v.

RUSSELL HOUSTON, Admr. of Anthony W. Vanleer, Deceased.

(See S. C. 13 Wall. 66-68.)

When administrator may sue in Federal court.

An administrator who removes from the state in which he was appointed, and becomes a citizen of another state, may sue in the United States circuit court in the state from which he removed, for the collection of debts due him as administrator.

[Nos. 32, 33.]

Submitted Nov. 23, 1871. Decided Dec. 11, 1871.

IN ERROR to the Circuit Court of the United States for the Middle District of Tennessee.

The case is sufficiently stated by the court.

Mr. **R. A. Crawford** for plaintiffs in error.

Messrs. Francis B. Fogg and **Horace Maynard** for defendant in error.

Mr. Justice **Davis** delivered the opinion of court:

These suits were brought in the circuit court by Houston, a citizen of Kentucky, the administrator of the estate of A. W. Vanleer, against the plaintiffs in error, to recover on notes given by them to the decedent. The defendants below craved oyer of the letters of administration, which were granted by the proper authority of Tennessee and then pleaded in abatement that, as administrator of Vanleer, Houston was not a citizen of Kentucky, but a creature of the law of Tennessee and, therefore, not entitled to sue the debtor of the estate in the Federal courts This question of jurisdiction is the only point in the case.

Although in controversies between citizens of different states, it is the character of the real and not that of the nominal parties to the record which determines the question of jurisdiction, yet it has been repeatedly held by this court that suits can be maintained in the circuit court by executors or administrators if they are citizens of a different state from the party sued, on the ground that they are the real parties in the interest, and succeed to all the rights of the testator or intestate by operation of law. And it makes no difference that the testator or intestate was a citizen of the same state with the defendants, and could not, if alive have sued in the Federal courts; nor is the status of the parties affected by the fact that the creditors and legatees of the decedent are citizens of the same state with the defendants. *Chappedelaine* v. *Dechenaux*, 4 Cranch, 306, 307; *Browne* v. *Strode*, 5 Cranch, 303; *Childress* v. *Emory*, 8 Wheat. 669; *Osborn* v. *Bk. U. S.* 9 Wheat. 856; *McNutt* v. *Bland*, 2 How. 15; *Irvine* v. *Lowry*, 14 Pet. 298; *Huff* v. *Hutchinson*, 14 How. 586; *Coal Co.* v. *Blatchford*, *ante*, 179.

In this state of the law on this subject, it is not perceived on what ground the right of Houston to maintain these suits can be questioned. He was a citizen of Kentucky, had the legal interest in the notes sued on, by virtue of the authority conferred on him by the court in Tennessee and, therefore, had a right to bring his action in the Federal or state courts at his option.

It is to be presumed, in the absence of an averment in *the pleadings to the contrary, [*68 that Houston, when appointed administrator, was a citizen of Kentucky, and if so the appointment was legal, for the laws of Tennessee do not forbid the probate court of that state to intrust a citizen of another state with the duties of administering on the estate of a person domiciled at the time of his death in Tennessee.

But if the fact be otherwise, as seems to be admitted in argument, and Houston were a citizen of Tennessee at the time he got his letters of administration, the liability of the defendants to be sued in the Federal courts remains the same, because there is no statute of Tennessee requiring an administrator not to remove from the state, and the general law of the land allows anyone to change his citizenship at his pleasure. After he has in good faith changed it, he has the privilege of going into the United States courts for the collection of debts due him by citizens of other states, whether he holds the debts in his own right or as administrator.

The judgments of the Circuit Court are affirmed.

JAMES M. JOHNSON *et al.*, *Plffs. in Err.*,
v.
JOHN W. TOWSLEY.

(See S. C. 13 Wall. 72-91.)

Contests between pre-emption claimants—decision of special tribunal, when conclusive—power of courts of equity—land office decision, when final—when reversed—pre-emption rights.

1. The 10th section of the act of June 12, 1858, which declares that cases of contest between different settlers for the right of pre-emption, shall hereafter be decided by the Commissioner of the General Land Office, whose decision shall be final, means that his decision should exclude further inquiry in that department.
2. When the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others.
3. The action of the Land Office in issuing a patent for any of the public land, which is subject to sale by pre-emption or otherwise, is conclusive of the legal title.
4. Courts of equity have the power to inquire into and correct mistakes, injustice, and wrong in judicial and executive action, when it invades private rights.
5. When officers of the Land Office decide controverted questions of fact, in the absence of fraud, imposition or mistake, their decisions on those questions are final, except as they may be reversed on appeal in that department.
6. But when they, by misconstruction of the law, take from a party that to which he has acquired a legal right, the courts have power to give relief.
7. This court will refuse to interfere, by mandamus or injunction, with officers having charge of settling public lands in the discharge of their duties, so long as the title remains in the United States and the matter is rightfully before those officers for decision.
8. But after the title has passed from the government, and the question becomes one of private right, courts may inquire whether the party holding that title should hold absolutely as his own, or as trustee for another.
9. The effect of a double declaration under the 4th section of the act of 1843, in defeating the right of the pre-emptor to the land which he finally claims to purchase, is limited to lands subject, at the time, to private sale.
10. By the 5th section of the act of 1843, the first settler has three months to make his declaration, and if this is not done within that time anyone else who has settled on it before the first settler makes his declaration, shall have the better right.
11. If no other party has made a settlement or has given notice of such intention, then, after three months, the party still in possession may make his declaration.

[No. 14.]

Argued Mar. 28, 1871. Decided Dec. 11, 1871.

IN ERROR to the Supreme Court of the State of Nebraska.

The case is stated in the opinion and in the similar case there referred to.

Messrs. **Lyman Trumbull** and *J. J. Reddick*, for plaintiffs in error:

A court of equity has no jurisdiction to revise the decision of one of the executive departments of the government in a case properly before it, when there is no allegation of fraud or mistake, other than in arriving at a wrong conclusion after a full hearing of all the parties in interest.

Wilcox v. *Jackson*, 13 Pet. 511; *Lytle* v. *Ark.* 9 How. 333.

This court has made numerous decisions as to the authority of courts of equity to revise the decisions of the Land Department in regard to pre-emptions; but it is submitted that in no case has it decided that, in the absence of fraud or mistake, a court of equity has such authority. The pre-emption laws, prior to Sep. 4, 1841, did not declare that all questions arising between settlers should be settled by the land officers, subject to appeal, etc. Hence the decisions of courts of the right to review the action of the Land Department in pre-emption cases arising under acts prior to 1841, can have no bearing on the right to do so under that and subsequent acts, which first gave the jurisdiction to try cases between conflicting claimants, and made the decision final.

The cases of *Cunningham* v. *Ashley*, 14 How. 378; *Barnard* v. *Ashley*, 18 How. 43, 15 L. ed. 285; *Garland* v. *Wynn*, 20 How. 8, 15 L. ed. 802; and *Lytle* v. *Ark.* 22 How. 193, 16 L. ed. 306, all arose under pre-emption acts prior to 1841, and before the law vested the land officers with authority to settle questions arising between different pre-emptors, or made their decisions final.

In all of these cases, as well as in the subsequent ones of *Minnesota* v. *Bachelder*, 1 Wall. 109, 17 L. ed. 551; and *Lindsay* v. *Hawes*, 2 Black, 554, 17 L. ed. 265, fraud and misrepresentation were alleged, and in most of them the proceedings before the land officers had been *ex parte*. In none of them had there been a decision between conflicting claimants, after a full hearing on notice and final appeal to the Secretary of the Interior, as in this case.

Smiley alleges in his bill, that he settled on the land in controversy in May, 1857, that he has ever since occupied the same, and that he offered to file a declaratory statement in June, 1858. Having failed by his own showing to file his declaratory statement within the time required by either the act of Sep. 4, 1841, § 15, or that of Mar. 3, 1843, § 5, he forfeited, by the express terms of those acts, all claim to the land, and it became subject to entry by any other purchaser long before Aug., 1860, when Sampson filed his declaratory statement.

If Smiley, by settling on a tract of land in 1857, and offering to file a declaratory statement in 1858 of his intention to pre-empt the same, could prevent another person from settling upon and pre-empting the land in 1860, he could do so indefinitely, and need never complete his pre-emption and purchase.

"Courts have no authority to dispense with the requirement that the declaratory statement be filed within three months."

Megerle v. *Ashe*, 33 Cal. 83.

Mr. **J. M. Woolworth** for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

The record before us is brought here by a writ of error to the supreme court of the state of Nebraska, for the purpose of revising a judgment of that court, affirming a decree in chancery of one of the district courts of that state.

The plaintiff in error, Johnson, having secured from the United States a patent for eighty acres of land, the subject of this controversy, a suit was brought in the proper courts of Nebraska by Towsley, the defendant in er-

NOTE.—*Patents for land may be set aside for fraud*—see notes, 5 L. ed. U. S. 381; 22 C. C. A. 43.
Pre-emption rights—see note, 10 L. ed. U. S. 785.

ror, to compel a conveyance of the title thus held, on the ground that in equity he was entitled to it, and the Nebraska courts decreed as prayed by him.

The jurisdiction of this court rests on two grounds found in the 25th section of the judiciary act, or, perhaps we should rather say, in the 2d section of the act of February 5, 1867 (14 Stat. at L. 385), which seems to be a substitute for the 25th section of the act of 1789 (1 Stat. at L. 73) so far as it covers the same ground. The defendant in error relied on his patent, as conclusive of his right to the land, as an authority emanating from the United States, which was decided against him by the 81*] state court, *and he relied upon certain acts of Congress as making good his title, and the decision of the state courts was against the right and title set up by him under those statutes. Undoubtedly, the case is fairly within one or both of these clauses of the act of 1867, and the conclusiveness of the patent and the right of the plaintiffs in error claimed under the statutes must be considered.

The contest arises out of rival claims to the right of pre-emption of the land in controversy. The register and receiver, after hearing these claims, decided in favor of Towsley, the complainant, and allowed him to enter the land, received his money, and gave him a patent certificate. On appeal to the Commissioner of the Land Office their action was affirmed, but on a further appeal to the Secretary of the Interior, the action of these officers was reversed on a construction of an act of Congress, in which the Secretary differed from them, and under that decision the patent was issued to Johnson.

It will be seen by this short statement of the case that the rights asserted by complainant, and recognized and established by the Nebraska courts, were the same which were passed upon by the register and receiver, by the commissioner, and by the Secretary of the Interior, and we are met at the threshold of this investigation with the proposition that the action of the latter officer, terminating in the delivery to the defendant of a patent for the land, is conclusive of the rights of the parties not only in the Land Department, but in the courts and everywhere else.

This proposition is not a new one in this court in this class of cases, but it is maintained that none of the cases heretofore decided extend, in principle, to the one before us; and the question being pressed upon our attention with an earnestness and fullness of argument which it has not, perhaps, before received, and with reference to statutes not heretofore considered by the court, we deem the occasion an appropriate one to re-examine the whole subject.

The statutory provision referred to is the 82*] 10th section of *the act of June 12, 1858 (11 Stat. at L. 326), which declares that the 11th section of the general pre-emption law of 1841 shall "be so amended that appeals from the decision of the district officers, in cases of contest between different settlers for the right of pre-emption, shall hereafter be decided by the Commissioner of the General Land Office, whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior."

The finality here spoken of applies in terms to the decision of the Commissioner, and can only be supposed to attach to that made by the Secretary by some process of reasoning, which implies the absurdity of making the decision, on appeal to the Secretary, less conclusive than that made by the inferior officer. But the section under consideration is only one of several enactments concerning the relative duties, power and authority of the executive departments over the subject of the disposition of the public lands, and a brief reference to some of them will, we think, show what was intended by this amendment. By the 1st section of the act to re-organize the General Land Office, approved July 4, 1836 (5 Stat. at L. 107), it was enacted that the executive duties now prescribed, or which may hereafter be prescribed, by law, appertaining to the surveying and sale of the public lands, . . . and the issuing of patents for all grants of land, under the authority of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States. In the case of *Barnard's Heirs* v. *Ashley's Heirs*, 18 How. 45, 15 L. ed. 288, it was held that this authorized the commissioner to entertain appeals from the decisions of the register and receiver in regard to pre-emption claims, and it is obvious that the direct control of the President was contemplated whenever it might be invoked. Afterwards, when the act of September 4, 1841, was passed, which so enlarged the right of pre-emption as to have been ever since considered the main source of pre-emption rights, the 11th section provided that all questions as to the right of pre-emption arising between *different settlers should [*83 be settled by the register and receiver of the district within which the land is situated, subject to an appeal to and revision by the Secretary of the Treasury of the United States. This provision, in the class of cases to which it referred, superseded the functions of the Commissioner of the Land Office, as revising officer to the register and receiver, and, so far as the act of 1836 associated the President with the Commissioner, superseded his supervisory functions also. It left the right of appeal from the register and receiver to the Secretary of the Treasury direct as the head of the department. The 10th section of the act of 1858, so much relied upon by the plaintiffs in error, the operative language of which we have quoted, was clearly intended to remedy this defect or oversight, and to restore to the Commissioner his rightful control over the matters which belonged to his bureau. In the use of the word "final" we think nothing more was intended than to say that, with the single exception of an appeal to his superior, the Secretary of the Interior, his decision should exclude further inquiry in that department. But we do not see, in the language used in this connection, any intention to give to the final decision of the Department of the Interior, to which the control of the land system of the government had been transferred, any more conclusive effect than belonged to it without its aid.

But while we find no support to the proposition of the counsel for plaintiffs in error in the

special provision of the statute relied on, it is not to be denied that the argument is much stronger when founded on the general doctrine that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others. That the action of the Land Office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated, and in all courts, and in all forms of judicial proceedings, where this 84*] title must control, either by *reason of the limited powers of the court, or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand, there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice, and wrong, in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the Crown, or other executive branch of the government, have been corrected or declared void, or other relief granted. No reason is perceived why the action of the Land Office should constitute an exception to this principle. In dealing with the public domain under the system of laws enacted by Congress for their management and sale, that tribunal decides upon private rights of great value, and very often, from the nature of its functions, this is by a proceeding essentially *ex parte*, and peculiarly liable to the influence of frauds, false swearing, and mistakes. These are among the most ancient and well-established grounds of the special jurisdiction of courts of equity just referred to, and the necessity and value of that jurisdiction are nowhere better exemplified than in its application to cases arising in the Land Office. It is very well known that these officers do not confine themselves to determining, before a patent issues, who is entitled to receive it, but they frequently assume the right, long after a patent has issued and the legal title passed out of the United States, to recall or set aside the patent, and issue one to some other party, and if the holder of the first patent refuses to surrender it they issue a second. In such a case as this have the courts no jurisdiction? If they have not, who shall decide the conflicting claims to the land? If the land officers can do this a few weeks or a few months after the first patent has issued what limit is there to their power over private rights? Such is the case of *Starks* v. *Starrs*, 6 Wall. 402, 18 85*] L.ed. 925, in which the *patent was issued to one party one day and to the other the day after for the same land. They are also in the habit of issuing patents to different parties for the same land, containing in each instrument thus issued a reservation of the rights of the other party. How are those rights to be determined except by a court of equity? Which patent shall prevail, and what conclusiveness, or inflexible finality, can be attached to a tribunal whose acts are in their nature so inconclusive? So, also, the register and receiver, to whom the law primarily confides these duties, often hear the application of a party to enter land as a pre-emptor or otherwise, decide in favor of his right, receive his money, and give him a certificate that he is entitled to a patent. Undoubtedly, this constitutes a vested right, and it can only be devested according to law. In every such case, where the Land Office afterwards sets aside this certificate, and grants the land thus sold to another person, it is of the very essence of judicial authority to inquire whether this has been done in violation of law and, if it has, to give appropriate remedy. And so, if for any other reason recognized by courts of equity, as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience, and by the laws which Congress has made on the subject, it ought to go to another, "a court of equity will," in the language of this court in the case of *Starks* v. *Starrs*, just cited, "convert him into trustee of the true owner, and compel him to convey the legal title." In numerous cases this has been announced to be the settled doctrine of this court in reference to the action of the land officers. *Lytle* v. *Arkansas*, 22 How. 193, 16 L. ed. 306; *Garland* v. *Wynn*, 20 How. 8, 15 L. ed. 802; *Lindsey* v. *Hawes*, 2 Black, 559, 17 L. ed. 268.

Not only has it been found necessary in the interest of justice to hold this doctrine in regard to the decisions of the land officers of the United States, but it has been found equally necessary in the states which have had a system of land sales. Numerous cases are found in the courts of Kentucky and Virginia, where they have, by proceedings in equity, established the junior patent to be the title instead *of [*86 the elder patent, by an inquiry into the priority of location or some other equitable matter, or have compelled the holder of the title under the patent to convey, in whole or in part, to some persons whose claim rested on matters wholly anterior to the issuing of the patent. There is also a similar course of adjudication in the state of Pennsylvania, and we doubt not cases may be found in other states. Several of the Kentucky cases have come to this court, where the principle has been uniformly upheld. *Finley* v. *Williams*, 9 Cranch, 164; *McArthur* v. *Browder*, 4 Wheat. 488; *Hunt* v. *Wickliffe*, 2 Pet. 201; *Green* v. *Liter*, 8 Cranch, 229.

It is said, however, that the present case does not come within any of the adjudicated cases on this subject; that in all of them there has been some element of fraud or mistake on which the cases rested.

Undoubtedly, there has been in all of them some special ground for the exercise of the equitable jurisdiction, for this court does not and never has asserted that all the matters passed upon by the Land Office are open to review in the courts. On the contrary, it is fully conceded that when those officers decide controverted questions of fact, in the absence of fraud or impositions or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department. But we are not prepared to concede that when in the application of the facts as found by them they,

by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief. And this is precisely what this court decided in the case of *Minnesota* v. *Bachelder*, 1 Wall. 109, 17 L. ed. 551, and in the case of *Silver* v. *Ladd*, 7 Wall. 219, 19 L. ed. 138. In this latter case a certificate under the Oregon donation law, given by the register and receiver, was set aside by the commissioner, and his action approved by the Secretary, and the action of each of these officers was based on a different construction of the act of Congress. This court held that the register and receiver were right; that 87*] *the certificate conferred a valid claim to the land, and that the patent issued to another party by reason of this mistake must inure to the benefit of the party who had the prior and better right. This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the government, and in reference to the proceedings before the officers intrusted with the charge of selling the public lands it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as the title remained in the United States and the matter was rightfully before those officers for decision. On the other hand, it has constantly asserted the right of the proper courts to inquire, after the title had passed from the government, and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another. And we are satisfied that the relations thus established between the courts and the Land Department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice and to a sound administration of the law.

In the case now under consideration the complainant made his declaratory statement, and proved his settlement to the satisfaction of the register and receiver, and they gave him a patent certificate. The defendant, Johnson, contested the complainant's right before these officers and asserted that he was entitled to the pre-emption right for the same land, and when they decided in favor of Towsley he appealed to the commissioner. This officer approved the decision of the register and receiver, and an appeal was taken by Johnson to the Secretary of the Interior. The Secretary, or rather the Assistant Secretary as appears by the record, rejected Towsley's claim on the sole ground that he had previously filed a declaratory statement of his intention to claim a pre-emption for another tract of land, which he had voluntarily abandoned, and it is clear that but for his con- 88*] struction *of the statute on that subject Towsley would have received the patent which was awarded to Johnson.

We must, therefore, inquire whether the statute, rightly construed, defeated Towsley's otherwise perfect right to the patent, and this inquiry requires consideration of some of the features of our system of land sales.

One of these is that after the surveys are made in any given locality, so that the different tracts can be identified by the descriptions used in these surveys, they are not subject to sale by private entry at the Land Office until there has been a public auction, at which the lands so surveyed are offered to the highest bidder. The time and place of this sale and the lands offered for sale are made known by a proclamation of the President. The object of this public sale and of withholding the lands from private entry is, undoubtedly, to secure to the government the benefit of competition in bidding for these parcels of land supposed to be worth more than the price fixed by Congress, at which they may afterward be sold at private entry. But as the tide of emigration was greatly in advance of these public sales and, indeed, of the surveys, it was found that settlers who had made meritorious improvements were unable to secure the land on which they had settled without bidding at public auction against parties who took into consideration the value of the improvements so made and who would get them by the purchase. To remedy this evil several of the earlier pre-emption laws were passed, and they only included settlements made prior to the passage of those laws. The act of 1841, however, provided a general system of pre-emption, and authorized pre-emption of lands surveyed, but not open to private entry, as well as land which could be bought at private sale. It protected settlements already made, and allowed future settlements to be made with a right to pre-emption, which was a new feature to the pre-emption system. As, however, these settlements might now be made on lands subject to private sale, and the settler was allowed a year in which to make his entry and pay the money, the 15th section of the act required the settler on such lands to make a *declaratory statement if he intended to [*89 claim a right of pre-emption, in which he should declare such intention and describe the land. This statement was filed with the register and receiver, and was obviously intended to enable them to reserve the tract from sale for the time allowed the settler to perfect his entry and pay for the land. But an experience of two years seems to have shown that this privilege of withdrawing particular tracts from private sale was subject to abuse by persons who filed declarations for several tracts when they could only receive one as a pre-emptor, thus delaying the sales and preventing others from settling on or buying, with a view to a purchase by themselves or friends when it became convenient to do so. To remedy this evil Congress, when it came to legislate again about the right of pre-emption, by the act of 1843, enacted by the 4th section "that where an individual had filed, under the late pre-emption law, his declaration of intention to claim the benefit of said law for one tract of land, it shall not be lawful for the same individual, at any future time, to file a second declaration for another tract." As the only declaration of intention required by the act of 1841 (which is undoubtedly the one referred to as "the late pre-emption law") was, both by its express terms and by the policy which dictated it, confined to pre-emptions of land subject to private entry, we entertain no doubt that this section was limited, in like

manner, to that class of lands. As to lands not subject to private sale, no declaration of intention was required by the act of 1841, and the reference to such a declaration in the act of 1843 would be without anything on which to base it. This view is made still clearer by the fact that the next succeeding section of the act of 1843 does introduce distinctly, as a new and separate provision, the requirement that settlers on the land not yet proclaimed for sale are required to make a similar declaration, within three months from the time of settlement, on pain of forfeiting their pre-emption right in favor of the next actual settler, but making no provision whatever for the case of two declarations by the same party on different tracts of land. We are, therefore, of opinion that **90*]** *the effect of a double declaration in defeating the right of the pre-emptor to the tract which he finally claims to purchase is limited to lands subject, at the time, to private sale. The land in controversy in this suit was never subject to private entry, and the application of the principle by the Secretary to Towsley's case was, as we think, a misconstruction of the law, through which his right was denied him.

But it is argued that if the pre-emption claim of Towsley was not governed by the 4th section of the act of 1843, it certainly was by the 5th section of that act, and as he did not file his declaration of intention within three months from the time of settlement, his claim was forfeited and gave him no right.

The record shows, undoubtedly, that his settlement commenced about eight months before he filed his declaration, and it must be conceded that the land was of that class which had not been proclaimed for sale, and his case must be governed by the provision of that section. It declares that where the party fails to make the declaration within the three months, his claim is to be forfeited and the tract awarded to the next settler in order of time on the same tract, who shall have given such notice and otherwise complied with the conditions of the law. The words "shall have given such notice," presuppose a case where some one has given such notice before the party who has thus neglected seeks to assert his right. If no other party has made a settlement or has given notice of such intention, then no one has been injured by the delay beyond three months, and if at any time after the three months, while the party is still in possession, he makes his declaration, and this is done before anyone else has initiated a right of pre-emption by settlement or declaration, we can see no purpose in forbidding him to make his declaration or in making it void when made. And we think that Congress intended to provide for the protection of the first settler by giving him three months to make his declaration, and for all other settlers by saying, if this is not done within three months anyone else, who has set- **91*]** tled on it within that time, or at any *time before the first settler makes his declaration, shall have the better right. As Towsley's settlement and possession were continuous, and as his declaration was made before Johnson or anyone else asserted claim to the land or made a settlement, we think his right was not barred by that section, under a sound construction of its meaning.

There are other questions presented in the brief, such as supposed defects in the bill, and whether, on the evidence, Towsley made the necessary settlement and owned the improvements, which are not within the cognizance of this court. It is also argued that Towsley forfeited his right by entering into contracts by which his title should inure to the benefit of others than himself, in violation of the 13th section of the act of 1841; but as no such matter is put in issue in the pleadings, we will not consider it here.

We are of opinion that the decree of the Supreme Court of Nebraska must be affirmed.

Mr. Justice **Clifford** dissenting:

I dissent from the judgment of the court in this case, upon the ground that the case is controlled by the act of Congress which provides that the decision of the Commissioner of the General Land Office shall be final unless an appeal is taken to the Secretary of the Interior. In my judgment the decree of the Commissioner is final if no appeal is taken, and, in case of appeal, that the decision of the appellate tribunal created by the act of Congress is equally final and conclusive, except in cases of fraud or mistake not known at the time of the investigation by the Land Department.

CHESTER O. SAMSON *et al., Plffs. in Err.,*
v.
JOHN A. SMILEY.

(See S. C. 13 Wall. 91, 92.)

Pre-emption claims—effect of declaratory statement for another tract.

1. In contests for the right of pre-emption, that one of the claimants had filed a declaratory statement for another tract, where the land in question was not subject to private entry, does not deprive such claimant of his right, if it is otherwise perfect.
2. Johnson v. Towsley, *ante,* followed.

[No. 13.]

Argued Oct. 17, 1871. Decided Dec. 11, 1871.

IN ERROR to the Supreme Court of the State of Nebraska.

The case is stated by the court.

Messrs. **Lyman Trumbull** and *J. J. Reddick* for plaintiffs in error.

(See Mr. Trumbull's argument in the case of *Johnson* v. *Towsley, ante,* 485).

Messrs. **M. H. Carpenter,** *J. J. Poppleton,* and **J. M. Woolworth** for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

*This case differs in no respect from the [***92** case just decided, of *Johnson* v. *Towsley, ante,* 485, but one, and that is, that when the register and receiver decided in favor of Smiley against Samson, in the contest for the right of pre-emption to the land, they did not give him a patent certificate as they did to Towsley. The reason for this seems to be that the contest between him and Sampson was prosecuted immediately from the register and receiver's decision to the Commissioner, and from the Com-

missioner's decision affirming that of the register and receiver to the Secretary, so that there was no period until the final decision of the latter when either party could have been permitted to make entry.

But the record shows that, on a full and thorough investigation, all the officers of the Land Department decided that Smiley had established his right of pre-emption, and the Secretary overruled this, on the sole ground that he had filed a declaratory statement for another tract of land. The land in question having never been subject to private entry, this construction of the statute was erroneous, and was made to deprive Smiley of his right, otherwise perfect, to the land, and vested the legal title, which he ought to have received, in Samson.

The case comes, therefore, as we think, within the principle just decided in Johnson v. *Towsley, ante,* 485, *and the judgment of the Supreme Court of Nebraska is affirmed.*

Mr. Justice **Davis,** being interested in the question involved in these two cases, took no part in the decision.

JOHN T. SEMMES, Admr. of William R. Luckett, Deceased, *Plff. in Err.,*

v.

THE CITY FIRE INSURANCE COMPANY OF HARTFORD.

(See S. C. "*Semmes* v. *Hartford Ins. Co.*" 13 Wall. 158-162.)

Limitation in policy of twelve months in which to sue, how affected by the war.

1. The period of twelve months which an insurance policy allowed the plaintiff for bringing his suit for a loss, does not open and expand itself so as to receive within it three or four years of legal disability created by the war, and then close together at each end of that period so as to complete itself as though the war had never occurred.

2. The disability to sue imposed on the plaintiff by the war, relieves him wholly from the consequences of failing to bring suit within twelve months after the loss.

[No. 15.]

Argued Dec. 6, 1871. Decided Dec. 18, 1871.

IN ERROR to the Circuit Court of the United States for the District of Connecticut.

The case is stated by the court.

Messrs. **William Hamersley** and *Francis Fellowes,* for plaintiff in error:

It will not be denied that the period during which the state of war existed cannot be counted in determining the date when the right to commence a suit expired. This principle was conceded on the trial below, and it is too clearly established by authority to require argument.

Tucker v. *Watson,* 15 Am. L. Reg. 221; *Jackson Ins. Co.* v. *Stewart,* 15 Am. Law Reg. 732; *Conn. Mut. L. Ins. Co.* v. *Hall,* 16 Am. Law Reg. 606; *Hanger* v. *Abbott,* 6 Wall. 532, 18 L. ed. 939; *The Protector,* 9 Wall. 687, 19 L. ed. 812; *U. S.* v. *Wiley, ante,* 211; *Levy* v. *Stewart, ante,* 86.

We claim: 1. That our right to sue for the debt in question was suspended by the war because our right to the debt ceased at the outbreaking of the war, and the debt thenceforth remained subject to confiscation at the mercy of the U. S. Congress.

2. That the debt so remained at the mercy of Congress until by the return of peace (*i. e.,* by the suppression of the Rebellion or by a treaty of peace) the right of Congress to enforce the confiscation ceased.

3. That, therefore, our right to sue remained suspended until the return of peace.

4. That neither the President nor Congress recognized such a peace before Apr. 2, 1866, and the court cannot do so without infringing on the political power.

5. This court has recognized the proclamation of Aug. 20, 1866, as a rightful exercise of the President's power to determine the suppression of the Rebellion, and has declared that that date must be accepted in all matters affecting private rights. *U. S.* v. *Anderson,* 9 Wall. 56, 19 L. ed. 615.

And the same principle has been applied by the courts of Mississippi in construing their own laws. *Griffing* v. *Mills,* 40 Miss. 611.

The plaintiff, having been prevented by the existence of war from bringing suit within the year, may bring suit at any time within six years.

The limitation clause is a condition subsequent, and as such is not absolute.

Non-performance of a condition may be excused by act of God or by act of legislature, or may be waived by the agreement or conduct of the defendant.

A similar condition has, in many cases, been held not absolute, but liable to be waived and not binding where performance is impossible.

Ripley v. *Ins. Co.* 29 Barb. 552; *N. Y.* v. *Ins. Co.* 10 Bosw. 537; *Stout* v. *Ins. Co. of N. Haven,* 12 Ia. 371; *Bartlett* v. *Ins. Co.* 46 Me. 500; *Ames* v. *Ins. Co.* 14 N. Y. 264; *Ins. Co.* v. *Hall,* 12 Mich. 202; *Coursin* v. *Ins. Co.* 46 Pa. 323.

Mr. **R. D. Hubbard** for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is an action on a policy of insurance commenced on the 31st day of October, 1866, in the circuit court of the United States for the district of Connecticut, for a loss which occurred on the 5th day of January, 1860.

The only plea of the defendant is that the action was not brought within twelve months after the loss occurred, as provided by one of the conditions of the policy. To this plea there are replications setting up, among other things, that the late Civil War prevented the bringing of the suit within the twelve months provided by the condition, the plaintiff being a resident of the state of Mississippi, and the defendant of Connecticut, during all that time.

There is, in the record, a paper purporting to be an opinion of the court, and a finding of the facts by the court, which finding is so mixed up with the argument of the court in support of its decision that, under the construction so frequently given to the act of March 3, 1865, the paper cannot be treated as a part of the record, and can give us no aid in deciding the case, except what may be derived from the able

NOTE.—*Suspension of statute of limitations during war*—see note to Hanger v. Abbott, 18 L. ed. U. S. 939.

argument of the learned judge who decided it below.

Fortunately, the pleadings themselves set up facts of which this court can take judicial notice, sufficient to enable us to decide on the alleged error of the record, which is that the plea of defendant was held to prevent a good bar to the action, notwithstanding the effect of the war on the rights of the parties.

The circuit court, in arriving at this conclusion, held: First, that the condition in the contract limiting the time within which suit could be brought, was, like the statute of limitations, susceptible of such enlargement in point of time, as was necessary to accommodate itself to the precise number of days during which the plaintiff was prevented from bringing suit by the existence of the war. Ascertaining this by reference to certain public acts of the political department of the government, the court found that there was, between the time at which it fixes the commencement of the war and the date of the plaintiff's loss, a certain number of days which, if added to the time between the close of the war and the commencement of the action, amounted to more than twelve months allowed by the condition of the contract.

It is not necessary, in the view which we take of the matter, to inquire whether the circuit court was correct in the principle by which it fixed the date, either of the commencement or cessation of the disability to sue growing out of the events of the war. For we are of opinion that the period of twelve months which the contract allowed the plaintiff for bringing his suit does not open and expand itself so as to receive within it three or four years of legal disability created by the war and then close together at each end of that period so as to complete itself, as though the war had never occurred.

It is true that, in regard to the limitation imposed by statute, this court has held that the time may be so computed, but there the law imposes the limitation and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other. If the law did not, by a necessary implication, take this time out of that prescribed by the statute, one of two things would happen: either the plaintiff would lose his right of suit by a judicial construction of law which deprived him of the right to sue yet permitted the statute to run **161*]** until *it became a complete bar, or else, holding the statute under the circumstances to be no bar, the defendant would be left, after the war was over, without the protection of any limitation whatever. It was, therefore, necessary to adopt the time provided by the statute as limiting the right to sue, and deduct from that time the period of disability.

Such is not the case as regards this contract. The defendant has made its own special and hard provision on that subject. It is not said, as in a statute, that a plaintiff shall have twelve months from the time his cause of action accrued to commence suit, but twelve months from the time of loss; yet by another condition the loss is not payable until sixty days after it shall have been ascertained and proved. The condition is that no suit or action shall be sustainable unless commenced within the time of twelve months next after the loss shall occur, and in case such action shall be commenced after the expiration of twelve months next after such loss, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim. Now, this contract relates to the twelve months next succeeding the occurrence of the loss, and the court has no right, as in the case of a statute, to construe it into a number of days equal to twelve months, to be made up of the days in a period of five years in which the plaintiff could lawfully have commenced his suit. So, also, if the plaintiff shows any reason which in law rebuts the presumption, which, on the failure to sue within twelve months, is, by the contract, made conclusive against the validity of the claim, that presumption is not revived again by the contract. It would seem that when once rebutted fully, nothing but a presumption of law or presumption of fact could again revive it. There is nothing in the contract which does it, and we know of no such presumptions of law. Nor does the same evil consequence follow from removing absolutely the bar of the contract that would from removing absolutely the bar of the statute, for when the bar of the contract is removed there still remains the bar of the statute, and though the plaintiff may show by his disability to sue a sufficient answer to the twelve months provided by the contract, *he must still bring his suit within the [***162** reasonable time fixed by the legislative authority, that is, by the statute of limitations.

We have no doubt that the disability to sue imposed on the plaintiff by the war, relieves him from the consequences of failing to bring suit within twelve months after the loss, because it rendered a compliance with that condition impossible and removes the presumption which that contract says shall be conclusive against the validity of the plaintiff's claim. That part of the contract, therefore, presents no bar to the plaintiff's right to recover.

As the Circuit Court founded its judgment on the proposition that it did, that judgment must be reversed, and the case remanded for a new trial.

DAVID R. STOCKWELL *et al., Plffs. in Err.,*
v.
UNITED STATES.

(See S. C. 13 Wall. 531-568.)

Action of debt by United States to recover penalty—construction of duty act—partners, when liable for torts of one of their number—principal, liable for agent's torts—acts and declarations of agent, when evidence—liability of importers—repeal of act.

1. A civil action of debt will lie, at the suit of the United States, to recover the forfeitures or penalties incurred under the duty act of Mar. 3, 1823.
2. Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty.
3. The act of 1823 is remedial in its character, and it is not the less so because the liability of the wrong-doer is measured by double the value of the

NOTE.—*Liability of partnership for torts of partner*—see notes, 51 L. R. A. 463; 45 C. C. A. 277.
Liability of principal for torts of agent—see notes, 43 C. C. A. 316; 41 L. R. A. 650.

goods received, concealed, or purchased, instead of their single value.

4. Partners are all liable to make indemnity for the tort of one of their number, committed by him in the course of the partnership business.

5. The tortious act of the agent is the act of his principals, if done in the course of his agency, though not directly authorized.

6. Whatever an agent does or says in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case.

7. Section 2d of the act of 1823 applies to illegal importers.

8. That section was not repealed by the act of July 1866, so as to affect a suit brought to enforce liabilities incurred before the latter act was passed.

[No. 77.]

Argued Nov. 17, 1871. Decided Dec. 11, 1871.

IN ERROR to the Circuit Court of the United States for the District of Maine.

The case is stated in the opinion.

Mr. **R. H. Dana, Jr.,** for plaintiffs in error:

Where the proceeding is by the sovereign and for a penalty based on an offense, it must be by indictment or by information of debt.

This statute (1823, ch. 58) evidently looks to proceedings criminal, or at least prerogative, in their nature.

(1) Section 2 makes the penalty depend "on conviction thereof."

(2) It requires knowledge on the part of the offender.

(3) The offense and penalty are not based on illegal importation, but on the knowingly concealing, etc., goods illegally imported.

The provisions of § 5, that the penalties and forfeitures "shall be sued for and recovered" in the manner prescribed by the act of 1799, ch. 22, § 89, does not necessarily give a civil action of debt. The words "sued for," "recovered," will embrace the information of debt, and even an indictment for a penalty.

Act 1808, ch. 8, § 6, 2 Stat. 454; *Walsh* v. *United States*, 3 Wood. & M. 345.

There was error in the ruling, that in a proceeding under the act of 1823, the knowledge required of the defendants was conclusively presumed from the knowledge possessed by their agent, being their partner in the transaction.

If an agent or partner, in the course of his employment, wilfully does an act in violation of law, the principal or partner is not liable, except upon evidence that he authorized or adopted it. An absolute instruction, as this substantially was, that from the fact of an authority to buy and ship goods, an illegal act of shipping goods by a fraudulent invoice or description was in law the act of the partnership, and not open to rebuttal, would be incorrect. Story, Ag. § 456; *McManus* v. *Crickett*, 1 East, 106.

Such ruling would deprive the defendants of the benefit of the presumption that no one does an act prohibited by law. This presumption applies, of course, to the authorizing of an illegal act by another. It is, doubtless, a rebutable presumption and cannot overweigh facts, and is to be balanced with other presumptions; but the defendants should have the benefit of it in the scales.

Bennett v. *Clough*, 1 B. & Ald. 461; *Sissons* v. *Dixon*, 5 B. & Cr. 758, 8 Dowl. & R. 526; *Wilson* v. *Rankin*, 6 Best. & Sm. 208; *Peachey* v. *Rowland*, 13 C. B. 182; *Lyons* v. *Martin*, 8 Ad. & E. 512; *Freeman* v. *Rosher*, 13 Q. B. 780; *Earle* v. *Rowcroft*, 8 East, 126; Best, Presumptions, 64–68; Tayl. Ev. 116.

The instructions were erroneous in other respects. They require the jury to find that the defendants knew of the illegal importations, from the mere fact of the knowledge of their partner in a foreign country, without submitting to the jury the question whether the defendants authorized the act of their agent and partner, or did in fact know of it.

In all cases where knowledge is required by statute, the question of knowledge is left to the jury, with instructions as to presumptions and prima facie proof, etc., but on balancing the presumptions arising on each side and the facts proved, the jury must be satisfied of the knowledge. A careful examination of the cases will show that such is always the course taken whenever a principal or partner is charged for a penalty or even to make good a loss, by reason of an act of an agent or partner, if knowledge on his part is an ingredient.

Reg. v. *Dean*, 12 Mees. & W. 39; *Cooper* v. *Slade*, 6 H. of L. Cas. 749; *Queen* v. *Bradley*, 10 Mod. 155; *King* v. *Dixon*, 3 Maule & S. 11; *King* v. *Manning*, 2 Com. 616; *Atty. Gen.* v. *Riddle*, 2 Cr. & J. 493; *Atty. Gen.* v. *Siddon*, 1 Cr. & J. 220; *United States* v. *Halberstadt*, Gilp. 262; *Graham* v. *Pocock*, L. R. 3 Pr. C. 345.

So in civil suits where knowledge is required.

Lewis v. *Reed*, 13 Mees. & W. 834; *Castle* v. *Bullard*, 23 How. 172, 16 L. ed. 424.

In all cases when the principal or partner has not authorized the act or adopted it with knowledge, he is held liable only to make good the loss, or to the extent of the consideration or benefit received.

U. S. v. *Halberstadt*, Gilp. 262; *Turner* v. *N. B. R.* 34 Cal. 594; *Hutchins* v. *Turner*, 8 Humph. 415; Sm. Lead. Cas. (H. & W.) 329; Story, Ag. § 453; *Morley* v. *Gaisford*, 2 H. Bl. 442; *McManus* v. *Crickett*, 1 East, 106; *Gordan* v. *Rolt*, 4 Exch. 365 (7 Dowl. & L. 87); *Sharrod* v. *L. & N. W. R.* 4 Exch. 580 (7 Dowl. & L. 213); *Taylor* v. *Green*, 8 C. & P. 316.

The act of 1866, ch. 201, § 4, 14 Stat. at L., 179, inflicts a penalty for the same offense as set forth in the act of 1823. This penalty may be less than that of the act of 1823, as it may be a fine of only $50. It must, therefore, be held to supersede and repeal the penalty under the former act. The proceedings in this suit were commenced after the passage of the latter act, Aug. 1866, and are not saved by § 44 of the act, 14 Stat. at L. 188.

Messrs. **B. H. Bristow,** *Solicitor Gen.*, and **C. H. Hill,** for defendants in error:

Debt is maintainable, and is the proper action to recover forfeitures and penalties incurred by force of the act under consideration.

U. S. v. *Bougher*, 6 McLean, 281; *Walsh* v. *U. S.* 3 W. & M. 342; *U. S.* v. *Allen*, 4 Day, 474; *U. S.* v. *Lyman*, 1 Mas. 482; *Jacob* v. *U. S.* 1 Brock, 520; act 1823, ch. 58, § 5, 3 Stat. at L 781; act, 1799, ch. 22, § 89, 1 Stat. at L. 695.

The same form of action is an appropriate remedy to recover unpaid duty in cases where goods from a foreign country have been imported without payment.

Penalties and duties are alike debts due to the government. Payment of either does not

extinguish the other. The duty becomes due by the importation. The penalty grows out of the fraud. They arise from different sources, and may both be demanded and recovered. *U. S.* v. *Lyman*, 1 Mas. 482.

As for the joinder of counts for both penalties and duties, it is well settled that whenever the same plea may be pleaded and the same judgment given on two counts, they may be joined in the same declaration; and the fact that the duties were to be paid in gold, is not sufficient to take the case out of the operation of that rule of pleading, as that matter is regulated by statute.

Stockwell v. *U. S.*, Int. Rev. Rec., *supra; Brown* v. *Dickson*, 1 T. R. 276; *Cheang-Kee* v. *U. S.* 3 Wall. 320, 18 L. ed. 72.

The defendants are chargeable with knowledge procured by their partner and agent, Leman Stockwell, who transacted the business.

The *Distilled Spirits, ante*, 167; *Castle* v. *Bullard*, 23 How. 188, 16 L. ed. 429.

Partners constitute, as such, but one person in law; and the act of one in the business constituting the subject-matter of the partnership is, *civiliter*, the act of all. They are liable *in solido* for the tort of one of their number, if that tort was committed by him as partner, and in the course of the partnership business.

Locke v. *Stearns*, 1 Met. 560; *Hawkins* v. *Appleby*, 2 Sandf. 421; *Glasgow Exch. Co.* v. *Drew*, 2 MacQueen, 103.

Mr. Justice **Strong** delivered the opinion of the court:*

This was an action brought to recover, *inter alia*, double the value of certain importations of shingles, alleged to have been illegally made and received and concealed and bought by the defendants with the knowledge that the shingles had been illegally imported into the United States. It was found upon the 2d section of the act of March 3, 1823, 3 Stat. at L. 781, which enacted "that, if any person or persons shall receive, conceal or buy any goods, wares, or merchandise, knowing them to have been illegally imported into the United States and liable to seizure by virtue of any act in relation to the revenue, such person or persons shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares or merchandise, so received, concealed or purchased." A verdict and judgment having been recovered against the defendants in the court below, the record has been removed into this court, and four errors have been assigned.

The first is that a civil action of debt will not lie, at the suit of the United States, to re-
542*] cover the *forfeitures or penalties incurred under this act of Congress, and that the court below erred in holding that such an action might be maintained. It is not contended that an action of debt will not lie to recover duties, if the defendant be the owner or importer of the goods imported, for it is conceded that by the act of importing, an obligation to pay the duties is incurred. The obligation springs out of the statutes which impose duties. Nor is it doubted that when a statute gives to a private person a right to recover a penalty for a violation of law he may maintain an action of debt, but it is insisted that when the government proceeds for a penalty based on an offense against law, it must be by indictment or by information. No authority has been adduced in support of this position, and it is believed that none exists It cannot be that whether an action of debt is maintainable or not depends upon the question who is the plaintiff. Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount. It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred, or by what it is evidenced, if the sum owing is capable of being definitely ascertained. The act of 1823 (3 Stat. at L. 781) fixes the amount of the liability at double the value of the goods received, concealed or purchased, and the only party injured by the illegal acts, which subject the perpetrators to the liability, is the United States. It would seem, therefore, that whether the liability incurred is to be regarded as a penalty, or as liquidated damages for an injury done to the United States, it is a debt, and as such it must be recoverable in a civil action.

But all doubts respecting the matter are set at rest by the 4th section of the act, which enacted that all penalties and forfeitures incurred by force thereof shall be sued for, recovered, distributed and accounted for in the manner prescribed by the act of March 2d, 1799 (1 Stat. at L. 627) entitled "An Act to Regulate the Collection of Duties on Imports and Tonnage." By referring to the 89th section of that act it will be seen that it directs all penalties, accruing by any breach of the *act, [*543 to be sued for and recovered, with costs of suit, in the name of the United States of America, in any court competent to try the same; and the collector, within whose district a forfeiture shall have been incurred, is enjoined to cause suits for the same to be commenced without delay. This manifestly contemplates civil actions, as does the proviso to the same section, which declares that no action or prosecution shall be maintained in any case under the act, unless the same shall have been commenced within three years after the penalty or forfeiture was incurred. Accordingly, it has frequently been ruled that debt will lie at the suit of the United States, to recover the penalties and forfeitures imposed by statutes. *U. S.* v. *Colt*, Pet. (C. C.), 145; *Jacob* v. *U. S.* 1 Brock, 520; *U. S.* v. *Bougher*, 6 McLean, 277; *Walsh* v. *U. S.* 3 Wood. & M. 342; *U. S.* v. *Lyman*, 1 Mas. 482; *U. S.* v. *Allen*, 4 Day, 474. It is true that the statute of 1823 imposes the forfeiture and liability to pay double the value of the goods received, concealed or purchased with knowledge that they had been illegally imported, "on conviction thereof." It may be, therefore, that an indictment or information might be sustained. But the question now is, whether a civil action can be brought and, in view of the provision that all penalties and forfeitures incurred by force of the act shall be "sued for and recovered" as prescribed by the act of 1799, we are of the opinion that debt is maintainable. The expression "sued for and recovered" is primarily applicable to civil actions, and not to those of a criminal nature.

The second assignment of error is that the jury were instructed the knowledge of the defendants required by the statute in order to

render them liable, was conclusively presumed from the knowledge of their agent, their partner in the transaction. This is hardly a fair exhibition of what the court did charge. The instruction given to the jury, and all that is assigned for error, was that "if Leman Stockwell, as a member of the firm, engaged in the shingle business at the time of the importation 544*] and reception of the shingles at *Bangor, knew that they were province shingles, liable to duty and seizure, and illegally imported, it was not necessary for the government to prove that the defendants personally had actual knowledge of these facts, which were then within the knowledge of their partner, Leman Stockwell." This is all which is embraced in the assignment. But the court added, that "if with this knowledge, as before stated on Leman's part, that the shingles were illegally imported and liable to seizure, D. R. Stockwell & Co., in the usual course of the business, received the shingles at Bangor, and they were disposed of by them, and the profits of the business divided as stated above, the jury were authorized to find that the defendants, being Leman's partners, received the shingles knowing the same were illegally imported and liable to seizure." Taking this together, and it must be so taken, for the exception was general to the instructions given, it cannot be said to justify the complaint that the court ruled that knowledge of the defendants that the shingles had been illegally imported was conclusively presumed from the knowledge of Leman Stockwell, their partner. Qualified by what was added to the language alleged to be erroneous, it amounts to no more than that the jury might presume such knowledge from the facts stated.

To understand the force and merits of this instruction, it is necessary to notice concisely the facts of which evidence had been given at the trial.

The defendants were lumber dealers resident in Bangor, in the state of Maine, and partners under the firm name of D. R. Stockwell & Co. In 1863 they made an arrangement with Leman Stockwell, a brother of one of the partners, that he should go to Aroostook county, in Maine, and to Frederickton and St. John, in the province of New Brunswick, and there collect, buy, and forward shingles, consigned to the firm at Bangor. By the arrangement he became a partner with them in the shingle business, done in pursuance of it. He purchased shingles and shipped them from St. John to Bangor, consigned to the firm. Some of these shingles were of provincial growth, known to 545*] Leman Stockwell *to be such. They were, of course subject to duties. There was evidence that Leman Stockwell knew them to be subject to duties, and liable to seizure if the duties were not paid, and that with that knowledge he exported them from St. John, documented as of the growth of Maine, with the intent that they should be and in order that they might be imported as free from duty. When the cargoes came to Bangor, in 1863 or 1864, the defendants reported them at the custom-house with the manifest and foreign clearances and with certificates or affidavits of their American origin. No duties were, therefore, exacted, nor were entries required to be made, or invoices or bills of lading to be produced; but the collector allowed the shingles to be taken to the sheds of the defendants, where they were received, sorted and sold in the usual manner of the trade. An account was kept of the business, and at the end of each year the profits were divided between Leman Stockwell and the members of the firm. When subsequently it was discovered, after all the shingles had been sold, that they were not of American origin, but were the growth of the province of New Brunswick, and as such subject to duties and, consequently, that they had been illegally imported, in fraud of the revenue laws, this action was brought, and at the trial the defendants requested the court to charge the jury "that they must be satisfied, as to each defendant, that he knew that the shingles had been illegally imported, and were liable to seizure, before he received, concealed or bought the same; and that such receiving, concealing or buying must have been with an intent to defraud the revenues." The court, however, instructed the jury, as we have above stated. It is now insisted that in thus charging the jury the court fell into error. The argument is rested mainly upon the assumption that the statute upon which the action is founded is a penal statute intended solely for the punishment of crimes against the revenue laws. It is not seriously denied that in civil transactions a principal or a partnership is affected by the knowledge of the agent or copartner, and that the knowledge of the agent is in law attributed to his principal, as *well as that [*546 of the partner to all the members of the firm; nor is it much insisted that a principal, or copartner, is not liable for the tort of an agent, or copartner, done without his knowledge or authority, in suits brought by third persons to recover compensation or indemnity for loss sustained in consequence of the tort; but it is argued that the rule does not apply in the case of suits for a penalty. It becomes, then, material to consider the nature and purposes of the statute under which it is claimed the liability of the defendants has arisen. Is it strictly punitive, or is it remedial?

When foreign merchandise, subject to duties, is imported into the country, the act of importation imposes upon the importer the obligation to pay the legal charges. Besides this, the goods themselves, if the duties be not paid, are subject to seizure and appropriation by the government. In a very important sense they become the property of the government. Every act, therefore, which interferes with the right of the government to seize and appropriate the property which has been forfeited to it, or which may hinder the exercise of its right to seize and appropriate such property is a wrong to property rights, and is a fit subject for indemnity. Now, it is against interference with the right of the government to seize and appropriate to its own use property illegally imported that the statute of 1823 was aimed.

It was to secure indemnity for a wrong to rights of property. The instant that goods are illegally imported, the instant that they pass through the custom-house without the payment of duties, the right of the government to seize and appropriate them becomes perfect. If any person receives them, knowing them to have been illegally imported, or conceals them, or buys them, his act necessarily embarrasses, if it does not defeat altogether, the possibility

of the government's availing itself of its right and securing the property. It is, therefore, manifest that the act of 1823 was fully as remedial in its character, designed as plainly to secure civil rights, as are the statutes rendering importers liable to duties. Its plain purpose was to protect the government in the unembarrassed enjoyment of its rights to all goods 547*] and *merchandise illegally imported, and it proportioned indemnity for infringement upon such right to the loss which such infringement might cause. The amount recoverable is in proportion to the value of the goods abstracted or concealed, or bought, not at all in proportion to the degree of criminality of the act of receipt or concealment. Obviously, there may be more guilt in concealing goods illegally imported, worth only $100, than in receiving or concealing imported property worth ten times as much, but the statute measures the liability not by the guilt but by the value of the goods.

It must, therefore, be considered as remedial, as providing indemnity for loss. And it is not the less so because the liability of the wrongdoer is measured by double the value of the goods received, concealed or purchased, instead of their single value. The act of abstracting goods illegally imported, receiving, concealing or buying them, interposes difficulties in the way of a government seizure, and impairs, therefore, the value of the government right. It is, then, hardly accurate to say that the only loss the government can sustain from concealing the goods liable to seizure is their single value, or to assert that the liability imposed by the statute of double the value is arbitrary and without reference to indemnification. Double the value may not be more than complete indemnity. There are many cases in which a party injured is allowed to recover in a civil action double or treble damages. Suits for infringement of patents are instances, and in some states a plaintiff recovers double damages for cutting timber upon his land. It will hardly be claimed that these are penal actions requiring the application of different rules of evidence from those that prevail in other actions for indemnity. Regarding, then, an action of debt founded upon the act of 1823 as a claim for compensation or indemnity, it cannot be maintained, upon authority or principle, that the knowledge of the agent that the goods had been illegally imported is not presumptively the knowledge of the principal. That, as a general rule, partners are all liable to make indemnity for the tort of one of their number, committed by him in the course of the 548*] partnership *business, is familiar doctrine. It rests upon the theory that the contract of partnership constitutes all its members agents for each other, and that when a loss must fall upon one of two innocent persons, he must bear it who has been the occasion of the loss or has enabled a third person to cause it. In other words, the tortious act of the agent is the act of his principals, if done in the course of his agency, though not directly authorized. And this is emphatically true when the principals, as in this case, have received and appropriated the benefit of the act. These defendants received the shingles on their arrival at Bangor, presenting at the custom-house false certificates of their American origin. They paid no duties. They removed the property to their own lumber sheds, sold it, and divided the profits, retaining a portion for themselves. They have, therefore, now the proceeds of sale of property which was not their own, but which had been forfeited to the United States, and they have secured and they now hold these proceeds through the tortious act of their own partner, who planned and effected the fraudulent importation for their benefit and his. Can it be that they may derive a profit from his fraud and yet repudiate his act by asserting that his knowledge of the fraud does not affect them? If they can, the revenue laws will be found utterly ineffectual to protect the revenues of the government, and facilities to fraud will be abundant. If an irresponsible agent consigns to his principal foreign merchandise, documenting it as of American growth or production, it will always be difficult if not impossible to prove knowledge by the principal that the agent has perpetrated a fraud, and if that is necessary to give to the government a right of action under the act of 1823 against the principals who claim or conceal property thus brought into the country, the act utterly fails to secure a remedy for the mischief against which it was intended to guard.

The plaintiffs in error have argued that in all cases where knowledge is by statute made essential to liability, whenever an attempt is made to hold a principal or partner responsible *for a loss occasioned by the act of [*549 his agent or partner, the question of his knowledge, apart from that of the agent, is submitted to the jury, or, in other words, the knowledge of the agent or partner is regarded as distinct from that of the principal. Numerous cases have been cited which it is supposed support this position. We do not find, however, that such is the doctrine of any of them. The case of *Regina* v. *Dean*, 12 Mees. & W. 39, one of the cases cited, was an information for penalties under the Smuggling Prevention Act of 3 & 4 Wm. IV., in which the defendant was charged, *inter alia*, with knowingly harboring goods imported and illegally unshipped without payment of duties. At the trial it appeared that a clerk of the defendant, with the assistance of two custom-house officers, had made false entries of the quantities of goods imported, but no knowledge of the fraud was brought home to the defendant, although it appeared that he had or must have derived benefit from the fraudulent transaction. Lord Abinger told the jury that as the defendant had derived benefit from the fraud, they might infer knowledge on his part of the fraud having been committed, and that the case, under those circumstances, would be made out against the defendant. This was very like the instruction given, of which the plaintiffs in error complain. On a motion for a new trial, for misinstruction, the exchequer refused a rule. It was conceded in the argument that when goods illegally imported, without payment of duties, are brought to the place of business of a trader, by an agent or clerk of his, known by him not to have paid any duty, and are found there, there is a fair inference that he knew the duties had been evaded. The ruling in this case was in a criminal proceeding. The information was for a penalty, and not for the value

of the goods. *Graham* v. *Pocock*, 3 Priv. C. Law Rep. 345, is another case cited. There the defendants were sued, and one of them was held liable for unshipping and landing goods liable to forfeiture. No question of knowledge was mooted. And in none of the other cases cited do we find it held that in civil actions for indemnity, or for double or treble value, the knowledge of the agent is not to be imputed to **550***] the principal. Upon this *subject the opinion of this court has been outspoken, and it has been in accordance with the instruction given to the jury in the case before us. *U. S.* v. *Gooding*, 12 Wheat. 468; *Am. Fur Co.* v. *U. S.* 2 Pet. 364; *Cliquot's Champagne*, 3 Wall. 140. 18 L. ed. 119. The principle asserted in all those cases is, that whatever an agent does or says in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case, in like manner as if the evidence applied personally to the principal.

The British statutes for the prevention of smuggling differ from our act of 1823. They are both penal and remedial. They impose not only a liability for treble value of goods illegally imported, upon assisting in unlading them or knowingly harboring or concealing them, but also a stipulated penalty, in some cases leaving to the revenue commissioners to determine whether proceedings shall be instituted for the penalty or for treble the damages. Yet in both classes of cases the fraudulent act of a servant is held attributable to his master when the master has derived a benefit from the illegal importation. *Atty. Gen.* v. *Siddon*, 1 Crompt. & J. 220; *Rex* v. *Manning*, 2 Com. 616. We think, therefore, the charge of the court, of which the plaintiffs in error complain, was not erroneous.

It is next contended that section 2d of the act of 1823 cannot be construed to apply to the illegal importers themselves. As it extends only to acts done after the illegal importation and requires knowledge of its illegality, it is argued that it aims rather at accessories after the fact. We think, however, it embraces both. If it does not, then greater liabilities are laid on the accessory than on the principal. The mischief at which the act aimed was, as we have seen, embarrassing the right of the government to seize the forfeited goods. That may **551***] be done as well by importers as *others. They may receive the goods or conceal them, and the wrong to the government is precisely the same, whether the concealment is by them or by others who were not the importers. It certainly would be most strange if the accessory to a wrongful act were held responsible therefor when the principal goes free. As was said in *Graham* v. *Pocock*, *supra*, the question who is liable for receiving, concealing or buying the shingles is a question to be determined irrespective of the inquiry, who is the principal and who the accessory.

Finally, it is argued that the act of 1823 (§ 2) was repealed by the act of July 18, 1866 (14 Stat. at L. 178) entitled "An Act Further to Prevent Smuggling, and for other purposes," the 4th section of which enacted "that if any person shall fraudulently or knowingly import or bring into the United States any goods, wares, or merchandise contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation or concealment or sale of such goods, wares or merchandise after their importation, knowing the same to have been imported contrary to law, such goods, wares, and merchandise shall be forfeited, and he or she shall, on conviction thereof before any court of competent jurisdiction, be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both, at the discretion of such court." The 43d section of that act enacted that all other acts and parts of acts conflicting with or supplied by it should be repealed. It is now insisted that the act of 1823 was in conflict with this act, or, if not, that it was supplied by it. Very clearly, however, this is not maintainable. The act of 1823 was, as we have seen, remedial in its nature. Its purpose was to secure full compensation for interference with the rights of the United States. The act of 1866 (14 Stat. at L. 179) is strictly penal, not at all remedial. It was avowedly enacted further to prevent smuggling. Its design, therefore, was not to substitute new penalties which might be less onerous than the liabilities which former acts had imposed, but to punish as a crime that which before had subjected its perpetrator *to civil liability, or quasi- [***552** civil liability. Hence it is cumulative in its character rather than substitutionary. If it has, indeed, only supplied what was enacted in 1823, then a party who conceals goods illegally imported and forfeited to the United States is subject to no more than a fine of $5,000, with possible imprisonment, though the goods concealed and thereby wholly lost to the government may be worth $100,000, and this, though the declared purpose of the act was more effectually to prevent smuggling. This cannot be. There is no inconsistency between a remedy for an illegal act which works a private wrong, securing pecuniary compensation, and a statute making the same act a criminal offense and punishing it accordingly. Were there nothing more, then, in the act of 1866 than the 4th and the 43d sections, we should feel compelled to hold that the 2d section of the act of 1823 was not repealed by it. But the 18th section expressly enacted that nothing in the act shall be taken to abridge or limit any forfeiture, penalty, fine, liability, or remedy provided for or existing under any law then in force, except as in the act was specially provided. Certainly the act contains no special provision for the civil remedy given by the act of 1823. It merely imposes punishment and superadds criminality to that which before was a civil injury. It is said the court will not construe the statutes so as to give the executive department the option to treat two citizens who have done the same act affecting the same cargo in such manner that one statute may be applied to one and a different statute to another, thus causing different consequences. But the true question is: whether a wrongdoer may not be both civilly and criminally responsible for the same act, and it would not be strange if Congress had given the option to sue for double values, or to prosecute for the crime. The British statutes against smuggling, as we have stated, allow suits for treble

value of goods illegally imported and harbored, or prosecutions for penalties, at the election of the government. Our opinion, then, is that the 2d section of the act of 1823 was not re- [*553] pealed by the act of 1866, *certainly not so as to affect this suit, brought to enforce liabilities incurred before the later act was passed.

The judgment is affirmed.

Mr. Justice **Field**, dissenting:

I am compelled to dissent from the judgment of the court in this case.

I am of opinion:

1. That the penalty of the 2d section of the statute of March 3d, 1823, is superseded and repealed by the act of July 18th, 1866;

2. That if the penalty be not thus repealed, the provisions of the section are not applicable to importers; and,

3. That if the penalty be in force, and the section be applicable to importers, the court below erred in ruling that the knowledge by the defendants required by the section, to subject them to the penalty prescribed, could be conclusively presumed from the knowledge possessed by their partner.

The 2d section of the statute of 1823, under which the defendants are charged, is directed against the receiving, the concealing, and the buying of goods illegally imported and liable to seizure. It is not directed against anything else. Whoever does one of these three things, knowing that the goods have been illegally imported, and are liable to seizure under any act relating to the revenue, is subject, on conviction thereof, to a penalty of double the amount or value of the goods. 3 Stat. at L. 781.

The statute of July 18th, 1866 (14 Stat. at L. 179), in its 4th section, embraces not merely the three things designated in the statute of 1823, but several other things not thus designated in connection with the illegal importation of goods, or the disposal of such goods; and it prescribes for each a different penalty from that provided in the first statute. It is directed against the fraudulent importation of goods as well as against receiving, concealing, and buy- [*554] ing them after they are thus *imported. It further includes what is omitted in the statute of 1823—the selling of such goods and facilitating their transportation, concealment, and sale. It also declares that such goods shall be forfeited, and that every person who does any one of the things enumerated, shall, on conviction thereof, be subjected to a fine in a sum not exceeding $5,000, nor less than $50, or to imprisonment not exceeding two years, or to both, in the discretion of the court. This is not all; the statute declares that present or past possession of the goods by the defendant shall be sufficient evidence to authorize his conviction, unless such possession be explained to the satisfaction of the jury.

The statute of 1866, as thus appears, is much broader in its provisions than the statute of 1823. It supplements the first statute by including as offenses acts there omitted though equally connected as those designated with the disposal of goods illegally imported, and by providing a rule of evidence which renders it less difficult for the government to enforce the prescribed penalties. Had the statute of 1866 stopped here, there would be no pretense that it conflicts with the statute of 1823. But it does not stop here; it goes further and changes the punishment for the offenses designated. By the first statute, the receiving, concealing, or buying any goods by a person knowing them to be illegally imported and liable to seizure under any revenue act, is punishable by a forfeiture of double the value of such goods. By the second statute, the receiving, concealing, or buying goods after their importation, by a person knowing them to have been imported contrary to law, is punishable by fine and imprisonment, or both, at the discretion of the court. In both acts the same offenses are designated, for the liability to seizure attends all illegal importation, and a knowledge of this latter fact necessarily includes the other. Both acts are penal; the first equally so as the last, for it does not go for the value of the goods, or indemnification to the government, but for the enforcement of a penalty upon a party offending in any of the particulars mentioned. *The very defini- [*555] tion of a penal statute is that it is a statute which inflicts a penalty for the violation of its provisions. It is admitted in the opinion of the majority of the court that the offenses designated in the act might be prosecuted by information or indictment; an admission which seems to me to be inconsistent with the position that the act is not penal. I have not been aware that an information or an indictment could be founded on any statute which was not penal in its character.

Different punishments being prescribed for the same offenses by the two statutes, the latter statute must be held according to all the authorities, to have superseded and repealed the penalty prescribed by the first statute. Such was the unanimous decision of this court in *Norris* v. *Crocker*, 13 How. 429, a case which does not differ from this in any essential particular. That was an action of debt to recover a penalty prescribed by the 4th section of the act of Congress of 1793, respecting fugitives from justice and persons escaping from the service of their masters. That section declared that any person who should knowingly and willingly obstruct or hinder the claimant, his agent or attorney in seizing or arresting the fugitive from labor, or should rescue him from such claimant, agent or attorney when arrested pursuant to the authority given by the act, or should harbor or conceal him after notice that he was a fugitive from labor, should for each of these offenses forfeit and pay the sum of $500, to be recovered in an action of debt.

Pending the action brought under this section, Congress, in 1850, passed an act amendatory of and supplementary to the act of February, 1793, the 7th section of which embraced the same offenses specified in the act of 1793, and created new offenses and prescribed as a punishment for each offense fine and imprisonment upon indictment and conviction of the offender; the fine not to exceed $1,000 and the imprisonment not to exceed six months.

For obstructing the claimant or rescuing the fugitive, or harboring him, the act of 1793 declared that the offender *should "for- [*556] feit and pay" for each offense a specified sum, and authorized its recovery by civil action. For the same offenses of obstructing the claimant, rescuing the fugitive, or harboring him, as well

as for offenses of a similar character, the act of 1850 declared that the offender should be punished by fine and imprisonment, and that this punishment should be enforced, upon indictment and conviction.

The act of 1850 contained no repealing clause in terms, yet the court held unanimously that it was repugnant to the act of 1793, and necessarily operated as a repeal of the penalty of that act. That case is not distinguishable in principle from the case at bar. The act of 1793, like the act of 1823, prescribed a penalty recoverable by civil action. The act of 1850, like the act of 1866, prescribed, for the offenses designated, fine and imprisonment enforceable by indictment.

It was urged with great force in the case of *Crocker* v. *Norris, supra,* on the part of the government, that the act of 1850 only added cumulative remedies, and was enacted to give greater facilities to the master of the slave in securing the fugitive; that it was, as its title indicated, amendatory of and supplementary to the original act, and was designed to carry more effectually into execution a provision of the Constitution, and it could not be supposed that Congress having this object in view, intended to repeal the act of 1893, and wipe out liabilities incurred under that act, and thus deprive the master of rights of action in suits then pending; but the court thought otherwise, Mr. Justice Catron delivering its opinion, and observing that, "as a general rule, it was not open to controversy, that, where a new statute covers the whole subject-matter of an old one, adds offenses, and prescribes different penalties for those enumerated in the old law, that the former statute is repealed by implication, as the provisions of both cannot stand together."

The court did not seem to think that the fact that the penalty designated in the act of 1793 was enforced by a civil action, and the penalty designated in the act of 1850 was enforced by indictment, made any difference. In principle, 557*] *the mode of enforcement could not alter the substantial and important fact that the penalty for the same offense was changed, and that by the change, the sovereign power which created the original law had declared that its penalties should no longer be enforced.

If there were no other provisions of law than the two sections mentioned of the acts of 1823 and 1866 before us, I should not hesitate to repeat the language of this court in *Norris* v. *Crocker*, that it is not open to controversy that the latter act repeals the penalty prescribed by the former. But there is another provision of law which removes, as it appears to me, all possible doubt as to the intention of Congress. The 43d section repeals several acts by name, and also "all other acts and parts of acts conflicting with or supplied by this act."

Now, in my judgment, it does not admit of any question that an act like that of 1866, which declares that certain specified offenses shall be punished by fine or imprisonment, or both, does conflict with an act like that of 1823, which provides that the same offenses shall be punished by a forfeiture of double the value of the goods in respect to which the offenses are committed. And it appears to me that I have pointed out several particulars in which omissions of the act of 1823 are supplied by the act of 1866.

The 18th section of the act of 1866, which is supposed by the majority of the court to preserve the penalty of the act of 1823, does, in my judgment, when read in connection with other provisions, have directly an opposite effect. That section declares "that nothing in the act shall be taken to abridge or limit any forfeiture, penalty, fine, liability, or remedy provided for or existing under any law now in force, except as herein otherwise specially provided." This means, as I read it, that the same punishments prescribed by law then in force, without abridgement or limitation; that is, in kind and extent and mode of enforcement, shall continue to exist, unless for such offenses other penalties and remedies are specially provided; and this is equivalent to declaring that such punishments and remedies *shall [*558 not continue to exist when other special provisions are made on the subject.

But if I am mistaken in this construction, and Congress did actually contend this strange and anomalous legislation, that for the offenses designated there should be three distinct punishments inflicted: (1) By a forfeiture of double the value of the goods illegally imported; (2) by a forfeiture of the goods themselves; and (3) by fine, which may go from $50 to $5,000, or by imprisonment, which may extend to two years, or by both; then I contend that the act of 1823 does not apply to the defendants in this case. They were the importers of the goods for double the value of which they are sued; and the section applies only to offenses committed after their importation. It is directed against the offenses of receiving, concealing or buying the goods with knowledge of their having been illegally imported and being liable to seizure. There are numerous other acts providing punishment for all forms of illegal importation. This act was only intended to reach those who, after the original offense was committed, in some way aided, with knowledge of that offense, in keeping the goods out of the reach of the government. The language used is inappropriate and inapt to describe an act of the illegal importer. It is limited to an act done after the illegal importation. It requires knowledge of such importation, which, as counsel observes, it would be absurd to require of the illegal importer himself. He receives his own goods in the act of importation, not afterwards; he cannot buy them of himself; and if he conceals them it is only an act in execution of the original offense.

The language is appropriate to describe an offense, which is, in its nature, accessorial after the fact, and counsel have cited several instances of legislation, where similar language has always been held applicable only to accessories after the fact. Thus in the Crimes Act of 1790 (1 Stat. 116, § 17), it is enacted "that if any person shall receive or buy any goods" stolen from *another "knowing the same [*559 to be stolen" he shall be subjected to like punishment as in case of larceny. No one has ever supposed that this language was applicable to the act of the original offender. So in the general postoffice act of 1825 (4 Stat. at L. 114) it is enacted in the 45th section "that if any person shall buy, receive or conceal" any article men-

tioned in a previous section, "knowing the same to have been stolen or embezzled from the mail," he shall be fined and imprisoned. It has never been thought that the purchaser, receiver or concealer of the stolen property, with knowledge of the larceny, was any other than an accessory after the fact. *U. S.* v. *Crane*, 4 McLean, 317; *U. S.* v. *Keene*, 5 McLean, 509.

So in the act of 1825, more effectually to provide for the punishment of certain crimes (4 Stat. at L. 116, § 8), it is enacted that if any person upon the high seas shall "buy, receive, or conceal" any money, goods, bank notes or other effects, subject to larceny, feloniously taken, or stolen from another, "knowing the same to have been taken or stolen" he shall be deemed guilty of a misdemeanor and be punished by fine and imprisonment. And the act shows, on its face, that the language was intended only for the offense of an accessory, for it declares that the person offending may be prosecuted, although the principal offender chargeable or charged with the larceny shall not have been prosecuted or convicted.

In all these cases the receiver, the concealer and the buyer are accessories after the fact, and the language would be inappropriate if applied to them in any other character; and in the present case it would be extending, in my judgment, the construction of a penal statute beyond all precedent to apply these terms, in the act of 1823, to the original importers.

The act which the illegal importer is likely to do, after the importation, is to sell the goods, but the statute of 1823 does not make the act of selling them an offense. The statute of 1866 does, however, remedy this defect, **560***] which is *one evidence, among others, that it was intended to supply the deficiencies of the original act, and thus supersede it.

The declaration in the case in the counts, upon which double the value of the goods is charged, does not allege that the defendants illegally imported the goods, but that such importation was made by persons unknown, and that the defendants, knowing of the illegal importation received, concealed, and bought them. Yet it appears that the entire action of the court on the trial, and its instructions to the jury, proceeded upon the supposition that the defendants and the absent partner were the owners of the goods, and that the defendants made the importation. It is expressly stated in the bill of exceptions that no attempts were made by either of the defendants, or any person connected with them, to conceal the property imported, or in any way to interfere with the exercise of the power of seizing it. The case rests, therefore, entirely upon the alleged acts of receiving and buying.

If the penalty of the act of 1823 be not superseded and repealed, and the words used in that act are susceptible of the application made of them, I am still of opinion that the judgment should be reversed, for the ruling of the court below, that the knowledge of the illegal importation by the defendants, required by the act, was to be conclusively presumed from the knowledge possessed by their partner. The instruction of the court clearly went to this extent. After stating hypothetically to the jury that if certain matters were done by Leman Stockwell, the shingles sent by him from New Brunswick to Bangor were illegally imported, the court instructed them as follows:

"This being a civil action, and not a criminal prosecution, the knowledge of one of the firm on these matters in this suit is to be deemed the knowledge of the defendants, his copartners in the shingle business.

"If Leman Stockwell, as a member of the firm engaged in the shingle business, at the time of the importations and reception of the shingles at Bangor, knew that they were province shingles, liable to duty and seizure, and illegally *imported, it is not necessary [***561** for the government to prove that the defendants personally had actual knowledge of these facts, which were then within the knowledge of their partner, Leman Stockwell."

Here the court tells the jury that the knowledge of one of the firm, Leman Stockwell, is to be deemed the knowledge of the defendants, and that it is not necessary for the government to prove that the defendants, personally, had actual knowledge of the facts, which were within the knowledge of their partner.

If this language does not amount to an instruction that knowledge of the illegal importation by the defendants is to be conclusively presumed from the knowledge of their partner, it is difficult to perceive what else can be made of it.

The ruling of the court in this respect goes against all notions which I have hitherto entertained of the law on the subject of imputed guilty knowledge, and my sense of justice revolts against its application. I cannot reconcile to either law or justice the doctrine that a person can be charged and punished for knowingly doing a thing of which he never had any actual knowledge; and that in a proceeding to enforce penalties imposed for knowingly doing a thing charged, the knowledge, which is an essential ingredient of the offense, can be conclusively imputed to him from its possession by another.

The claim in question, it is to be remembered, is not made for the forfeiture of the goods; that would follow from the act of illegal importation, without reference to the parties engaged. Neither is it made for the duties, for the right to them accrues to the government upon the importation. The claim is not for indemnification, but for penalties prescribed.

The principle upon which partners are made liable for the acts of each other is that each partner is the general agent of the partnership in all matters within the scope and objects of the partnership business. The liability and the limitations upon the liability are measured by the nature of the business of the partnership. The acts of one partner beyond that *busi- [***562** ness will not bind the firm, for his agency goes not to that extent.

Nor will any act of a partner, done in violation of law, bind his partners unless they originally authorized or subsequently adopted it. Such authorization and adoption are not matters to be presumed from the relationship of the partners to each other, but are to be proved like any other matters done outside of the scope of the partnership business, for which liability is sought to be fastened on the firm. It will often happen, owing to the position of the parties, the nature of the business, and the char-

acter of the act, that this authorization or adoption will be inferred from very slight additional circumstances. Thus in some cases it might be inferred that the importation of goods by one partner, without payment of the duties thereon, was approved by the other partners from the management taken by each partner in the affairs of the firm, and the knowledge which such management must give of the payments made and goods received. A jury might sometimes even be justified in inferring authority or approval of the other partners from their silence. But very different evidence would be required if, when one partner made the importation, the other was absent from the country or was a silent partner, taking no part in the management of the affairs of the firm. In the present case the importation of the shingles by the defendants might have been consistent with entire ignorance that they were the product of New Brunswick and, therefore, subject to duties. It does not appear that there was anything in their shape or character which would inform the defendants of their foreign origin, or anything which would excite the suspicions, even, of the defendants, on the subject They were brought to Bangor accompanied by the proper documentary evidence that they were of American origin.

Leman Stockwell, who was engaged in purchasing shingles in Maine and New Brunswick, was entitled to half the profits of the partnership, and the illegal transaction may have originated with him, to enlarge his share of the profits, and all knowledge that the shingles **563*]** were of foreign origin *may have been concealed by him from the defendants. Many motives may be suggested for such concealment. His designs may have been frustrated or endangered by communicating them to his partners. Be this, however, as it may, certain it is that such knowledge by them cannot be presumed from the naked fact of their partnership with him. Presumptions are conclusions which the law draws from a particular state of facts, and the law does not draw from the mere fact of partnership the conclusion that one partner approves or is cognizant of the illegal acts of the other, but, on the contrary, the presumption of innocence, which everyone may invoke for his protection when accused, repels such conclusion. The doctrine of imputed knowledge and, consequently, of imputed guilt in such cases, finds no support in principle or authority. The adjudged cases all speak another language, without a dissentient voice. Even the case of *Regina* v. *Dean*, 12 M. & W. 39, cited in the opinion of the majority, does not militate against this view. That was an information for penalties for unshipping goods without payment of duties, knowingly harboring them, and removing them from a place of security. Under a practice of the custom-house the goods had been received without payment of the duties, an entry of the contents of the cases containing the goods having been made in a book kept for that purpose by the officers of the customs. A clerk of the defendant had removed the leaves in the book containing the entry and substituted other leaves containing false entries of the goods. There was no direct evidence that the defendant had been previously concerned in tampering with the book, nor was knowledge of the fraud brought directly home to him; but it appeared that he had, or must have derived benefit from the fraudulent transaction. Under these circumstances the court told the jury that as the defendant had derived a benefit from the fraud, they might infer knowledge of the fraud on his part. On motion for a new trial, Baron Alderson, one of the judges, said:

"I think there was evidence for the jury of the defendant's being acquainted with this fraud.

*"He obtained possession of goods for [***564** which less than the proper duty appeared to have been paid. If that were not so, it was incumbent on him to show that he had paid the full amount of duty. He must have had books to show the price of the goods, and the amount of duties payable in respect to them; and those books he does not produce. He derives benefit from the fraud and, therefore, the jury were warranted, in the absence of evidence to the contrary, in inferring that he had a knowledge of it."

It is not perceived that this case, where the question of knowledge was left to the jury, can give support to the ruling in the case at bar, which was substantially, as I understand it, that knowledge must be conclusively presumed from the fact of copartnership.

The case of *Graham* v. *Pocock*, *supra*, recently decided by the Privy Council in England, is not without bearing upon this case, for it decides that one partner cannot be subjected to a penalty for an illegal entry by his partner of goods belonging to the partnership where he did not himself personally participate in such entry. L. R. 3 P. R. C. 345. The report shows that appeals were taken from judgments in two actions brought upon an ordinance of the colony of the Cape of Good Hope. That ordinance provided that no goods should be unladen from a ship in that colony until entry was made of the goods and warrants were granted for their unloading; that the person entering the goods should deliver to the collector a bill of entry containing, among other things, the particulars of the quality and quantity of the goods; and that any goods taken or delivered from a ship, by virtue of an entry or warrant not properly describing them, should be forfeited. The 50th section of the ordinance further provided that every person who should assist or be otherwise concerned, in the unshipping, landing, or removal, or the harboring of such goods, should be liable to a penalty of treble the value thereof, or to a penalty of £100, at the election of the officers of the customs. The first action was brought for *the forfeiture of goods imported by the [***565** respondents; the second action was brought for the penalty of treble the value of the goods under the 50th section. The facts of the cases were these: the respondents, Pocock and Matthew, were partners, doing business at Cape Town, in the colony of Good Hope. Pocock, whilst in England, shipped to his partner at Cape Town twenty-five packages of glassware and three carriages. In the carriages a large number of corks were packed, which were liable to duty. When the goods arrived at Cape Town, the respondent, Matthew, made an entry for the landing of the glassware and carriages,

in which no mention was made of the corks. For this defect in the entry the whole shipment was seized. The supreme court of the Colony decreed a forfeiture of the carriages, but gave judgment for the respondents in the action for the penalty. On appeal to the Privy Council it was contended, in the second case, that the respondent, Matthew, who made the entry, was liable to the penalty of treble the value of the goods, and that Pocock, who was in England at the time, was answerable for his partner's acts; but the court held that Matthew was liable for the penalty, and that Pocock, his partner, was not liable. Lord Cairnes, who delivered the opinion of the court, did not seem to think that the liability of Pocock was a matter to be considered, he not having participated in the actual entry. "I may put out of the case," he said, "the first respondent, Pocock, for it was admitted that there was no case of personal culpability against him." Personal, not imputed, culpability was here considered essential to a recovery by the Crown.

It will be found on examination of the authorities that in all cases where a principal or partner has been held liable, penally or criminally, for the act of his agent or partner, the act was originally authorized or assented to, or subsequently adopted. The question in such cases has always been as to the effect of certain acts or employment as evidence of authorization, assent, or adoption, and it has always been held a matter for the jury.

566*] *The cases of *Rex* v. *Almon*, 5 Burr. 2686, and *Attorney General* v. *Siddon*, 1 Cromp. & J. 220, usually cited against this position, are consistent with it. In the first case, a bookseller was proceeded against for a libel sold in his bookstore by his servant in the course of his employment, and Lord Mansfield held that the relation of the defendant to the act of sale was prima facie evidence to establish his liability, but that he might avoid it by showing that "he was not privy nor assenting to it nor encouraging it." Here such was the nature of the employment as to imply prima facie authorization of the sale and consequent publication of the libel by the master.

In the second case, a trader was held liable to a penalty for the illegal act of his servant done in conducting his business with a view to protect smuggled goods, although absent at the time. The case was an information for penalties, the second count of which charged that the defendant had harbored and concealed property upon which duties had not been paid. The court placed great reliance upon the fact that the possession of the property without explanation was prima facie evidence to warrant conviction, and that the special circumstances detailed in connection with the transaction and the employment of the servant presented a prima facie case of authorization by the master.

There are numerous cases where a principal or partner will be held liable for the fraud of an agent or partner although entirely ignorant of the fraud, as where goods are obtained by false and fraudulent representation; but the liability in such cases proceeds upon the ground that the title to the property in fact never passed to principal or partnership. *Kilby* v. *Wilson*, 1 Ry. & M. 178; *Irving* v. *Motly*, 7 Bing. 543; *Root* v. *French*, 13 Wend. 570; *Cary* v. *Hotailing*, 1 Hill, 311.

So a principal or partner will sometimes be held liable for the fraud of the agent or partner, which was not authorized, where the fruits of the fraud are retained; but the liability in these cases proceeds upon the ground that one cannot *claim immunity by reason of the [**567** fraud and, at the same time, enjoy the benefits of the transaction. These cases properly fall under the head of implied aoption of the act of the agent or partner. *Bennett* v. *Judson*, 21 N. Y. 238; *Veazie* v. *Williams*, 8 How. 134, 137.

So, sometimes, a principal or partner will be held liable where an agent or partner is allowed to exhibit an apparent authority which he does not possess, and, in consequence, fraudulently obtains the property or services of third parties; but the liability in such cases proceeds upon the principle that where one of two innocent parties must suffer, the party who by his acts, clothes the agent with the apparent authority, and thus enables him to commit the fraud, ought to suffer. *Locke* v. *Stearns*, 1 Met. 560; Story, Part. § 108; Story, Ag. 443; *Hern* v. *Nichols*, 1 Salk. 289.

In all these cases the principals or partners are held liable only to make good the loss occasioned by the fraudulent act of the agent or partner. The rule which governs these cases has no application to an action for penalties, which goes not, as already stated, for compensation or indemnification, but for punishment. Where penalties which are punitive and not mere liquidated damages are concerned, there must, in all cases, be personal culpability arising from original authorization of the fraudulent act, or assent to it, or its subsequent adoption with knowledge. This principle is of the highest importance, and its conservation is essential to a just administration of the law. As this principle was disregarded in the trial of this case in the court below, *I think the judgment should, on that account, as well as for the other reasons stated, be reversed and the cause remanded for a new trial.*

Mr. Justice **Miller**, concurring:

I concur in this opinion on the ground that the statute of 1823 was repealed by that of 1866, and on the point that the act of 1823, when in *force, was not applicable to [**568** fraudulent importers. I express no opinion as to the instructions imputing knowledge of the guilty partner to the others.

Mr. Justice **Bradley**, concurring:

I concur in the foregoing opinion; dissenting from the opinion of the court, on all the points taken therein.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY, *Appt.*,

v.

ELIZABETH A. BAILEY.

(See S. C. 13 Wall. 616-623.)

Suit to recover life insurance—equity has no jurisdiction of a legal demand.

1. Where the obligation to pay becomes fixed and absolute, as by the death of a party whose life is insured, the sums insured become a purely legal demand.

2. Where a party has a good defense at law to "a purely legal demand" he cannot resort to a court of equity for relief.

[No. 76.]

Argued Nov. 16 and 17, 1871. Decided Dec. 11, 1871.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. J. M. Carlisle, **J. D. McPherson,** and *W. S. Cox,* for appellant:

The jurisdiction of courts of equity to compel the delivery up to be canceled, of agreements, etc., obtained through false and fraudulent representations, is well established.

Adams, Eq. 174; Story, Eq. Jur. § 692.

Insurance cases are particularly within this jurisdiction. Ad. Eq. 176.

Messrs. **R. B. Washington** and *W. D. Davidge,* for appellee:

The appellant is not entitled to equitable relief. There is a complete defense in law in favor of the appellant, if the allegations of the bill are true. The issues of fact raised in the cause are peculiarly suited for the determination of the jury; and even if a court of equity has discretion to entertain the case, that discretion should not be exercised.

A court of law is the proper tribunal, where the question to be tried is whether a representation was true or false, material or immaterial.

Alexander v. *Muirhead,* 2 Des. 62; *Ins. Co.* v. *Delevan,* 8 Paige, 419; *Home Ins. Co. of N. Y.* v. *Stanchfield,* 5 Am. Law Rev. 564.

Mr. Justice **Clifford** delivered the opinion of the court:

Policies of life insurance are governed, in some respects, by different rules of construction from those applied by the courts in case of policies against marine risks or policies against loss by fire.

Marine and fire policies are contracts of indemnity, by which the claim of the insured is commensurate with the damages he sustained by **619*]** the loss of, or injury to, the property *insured. Such being the nature of the contract, it is clear that an absolute sale of the property insured, prior to the alleged disaster, is a good defense to an action on the policy, as the insured cannot justly claim indemnity for the loss of or injury to property in which he had no insurable interest at the time the loss or injury occurred.

Life insurances have sometimes been construed in the same way, but the better opinion is that the decided cases which proceed upon the ground that the insured must necessarily have some pecuniary interest in the life of the *cestui qui vie* are founded in an erroneous view of the nature of the contract; that the contract of life insurance is not necessarily one merely of indemnity for a pecuniary loss, as in marine and fire policies; that it is sufficient to show that the policy is not invalid as a wager policy, if it appear that the relation, whether of consanguinity or of affinity, was such, between the person whose life was insured and the beneficiary named in the policy, as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the person insured. *Dalby* v. *India & Lon. Ins. Co.* 15 C. B. 365; *Loomis* v. *Eagle L. & H. Ins. Co.* 6 Gray, 396; *Lord* v. *Dall,* 12 Mass. 118; *Trenton L. & F. Ins. Co.* v. *Johnson,* 4 Zab. 576; *Rawls* v. *Am. L. Ins. Co.* 36 Barb. 357, 27 N. Y. 282.

Insurers in such a policy contract to pay a certain sum, in the event therein specified, in consideration of the payment of the stipulated premium or premiums, and it is enough to entitle the insured to recover if it appear that the stipulated event has happened, and that the party effecting the policy had an insurable interest, such as is described, in the life of the person insured at the inception of the contract, as the contract is not merely for an indemnity, as in marine and fire policies.

Two policies for insurance upon the life of Albert W. Bailey, the husband of the appellee, were issued by the appellants, and made payable to the appellee in ninety days after due notice and proof of the death of the husband. He died on the 11th of October following, and due notice of that *event was given to the [***620** appellants by the appellee, to whom the sums insured, amounting to $10,000, were payable, but they refused to pay the same, upon the ground that the policies were obtained by fraudulent misrepresentations and by the fraudulent suppression of material facts. They not only refused to pay the sums insured, but instituted the present suit in equity to enjoin the appellee from assigning or in any manner disposing of the policies, and also prayed that she might be compelled by the decree of the court to deliver up the policies to be canceled, and for further relief. Process was issued and served and the respondent appeared and answered, denying all the charges set forth in the bill of complaint, and alleging that the complainants were bound to pay her the entire sums insured in the respective policies. Proofs were taken on both sides, and the cause having been duly transferred to the general term, the parties proceeded to final hearing, and the supreme court of the district entered a decree dismissing the bill of complaint with costs, but without prejudice, and the complainants appealed to this court.

Fraudulent misrepresentations and the fraudulent suppression of material facts are the principal grounds alleged for the relief prayed in the bill of complaint, and it must be conceded that the proofs introduced by the complainants tend strongly to support the allegations which contain those charges. Those allegations in the bill of complaint are denied in the answer, and the respondent has introduced proofs in support of those denials, but it is not going too far to say that the weight of the evidence, as exhibited in the record, is adverse to the pretensions of the respondent, nor does it appear that any different views were entertained by the subordinate court. Grant all that, and still it does not follow that the decree in the court below is erroneous, as the bill of complaint may well have been dismissed upon grounds wholly disconnected from the merits of the controversy.

Suits in equity, the judiciary act provides, shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be *had [***621** at law, and the same rule is applicable where the suit is prosecuted in the chancery court of this district. *Hipp* v. *Babin,* 19 How. 271, 15 L. ed. 633; *Parker* v. *W. L. Cotton & Woolen Co.* 2 Black, 545, 17 L. ed. 333; *Boyce* v. *Grundy,* 3

Pet. 210; *Graves* v. *Ins. Co.* 2 Cranch, 444; 1 Stat. at L. 82.

Much consideration was given to the construction of that section of the judiciary act in the case first referred to, and also to the question whether a party seeking to enforce a legal right could resort to equity in the first instance in a controversy where his remedy at law is complete, and the court, without hesitation, came to the conclusion that he could not, if his remedy at law was as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.

Most of the leading authorities were carefully examined on the occasion and the court came to the following conclusion, which appears to be correct: that whenever a court of law in such a case is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must in general proceed at law, because the defendant, under such circumstances, has a right to a trial by jury. *Foley* v. *Hill*, 1 Phil. 399, 2 H. of L. Cas. 28; *Fire Ins. Co.* v. *Delevan*, 8 Paige, Ch. R. 422; *Alexander* v. *Muirhead*, 2 Desaus. 162, 5 Am. Law Rev. 564.

Exceptions undoubtedly exist to that rule, of which there are many to be found in the reports of judicial decisions, and in which preventive relief was administered by injunction. Such relief is granted to prevent irreparable injury or a multiplicity of suits, or where the injury is of such a nature that it cannot be adequately compensated by damages at law, or is such, as, from its continuance or permanent mischief, must occasion constantly recurring grievance, which cannot be removed or corrected otherwise than by such a preventive remedy.

Authorities to show that equity will interfere to restrain irreparable mischief, or to suppress **622*]** oppressive and interminable *litigation, or to prevent multiplicity of suits, is unnecessary, as that proposition is universally admitted.

Jurisdiction may also be exercised by courts of equity to rescind written instruments in cases where they have been procured by false representations or by the fraudulent suppression of the truth, if it appear that the rescission of the same is essential to protect the opposite party from pecuniary injury. Equity will rescind or enjoin such instruments where they operate as a cloud upon the title of the opposite party, or where the instruments are of a character that the vice in the inception of the same would be unavailing as a defense by the injured party if the instruments were transferred for value into the hands of an innocent holder. Title deeds fraudulently procured may, under such circumstances, be decreed to be canceled or reformed, as the case may be, and bills of exchange or promissory notes may be enjoined and practically devested of their negotiable quality.

Such jurisdiction also extends to the protection of letters patent against infringement, and is exercised in many cases to prevent waste, and for many other judicial purposes, but the rule in the Federal courts is universal, that if the defendant has a good defense at law, and the remedy at law is as perfect and complete as the remedy in equity, an injunction will not be granted.

Whether the remedy sought in this case would have been available if the suit had been instituted before the death of the person whose life was insured it is not necessary to determine, as no such question is involved in the record. Suffice it to say upon that topic that the complainant has not referred the court to any decided case which supports the affirmative even of that inquiry, but the difficulty in the way to such a conclusion in the case before the court is much greater, as by the death of the *cestui que vie* the obligation to pay, as expressed in policies, became fixed and absolute, subject only to the condition to give notice and furnish proof of that event within ninety days. Notice having been given and the required proof furnished, the obligation to pay certainly became fixed by the terms of the policies, and the *sums insured became a purely legal [***623** demand, and if so, it is difficult to see what remedy, more nearly perfect and complete, the appellants can have than is afforded them by their right to make defense at law, which secures to them the right of trial by jury. *Foley* v. *Hill*, 2 H. of L. Cas. 45; *Thrale* v. *Ross*, 3 Bro. Ch. 56; *Arundel* v. *Holmes*, 4 Beav. 325; *Norris* v. *Day*, 4 You. & C. 475.

Where a party, if his theory of the controversy is correct, has a good defense at law to "a purely legal demand," he should be left to that means of defense, as he has no occasion to resort to a court of equity for relief, unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied a preventive remedy. Nothing of the kind is to be apprehended in this case, as the contracts, embodied in the policies, are to pay certain definite sums of money, and the record shows that an action at law has been commenced by the insured to recover the amounts, and that the action is now pending in the court whose decree is under re-examination.

Courts of equity, unquestionably, have jurisdiction of fraud, misrepresentation, and fraudulent suppression of material facts in matters of contract, but where the cause of action is "a purely legal demand," and nothing appears to show that the defense at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in a Federal court, as it is clear that the case, under such circumstances, is controlled by the 16th section of the judiciary act.

Decree affirmed.

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*UNITED STATES, *Appt.*, [***636**

v.

JOHN H. KIMBAL *et al.*

(See S. C. 13 Wall. 636-646.)

Court of claims has jurisdiction of a claim for carrying coal during the war under a contract, but not of claim for services of impressed vessel.

Where, during the late war, a vessel transported a load of coal for the United States by agreement, and was impressed to undertake another voyage; held, that the court of claims had jurisdiction of the claim under the contract, but not of the claim for the other voyage which was outside of the contract.

[No. 53.]

Argued Nov. 14, 1871. Decided Dec. 11, 1871.

APPEAL from the Court of Claims.

The case is stated by the court.

The marginal clause referred to by the counsel for the United States was as follows: "If, on the arrival of this vessel at the port of destination, the consignee should order her to another place of discharge, such order in all cases to be in writing on the bill of lading."

Messrs. B. H. Bristow, Solicitor Gen., and **C. H. Hill,** *Asst. Atty. Gen.*, for appellant:

The bill of lading and the memorandum on its margin must be construed together. The marginal clause was not merely a direction to the government officers at Port Royal, but, like the memorandum or marginal clause in a policy of insurance, was a part of the contract entered into between the parties; and by it the master was required to proceed to Key West, when directed so to do by the quartermaster at Port Royal.

See *Barnard* v. *Cushing*, 4 Met. 230.

If this be so, then it is evident that the delay in getting away from Port Royal for Key West was owing to the fault of the master. But however this might be, the stranding of the bark in going over the bar was a peril of the sea, and the consequent injury is one which must be borne by the owners of the vessel and not by the government.

Reed v. *United States*, *ante*, 220.

But if the contract of affreightment did not require the master to proceed from Port Royal to Key West, when ordered, and there discharge his cargo, it follows, either that the action of the government officers in requiring this duty of him, was tortious, in which case no action can be maintained against the government in the court of claims, for the consequences thereof; or else it was an appropriation of the vessel for the military service of the government, within the meaning of the act of July 4, 1864, 13 Stat. at L. 381, and therefore, is a case expressly taken out of the jurisdiction of the court of claims thereby.

United States v. *Russell*, *ante*, 474.

In neither case can the consequence of ordering the vessel to sea be considered as damages arising from a breach of contract by the government.

Messrs. N. P. Chipman & Hosmer, **Charles F. Peck,** and **Thomas J. Durant** for appellees.

Mr. Justice **Swayne** delivered the opinion of the court:

This is an appeal by the United States from the judgment of the court of claims.

On the 18th of April, 1865, the United States contracted with the bark Annie Kimbal to convey a cargo of anthracite steamer coal from Philadelphia to Port Royal, in South Carolina. The United States agreed to pay freightage "at the rate of $6.25 per ton, and demurrage $100 per day, allowing twenty-one days for discharging." In the margin of the bill of lading was the following memorandum: "Freight and demurrage payable only on the certificate of quartermaster that the cargo has been received in good order."

The vessel arrived at Port Royal on the 4th of May, 1865. The master immediately tendered the delivery of the cargo to the quartermaster, who was the consignee. He refused to receive it, and ordered the master to proceed with the *vessel and cargo to Key West. [*643 This the master refused to do, and notified the quartermaster that the owners would hold the United States responsible for damages if the order was enforced. The master protested against being compelled to sail immediately, upon the ground that the state of the tide would render his departure then unsafe. Permission to delay was refused. The vessel was towed by a government tug. She struck violently on a bar off Port Royal, was severely injured, and sprung a leak. She was towed back and beached to prevent her from foundering. She was detained at Port Royal, by the delay of the authorities of the United States in discharging her cargo, until the 24th of June. The quartermaster certified that the cargo was received in good order, and that the detention of the vessel was owing to no fault of the master or crew. The vessel was unavoidably further detained at Port Royal until the 11th of July. She then left, a government tug towing her, for Boston, where she arrived on the 18th of that month. Her crew were thereupon discharged.

The twenty-one days specified in the contract for the delivery of the cargo expired on the 24th of May. The court of claims found that the damages which the appellees had sustained by the loss of the vessel's service, and her expenses, was $100 a day, making an aggregate of $5,300, and that they had expended at Boston, in repairing the injuries to the vessel, the sum of $7,604.41.

Before the commencement of this suit the United States paid the amount due, according to the terms of the contract, for freight, but refused to pay anything more.

The court of claims held that the appellees were entitled to recover the sums above mentioned, making an aggregate of $12,904.41, and gave judgment accordingly.

So far as the thirty days' demurrage, extending from the 24th of May to the 25th of June, is concerned, the judgment is clearly correct. The certificate of the quartermaster brings the case within the terms of the contract. The appellees were as much entitled to this compensation as to the amount *stipulated to be [*644 paid for freight. The right to both rests upon the same foundation, and the appellants might as well have refused to pay the latter as the former. This item amounted to the sum of $3,000.

The allowance of the residue of the damages and of the amount expended for repairs, involves other considerations, and requires a separate examination.

The order to the master to proceed to Key West was certainly not authorized by the contract. That imposed no such obligation. No rate of freight for this voyage had been agreed upon, and no such stipulation had been entered into. The contract expired upon the delivery of the cargo at Port Royal. It is silent as to anything further. It may be safely assumed that nothing beyond this was in the contemplation of either party when the vessel left Philadelphia. The court of claims held that the conduct of the quartermaster was not an appropriation, but the impressment of the vessel.

The duress, the *vis major*, the resistance of the master, and his compulsory obedience, are clearly developed in the findings of the record. We think the view of the court below upon this subject was the proper one; but did that entitle the appellee to recover for the damages and repairs here under consideration?

The 1st section of the act of July 4, 1864, declares that the jurisdiction of the court of claims shall not extend to "any claim against the United States growing out of the destruction or appropriation of or damage to any property, by the Army or Navy, or any part of the Army or Navy, engaged in the suppression of the Rebellion, from the commencement to the close thereof." The 2d and 3d sections provide for the adjustment and payment, through the Quartermaster General, the Commissary General, and the Third Auditor of the Treasury, of all claims of loyal citizens in states not in rebellion, for quartermaster stores and subsistence furnished to the Army. 13 Stat. at L. 381.

The act of February 21, 1867, 14 Stat. at L. 645*] 397, declares that the act of *1864 shall not be construed to authorize the settlement of any claim for supplies taken or furnished for the use of the armies of the United States, nor for the occupation of or injury to real estate, nor for the appropriation or destruction of or damage to personal property, by the military authorities or troops of the United States, "where such claim originated during the war for the suppression of the southern Rebellion, in a state or part of a state declared in insurrection."

The resolution of the 23d of December, 1869 (16 Stat. at L. 368), provides that the act of 1867 shall not be so construed as to "debar the settlement of claims for steamboats or other vessels, taken without the consent of the owner or impressed into the military service of the United States during the late war, in states or parts of states declared in insurrection, provided the claimants were loyal at the time their claims originated, and remained loyal thereafter, and were residents of loyal states, and such steamboats or other vessels were in the insurrectionary districts by proper authority."

The act of 1864 took away the jurisdiction of the court of claims as to all cases there specified. The act of 1867 forbade the payment of the claims which it described, while the resolution permitted the settlement of those within the category which it laid down and the qualifications prescribed in the proviso. The resolution refers expressly to the act of 1867, and that act to the act of 1864. They are *in pari materia*, constitute a common context, and must be construed together. This case, in the aspect of it we are considering, is clearly within the body of the resolution. Whether it is also within the requirements of the proviso is not disclosed by the findings in the record. They are silent upon that subject. If the appellees can bring themselves within both they will be entitled to be paid, but not, we think, by the instrumentality of the court of claims.

The purpose of the resolution, obviously, was not to enlarge or restore the jurisdiction of that court, but to remove the bar which the act of 646*] 1867 had been held to create. That *bar affected not the court, but the officer of the Army and of the Treasury, whose duty it would otherwise have been to adjust and liquidate such demands. When the restriction was removed the jurisdiction and authority of those officers, and not of the court, was revived. The phrase "settlement," used in the resolution, has reference to executive and not to judicial action. The context of the two acts and the resolution point clearly to this construction of the latter. The remedy of the appellees, if they are entitled to any, must be sought at the hands of the executive or legislative department of the government. The judicial department is incompetent to give it.

In our opinion the court of claims erred in taking jurisdiction of either of the claims outside of the contract. *The United States* v. *Russell, ante*, 474, heretofore decided at this term, is clearly distinguished by its controlling facts from the present case. It is not intended to impugn anything said by the court in that case.

The judgment of the Court of Claims is reversed, and the cause will be remanded, with directions to enter a judgment in conformity to this opinion.

THE OFFICERS AND CREWS OF THE UNITED STATES SHIPS OF WAR MONADNOCK, KATTSKILL, NANTUCKET, CANONICUS, MAHOPAC, SANGAMON, *et al.*, *Appts.*,

v.

UNITED STATES.

(See S. C. *"The Siren,"* 13 Wall. 389-396.)

English maritime law—interest in prize—right of United States.

1. The English maritime law, including the law of prize, is the maritime law of this country, so far as it is adapted to the altered circumstances and condition of the country, and has not been modified by the proper national authorities.
2. No one can have any right or interest in any prize, except by the grant or permission of the United States. All captures made without their express authority inure *ipso facto* to their benefit.
3. Joint captures by the Army and Navy inure exclusively to the benefit of the United States.

[No. 27.]

Argued Nov. 1, 1871. Decided Dec. 18, 1871.

APPEAL from the District Court of the United States for the District of Massachusetts.

A statement of the case will be found in the opinion.

Messrs. **Charles Cowley** and **Charles Levi Woodbury** for appellants.

Mr. **C. H. Hill**, *Asst. Atty. Gen.*, for the appellees.

Mr. Justice **Swayne** delivered the opinion of the court:

This is an appeal in prize from the decree of the district court of the United States for the district of Massachusetts.

In the English maritime jurisprudence the jurisdiction of the admiralty court on the instance side, and the jurisdiction in prize, are entirely distinct and independent of each other. When exercising one, it is called the instance court, and the prize court when exercising the other. The rules of procedure and adjudication in the latter are said to be no more like

those which prevail in the former, than they are like those of any court in Westminster Hall. But from time immemorial both jurisdictions have been exercised by the same judge. As judge of the admiralty or instance court he is appointed by a commission under the great seal. This commission specifies fully and particularly the subjects of his jurisdiction, but is wholly silent as to prize. To give that jurisdiction, and bring it into activity, a commission under the great seal, in every war, was issued to the Lord High Admiral, to require the judge of admiralty to take cognizance of all captures, seizures, prizes, and reprisals of all ships and goods that should be taken, and to hear and determine according to the course of the admiralty and the law of nations. A special warrant was thereupon issued by the admiral. Since the reign of Elizabeth it does not appear that any special authority has been given to the judge. He has exercised exclusive jurisdiction in prize under his commission from the King, or under the power inherent in his office, or by virtue of both. *Lindo* v. *Rodney*, 2 Doug. 613, note.

392*] *Prize was wholly the creature of the Crown. No one could have any interest but what he took as the gift of the King. Beyond this he could claim nothing. The reasons upon which the rule was founded were: That right of making war and peace was exclusively in the sovereign; that the acquisitions of war must, therefore, belong to him, and that their disposal might be of the utmost importance for the purposes both of war and peace. It was held that it must be presumed from these considerations that the government did not intend to devest itself of this important attribute, except in so far as such a purpose was clearly and unequivocally expressed. The right is not the private property of the sovereign, but a trust confided to him for the public good. In private grants the construction is most strongly against the grantor. In all concessions touching capture the opposite rule prevails. A presumption arises against the grant, and it can only be rebutted by language so explicit as to leave no room for doubt upon the subject. *The Elsebe*, 5 Rob. 173.

The Lord High Admiral exists now only in contemplation of law. It was deemed expedient to assign to him a certain portion of the rights of the Crown to maintain the dignity and splendor of his office. *The Maria Francoise*, 6 Rob. 293. Hence the doctrines of droits of the admiralty, and of captured property which belonged to the King, *virtute coronæ*. The Lord High Admiral is now represented by the King, who holds the office, but in a capacity distinct from his regal character, and the droits which belonged to the office, so far as they still subsist and are not otherwise disposed of, have in the progress of time become reattached to the Crown. *The Rebeckah*, 1 Rob. 227; *The Mercurius*, 1 Rob. 81; *The Joseph*, 1 Gall. 545; 3 Reeves, Hist. Eng. Law, 197.

To the legal scholar the subject is full of the interest of antiquarian research, but its examination is not necessary to the decision of the present case. The proper limits of this opinion forbid us to pursue the inquiry further.

While the American Colonies were a part of the British Empire, the English maritime law **393*]** including the law of prize, *was the maritime law of this country. From the close of the Revolution down to this time it has continued to be our law, so far as it is adapted to the altered circumstances and condition of the country, and has not been modified by the proper national authorities. *30 Hds. Sugar* v. *Boyle*, 9 Cranch, 198. In our jurisprudence there are, strictly speaking, no droits of admiralty. The United States have succeeded to the rights of the Crown. No one can have any right or interest in any prize except by their grant or permission. All captures made without their express authority inure *ipso facto* to their benefit. Whenever a claim is set up, its sanction by an act of Congress must be shown. If no such act can be produced the alleged right does not exist. The United States take captured property, not as droits, but strictly and solely *jure reipublicæ*. *The Joseph*, 1 Gall. 555, 558; *The Dos Hermanos*, 10 Wheat. 310.

During the late Civil War a land and naval force of the United States were beleaguering Charleston in South Carolina. The rebel fortifications and forces kept both at bay. This had been the condition of things for a considerable period. In the night of the 17th February, 1865, the insurgent troops evacuated the neighboring forts and abandoned the city. This became known the next morning. The fleet thereupon approached the city by water, and the Army by land. The Gladiolus, a steam propeller of the Navy, was one of the leading vessels. When she was off the battery at Charleston, a boy from the shore gave information that a blockade runner was lying near by in Ashley river. A boat's crew from The Gladiolus was dispatched in quest of her. They found her on fire and surrounded by boats filled with colored people from the shore. The crew of the boat and others present proceeded to put out the fire. The Gladiolus reached the scene a few minutes after the arrival of the boat. The fire was extinguished; the crew of the Gladiolus assisted in putting it out. It was found that the pipes of the vessel had been cut and she was filling with water. The Gladiolus towed her to shallow water and her leaks were stopped. *She was the Siren, a side-wheeled [**394** steamer of about one hundred and fifteen tons burden, and had run the blockade the night before. That morning her crew had cut her pipes, set her on fire and abandoned her. She was sent to Boston for trial as a prize of war. On her way she collided with another vessel. She was libeled by the United States in the district court of Massachusetts. On the 7th of April, 1865, she was condemned as lawful prize and subsequently sold. All questions as to the distribution of the proceeds were left open by the decree for future adjudication. The owners of the vessel collided with intervened and claimed damages. They were allowed by this court on appeal. *The Siren*, 7 Wall. 152, 19 L. ed. 129. Salvage was claimed in behalf of the Gladiolus. One half of the proceeds of the sale was also claimed for that vessel as prize money. The other appellant vessels of war claimed to participate with her. A decree of distribution was made on the 3d of July, 1869. The court allowed the claim for salvage, and ordered that the residue of the fund, less the sums decreed for damages arising from the collision, should be paid over to the

United States. The appellants have brought this decree before us for review.

Four acts of Congress have been passed allowing captors to participate in the fruits of the property captured. They are the act of 1799 (1 Stat. at L. 715); that of 1800 (2 Stat. at L. 45); that of 1862 (12 Stat. at L. 606), and that of 1864 (13 Stat. at L. 306). It is necessary in this case to consider only one clause of the 10th section of the act last mentioned, which is as follows: "The net proceeds of all property condemned as prize, when the prize was of superior or equal force to the vessel or vessels making the capture, shall be decreed to the captors. And when of inferior force, one half shall be decreed to the United States and the other half to the captors."

No provision is found in any of these statutes touching joint captures by the Army and Navy. **395*]** They are wholly *silent as to the military arm of the service. It results from this state of things, according to the principles we have laid down, that such captures inure exclusively to the benefit of the United States. In the English law they are held not to be within the prize acts, and are provided for by statutes passed specially for that purpose. In *The Genoa and its Dependencies*, 2 Dod. 446, Lord Stowell, speaking of the word "prize," says: "It evidently means maritime capture effected by maritime force only—ships and cargoes taken by ships. . . . What was taken by a conjunct expedition was formerly erroneously considered as vested in a certain proportion of it, in the capturing ships under the prize acts; but in a great and important case lately decided (*Hoogscarpel*, Lords of Appeal, 1785), it was determined that the whole was entirely out of the effect of those prize acts, and, in so deciding, determined by direct and included consequence that the words 'prizes taken by any of Her Majesty's ships or vessels of war,' cannot apply to any other cases than those in which captures are made by ships only."

In *Booty in the Peninsula*, 1 Hagg. 47, the same great authority referring to "a conjunct expedition" held this language: "It may be difficult, and perhaps perilous, to define it negatively and exclusively. It is more easy and safe to define it affirmatively, that that is a conjunct expedition which is directed by competent authority, combining together the actions of two different species of force, for the attainment of some common specific purpose."

The opinion of the court below proceeded upon the ground that the present case is one of this character. Whether it was or was not is the question presented for our determination. The application of Lord Stowell's test leaves no room for doubt as to its proper solution.

We have already adverted to the ingress of the Navy into the harbor of Charleston on the morning of the 17th of February. At nine o'clock that morning an officer of the land forces hoisted the national flag over the ruins of **396*]** Fort *Sumter. Flags were also raised over Forts Ripley and Pinckney. At ten o'clock a military officer reached Charleston. The mayor surrendered the city to him. Four hundred and fifty pieces of artillery, military stores, and much other property were captured with it. Contemporaneously with these things was the seizure of the Siren by the Gladiolus, and the approach and arrival of the rest of the fleet.

The two forces were acting under the orders of a common government, for a common object, and for none other. They were united in their labors and their perils, and in their triumph they were not divided. They were converging streams toiling against the same dike. When it gave way both swept in without any further obstruction. The consummation of their work was the fall of the city. Either force, after the abandonment of their defenses by the rebels, could have seized all that was taken by both. The meritorious service of the Gladiolus was as a salvor, and not as a captor. Precedence in the time of the arrival of the respective forces is an element of no consequence. Upon principle, reason, and authority we think the judgment of the district court was correctly given.

The decree of condemnation committed the court to nothing as to the distribution. The course pursued was eminently proper under the circumstances, and according to the course of practice in proceedings in prize. *The Maria Francoise*, 6 Rob. 292. The allowance of salvage by the court below was not objected to in the argument here.

It has been suggested that the capture was within the 7th section of the act of the 2d of July, 1864, 13 Stat. at L. 377, which declares that "no property seized or taken upon any of the inland waters of the United States by the naval forces thereof shall be regarded as maritime prize," etc. The aspect in which the case has been examined and the conclusions reached, render it unnecessary to consider that proposition, and we express no opinion upon the subject.

The decree of the District Court is affirmed.

BENOIT JULIEN CAUJOLLE *et al.*, *Appts.*,
v.
CYRUS CURTISS and John P. Ferrié, Adm'rs of Geanne du Lux, Deceased.

(See S. C. 13 Wall. 465-474.)

State judgment, when conclusive—pleadable in bar.

1. If the judgment of a state court in a suit for administration, turns upon the question of which of the parties is next of kin to the intestate, it is conclusive upon that question in a subsequent suit in the United States circuit court between the same parties for distribution.
2. Such judgment in the state suit for administration is pleadable in bar to the subsequent suit.

[No. 23.]

Argued Dec. 7, 8, 1871. Decided Dec. 18, 1871.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is sufficiently stated by the court.

Messrs. Charles O'Conor, Jno. E. Ward, and **Charles E. Whitehead,** for appellants:

The contest concerning the administration and the decision thereon, do not create an estoppel against the complainants. It is a rule that the judgment of a court of competent ju-

NOTE.—*Conclusiveness of judgments as between Federal and state courts*—see notes, 21 C. C. A. 478, 49 C. C. A. 468.

risdiction directly on the point is, as a plea, a bar or, as evidence, conclusive between the same parties upon the same matter directly in question in another case.

Gardner v. *Buckbee*, 3 Cow. 126; *Burt* v. *Sternburgh*, 4 Cow. 562; *Wright* v. *Butler*, 6 Wend. 288; *Davis* v. *Tallcot*, 12 N. Y. 188; *Smith* v. *Kernochen*, 7 How. 218; 1 Phil. Ev. 351; C. & H. Notes, pp. 803-923; *Duchess of Kingston's Case*, 20 How. St. Tr. 355; *Outram* v. *Morewood*, 3 East. 346.

The general doctrine is stated by the respondent's counsel in *Mason's Ex'rs* v. *Alston*, 9 N. Y. 32.

I. But such decisions as are relied upon by the defendants in this case are not within the rule.

It seems to be well established that the decision of a surrogate or of a higher court upon an appeal from him, even if founded upon a verdict of a jury, is not conclusive as to the validity of a will of real estate. The issue in such case is merely whether the paper shall be recorded as a will.

Bogardus v. *Clarke*, 1 Edw. Ch. 266; on Appeal, 4 Paige, 623; *Smith* v. *Bonsall*, 5 Rawle, 80.

So as to proving lost will. *Harris* v. *Harris*, 26 N. Y. 440.

II. The relationship of the applicant was not directly in question. It was only incidentally so, as, for instance, the existence of a debt would have been, in case a creditor had applied for administration. *Fitzpatrick* v. *Brady*, 6 Hill, 581.

III. The issue was between the present plaintiffs and Ferrié individually; here the question arises between the plaintiffs and Ferrié *en autre droit*. The parties are not the same within the meaning of the rule. 2 Phil. Ev. 9.

IV. The rule has never been laid down nor applied in any case where a right was not involved in or determined by the first decision.

It certainly does not apply to the determination of a matter of fact on any mere practice motion.

Simson v. *Hart*, 14 Johns. 76; see note to *Dollfus* v. *Frosch*, 5 Hill, 494; *Van Rensselaer* v. *Sheriff*, 1 Cow. 512; *Banks* v. *Am. Tract Soc.* 4 Sandf. Ch. 462; *Acker* v. *Ledyard*, 8 Barb. 518; *Snyder* v. *White*, 6 How. Pr. 325.

A decision by a surrogate that A shall be administrator, merely casts upon him a burdensome duty. *Bettison* v. *Bromley*, 12 East, 252.

It settles a staple point of practice, like a determination that B is a fit referee or juror. It is conceived that such an adjudication is not within the rule.

Fitzpatrick v. *Brady*, 6 Hill, 581, per Gibson, Ch. J.; *Hibshman* v. *Dulleban*, 4 Watts, 191.

V. The law relating to granting administration in cases of intestacy does not provide for such a decision as should conclude the right. It is, indeed, recognized that there may be a contest.

3 R. S. 160, § 138, 5th ed.; 3 R. S. 167, § 75, 5th ed.

But the decision is not conclusive; for the surrogate himself may at any time revoke the letters "whenever it shall appear to him that the letters have been granted by reason of false representations made to him by the persons to whom the same were granted." 3 R. S. p. 164, § 156, 5th ed.

The methods of proof imply that the questions are to be determined summarily.

3 R. S. 158, § 26, 5th ed.; see also pp. 364, 365.

The surrogate is allowed to take proof of devisees and to record the instrument. There may be appeals from his decision and a jury trial of a matter of fact. 3 R. S. 150, §§ 71-78, 5th ed.

But, nevertheless, the decision is not final as to real estate. See § 75.

VI. This precise question came before Vice Chancellor Knight Bruce in *Barrs* v. *Jackson*, June 10, 1842. See 1 Younge & C. 585.

By a most satisfactory train of reasoning, he held the decision of the ecclesiastical court on the question of administration not to have been conclusive on the court of equity in a suit for distribution. He reviewed a decision of the House of Lords in *Bouchier* v. *Taylor*, 4 Bro. P. C. 708, and showed quite plainly that it was impossible to say whether the decision went upon the estoppel, or some other of the very substantial grounds presented. 1 Younge & C. 591, 593.

Lord Lyndhurst, on appeal, 1 Phil. 582, reversed the decision. He declined to enter into any of the general arguments, but held himself to be bound by the decision of the Lords in *Bouchier* v. *Taylor*, 4 Bro. P. C. 708.

Lord Lyndhurst, p. 584, admits that "'if it rested on Mr. Brown's report, it would be difficult to say on what ground the judgment in question proceeded." But he resorted to the Law Tracts of Mr. Hargrave for evidence that the House went "on both points," *i. e.*, the merits and the estoppel.

If he had more carefully examined Mr. Hargrave's work, Lord Lyndhurst would have had some difficulty in pronouncing that the estoppel was affirmed in that case.

The case was argued Mar. 7, 1776, 4 Bro. P. C. 708. The Constitution of New York fixes upon the day of Lexington, *i. e.*, Apr. 19, 1775, as the point of time at which the English common law was accepted in this state. So if this case could be regarded as an authority in England, it would not bind; and of course the recent opinion of Lord Lyndhurst is no stronger.

In Mar. 1774, the master of the rolls held that the prior adjudication was not conclusive. 4 Bro. P. C. 715. This is authority.

The ground upon which a former decision binds is that there has been an issue between the same parties upon a matter of interest or value to them, with an opportunity of trying the fact according to the usual course of judicial proceedings, a full hearing, the compulsory production of proofs and witnesses and a right enjoyed by each party to examine such proofs and cross-examine such witnesses.

All these requisites are wanting in decisions on motions, and what are called practice matters. Everything is done summarily; some things are done *ex parte*, and there is no property or pecuniary value or absolute personal right at stake. Besides, discretion, not the *strictum jus*, presides over the judgment, to an extent greater or less, according to circumstances.

This surrogate's decision is not more binding

as an estoppel by reason of its affirmance in the higher courts, though it may be more persuasive as evidence. Common practice motions as to appointments of receivers, issuing temporary injunctions, referring causes, etc., are often reviewable on appeal in the state courts of last resort. They are now daily reviewed in the New York Court of Appeals. Consequently, no peculiar charm attaches to this surrogate's sentence or order, because it was allowed to be and was, in fact, thus reviewed. The controversy and the question were both of the same nature, wherever they were adjudicated upon.

Mr. **S. P. Nash**, for respondents:

The point in issue here, to wit, the legitimacy of Ferrié, was, necessarily, not merely incidentally, involved in the contest before the surrogate. "Administration in case of intestacy shall be granted to the relatives of deceased who would be entitled to succeed to his personal estate, . . . in the following order: First, to the widow, second, to the children," etc.

2 R. S. 74, § 27; 2 R. S. 96, § 75, subd. 4, 5.

The same general statute, therefore, which prescribes the right and order of administration, prescribes the order of succession and distribution; and though, where relatives are personally disqualified as being convicts, aliens, etc., or are unwilling to accept, administration may be granted to creditors, or to the county treasurer; in the city of New York, to the public administrator; and such grant concludes nothing as to the right of succession, yet, as between relatives, the right of administration, by the very words of the statute, involves and is determined by the right of succession.

2 R. S. 74, § 27.

This distinction, based on the statute itself, was overlooked in the opinion given in the court below on overruling the plea. 5 Blatchf. 225.

But if persons, claiming as next of kin, contest their rights as next of kin, before the surrogate, no question being made as to personal competency, the inquiry before the surrogate is one of right, not of discretion, and is, by the express language of the statute, to be determined by the right to succession. A trial is had, after citation to the adverse claimants, and if delay is thus produced, a special collector is appointed to preserve the estate.

2 R. S. 76, § 35; Laws of 1837, 528, § 23.

Nor is there any difference, as suggested in the opinion, between the English and American systems of administration in respect to the point under consideration. In the ecclesiastical law as administered in England, as well as under the systems in operation in the United States, the right of administration follows, as a general rule, the right to property.

In the Goods of Gill, 1 Hagg. (Eccl.) 342; 1 Will. Exrs. 343.

But, assuming that the question of the legitimacy of Ferrié was incidentally and not necessarily involved in the inquiry before the surrogate, still, as the contestant, the plaintiff here, chose to try the question on the inquiry as to the administration, they should be estopped by the result. If, as they now contend, it was unimportant who administered the estate, they should have waived the contest and allowed letters to issue, reserving their claims to the succession until the time came for the administrator to render his account and to make distribution. 2 R. S. 92, 96.

On authority, as well as on principle, the decision of the surrogate is *res judicata*.

In some matters the decisions of courts of probate, surrogates, and ecclesiastical courts are, by statute, conclusive only to a limited extent. Thus, in New York, the probate of a will is only conclusive so far as it affects personal estate.

2 R. S. 67, § 69; *Bogardus* v. *Clark*, 4 Paige, 623.

So his refusal to order the payment of a debt, his right to do so only existing where the debt is not disputed, does not preclude the creditor from his action at law.

Fitzpatrick v. *Brady*, 6 Hill, 581; *Campbell* v. *Bruen*, 1 Bradf. 224.

So, the effect of a final decree on an accounting is expressly limited by the statute. 2 R. S. 94, § 65.

But unless they are deprived of that effect by statute, the decrees and sentences of the spiritual courts are final and conclusive to a certain extent, as the judgments of the superior courts of law and equity, and have been held to be so in the very point involved in this action.

Blackburn v. *Crawfords*, 3 Wall. 175, 18 L. ed. 186; *Thomas* v. *Keteriche*, 1 Ves. 332; *Bouchier* v. *Taylor*, 4 Bro. (P. C.) 708; *Barrs* v. *Jackson*, 1 Phil. Ch. 582.

In *Barrs* v. *Jackson*, the vice chancellor had denied to the sentence of the ecclesiastical court a conclusive effect (1 Younge & C., C. C. 585), and supported his views in an elaborate opinion. But his decision was overruled by the chancellor, on a review of all the authorities.

In *Blackburn* v. *Crawford*, this court held that the decision of the probate court in Maryland on a claim of administration that the claimant was illegitimate, and a consequent grant of administration for another party, was conclusive as between the same parties to an action of ejectment brought by the party rejecting the deeds for lands which he claimed as heir of the intestate.

In the opinion of the court it is said that the result of the proceeding in the probate court under the laws of Maryland to which our attention has been called, has all the elements of *res judicata*, and it may be argued that it is under some statutory provision of that state that the decree has this effect. But it will be seen, by examining the laws of Maryland, that this result follows on general principles, simply because the probate court has jurisdiction of the subject-matter, not by reason of any statute which expressly gives to the decision of this court that effect, because there is none.

Mr. Justice **Davis** delivered the opinion of the court:

On the 15th day of November, 1854, Geanne Du Lux, a woman of French extraction, died at an advanced age in the city of New York, intestate, leaving a large personal estate to be administered and distributed according to the laws of the place of her domicil.

Within a month of her decease, John P. Ferrié applied to the surrogate of the county of

New York for letters of administration on her estate, claiming them on the ground that he was her only child and, therefore, her sole heir at law and next of kin. This application was opposed by the public administrator, an officer who, in the city of New York, is entitled to administer upon the estate of deceased persons where there are no next of kin, and the French consul was allowed to contest for the benefit of any party in interest in France. During the pendency of these proceedings, these appellants appeared before the surrogate and asked to be heard, alleging that they were the next of kin, and for that reason entitled to intervene in the matter of the administration, and to share upon the distribution of the estate. The prayer of their petition was granted, and after this was done, the French consul withdrew **467*]** *from the contest. The only question involved in the application for administration was whether John P. Ferrié was the legitimate child of Geanne Du Lux, and all the proofs taken and admitted related to that issue alone. As Ferrié was conceded to have been born in France, a commission was issued to take testimony in that country regarding the real relationship he bore to the said Geanne Du Lux. This commission was executed and returned to the surrogate with a large mass of oral evidence on the subject, together with documents and extracts from public records.

The case came to a hearing on the 15th of September, 1856, on the proofs taken in France and at home, and the surrogate rendered the following decree: "In the matter of the estate of Geanne Du Lux, deceased. Upon taking proof of all the parties who have appeared in this matter, and after hearing counsel in behalf of John P. Ferrié, claiming to be the son of the intestate, and counsel in behalf of the public administrator in opposition thereto, and counsel in behalf of Benoit Julian Caujolle, Bert Barthelemy Caujolle, and Mauretta Elie and their respective wives, claiming as next of kin of said intestate, it is ordered, adjudged, and decreed that letters of administration upon the estate of said Geanne Du Lux be granted and issued to the said John P. Ferrié as the legitimate son and sole next of kin of the said intestate or, to said Ferrié and such persons as may be joined with him under the statute, by giving the proper security required by law."

An appeal was taken from this decree to the supreme court of the state, by one of these appellants acting for his family, where it was affirmed. While the case was pending in the supreme court on application of the appellant there, additional evidence was received, not heard by the surrogate, tending to show the illegitimacy of Ferrié. Notwithstanding this additional evidence, the decision of the surrogate was affirmed, and it was reaffirmed on a subsequent appeal to the court of appeals. It was on this final decision in his favor, after a protracted and expensive litigation of seven years, that administration of his mother's estate was granted to Ferrié. It would seem, as the proper result of these proceedings, that the persons living in France, who claimed to be the next of kin of Geanne Du Lux, had exhausted their legal rights in contesting the legitimacy of Ferrié. But they did not think so, for in a short time after the decision against them in the highest court of the state of New York, they filed their bill in the circuit court of the United States for the southern district of New York, for distribution, seeking in this way to try over again the same question which had been so long the subject of contestation.

To this bill the appellees in this court pleaded in bar the decision of the state court on the contest for administration, as an adjudication between the same parties of the very same point in issue, by a tribunal having jurisdiction of the subject-matter. This plea was overruled and the cause, after answer, replication and the taking of proof, was heard on its merits, and the legitimacy of Ferrié again established. Appeal was taken to this court from this decision, and the inquiry arises, then, in the first place, whether he did so err or not.

There must be an end of every controversy, and the question raised by the plea is whether the litigation concerning the legitimacy of Ferrié in the state tribunals of New York has been of such a character that it cannot be renewed between the same parties in the Federal courts.

Chief Justice De Gray, in the *Duchess of Kingston's Case*, 2 Sm. L. Cas. 648, has, in a few words, given a comprehensive summary of the law on this subject: "From the variety of cases in respect to judgments being given in evidence," said the Chief Justice, "these two distinctions seem to follow as being generally true: First, that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar; or, as evidence, conclusive between the same parties on the same matter directly in question in another court; second, that the judgment of a court of exclusive jurisdiction directly upon the point is, in like manner, conclusive upon the same matter between the same parties, coming incidentally in question, in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." Did the fact of legitimacy come before the surrogate's *court, [***470** directly or incidentally, and was it necessary to decide the point before the letters of administration could issue, are the questions to be considered and determined.

In cases of intestacy in New York the surrogate has the sole and exclusive power of granting letters of administration, and is obliged to grant them—no question being made as to personal competency—to the relatives of the deceased who would be entitled to succeed to his or her personal estate, and if Ferrié were the only child of the intestate, he had the legal right to administer, because he succeeded to the whole of her estate. 2 R. S. N. Y. 73, §§ 23, 74, 27, 96, 75, 4, 5. It is true a large discretion is given to the surrogate to secure a competent person, and if relatives are disqualified, for certain causes mentioned in the statute, or are unwilling to accept, administration may be granted to others, and, in such a case, the basis of action concludes nothing as to the right of succession. But if there be next of kin, and no personal disqualifications attach to

them, the surrogate can exercise no discretion on the subject. The inquiry becomes then a matter of right, and is, by the express language of the statute, to be determined by the right to the succession. 2 R. S. 74, § 27.

In this state of the law on the subject Ferrié applied for letters of administration on the estate of Geanne Du Lux, claiming to be her son and, therefore, her nearest of kin. But these appellants said, You cannot have these letters, because you are illegitimate, and we, as the descendants of a deceased aunt of the intestate, are her nearest relatives and, therefore, entitled to the succession. The purpose was to get at the estate, and so they say in their petition addressed to the surrogate for leave to intervene. They allege themselves to be "the nearest of kin" and entitled to share upon the distribution of the estate," and ask to be heard "and to receive their distributive share of the estate." Manifestly, they sought the contest because they supposed the right to administer involved the right to the property. Their opposition was not based on the ground of Fer-**471***] rié's personal unfitness, *nor did they wish to administer themselves. How, then, can it be said that the administration in this case was granted, without any reference to, or consideration of, the question of distribution? In the absence of personal disqualifications, as we have seen, it is compulsory on the surrogate to grant the letters to the party to whom the inheritance belongs. This is the primary and only object of inquiry, in order to ascertain to whom the letters should be issued. The illegitimacy of Ferrié in any other view was an immaterial issue. It is personal good conduct, and not the status of birth, which constitutes a man a fit person to be intrusted with the duties of administration. It is idle, therefore, to suppose that this contest was inaugurated and carried on, on any other theory than that the result of it settled the right to the estate. Because an administrator can, under certain circumstances, be appointed, who is not connected by kinship with the intestate, proves nothing. It is enough to say there was no occasion for the surrogate to do this, and his action was not grounded on his ability to do it in certain contingencies. His power was invoked under that clause of the statute which directed him to issue letters, in case there were relatives, to the one to whom the estate went, by the law of descents. Ferrié alleged himself to be that person, because he was the son of the deceased. These appellants said: Not so, for you are illegitimate, and have no inheritable blood, and we propose to try that question, and if it is decided in our favor, we get the estate, as we are, confessedly, in that event the nearest of kin. The issue thus solicited was framed; voluminous evidence both from abroad and at home taken upon it; able arguments heard; elaborate opinions given, and repeated decisions made against the right set up by these appellants, and yet they are not content. Beaten in the state courts on the vital question—the illegitimacy of Ferrié—they turn to this court to try over again the very point decided against them. Can they do this? They say the point was only cognizable incidentally; but how can this be, when the surrogate could not have done the thing he did do without deciding it? It *had to be decided in order to determine [***472** to whom the letters should issue, and the decision of it, of necessity, settled the distribution of the estate. If this litigation can be renewed in a separate suit for distribution in another court, then the same persons can try the same question, in respect to the same subject, in two different suits. The question before the surrogate was the legitimacy of Ferrié, and the subject in regard to which it was necessary to decide it, was the distribution of the estate. That the ultimate right of property was the pivotal point of the case appears by the decree itself, but it finds Ferrié to be the legitimate son and sole nearest of kin of the intestate, and by reason of this directs administration to be granted to him. And it goes further, for it finds, substantially, that the contest was made on the question of kinship alone, and denies the claim set up by these appellants. Suppose the suit for distribution had been brought in the surrogate's court; can there be a doubt that the decree granting administration to Ferrié would be pleadable in bar to it? If such be its effect in that court, can or ought it to have a different effect in another court of concurrent jurisdiction? If so, then instead of there being uniformity in the exercise of concurrent jurisdiction, there would be conflicting determinations, and the evils resulting from such a course of procedure can be easily foreseen. Neither the policy of the law nor the interests of society require this to be done.

We have thus far considered the question on principle, but we are also sustained by authority.

In the ecclesiastical courts in England, in cases of intestacy, the right of administration follows the right to the property (1 Williams on Exrs. 394), as it does in New York and elsewhere in this country.

The effect of the sentence of the ecclesiastical court, in granting administration, was considered by Lord Hardwicke, in *Thomas* v. *Ketteriche*, 1 Ves. 333, on a bill filed for distribution of an intestate's goods, and he held himself concluded by it. *There had been a [***473** contest in the ecclesiastical court for administration between the same parties on the point which was the nearest of kin. The court decided they were in equal degree, and granted administration to Ketteriche, because Thomas was a minor. Thomas, believing the ecclesiastical court had not computed the degrees correctly, and that he was nearer in relationship to the intestate, filed his bill for distribution in the High Court of Chancery for the purpose of getting another computation, but the Lord Chancellor refused to go behind the sentence of the ecclesiastical court. "That court," he said, "is bound to grant administration to the next of kin; and, if I should determine these parties not to be equal, but the plaintiff nearer, it is directly contrary to the foundation of this sentence, which would make it erroneous and to be reversed, the consequence of which would be that, by choosing to come here for a distribution, you would change the rule relating thereto, for the suit might have been in the ecclesiastical court for a distribution as well as here, and that court could not have contradicted the sentence by which administration was granted." This decision was in 1749.

In *Bouchier* v. *Taylor*, 4 Bro. P. C. 708, the same point was raised and decided the same way by the House of Lords in 1776. Notwithstanding these decisions the question was again the subject for discussion, in a suit for distribution, before Vice Chancellor Bruce in *Barrs* v. *Jackson*, 1 You. & C. Ch. 585, as late as 1842, and he denied to the sentence of an ecclesiastical court, in a suit for administration, the effect which was given to it in the other cases. But, on appeal to the House of Lords, this decree was reversed, and Lord Chancellor Lyndhurst, on a review of all the authorities, held that the question was no longer an open one. 1 Phil. 582. It is to be observed, in regard to the opinion of the learned chancellor, that, although he declined to enter into any of the 474*] general arguments in the case, on *the ground that he was bound by the decision of the House of Lords in *Bouchier* v. *Taylor, supra*, yet he concedes that if the suit for distribution had been instituted in the ecclesiastical court, the sentence in the suit for administration would have been conclusive upon it, and, if it were conclusive there, that ought to be conclusive in the court of chancery.

It may, therefore, as the result of these authorities, be safely assumed to be the established law in England, that if the sentence of an ecclesiastical court, in a suit for administration, turns upon the question of which of the parties is next of kin to the intestate, it is conclusive upon that question in a subsequent suit in the court of chancery between the same parties for distribution.

We are not aware of any decisions directly upon this subject in any of the state courts of this country. This, doubtless, results from the fact that, with us, estates are settled and distributed in the same court that grants the letters of administration. It seldom occurs here that separate suits for distribution are instituted at all, and very rarely, anywhere else than in the courts of probate. The recent case in this court, of *Blackburn* v. *Crawfords*, 3 Wall. 175, 18 L. ed. 186, is, in some of its features, unlike this, but the principle of that case would seem to create an estoppel in this.

On principle and authority, therefore, the judgment in the suit for administration in New York was pleadable in bar to this suit, and on that ground alone the bill should have been dismissed.

The decree is affirmed.

Mr. Chief Justice **Chase**, having been of counsel for the appellee Ferrié did not sit in this case.

HOSEA STOUT, *Plff. in Err.*,

v.

THE PEOPLE OF THE U. S. IN THE TERRITORY OF UTAH.

Court equally divided in a criminal case—habeas corpus, jurisdiction under.

Where the judges of this court are equally divided, four of them being of the opinion that on habeas corpus, if the commitment be on an indictment regular in form and for a crime of which the court below has jurisdiction, the judge cannot discharge for matters behind the indictment, such as irregularities in the summons of the grand jury, etc., and four being of a different opinion, thinking the summons void, the judgment is necessarily affirmed.

[No. 478.]

Argued Dec. 15, 1871, and Jan. 17, 1872. Decided Feb. 5. 1872.

IN ERROR to the Supreme Court of the Territory of Utah.

The plaintiff in error was indicted for murder in the third judicial district court for the territory of Utah, at the September term, 1871, of which court the Hon. James B. McKean, chief justice of the supreme court of Utah, is judge, assigned to that district in accordance with the organic law of the territory. Having been arrested on this indictment and being in the custody of the United States marshal, the plaintiff in error applied to Chief Justice McKean, Oct. 30, for a writ of habeas corpus, upon the ground that he could "only be indicted for the crime aforesaid by a grand jury, duly selected, drawn, summoned and impaneled according to the laws of the territory of Utah; that the said grand jury, by whom said pretended indictment was found, was not drawn according to said law, but an open *venire* was issued by order of Hon. James B. McKean, judge of the third judicial district court of Utah territory," which was delivered to the United States marshal for the territory, who selected and summoned the persons composing the grand jury which returned the indictment, and who "were selected, chosen, designated, and called by said marshal of the United States for Utah territory, promiscuously, and not by drawing or ballot as prescribed by the laws of said territory, and in contravention of each and every section of the laws of said territory, prescribing the manner of drawing, selecting, and obtaining jurors to serve in the district courts of said territory. Said jurors were not "selected, summoned, or called in accordance with the provisions of any act of Congress, nor in accordance with the practice or rules of any court of the United States, nor in accordance with any rule of this court." Nov. 2 Chief Justice McKean refused the writ, and in so doing, in accordance with the territorial law, made the following decision:

"The territorial legislation touching grand jurors in Federal courts being inapplicable thereto, and inconsistent with Federal legislation and practice, and the grand jury mentioned in the foregoing application for a writ of habeas corpus having been selected, summoned and impaneled in accordance with the last-named legislation and practice, the said application is denied."

The relator thereupon brought this writ of error.

Messrs. **C. J. Hillyer** and *Thos. Fitch*, for plaintiff in error:

An indictment found by an illegally constituted jury is not merely irregular, but void.

6 McLean, 609; *Doyle* v. *State*, 17 Ohio, 222.

Upon habeas corpus, the legality of the constitution of the court, whose power is questioned, may be inquired into, and if found illegal the process is void.

Brooks v. *Adams*, 11 Pick. 441.

The regularity of the warrant and the jurisdiction of the court over the subject-matter are never conclusive; but on habeas corpus the le-

gality of the steps taken by the court to acquire jurisdiction of the person and the process may be inquired into and the invalidty of the warrant thereby established.

Ex parte Bollman, 4 Cranch, 75; *Nelson* v. *Cutter*, 3 McLean, 326; *Ex parte Beatty*, 12 Wend. 229; *U. S.* v. *Hamilton*, 3 Dall. 17; *State* v. *Stalnaker*, 2 Brev. 44; *Slacum* v. *Simms*, 5 Cranch, 363; *Reynolds* v. *Orvis*, 7 Cow. 269; Hurd, *Hab. Corp.* 350.

But where the court or judge to whom the application is made, sustains such relation to the tribunal whose process is in question that it has, in the ordinary course of justice, a revision of its decision in the particular case, a much larger discretion may be exercised on habeas corpus, and the prisoner may be discharged from process which is only voidable, and not void.

Hurd, *Hab. Corp.*, 351, and cases there cited.

In the case at bar, the judge to whom the application was made stands in this position. It was, therefore, his duty to have entertained the application, even if the affidavit had shown only irregularity, and not illegality, in the proceedings.

Messrs. Geo. H. Williams, Atty. Gen., Ch. H. Hill, Asst. Atty. Gen., and **B. H. Bristow**, *Solicitor Gen.*, for defendant in error:

It is contended that the question of whether the grand jury which indicted the plaintiff in error was legally summoned or not, could not be inquired into on habeas corpus. There is nothing on the face of the indictment to show that the grand jury was not legally summoned. The regular mode of contesting the question, whether the indictment was returned by a lawful grand jury, would seem to be by plea in abatement.

1 Bish. Crim. Proc. § 749.

A question of this kind cannot be raised collaterally on a habeas corpus for the discharge of the prisoner. Where a prisoner is detained under process, lawful on its face, issued by a court of competent jurisdiction, any latent defect or error in the proceedings must be corrected by writ of error or certiorari and not by habeas corpus. The proceedings in such case are not void but voidable and, of course, must stand until reversed or annulled in the proper course of proceedings in a court having authority to revise and annul it.

Wilmot's Opinions, 106; Hurd, *Hab. Corp.* 331, and cases cited; *Ex parte Lees*, E. B. & E. 828; *Herrick* v. *Smith*, 1 Gray, 49.

Mr. Chief Justice **Chase** delivered the opinion of the court:

Four of the judges are of opinion that on habeas corpus, if the commitment be shown to be on an indictment regular in form and for a crime of which the court has jurisdiction, the judge cannot discharge for matters behind the indictment, such as irregularities in the summons of grand juries, etc., and, therefore, that the judgment ought to be affirmed.

The other judges are of a different opinion, thinking the summons in this case wholly void, and *the court being equally divided on this point, the judgment must, necessarily, be affirmed.*

MARY G. CURTIS, *Plff. in Err.*,
v.
JONATHAN WHITNEY *et al.*

(See S. C. 13 Wall. 68-72.)

Wisconsin statute, when does not impair obligation of contract.

The Wisconsin statute of April 10, 1867, that the holder of a certificate of tax sale should give notice to whoever might be found in possession of the land before taking a deed, does not impair the obligation of the contract made at the sale.

[No. 28.]

Argued Dec. 13, 1871. Decided Jan. 22, 1872.

IN ERROR to the Supreme Court of the State of Wisconsin.

This action was brought by the plaintiff in error in the circuit court of Brown Co., Wis., to quiet her title to a certain tract of land.

Wis. Gen. Laws, 1859, ch. 2.

Judgment was rendered for the defendants, and on appeal this judgment was affirmed by the supreme court of the state. The plaintiff brought the case to this court.

The case is stated by the court.

Mr. **E. H. Ellis**, for plaintiff in error, cited *Bronson* v. *Kinzie*, 1 How. 311; *McCracken* v. *Hayward*, 2 How. 608; *Howard* v. *Bugbee*, 24 How. 461, 16 L. ed. 753; *Green* v. *Biddle*, 8 Wheat. 1; *Robinson* v. *Howe*, 13 Wis. 341; *Lain* v. *Shepardson*, 18 Wis. 59.

Mr. **T. O. Howe**, for defendants in error:

The defendants insist that the plaintiff's deed was invalid, because they were in possession of the premises for more than thirty days during the six months preceding the expiration of the time of redemption, and yet no notice was served upon them that the deed was to be applied for. Laws of Wis. Sess. of 1867, ch. 113, § 1.

The answer to this objection is that the act of 1867 is unconstitutional, as it impairs the obligation of a contract. We reply that the act does not impair the obligation of any contract.

State v. *Hundhausen*, 24 Wis. 196; *Curtis* v. *Morrow*, 24 Wis. 664; *R. Co.* v. *Nesbit*, 10 How. 395.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the supreme court of Wisconsin.

The plaintiff in error, who was plaintiff below, brought suit under the statute of Wisconsin, to have her title to the land in controversy, which she claimed under a deed made on a sale for taxes, established and quieted as against the defendants.

*The sale for taxes took place on the 11th [*69 day of May, 1865, and she received a certificate stating the sale, and that unless the land was redeemed within three years by payment of the amount bid, with interest and penalties, she would be entitled to a deed for the land; and accordingly, on the 12th day of May, 1868, she

NOTE.—*Constitutionality of ex post facto laws*—see note to Calder v. Bull, 1 L. ed. U. S. 648; and note to Sturges v. Crowninshield, 4 L. ed. U. S. 526.

What laws are void as impairing the obligation of contracts—see note to Fletcher v. Peck, 3 L. ed. U. S. 162.

received the deed which she seeks to establish as the title to the land.

But the legislature of Wisconsin, on the 10th of April, 1867, enacted that in all such cases where lands have been, or should thereafter be, sold for taxes and any person should have been in the actual occupancy or possession of such land for thirty days or more, within six months preceding the time when the deed shall be applied for, the deed shall not be issued unless a written notice shall have been served on the owner or occupant by the holder of the tax certificate, at least three months prior thereto. This notice must set forth a copy of the certificate, and state who is the holder, and the time when the deed will be applied for.

In the case before us there was such occupancy, and no notice was served; and the court held the tax deed void for want of it, overruling the objection of plaintiff that the statute requiring notice was void as applied to her case, because it impaired the obligation of her contract, evidenced by the certificate of sale.

Did the statutory requirement that the holder of such certificate should give notice to whoever might be found in possession of the land before taking a deed, impair the obligation of the contract made at the tax sale?

It must be conceded by all who are familiar with the vast disproportion between the value of the land and the sum for which it is usually bid off at such sales, and the frequency with which the whole proceeding is conducted, to the making of the conveyance intended to pass the title, without any knowledge on the part of the real owner, that the requirement is an eminently just and proper one. Nor is it one difficult to comply with, as it is only made necessary where some one is found on the land, on whom the notice can be served, and the cost of serving the notice must be paid by any party offering to redeem.

That a statute is not void because it is retrospective has been repeatedly held by this court, and the feature of the act of 1867, which makes it applicable to certificates already issued for tax sales, does not of itself conflict with the Constitution of the United States. Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be 71*] affected in *many ways by state and national legislation. For such legislation demanded by the public good, however it may retroact on contracts previously made and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the Federal Constitution, so long as the obligation of performance remains in full force.

In the case before us the right of plaintiff to receive her deed is not taken away nor the time when she would be entitled to it postponed.

While she had a right to receive either her money or her deed at the end of three years, the owner of the land had a right to pay the money and thus prevent a conveyance. These were the coincident rights of the parties growing out of the contract by which the land was sold for taxes.

The legislature, by way of giving efficacy to the right of redemption, passed a law which was just, easy to be complied with, and necessary to secure in many cases the exercise of this right. Can this be said to impair the obligation of plaintiff's contract, because it required her to give such notice as would enable the other party to exercise his rights under the contract?

How does such a requirement lessen the binding efficacy of plaintiff's contract? The right to the money or the land remains, and can be enforced whenever the party gives the requisite legal notice. The authority of the legislature to frame rules by which the right of redemption may be rendered effectual cannot be questioned, and among the most appropriate and least burdensome of these is the notice required by statute.

In the case of *Jackson* v. *Lamphire*, 3 Pet. 290, this court said: "It is within the undisputed province of state legislatures to pass recording acts by which the elder grantee shall be postponed to a younger if the prior deed is not recorded within the limited time, and the power is the same, whether the deed is dated before or after the recording act. Though the *effect of such a law is to render the prior [*72 deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts. Such, too, is the power to pass acts of limitations, and their effect. Reason and sound policy have led to the general adoption of laws of both descriptions and their validity cannot be questioned" . . . "Cases may occur," says the court, "where the provisions of a law on those subjects may be so unreasonable as to amount to a denial of a right, and call for the intervention of the court; but the present is not one of them."

So we think of the case now under consideration, and we therefore affirm the judgment of the state court.

THE PRESIDENT AND DIRECTORS OF THE BANK OF WEST TENNESSEE, *Plffs. in Err.*,

v.

THE CITIZENS' BANK OF LOUISIANA.

(See S. C. 13 Wall. 432, 433.)

Action for Confederate notes, jurisdiction over.

This court cannot take jurisdiction of a writ of error to a state court in an action for the amount of a deposit in Confederate Treasury notes, the judgment of the state court being against the right to recover.

[No. 190.]

Argued Jan. 12, 1872. Decided Jan. 22, 1872.

IN ERROR to the Supreme Court of the State of Louisiana.

The case is stated by the court.

Messrs. Louis and **Edward Janin** for defendant in error.

Mr. **Thomas J. Durant**, for plaintiffs in error:

The relation of debtor and creditor, not of bailor and bailee, existed between the plaintiff and defendant by a transaction in money, in its character as such; the obligation of the

NOTE.—*What adjudication of state courts can be brought up for review*—see note, 62 L. R. A. 513.

debtor was to pay money. If the obligation be modified or destroyed, the obligation of the contract is violated.

Story, Com. Const. §§ 1372, 1379; *Sturges* v. *Crowninshield*, 4 Wheat. 197; *Marsh* v. *Burroughs*, Am. Law. Reg. for Nov. 1871, p. 725, foot.

The obligation of the contract between the plaintiff and defendant was destroyed by article 127 of the Constitution of Louisiana, adopted in 1868, which declares that "all agreements, the consideration of which was Confederate money, notes or bonds, are null and void, and shall not be enforced by the courts of this state."

This is the article relied upon by the supreme court of Louisiana in this case.

It is urged by the defendant in error, that the supreme court of Louisiana refers to the Constitution of 1868, only in a narrative form, but does not thereon decide the cause, but decides it on its own established jurisprudence.

Jurisprudence ought not to violate the obligation of contracts; and the position assumed is unsound.

The court of Louisiana, in view of article 127 of the Constitution, could not decide in any other way. So long as the question was one resting in the view taken by the supreme court of Louisiana, of the common law of the state, or of what was the public policy, the decision might have annulled or sustained the contract, as the judges were inclined. But so soon as the Constitution of the state said such contracts shall not be enforced, then the judges could no longer enforce the contract, even if they were of opinion that they were not contrary to public policy. The judgment, then, rests on the Constitution alone.

Mr. Justice **Swayne** delivered the opinion of the court:

This case was brought into this court by a writ of error to the supreme court of the state of Louisiana, issued under the 25th section of the judiciary act of 1789.

The matter now before us is a motion to dismiss the writ for want of jurisdiction.

The plaintiff in error brought suit against the defendant in error, in the fifth district court of New Orleans, to recover the sum of $93,380.97, for moneys deposited by the plaintiff with the defendant, and moneys collected by the latter for the former. All the so-called **433*]** moneys received by *the defendant were the notes of the rebel government. The district court, on the 27th of March, 1867, gave judgment for the plaintiff. The case was thereupon taken by appeal to the supreme court of the state. That court, on the 14th of December, 1869, reversed the judgment of the court below and dismissed the case. In the opinion delivered it was said: "Under the Constitution of 1868 the courts of this state cannot entertain an action based upon transactions in Confederate Treasury notes. We think the evidence discloses that this case is founded upon dealings in unlawful currency, and the court has often refused to lend its aid to transactions reprobated by law." The Constitution of 1868 was not in existence when the case was decided by the district court.

The supreme court founded its judgment alike upon the constitutional provision and prior adjudications. Those adjudications are numerous and conclusive upon the subject. *Hunley* v. *Scott*, 19 La. Ann. 161; *King* v. *Huston*, 19 La. Ann. 288; *McCracken* v. *Poole*, 19 La. Ann. 359; *Norton* v. *Dawson*, 19 La. Ann. 464. The Constitution only declared a settled pre-existing rule of jurisprudence in that state. The result in this case would have been necessarily the same if the Constitution had not contained the provision in question. This brings the case within the authority of *Bethell* v. *Demaret*, 10 Wall. 537, 19 L. ed. 1007. Upon such a state of facts this court cannot take jurisdiction under the section of the judiciary act upon which the writ of error is founded.

The motion must, therefore, be sustained, and the case dismissed.

WILLIAM TUCKER, *Plff. in Err.*,
v.
NATHAN W. SPALDING.

(See S. C. 13 Wall. 453-456.)

Infringement of patent, a question for a jury —adaptation of instrument to a new use, not patentable.

1. In a suit at law for an infringement of a patent the diversity or identity in principle of two mechanical instruments must be submitted to the jury, if there is no such resemblance as raises the question at all.
2. The adaption of a mechanical instrument to a new use is not a new invention and is not patentable.
3. This court has no more right than the court below, to decide that the one patent did or did not cover the invention of the other.

[No. 78.]

Argued Nov. 20, 1871. Decided Jan. 22, 1872.

IN ERROR to the Circuit Court of the United States for the District of California.

The case is stated by the court.

Messrs. **Geo. Gifford** and **W. C. Witter**, for plaintiff in error:

The Newton patent was earlier in date than either Spalding's patent or the time of his alleged invention, and was proper evidence to prove want of novelty.

It was proper evidence to go to the jury and to be made the subject of testimony as to its contents and their relation to the plaintiff's alleged invention.

Determining the similarity or dissimilarity in the contents of two patents, belongs to the province of evidence, and not to that of construction, and is for the jury, and not for the court.

Bischoff v. *Wethered*, 9 Wall. 812, 19 L. ed. 829.

The name applied to a thing described in a patent does not determine its character nor affect its relation to some other patented thing.

Bridge Proprs. v. *Hoboken Co.* 1 Wall. 116, 17 L. ed. 571.

It is immaterial what name is given to the machine or thing described in the Newton patent. The court below seems to have excluded this patent, for the reason of the thing patented not being called a saw, and because it is stated

NOTE.—*Patents; new application of old devices* —see notes, 38 L. ed. U. S. 138; 40 L. ed. U. S. 1025.

in the patent as being used for cutting tongues, grooves, mortises, etc.

The Newton patent calls the invention a new and useful method of securing cutters to rotary discs or plates, and states its object to be for cutting tongues and grooves, mortises, etc.

Cutting grooves or mortises or tongues, by the Newton rotary disc, is merely sawing them. The teeth of all rotary saws have a cutting edge, and these teeth, in sawing, cut. The cutting constitutes the sawing.

A new use of an old machine is not patentable.

Curt. Pat. §§ 50–56, inclusive, and cases there cited; Law, Dig. 254, §§ 6–8; *Ames* v. *Howard*, 1 Sumn. 487; *Bean* v. *Smallwood*, 2 Story, 411; *Hotchkiss* v. *Greenwood*, 4 McLean, 461.

Messrs. M. A. Wheaton and *J. J. Coombs*, for defendant in error:

The 6th exception is based solely upon the ruling of the court in refusing to admit in evidence a patent granted to Jonah Newton in 1855 for an improvement, not in saws, but in a grooving and mortising machine.

In this machine there is neither a saw nor a saw-tooth nor any socket for a saw-tooth. There is in it a rotary disc or hub with four projections, one half an inch thick, to which cutters are bolted.

The disc is nearly half an inch thick and about four inches in diameter, the thickness being over one tenth of the diameter. The strength of the metal precludes any idea of its ever breaking. Besides, as is stated by Emerson, the defendant's witness, "The tendency and effect of the insertion of the Spalding tooth are to strain the saw-plate, while there is no such tendency in the Newton tooth."

It was this tendency to "strain the saw-plate" and nothing else which Spalding's invention overcame. As there was no such tendency in the Newton machine, there could have been no application of Spalding's invention, and the patent was properly ruled out.

Doubtless there are cases where the description of the inventions patented, upon which the trial is being had, and that which is offered as an anticipation to show a prior use, may be so nearly alike that the court would submit the question of identity to the jury when the court is doubtful whether the two are identical or not. But when the differences are so great that there is no room to believe there is any point of identity between them, the court should rule out the machine or description offered to show priority, as irrelevant.

Models were offered with the Newton patent. The court, therefore, did not need the opinion of experts to learn whether the Newton mortising machine tended to show want of novelty in Spalding's patent or not. As to what the evidence tends to prove, it is a question of law and is for the court to decide.

The Newton patent was a written instrument and was for the court to construe.

The court had as good a right to be assisted in its construction of the patent by the model as by the opinion of experts.

Parker v. *Hulme*, 1 Fish. 44; *Ransom* v. *Mayor of N. Y.* 1 Fish. 252; *Day* v. *Stellman*, 1 Fish. 487; *Many* v. *Sizer*, 1 Fish. 31; *Adams* v. *Jones*, 1 Fish. 531; *Morris* v. *Barritt*, 1 Fish. 463; *Swift* v. *Whisen*, 3 Fish. 359.

Mr. Justice **Miller** delivered the opinion of the court:

This is an action at law to recover damages for the infringement of a patent for the use of movable teeth in saws and saw-plates.

A verdict and judgment were rendered for the plaintiff, Spalding, and the other party assigns in this court several errors in the rejection of evidence offered by him, and in the charge of the court to the jury.

We are of opinion that the court erred in refusing to admit the patent to Jonah Newton, confessedly prior in date and invention to that of the plaintiff, which the defendant offered as covering the subject-matter of the plaintiff's patent.

Other bills of exception were taken to the rejection of the testimony of experts to prove the identity of the invention described in the Newton patent, with that of plaintiff, but the cardinal point in the case is the refusal of the court to permit the Newton patent to be read to the jury.

Whatever may be our personal opinions of the fitness of the jury as a tribunal to determine the diversity or identity in principle of two mechanical instruments, it cannot be questioned that when the plaintiff, in the exercise of the option which the law gives him, brings his suit in the law in preference to the equity side of the court, that question must be submitted to the jury, if there is so much resemblance as raises the question at all. And though the principles by which the question must be decided may be very largely propositions of law, it still remains the essential nature of the jury trial that while the court may, on this mixed question of law and fact, lay down to the jury the law which should govern them, so as to guide them to truth and guard them against error, and may, if they disregard instructions, set aside their verdict, the ultimate response to the question must come from the jury.

The patent of plaintiff claims the forming of recesses or sockets in saws or compound saw-plates for detachable or removable teeth on circular lines, and, in combination with these recesses, teeth having their base or bottom part formed on circular lines as described.

Newton's patent had cutters of the same general shape and form, including circular base, as the compound saw-teeth of the other patent, attachable to a circular disc, and removable as in the other, but attached by screws or nuts; and the claim or purpose of the Newton patent is for cutting tongues, grooves, mortises, etc.

The court in rejecting the patent of Newton seems to have been mainly governed by the use which was claimed for it, and also that no mention is made of its adaptability as a saw. But if what it actually did is in its nature the same as sawing, and its structure and action suggested to *the mind of an ordinary [*456 skilful mechanic this double use to which it could be adapted without material change, then such adaptation to the new use is not a new invention, and is not patentable.

The defendant offered to prove that such was the relation of the principle of the Newton patent and plaintiff's patent by experts, and we are clear that the resemblance was close enough to require the submission of the question of iden-

tity to the jury, and the admission of the testimony of experts on that subject.

This subject was fully considered in the case of *Bischoff* v. *Wethered*, 9 Wall. 815, 19 L. ed. 830, decided since the present writ of error was issued.

This court has no more right than the court below to decide that the one patent covered the invention of the other, or that it did not; and it is obvious that extended argument here, to prove such general resemblance as would require the submission of both parties to the jury, might prejudice the plaintiff's case on the new trial which must be granted. We, therefore, forbear to discuss the matter further; for the same reason we refrain from comment on the instruction. It is to be understood that in declining to pass upon the other alleged errors of the record, this court neither affirms nor overrules the action of the court on those points, and the case is reversed for this fundamental error, which includes several others resting on that.

The judgment of the Circuit Court is reversed, and a new trial ordered.

C. ADOLPH LOW *et al., Plffs. in Err.,*
v.
ALEXANDER AUSTIN.

(See S. C. 13 Wall. 29-35.)

Goods imported cannot be taxed while in custom-house—in original cases.

*1. Goods imported from a foreign country, upon which the duties and charges at the custom-house have been paid, are not subject to state taxation while remaining in the original cases, unbroken and unsold in the hands of the importer, whether the tax be imposed upon the goods as imports, or upon the goods as part of the general property of the citizens of the state which is subjected to an ad valorem tax.

2. Goods imported do not lose their character as imports, and become incorporated into the mass of property of the state, until they have passed from the control of the importer, or been broken up by him from their original cases.

[No. 142.]

Submitted Dec. 12, 1871. Decided Jan. 29, 1872.

IN ERROR to the Supreme Court of California:

The case is stated by the court.

Messrs. **Hall McAllister, William A. Fisher,** and *Charles Marshall,* for plaintiffs in error:

The plaintiffs in error believe that the controversy in this case is concluded by a number of decisions already rendered in this court. *Brown* v. *Md.* 12 Wheat. 419; *License Cases,* 5 How. 504; *Waring* v. *Mayor,* 8 Wall. 110, 19 L. ed. 342; *Weston* v. *Charleston,* 2 Pet. 449; *Bk.* v. *N. Y.* 2 Black, 629, 17 L. ed. 454.

But we will discuss briefly the grounds for the supposed distinction between the cases alluded to and that now before the court. The judges of the supreme court of California concede that the state can impose no tax upon the imported article, as such, while remaining in the original package in the possession of the importer for sale, but contend that imported goods, so situated, may be reached by taxation, under a tax which is applicable to all values alike.

But an examination of the reasons assigned by this court, for the conclusions in the cases already mentioned, will clearly show that goods so situated are not only protected from discriminating taxation, but from any taxation whatever by the state. In *Brown* v. *Md.* it was held that the importer, by payment of duties, purchased the right to sell, and that the good faith of the government required that he should be protected in that right, without burden upon its exercise or on the goods themselves by the state; and that it was indispensable to the full and beneficial exercise by Congress, of its power to collect imposts, that the imported article should be protected from state taxation, until it has become incorporated and mixed up with the mass of the property of the country. It does not become so incorporated so long as it remains in the possession of the importer in the original packages for sale. *Brown* v. *Md.* 12 Wheat. 442; *License Tax Cases,* 5 How. 574; *Waring* v. *Mayor,* 8 Wall. 122, 19 L. ed. 346.

The imported article is introduced, not only by the authority and permission of the state but of the United States, and it remains segregated from the mass of the property of the state, until it has been sold or bulk has been broken by the importer.

The literal meaning of the words of the 10th section of the 1st article of the Constitution lends no sanction to the views of the California court. It is not a discriminating tax that is forbidden, but any impost or duty whatever.

The distinction is raised upon the theory that there can be no danger of the destruction, or the serious diminution of the value of the import by the state taxation, because all other property is taxed to the same extent; but the power to tax does not depend upon the degree of its exercise, and although there may be no danger of serious diminution of the value of the import, by unequal taxation, there is the certainty of some loss from any taxation.

Messrs. Jo. Hamilton, Atty. Gen. of California, and **J. W. Denver,** for defendant in error:

The wine in question had passed beyond the protection of the laws of the United States when the tax was levied, and it was exclusively under the protecting shield of the laws of the state; and we contend that the right of taxation attached to the property in behalf of the state, as soon as the exclusive duty of protecting it devolved upon the authorities of the state. As it was under the sole protection of the laws of the state, it should bear its proportion of the burden necessary to a due administration of those laws.

Shall the state be required to protect the property of importing merchants stored in their warehouses, and be denied the right to tax it in their hands to support the state government? Is this the meaning of the Constitution? If so, they may import and store wines of the value of million of dollars, and increase their capital by the increased value of the wine which age gives to it, and thus valuable property be with-

*Headnotes by Mr. Justice FIELD.

NOTE.—*Power of Congress to regulate commerce; state licenses; power of states to tax commerce*—see notes, 6 L. ed. U. S. 23; 6 L. ed. U. S. 678; 29 L. ed. U. S. 158; 32 L. ed. U. S. 229; 37 L. ed. U. S. 216; 38 L. ed. U. S. 1041; 39 L. ed. U. S. 311; 39 L. ed. U. S. 538.

drawn from the burden of government while it is increasing in value. In fact, that is just this case. The record shows that the wines were consigned to the plaintiffs, and after all the custom-house duties and charges were paid, the wines were stored by them in their warehouse, subject to the order of the consignor; and they had thus held them for more than a year, as the record shows, and how much longer does not appear. But if the meaning of the Constitution is that, while the wine remains in the cases in which they were imported, they retain the character of imports, so as to prevent taxation, they might thus be held for twenty years or longer. But such is not the meaning of the Constitution. Could the importer be deprived of a constitutional right by changing the old cases?

But if the argument is sound, that there is any magic power in the cases, as soon as the importer changes these, he loses the right of exemption from taxation. The test of the right of the state to tax is not whether the imported wines are in the original cases or have been sold at least once, but whether they have passed from under the protection of the laws of the United States as against all wrong-doers, and are under the exclusive protection of the authorities and laws of the state. They thus may be said to have been mingled with the general mass of property in the state, and all subject alike to taxation for the support of the state government. And this doctrine is recognized in the case of *Brown* v. *Md. supra; Passenger Cases,* 7 How. 390.

When the Constitution says that the state shall not tax imports beyond what is necessary to the execution of its inspection laws, it means that the state shall not levy that peculiar tax beyond that amount, and has exclusive reference to impost duties which, in the Constitution and laws of the United States, means a duty on imported goods or merchandise, as stated by Bouvier (1 Bouv. Dic. 688) and I may say that imposts or duties on imports is a duty imposed upon imported goods as such, for the privilege of landing and selling them alone, and so understood by the framers of the Constitution, as they allowed such tax so far and to the extent necessary for the administration of the inspection laws. But what have the inspection laws to do with the goods after they are stored in the warehouse of the consignee? Nothing. Therefore, they did not assume to prescribe any limitation upon the ordinary power of taxation after the goods had passed the custom-house and found their way into the warehouse of the consignees.

As to when the property is beyond the jurisdiction of the United States and within the exclusive jurisdiction of the state, see *Waring* v. *Clarke,* 5 How. 441, also 628; *U. S.* v. *Coolidge,* 1 Wheat. 415; *U. S.* v. *Bevans,* 3 Wheat. 336; 1 Woodb. & M. 401; 2 Sumn. 419.

When the property is within the jurisdiction of the state, it may be taxed for the purpose of supporting the administration of the laws of the state, for the general good of all persons and property in the state.

Justice Woodbury's Op. in the *Passenger Cases,* 7 How. 537, and cases there cited; *Howell* v. *The State,* 3 Gill. 15; *Cumming* v. *Mayor, etc.,* R. M. Charl. 26; *Green* v. *Mayor, etc.,* R. M. Charl. 368.

*Mr. Justice **Field** delivered the opinion of the court: [*32

The plaintiffs have been for several years past, and still are, importing, shipping and commission merchants, in the city of San Francisco, in the state of California. In 1868, they received, on consignment from parties in France, certain champagne wines of the value of $10,000, upon which they paid the duties and charges at the custom-house. They then stored the wine in their warehouse in San Francisco, in the original cases in which the wines were imported, where they remained for sale. While in this condition they were assessed as the property of the plaintiff, for state, city, and county taxes, under the general revenue law of California, which subjects all property, real or personal, in the state, with certain exceptions, to an ad valorem tax. The defendant was at the time the tax collector of the city and county of San Francisco, and as such officer levied upon the cases of wines thus stored, for the amount of the tax assessed and was about to sell them, when the plaintiffs paid the amount and the charges incurred, under protest, and then brought the present action in one of the district courts of the state, to recover back money paid. The district court gave judgment for the plaintiffs: the supreme court of the state reversed the judgment, and the case is brought here on writ of error.

The simple question presented in this case for our consideration is whether imported merchandise, upon which the duties and charges at the custom-house have been paid, is subject to state taxation, whilst remaining in the original cases, unbroken and unsold, in the hands of the importer.

The decision of this court in the case of *Brown* v. *The State of Maryland,* 12 Wheat. 419, furnishes the answer to the question. The distinction between that case and the present case does not affect the principle affirmed, which equally governs both.

In that case the question arose whether an act of the legislature of Maryland requiring importers of foreign goods by the bale or package, to pay the state a license tax before selling them in the form and condition in which they were imported, was valid and constitutional. The court held the act in conflict with the provision of the Constitution which declares that no state shall, without the consent of Congress, lay any impost or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws.

In the elaborate opinion of Mr. Chief Justice Marshall the whole subject of the power of Congress over imports is considered, and the line marked where the power of Congress over the goods imported ends, and that of the state begins, with as much precision as the subject admits. After observing that the prohibition of the Constitution upon the states to lay a duty on imports, and their acknowledged power to tax persons and property, may come in conflict, he says, speaking for the court: "The powers, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them.

Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the 33*] present to say, generally, *that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." 12 Wheat. 441.

In that case it was also held that the authority given to import, necessarily carried with it a right to sell the goods in the form and condition, that is, in the bale or package, in which they were imported; and that the exaction of a license tax for permission to sell in such case was not only invalid as being in conflict with the constitutional prohibition upon the states, but also as an interference with the power of Congress to regulate commerce with foreign nations.

The reasons advanced by the Chief Justice not only commend themselves, by their intrinsic force, to all minds, but they have received recognition and approval by this court in repeated instances. Mr. Chief Justice Taney, who was at the time eminent at the bar, as he was afterwards eminent on the Bench, argued the case on behalf of the state of Maryland, and, in the *License Cases*, 5 How. 575, he referred to his position, and observed that, at the time, he pursuaded himself that he was right, and thought that the decision of the court restricted the powers of the state more than a sound construction of the Constitution of the United States would warrant. "But farther and more mature reflection," the great judge added, "has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the states on the other, and preventing collision between them. The question, I have already said, was a very difficult one for 34*]the *judicial mind. In the nature of things the line of division is, in some degree, vague and indefinite, and I do not see how it could be drawn more accurately and correctly, or more in harmony with the obvious intention and object of this provision in the Constitution. Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can, in no just sense, be regarded as a part of that mass of property in the state usually taxed for the support of the state government." See, also. *Almy* v. *Cal.* 24 How. 169, 16 L. ed. 644; *Woodruff* v. *Parham*, 8 Wall. 123, 19 L. ed. 382; *Hinson* v. *Lott*, 8 Wall. 148, 19 L. ed. 387.

The supreme court of California appears, from its opinion, to have considered the present case as excepted from the rule laid down in *Brown* v. *The State of Maryland*, because the tax levied is not directly upon imports as such and, consequently, the goods imported are not subjected to any burden as a class, but only are included as part of the whole property of its citizens which is subjected equally to an ad valorem tax. But the obvious answer to this position is found in the fact, which is, in substance, expressed in the citations made from the opinions of Marshall and Taney, that the goods imported do not lose their character as imports, and become incorporated into the mass of property of the state, until they have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them in any shape, is within the constitutional prohibition. The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the state to levy any tax. If, at any point of time between the arrival of the goods in port and their breakage from the original cases, or sale by the importer, they become subject to state taxation, the extent and the character of the tax are mere matters of legislative discretion.

There are provisions in the Constitution which prevent *one state from discriminating in- [*35 juriously against the products of other states, or the rights of their citizens, in the imposition of taxes, but where a state, except in such cases, has the power to tax, there is no authority in this court, nor in the United States, to control its action, however unreasonable or oppressive. The power of the state, except in such cases, is absolute and supreme. *Woodruff* v. *Parham*, 8 Wall. 123, 19 L. ed. 382; *Hinson* v. *Lott*, 8 Wall. 148, 19 L. ed. 387.

The argument for the tax on the wines in the present case, that it is not greater than the tax upon other property of the same value held by citizens of the state, would justify a like tax upon securities of the United States, in which form probably a large amount of the property of some of her citizens consists; yet it has been repeatedly held that such securities are exempted from state taxation, whether the tax be imposed directly upon them by name or upon them as forming a part in the aggregate of the property of the taxpayer. *Bk. Com.* v. *N. Y. City*, 2 Black, 620, 17 L. ed. 451. The rule is general that whenever taxation by a state is forbidden, or would interfere with the full exercise of a power vested in the government of the United States over the same subject, it cannot be imposed. Imports, therefore, whilst retaining their distinctive character as such, must be treated as being without the jurisdiction of the taxing power of the state.

It follows that the judgment of the Supreme Court of California must be reversed; and it is so ordered.

UNITED STATES, *Appt.*,
v.
JOHN A. KLEIN, Surviving Admr. of Victor F. Wilson, Deceased.

(See S. C. 13 Wall. 128-150.)

Titles in insurgent states when devested—captured and abandoned property—proceeds of—President's pardon—conditions of—void proviso in act.

1. By the abandoned and captured property act, no titles were devested in the insurgent states, un-

NOTE.—*The effect of pardons*—see note to Armstrong's Foundry v. U. S. 18 L. ed. U. S. 882.

less in pursuance of a judgment rendered after due legal proceedings, except of property used in actual hostilities.

2. The government constituted itself the trustee for those who were, by that act, declared entitled to the proceeds of captured and abandoned property, and for those whom it should thereafter recognize as entitled.

3. The title to the proceeds of the property which came to the possession of the government by capture or abandonment, with the exception above stated, was in no case devested out of the original owner.

4. It was for the government itself to determine whether or not these proceeds should be restored to the owner.

5. The President could annex to his offer of pardon any conditions or qualifications he should see fit; but after those conditions and qualifications had been satisfied, the pardon and its connected promises took full effect.

6. The restoration of the proceeds became the absolute right of the persons pardoned, on application within two years from the close of the war.

7. The proviso in the general appropriation act of 1870, which annuls the effect of the President's pardon in claims in the court of claims and prescribes a rule of decision for that court in such cases, was inadvertently inserted in said act, and can have no such effect.

[No. 17.]

Argued Apr. 21, 1871. Decided Jan. 29, 1872.

APPEAL from the Court of Claims.

This was a claim for the proceeds of captured and abandoned property, brought into the court of claims under the act of Mar. 12, 1863. The property claimed consisted of 664 bales of cotton, taken into the possession of the agents of the Treasury, in the summer of 1863, sold. and the proceeds paid into the Treasury, the net amount being $125,300. The intestate was the owner at the time of this seizure. Suit was brought after his decease, in 1866, by his administrators, by the survivor of whom it is now prosecuted.

The court of claims rendered judgment in favor of the claimant.

In the supplemental findings which make a part of the transcript of record in this case, it appears that the intestate, Wilson, in the years 1862 and 1863, signed, as surety, two official bonds of military officers in the Confederate Army, one of a brigade quartermaster, and the other of an assistant commissary.

This fact was shown to and found by the court of claims, in the hearing upon a motion made in behalf of the United States for a new trial, which motion the court overruled, notwithstanding the above finding, upon the ground that the taking (Feb. 15, 1864) by the intestate, of an amnesty oath under President Lincoln's proclamation of pardon to all who had participated in the Rebellion, dated Dec. 8. 1863, relieved him from any charge of disloyalty on account of his having become security as aforesaid.

A motion to dismiss the case was made in this court based upon a proviso in the act making appropriations for the legislative, executive and judicial expenses of the government for the year ending June 30, 1871.

The following is the material portion:

And provided, further, that whenever any pardon shall have heretofore been granted by the President of the United States to any person bringing suit in the court of claims for the proceeds of abandoned or captured property, under the said act approved March 12, 1863, and the acts amendatory of the same, and such pardon shall recite in substance that such person took part in the late Rebellion against the government of the United States, or was guilty of any act of rebellion against or disloyalty to the United States; and such pardon shall have been accepted in writing by the person to whom the same issued, without an express disclaimer of, and protest against, such facts of guilt contained in such acceptance, such pardon and acceptance shall be taken and deemed in such suit in the said court of claims, and on appeal therefrom, conclusive evidence that such person did take part in and give aid and comfort to the late Rebellion, and did not maintain true allegiance or consistency adhere to the United States; and on proof of such pardon and acceptance, which proof may be heard summarily, on motion or otherwise, the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant. Pamphlet 1869, '70, p. 235.

Messrs. **A. T. Akerman,** *Atty. Gen.*, *T. H. Talbot*, and **B. H. Bristow,** *Solicitor Gen.*, for the United States:

The motion to dismiss is made under the provisions of an enactment of July 12, 1870.

The suits in the court of claims which these motions aim to have dismissed, are brought under the authority of the act of March 12, 1863, § 3, 12 Stat. at L. 820.

Without the provisions of that statute, no such suits could be maintained.

The collection of "abandoned property" and the payment of its proceeds into the National Treasury, as prescribed by this act of Mar. 12, 1863, being within the lawful authority of Congress, it inevitably follows that the disposing of those proceeds in any manner is within the unlimited discretion of Congress; that is, unlimited by any judicial right of supervision, there being no constitutional method of drawing money from the Treasury of the United States, except in consequence of appropriations made by law. Art. 1, § 9, par. 6, Const. U. S.

At least if the above statement were held too broad, Congress is, without doubt, authorized to regulate at its discretion the manner in which such proceeds shall be restored to owners entitled to such restoration.

It may provide for such restoration directly from the Treasury, or directly from Congress, or from any other officer, commission or board, including the court of claims, upon which it may see fit to confer this authority. *Springfield* v. *Com'rs*, 6 Pick. 508.

This is all that Congress has attempted to do in the legislation of last summer. It merely enacts that certain persons shall not recover such proceeds by judgment of the court of claims. These persons are not thereby excluded from the privilege of an application for such proceeds, direct to Congress, or to any other officer who may be authorized by Congress to act upon such applications.

This statute of Mar. 12, 1863, is not a bill of attainder nor of pains and penalties, nor one in any way providing for the punishment of any persons, as the word "punishment" is understood in law, in the Constitution, or in courts of justice.

Two provisions of the statute make this characteristic very obvious. They are these:

(1) A provis, to the 1st section excludes

from being subject to the statute "any kind or description (of property) which has been used or which was intended to be used for waging or carrying on war against the United States."

The property thus excluded had, by a previous statute (Aug. 6, 1861, 12 Stat. at L. 319), been made lawful subject of capture and prize, of seizure, confiscation and condemnation in the district or circuit court of the United States, upon judicial proceedings instituted by the law officers of the United States. With this statute thus providing, to some extent at least, for punishment of the crime of rebellion, this act, to provide for the collection of abandoned property and for the prevention of fraud in insurrectionary districts, did not interfere.

(2) By the 7th section of this statute it was enacted:

That none of the provisions of this act shall apply to any lawful maritime prize by the naval forces of the United States.

Here it is made clear that the statute shall not touch even that extraconstitutional jurisdiction, quite on the extreme borders of the domain of punishment, which in time of war is exercised by prize courts.

Thus far, it has been unnecessary to discuss the question, whether Congress can limit the effect of a pardon. The affirmative of that question is not necessary to the maintenance of the constitutionality of the enactment of July 12, 1870, now in question.

But it is maintained that incidental consequences which the law has attached to the pardon, the law-making power, may detach therefrom. The legislature, in its authority over the rules of evidence, may prevent a person, once guilty of a disqualifying offense, from being subsequently qualified by a pardon to give testimony. Greenl. Ev. § 378, and n., with cases there cited.

Also, the power which controls the elective franchise may exclude from the exercise of that franchise all criminals, pardoned as well as unpardoned.

If there be any limit to the above principle, it must be found only in this: that those incidents which the common law, at the time of the adoption of the Constitution, annexed to a pardon cannot, by subsequent legislation, be taken away from a pardon authorized by that Constitution.

But this limitation will not avail against the constitutionality of the enactment of July 12, 1870; for the right to recover proceeds of enemy's property captured in war was not an effect of a pardon in 1789, nor was any right to sue the United States in any court of claims.

The right here asserted by the respondents to this motion to be beyond the power of Congress to take away or modify, it is to be noticed, is a mere statute right to sue in a statute court; both the tribunal and the right to sue therein being alike unknown to the common law and to the Constitution of the United States.

Messrs. **Bartley** & *Carey, R. W. Corwine,* **T. D. Lincoln, J. M. Carlisle,** and *McPherson,* for appellee:

This act of July 12, 1870, nullifies the amnesty and deprives the claimant of his damages and benefits promised by the act of July 17, 1862, § 13, and by the proclamation; and that, too, after the terms have been distinctly accepted, and the conditions and requirements faithfully performed and observed.

The Constitution, in express terms, vests the executive authority of this government in the President. It also specifically gives him "power to grant reprieves and pardons for offenses against the United States."

In speaking of this power, the Supreme Court of the United States, in *Ex parte Garland,* 4 Wall. 380, 18 L. ed. 370, says:

"This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."

In the same case the court says, speaking of the effect of the pardon: "It is to relieve him from all penalties and disabilities attached to the offense of treason committed by his participation in the Rebellion. So far as that offense is concerned, he is thus placed beyond the reach of punishment of any crime. It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency."

The same effect is attributed to a pardon by Chief Justice Marshall, in *U. S.* v. *Wilson,* 7 Pet. 150; by Mr. Justice Wayne, in *Ex parte Wells,* 18 How. 315, 15 L. ed. 425; 2 Sharsw. Bl. Com. 402; Plowd. 401; Bish. Cr. L. § 713; *Perkins* v. *Stevens,* 24 Pick. 280; *Cope* v. *Com.* 4 Casey, 297; *Armstrong's Foundry,* 6 Wall. 766, 18 L. ed. 882; *U. S.* v. *Padelford,* 9 Wall. 543, 19 L. ed. 792; *St. Louis Street Foundry,* 6 Wall. 770, 18 L. ed. 884.

To sustain this law, it must be held that, instead of Congress and the President being each independent and co-ordinate branches of government, the latter is but a dependent and subordinate appendage to the supreme and sovereign power of Congress. If his acts are liable to be controlled, modified, annulled, or defeated by Congress, the division of powers in this government is a chimera and a delusion.

The second general proposition which we shall endeavor to maintain is, that this act is unconstitutional, because it is *ex post facto* in altering the evidence necessary to convict after the commission of the alleged offense.

It will possibly be contended that, this being a civil proceeding, the doctrine of *ex post facto,* which relates only to crime, does not apply. But this cannot be maintained, for the very same point was expressly overruled by the Supreme Court in *Ex parte Garland, supra,* and in *Cummings* v. *Mo.* 4 Wall. 277, 18 L. ed. 356.

The act of July 12, 1870, is void, because it is in the nature of a bill of pains and penalties, and because it deprives the claimant of his property without due process of law.

Cummings v. *Mo. supra.*

In the discussion of this subject, we must keep in mind the status and position of claimant's intestate to these questions at the date of the passage of these enactments, and especially the act of July 12, 1870. He had a pardon, the validity and regularity of which are not assailed. The legal effect of that pardon was to place him in precisely the same position as if he had never committed the alleged condoned offense. All his civil disabilities were removed. All his guilt was absolved. All punishment of

every grade and kind was remitted. In the language of Mr. Chief Justice Chase in *U. S.* v. *Padelford, supra*: "The sufficient answer is that, after the pardon, no offense connected with the Rebellion can be imputed to him." The law makes the proof of a pardon a complete substitute for proof that he gave no aid or comfort to the Rebellion.

See, 2 Story, Com. Const. § 1, 789; 2 Kent, Com. 12, 13.

This act is unconstitutional, because it is a legislative usurpation of the separate powers and functions of the judiciary.

That judicial power which should be exercised by the courts, under and according to the ever changing and variable will of popular assemblies, would, of all things, be the most uncertain, unstable and unjust in its judgments and decrees. Instead of being, as the framers of this government intended it should be, an independent and co-ordinate branch of the government, the judiciary would then shrink into the mere instrument of Congress, to perform such subordinate duties as should be directed and imposed by the superior dominant power of the legislature. And this was evidently the view of the author and framer of this law. For it not only undertakes to circumscribe and restrict the jurisdiction of this court, where the Constitution has conferred it without limitation, but it specifies and directs what particular construction it shall give to certain prior enactments and the precise judgment it shall render in particular and enumerated cases.

Congress can neither exercise judicial power nor refuse, to vest it in the courts.

Martin v. *Hunter*, 1 Wheat. 304; Story, Const. § 1590; 2 Elliott's Debates, 380; Federalist, No. 81.

This is the case arising under the Constitution and laws of the United States, and in which express jurisdiction is given to this court by the Constitution.

Osborn v. *Bk.* 9 Wheat. 738; *Cohens* v. *Va.* 6 Wheat. 264; *Bk.* v. *Halstead*, 10 Wheat. 51; *The St. Lawrence*, 1 Black, 532, 17 L. ed. 184; *State* v. *Fleming*, 7 Humph. 152; *Lewis* v. *Webb*, 3 Me. 326; *Lanier* v. *Gallatas*, 13 La. Ann. 185; *Holden* v. *James*, 11 Mass. 396; *Sanborn* v. *Comrs.* 9 Minn. 279; *Merrill* v. *Sherburne*, 1 N. H. 203; *De Chastellux* v. *Fairchild*, 15 Pa. 18.

Mr. Chief Justice **Chase** delivered the opinion of the court:

The general question in this case is whether or not the proviso relating to suits for the proceeds of abandoned and captured property in the court of claims, contained in the appropriation act of July 12, 1870 (16 Stat. at L. 235), debars the defendant in error from recovering, as administrator of Victor F. Wilson, deceased, the proceeds of certain cotton belonging to the decedent, which came into the possession of the agents of the Treasury Department as captured or abandoned property, and the proceeds of which were paid by them according to law into the Treasury of the United States.

The answer to this question requires a consideration of the rights of property, as affected by the late Civil War, in the hands of citizens engaged in hostilities against the United States.

It may be said in general terms that property in the insurgent states may be distributed into four classes:

(1) That which belonged to the hostile organizations or was employed in actual hostilities on land.

(2) That which at sea became lawful subject of capture and prize.

(3) That which became the subject of confiscation.

(4) A peculiar description, known only in the recent war, called captured and abandoned property.

The first of these descriptions of property, like property of other like kind in ordinary international wars, became, wherever taken, *ipso facto*, the property of the United States. Halleck's Int. L.

The second of these descriptions comprehends ships and vessels with their cargoes belonging to the insurgents or *employed in aid of [*137 them; but property in these was not changed by capture alone, but by regular judicial proceeding and sentence.

Accordingly it was provided in the abandoned and captured property act of March 12, 1863 (12 Stat. at L. 820), that the property to be collected under it "shall not include any kind or description used or intended to be used for carrying on war against the United States, such as arms, ordnance, ships, steamboats and their furniture, forage, military supplies, or munitions of war."

Almost all the property of the people in the insurgent states was included in the third description, for after sixty days from the date of the President's proclamation of July 25, 1862 (12 Stat. at L. 1266), all the estates and property of those who did not cease to aid, countenance and abet the Rebellion became liable to seizure and confiscation, and it was made the duty of the President to cause the same to be seized and applied, either specifically or in the proceeds thereof, to the support of the Army. 12 Stat. at L. 589. But it is to be observed that tribunals and proceedings were provided, by which alone such property could be condemned, and without which it remained unaffected in the possession of the proprietors.

It is thus seen that, except to property used in actual hostilities, as mentioned in the 1st section of the act of March 12, 1863, no titles were devested in the insurgent states unless in pursuance of a judgment rendered after due legal proceedings. The government recognized to the fullest extent the humane maxims of the modern law of nations, which exempts private property of non-combatant enemies from capture as booty of war. Even the law of confiscation was sparingly applied. The cases were few, indeed, in which the property of any not engaged in actual hostilities was subjected to seizure and sale.

The spirit which animated the government received special illustration from the act under which the present case arose. We have called the property taken into the custody *of [*138 public officers under that act a peculiar species, and it was so. There is, so far as are aware, no similar legislation mentioned in history.

The act directs the officers of the Treasury Department to take into their possession and make sale of all property abandoned by its

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parties acquired rights which might be made absolute by decree, as ships and other vessels captured as prize, were expressly excepted from the operation of the act; and it is reasonable to infer that it was the purpose of Congress that the proceeds of the property for which the special provision of the act was made, should go into the Treasury without change of ownership. Certainly such was the intention in respect to the property of loyal men. That the same intention prevailed in regard to the property of owners who, though then hostile, might subsequently become loyal, appears probable from the circumstance that no provision is anywhere made for the confiscation of it; while there is no trace in the statute book of intention to devest ownership of private property not excepted from the effect of this act, otherwise than by proceedings for confiscation.

In the case of *Padelford*, we held that the right to the possession of private property was not changed until actual seizure by proper military authority, and that actual seizure by such authority did not devest the title under the provisions of the abandoned and captured property act. The reasons assigned seem fully to warrant the conclusion. The government constituted itself the trustee for those who were by that act declared entitled to the proceeds of captured and abandoned property, and **139***] for those whom it should thereafter *recognize as entitled. By the act itself it was provided that any person claiming to have been the owner of such property might prefer his claim to the proceeds thereof and, on proof that he had never given aid or comfort to the Rebellion, receive the amount after deducting expenses.

This language makes the right to the remedy dependent upon proof of loyalty, but implies that there may be proof of ownership without proof of loyalty. The property of the original owner is in no case absolutely devested. There is, as we have already observed, no confiscation, but the proceeds of the property have passed into the possession of the government, and restoration of the property is pledged to none except to those who have continually adhered to the government. Whether restoration will be made to others, or confiscation will be enforced, is left to be determined by considerations of public policy subsequently to be developed.

It is to be observed, however, that the abandoned and captured property act was approved on the 12th of March, 1863 (12 Stat. at L. 820), and on the 17th of July, 1862, Congress had already passed an act—the same which provided for confiscation—which authorized the President, "at any time hereafter by proclamation, to extend to persons who may have participated in the existing Rebellion in any state or part thereof, pardon and amnesty, with such exceptions and at such time and on such conditions as he may deem expedient for the public welfare." The act of the 12th of March, 1863, provided for the sale of enemies' property collected under the act, and payment of the proceeds into the Treasury, and left them there subject to such action as the President might take under the act of the 17th of July, 1862. What was this action?

The suggestion of pardon by Congress, for such it was, rather than authority, remained unacted for more than a year. At length, however, on the 8th of December, 1863 (13 Stat. at L. 737), the President issued a proclamation, in which he referred to that act, and offered a full pardon, with restoration of all *rights of property, except as to slaves [***140** and property in which rights of third persons had intervened, to all, with some exceptions, who, having been engaged in the Rebellion as actual participants, or as aiders or abettors, would take and keep inviolate a prescribed oath. By this oath the person seeking to avail himself of the offered pardon was required to promise that he would thenceforth support the Constitution of the United States and the union of the states thereunder, and would also abide by and support all acts of Congress and all proclamations of the President in reference to slaves, unless the same should be modified or rendered void by the decision of this court.

In his annual message transmitted to Congress on the same day, the President said: "The Constitution authorizes the Executive to grant or withhold pardons at his own absolute discretion." He asserted his power "to grant it on terms as fully established" and explained the reasons which induced him to require applicants for pardon and restoration of property to take the oath prescribed, in these words: "Laws and proclamations were enacted and put forth for the purpose of aiding in the suppression of the Rebellion. To give them their fullest effect, there had to be a pledge for their maintenance. In my judgment they have aided, and will further aid, the cause for which they were intended. To now abandon them would not only be to relinquish a lever of power, but would also be a cruel and astounding breach of faith. . . . For these and other reasons, it is thought best that support of these measures shall be included in the oath, and it is believed the Executive may lawfully claim it in return for pardon and restoration of forfeited rights, which he has clear constitutional power to withhold altogether or grant upon the terms which he shall deem wisest for the public interest."

The proclamation of pardon, by a qualifying proclamation issued on the 26th of March, 1864 (13 Stat. at L. 741), was limited to those persons only who, being yet at large and free from confinement *or duress, shall vol- [***141** untarily come forward and take the said oath with the purpose of restoring peace and establishing the national authority.

On the 29th of May, 1865 (13 Stat. at L. 758), amnesty and pardon, with the restoration of the rights of property except as to slaves, and that as to which legal proceedings had been instituted under laws of the United

States, were again offered to all who had, directly or indirectly, participated in the Rebellion, except certain persons included in fourteen classes. All who embraced this offer were required to take and subscribe an oath of like tenor with that required by the first proclamation.

On the 7th of September, 1867 (15 Stat. at L. 699), still another proclamation was issued, offering pardon and amnesty, with restoration of property, as before and on the same oath, to all but three excepted classes.

And finally, on the 4th of July, 1868 (15 Stat. at L. 702), a full pardon and amnesty was granted, with some exceptions, and on the 25th of December, 1868 (15 Stat. at L. 711), without exception, unconditionally and without reservation, to all who had participated in the Rebellion, with restoration of rights of property as before. No oath was required.

It is true that the section of the act of Congress which purported to authorize the proclamation of pardon and amnesty by the President was repealed on the 21st of January, 1867, but this was after the close of the war, when the act had ceased to be important as an expression of the legislative disposition to carry into effect the clemency of the Executive, and after the decision of this court that the President's power of pardon "is not subject to legislation;" that "Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders." It is not important, therefore, to refer to this repealing act further than to say that it is impossible to believe, while the repealed provision was in full force, and the faith of the legislature 142*] *as well as the Executive was engaged to the restoration of the rights of property promised by the latter, that the proceeds of property of persons pardoned, which had been paid into the Treasury, were to be withheld from them. The repeal of the section in no respect changes the national obligation, for it does not alter at all the operation of the pardon, or reduce in any degree the obligations of Congress under the Constitution to give full effect to it, if necessary, by legislation.

We conclude, therefore, that the title to the proceeds of the property which came to the possession of the government by capture or abandonment, with the exceptions already noticed, was in no case devested out of the original owner. It was for the government itself to determine whether these proceeds should be restored to the owner or not. The promise of the restoration of all rights of property decides that question affirmatively as to all persons who availed themselves of the proffered pardon. It was competent for the President to annex to his offer of pardon any conditions or qualifications he should see fit; but after those conditions and qualifications had been satisfied, the pardon and its connected promises took full effect. The restoration of the proceeds became the absolute right of the persons pardoned, on application within two years from the close of the war. It was, in fact, promised for an equivalent. "Pardon and restoration of political rights" were "in return" for the oath and its fulfilment. To refuse it would be a breach of faith not less "cruel and astounding" than to abandon the freed people whom the Execu[illegible] to maintain in their freedom. [illegible] distributed into

What, then, was the effect of [illegible] of the act of 1870 (16 Stat. at L. [illegible] hostile or[illegible] the right of the owner of the cotton [illegible]al hostili[illegible]ase? He had done certain acts whic[illegible] court (*U. S.* v. *Padelford*, 9 Wall. 531, [illegible] subject ed. 788), has adjudged to be acts in aid of [illegible] Rebellion; but he abandoned the cotton to the [illegible]gent of the Treasury Department, by whom it has been sold and the proceeds paid into the Treasury of the *United States; and [*143 he took, and has not violated, the amnesty oath under the President's proclamation. Upon this case the court of claims pronounced him entitled to a judgment for the net proceeds in the Treasury. This decree was rendered on the 26th of May, 1869; the appeal to this court made on the 3d of June, and was filed here on the 11th of December, 1869.

The judgment of the court in the case of *Padelford*, which, in its essential features, was the same with this case, was rendered on the 30th of April, 1870. It affirmed the judgment of the court of claims in his favor.

Soon afterwards the provision in question was introduced as a proviso to the clause in the general appropriation bill, appropriating a sum of money for the payment of judgments of the court of claims, and became a part of the act, with perhaps little consideration in either House of Congress.

This proviso declares in substance that no pardon, acceptance, oath, or other act performed in pursuance, or as a condition, of pardon, shall be admissible in evidence in support of any claim against the United States in the court of claims, or to establish the right of any claimant to bring suit in that court; nor, if already put in evidence, shall be used or considered on behalf of the claimant, by said court, or by the appellate court on appeal. Proof of loyalty is required to be made according to the provisions of certain statutes, irrespective of the effect of any executive proclamation, pardon, or amnesty or act of oblivion; and when judgment has been already rendered on other proof of loyalty, the Supreme Court, on appeal, shall have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction. It is further provided that, whenever any pardon granted to any suitor in the court of claims, for the proceeds of captured and abandoned property, shall recite in substance that the person pardoned took part in the late Rebellion, or was guilty of any act of rebellion or disloyalty, and shall have been accepted in writing without express disclaimer and protestation against the fact so recited, such pardon or acceptance shall be taken as conclusive evidence *in the court of claims, and on [*144 appeal, that the claimant did give aid to the Rebellion; and on proof of such pardon or acceptance, which proof may be made summarily on motion or otherwise, the jurisdiction of the court shall cease, and the suit shall be forthwith dismissed.

The substance of this enactment is that an acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence

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to pay the proceed conferred by it, both in the
That it was as and in this court on appeal.
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differe ate. It is as much the duty of the gov-
W ent as of individuals to fulfil its obliga-
wh ns. Before the establishment of the court
t f claims claimants could only be heard by
Congress. That court was established in 1855 (10 Stat. at L. 612), for the triple purpose of relieving Congress, and of protecting the government by regular investigation, and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims. It was required to hear and determine upon claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States. 10 Stat. at L. 612. Originally it was a court merely in name, for its power extended only to the preparation of bills to be submitted to Congress.

In 1863 the number of judges was increased from three to five, its jurisdiction was enlarged and, instead of being required to prepare bills for Congress, it was authorized to render final judgment, subject to appeal to this court and to an estimate by the Secretary of the Treasury of the amount required to pay each claimant. 12 Stat. at L. 765. This court being of opinion that the provisions for an estimate was inconsistent with the finality essential to judicial decisions, Congress repealed that provision. *Gordon* v. *U. S.* 2 Wall. 561, 17 L. ed. 921, 14 Stat. at L. 9. Since then the **145***] court of claims has exercised *all the functions of a court, and this court has taken full jurisdiction on appeal. 14 Stat. at L. 44.

The court of claims is thus constituted one of those inferior courts which Congress authorizes, and has jurisdiction of contracts between the government and the citizen, from which appeal regularly lies to this court.

Undoubtedly, the legislature has complete control over the organization and existence of that court and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make "such exceptions from the appellate jurisdiction" as should seem to it expedient.

But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty. It provides that, whenever it shall appear that any judgment of the court of claims shall have been founded on such pardons, without other proof of loyalty, the Supreme Court shall have no further jurisdiction of the case and shall dismiss the same for want of jurisdiction. The proviso further declares that every pardon granted to any suitor in the court of claims and reciting that the person pardoned has been guilty of any act of rebellion or disloyalty, shall, if accepted in writing without disclaimer of the fact recited, be taken as conclusive evidence in that court and on appeal, of the act recited; and on proof of pardon or acceptance, summarily made on motion *or otherwise, the jurisdiction of [***146** the court shall cease and the suit shall be forthwith dismissed.

It is evident from this statement that the denial of jurisdiction to this court, as well as to the court of claims, is founded solely on the application of a rule of decision, in causes pending prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the court of claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the judicial department of the government in cases pending before it?

We think not; and thus thinking, we do not at all question what was decided in the case of *Pennsylvania* v. *Wheeling Bridge Company*, 18 How. 429, 15 L. ed. 436. In that case, after a decree in this court that the bridge, in the then state of the law, was a nuisance and must be abated as such, Congress passed an act legalizing the structure and making it a post-road; and the court, on a motion for process to enforce the decree, held that the bridge had ceased to be a nuisance by the exercise of the constitutional powers of Congress, and denied the motion. No arbitrary rule of decision was prescribed in that case, *but the court [***147** was left to apply its ordinary rules to the new circumstances created by the act. In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time

to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction "the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the court of claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.

The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive.

It is the intention of the Constitution that each of the great co-ordinate departments of the government—the legislative, the executive, and the judicial—shall be, in its sphere, independent of the others. To the Executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offense pardoned and removes all its penal consequences. It may be granted on conditions. In these partic- 148*] ular pardons, *that no doubt might exist as to their character, restoration of property was expressly pledged; and the pardon was granted on condition that the person who availed himself of it should take and keep a prescribed oath.

Now, it is clear that the legislature cannot change the effect of such a pardon any more than the Executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt, and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority, and directs the court to be instrumental to that end.

We think it unnecessary to enlarge. The simplest statement is the best.

We repeat that it is impossible to believe that this provision was not inserted in the appropriation bill through inadvertence; and that we shall not best fulfil the deliberate will of the legislature by *denying the motion to dismiss and affirming the judgment of the Court of Claims; which is accordingly done.*

Mr. Justice **Miller** dissenting:

I cannot agree to the opinion of the court just delivered in an important matter; and I regret this the more because I do agree to the proposition that the proviso to the act of July 12, 1870, is unconstitutional, so far as it attempts to prescribe to the judiciary the effect to be given to an act of pardon or amnesty by the President. This power of pardon is confided to the President by the Constitution, and whatever may be its extent or its limits, the legislative branch of the government cannot impair its force or effect in a judicial proceeding in a constitutional court. But I have not been able to bring my mind to concur in the proposition that, under the act concerning captured and abandoned property, there remains in the former owner, who had given aid and *comfort to the Rebellion, [*149 any interest whatever in the property or its proceeds when it had been sold and paid into the Treasury or had been converted to the use of the public under that act. I must construe this act, as all others should be construed, by seeking the intention of its framers, and the intention to restore the proceeds of such property to the loyal citizen, and to transfer it absolutely to the government in the case of those who had given active support to the Rebellion, is to me too apparent to be disregarded. In the one case the government is converted into a trustee for the former owner; in the other it appropriates it to its own use as the property of a public enemy captured in war. Can it be inferred from anything found in the statute that Congress intended that this property should ever be restored to the disloyal? I am unable to discern any such intent. But if it did, why was not some provision made by which the title of the government could at some time be made perfect, or that of the owner established? Some judicial proceeding for confiscation would seem to be necessary if there remains in the disloyal owner any right or interest whatever. But there is no such provision, and unless the act intended to forfeit absolutely the right of the disloyal owner, the proceeds remain in a condition where the owner cannot maintain a suit for its recovery, and the United States can obtain no perfect title to it.

This statute has recently received the attentive consideration of the court in two reported cases.

In the case of *The U. S.* v. *Anderson*, 9 Wall. 65, 19 L. ed. 617, in reference to the relation of the government to the money paid into the Treasury under this act, and the difference between the property of the loyal and disloyal owner, the court uses language hardly consistent with the opinion just read. It says that Congress, in a spirit of liberality, constituted the government a trustee for so much of this property as belonged to the faithful southern people, and while it directed that all of it should be sold and its proceeds paid into the Treasury, gave to this class of persons an opportunity to establish *their [*150 right to the proceeds. Again, it is said, that "the measure, in itself of great beneficence, was practically important only in its application to the loyal southern people, and sympathy for their situation, doubtless, prompted Congress to pass it." These views had the unanimous concurrence of the court. If I understand the present opinion, however, it maintains that the government, in taking possession of this property and selling it, became the trustee of all the former owners, whether loyal or disloyal, and holds it for the latter until pardoned by the President, or until Congress orders it to be restored to him.

The other case which I refer to is that of *United States* v. *Padelford*, 9 Wall. 531, 19 L. ed. 788. In that case the opinion makes a labored and successful effort to show that

Padelford, the owner of the property, had secured the benefit of the amnesty proclamation before the property was seized under the same statute we are now considering. And it bases the right of Padelford to recover its proceeds in the Treasury on the fact that before the capture his status as a loyal citizen had been restored, and with it all his rights of property, although he had previously given aid and comfort to the Rebellion. In this view I concurred with all my brethren. And I hold now that as long as the possession or title of property remains in the party, the pardon or the amnesty remits all right in the government to forfeit or confiscate it. But where the property has already been seized and sold, and the proceeds paid into the Treasury, and it is clear that the statute contemplates no further proceeding as necessary to devest the right of the former owner, the pardon does not and cannot restore that which has thus completely passed away. And if such was not the view of the court when *Padelford's Case* was under consideration, I am at a loss to discover a reason for the extended argument in that case, in the opinion of the court, to show that he had availed himself of the amnesty before the seizure of the property. If the views now advanced are sound, it was wholly immaterial whether Padelford was pardoned before or after the seizure.

Mr. Justice **Bradley** concurred in the foregoing dissenting opinion.

602*] LEMUEL W. MASON, *Appt.*,
v.
EDWARD A. ROLLINS, Comr. of Int. Rev., *et al.*;
PARKER R. MASON, *Appt.*,
v.
S. S. MANN, Deputy Coll. of Int. Rev.,
and
PARKER R. MASON, *Appt.*,
v.
R. W. HART, Deputy Coll. of Int. Rev.

(See S. C. 13 Wall. 602, 603.)

Averments of citizenship, when necessary—repeal of act.

When the averments of citizenship in bills are not sufficient to give the circuit court jurisdiction under the judiciary act of 1789, and if, when the suits were brought, the special act giving jurisdiction without regard to citizenship was repealed, the bills will be dismissed.

[Nos. 79, 80, 81.]

Argued, No. 79, Nov. 21, 1871, and Nos. 80, 81, Nov. 23, 1871. Decided Jan. 29, 1872.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The cases are sufficiently stated by the court.

Mr. **E. H. Roby** for appellants.

Messrs. **Akerman,** *Atty. Gen.*, and *B. H. Bristow, Solicitor Gen.*, for appellees.

Mr. Chief Justice **Chase** delivered the opinion of the court:

The records in these cases are of proceedings in equity against the defendants. The first bill describes the plaintiff as a citizen of the state of Illinois, and the defendant, Rollins, as of the District of Columbia, and a citizen of the state of ———, and the defendants, Wm. B. Allen and Duncan Ferguson, as citizens of the state of Illinois.

The second bill describes the plaintiff as a citizen of the state of Illinois and the defendants, S. S. Mann, William B. Allen, and Duncan Ferguson, as citizens of the state of Illinois; and the defendant, Columbus Delano, as commissioner of internal revenue, without averring that he be a citizen of any state.

The third bill describes the plaintiff as a citizen of the state of Illinois, and does not aver that any of the defendants are citizens of any other state.

It is manifest that the averments of citizenship in neither *of the bills are sufficient [***603** to give the circuit court jurisdiction under the judiciary act of 1789; and all were filed subsequently to the 13th of July, 1866, when the act of 1833, which gave jurisdiction to the courts of the United States of suits under the internal revenue act against the collectors and others, without regard to citizenship, was repealed.

Ins. Co. v. *Ritchie*, 5 Wall. 544, 18 L. ed. 542.

When these suits were brought, therefore, there was no act in force giving jurisdiction, in cases such as those made by the records, to the courts of the United States. The circuit court was obliged, therefore, to dismiss the bill in each case for want of jurisdiction, *and the judgment of the court in the several cases must be affirmed.*

NOEL BYRON BOYDEN *et al.*, *Plffs. in Err.*,
v.
UNITED STATES.

(See S. C. 13 Wall. 17-25.)

Robbery of public moneys, no defense to action on receiver's bond—liability of receiver.

1. Where a receiver of public moneys has given bond for the faithful performance of his duties as required by law, proof that he has been robbed of the public money received by him, is no defense to a suit on such bond.
2. His liability is to be measured by his bond, and where that binds him to pay the money, a cause which renders that impossible is of no importance.

[No. 4.]

Submitted Oct. 16, 1871. Decided Feb. 5, 1872.

IN ERROR to the Circuit Court of the United States for the District of Wisconsin.

This was a suit commenced in the court below, against Boyden and his sureties, on his official bond, as receiver of public moneys for the district, of lands subject to sale, at Eau Claire, Wisconsin. The bond was given pursuant to the 6th section of the act of May 10, 1800, 2 Stat. 75, and has the condition that, if the said Boyden has truly and faithfully exe-

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NOTE.—*Liability of bailee, for loss by theft or robbery.*

A warehouseman is not liable for goods stolen by his servant, without negligence on his part. Schmidt v. Blood, 9 Wend. 268, 24 Am. Dec. 143.

If a thing let to hire perishes or is stolen without any neglect or want of care of the hirer, the latter will not be responsible for the loss. Williams

cuted and discharged and shall continue truly and faithfully to discharge all the duties of said office according to law, then the obligation shall be void. The breach alleged is that said Boyden received, as such receiver of the moneys of the United States, the sum of $5,088.16, which he has not paid over to the United States. The defendants pleaded: First, the general issue; second, performance of the conditions; third, that said Boyden was violently robbed of said sum of money. The plantiffs join issue on the first plea, and reply to the second and third, that Boyden received said money as receiver, and has not paid it to the plaintiffs as required by law, on which it seems that issues are joined.

The defendants upon the trial offered to prove that, Dec. 23, 1859, at the village of Eau Claire, N. B. Boyden, the receiver of public moneys, was beset by some person or persons to him unknown, and thrown down, and against all defense that he could make, was gagged and bound and the moneys described in the complaint, violently and without his fault, taken from him and carried away. To the introduction of this evidence the district attorney objected, upon the ground that the said facts, as offered to be proved, constituted no defense. The court sustained the objection, and the defendants excepted.

Judgment having been rendered for the plaintiff, the defendants brought the case to this court by writ of error.

Messrs. **Matt. H. Carpenter** and *M. M. Cowren*, for plaintiffs in error:

At the common law an officer was not responsible for loss of public or private funds, except upon the ground of negligence or default.

Lane v. *Cotton*, 1 Ld. Raym. 646; *Whitfield* v. *Le Despencer*, Cowp. 754.

In the case of *Albany Co.* v. *Dorr*, 25 Wend. 440, it was held that "a public officer, intrusted with the receipt and disbursement of public funds, is not responsible for moneys stolen from his office, where there is no imputation of negligence or other default on his part." Chief Justice Nelson, in giving the opinion, places emphasis upon the condition of the bond, being for the faithful execution of the duties of his office, and says that this condition recognizes the common-law rule.

Browning v. *Hanford*, 5 Hill, 589.

The case of *Albany Co.* v. *Dorr* was affirmed by the court of errors in 1844.

7 Hill, 583.

In May, 1845, the case of *Muzzy* v. *Shattuck*, 1 Den. 233, was decided by the supreme court of New York, and the decision affirmed by the court of errors, in which it was held that it was no defense to an action against a town collector and his sureties on the official bond, that the money had been stolen from the dwelling-house of the principal "without any fault, want of care, or omission of duty on his part."

1 Den. 233.

But the decision in this case is placed solely upon the construction of the statute, which was peculiar in its provisions, and in the opinion of the court rendered the collector a debtor for the amount by him collected, and his sureties guarantors for the payment of the debt.

It does not conflict with the case of *Albany Co.* v. *Dorr*, nor with the common-law rule as to official liability; but only interprets and gives effect to a particular statute. It is, therefore, only authority for the construction of a similar statute.

The surety of an official bond is not bound beyond the terms of the bond. *U. S.* v. *Boyd*, 15 Pet. 187.

In every act of Congress, receivers are spoken of and regarded as public agents and depositaries. Nowhere do they seem to be regarded as insurers against inevitable accident or irresistible force, or as debtors merely of the government.

The judgment should be reversed for two reasons:

First. That the court erred in refusing to allow the defendants to introduce any evidence to establish the facts by them offered to be proved.

Second. Because the declaration does not contain averments which constitute any cause of action.

Messrs. A. T. Akerman, Atty. Gen., **C. H. Hill**, *Asst. Atty. Gen.*, and **Bristow**, *Solicitor Gen.*, for the United States:

The plea of the plaintiffs in error constituted no defense to the suit of the United States to recover the money which Boyden had covenanted to pay by his bond. It is a settled principle of law, that an express contract to do a certain thing is not discharged by its becoming subsequently impossible to do it by unforseen occurrences, no matter how much beyond the contractor's control they may be. This rule of law has been applied to many cases of as great seeming hardship as that of the plaintiffs in error.

3 Kent, Com. 6th ed. 465, *et seq.*; Met. Cont. 213, and cases cited; *Dermott* v. *Jones*, 2 Wall. 1, 17 L. ed. 762; *The Harriman*, 9 Wall. 161, 19 L. ed. 629; *Paradine* v. *Jane*, Aleyn, 26.

It has been applied, by this and other courts,

v. Lloyd, W. Jones, 179; Taylor v. Caldwell, 3 B. & S. 836; 32 L. J. Q. B. 164; Coggs v. Bernard, Raym. 909; Finacue v. Small, 1 Esp. 315; Butt v. Great Western Ry. Co. 7 Eng. L. & E. 448, 11 C. B. 140.

Unless he is negligent, a warehouseman is not liable for goods stolen while under his charge, by his servants or others. Moore v. Mayor, etc. of Mobile, 1 Stew. 284; Williams v. Holland, 22 How. Pr. 137; Schwerin v. McKie, 51 N. Y. 180, 10 Am. Rep. 581; Cincinnati, etc. R. Co. v. McCool, 26 Ind. 140; Claflin v. Meyer, 75 N. Y. 280, 31 Am. Rep. 467; Lamb v. Western R. Co. 7 Allen, 98; Cass v. Boston, etc. R. Co. 14 Allen, 448; Neal v. R. Co. 8 Jones L. 482; Pike v. Chicago, etc. R. Co. 40 Wis. 583.

Warehouseman must do more than show that goods might have been stolen. Thomas v. Daldem, 22 La. Ann. 413.

If warehousemen exercise ordinary care, and a loss occurs by burglary, without their negligence, they are not responsible for it. Schwerin v. McKie, 51 N. Y. 180, 10 Am. Rep. 581.

A loss by theft or robbery will generally excuse a gratuitous bailee from liability. Fay v. Steamer New World, 1 Cal. 348.

A private carrier for hire is not liable for a loss by robbers, nor for a taking from him or his servants by force. Coggs v. Bernard, Raym. 909; Brind v. Dale, 8 Carr. & P. 207.

In an action against a collector for the non-payment of money collected by him, it is not a defense that the money was stolen from him without his fault. New Providence v. McEachron, 33 N. J. 339.

to the cases of official bonds, under circumstances undistinguishable in principle from the present.

U. S. v. *Prescott*, 3 How. 578; *U. S.* v. *Dashiel*, 4 Wall. 185, 18 L. ed. 321; *U. S.* v. *Keehler*, 9 Wall. 83, 19 L ed. 574; *Com.* v. *Comly*, 3 Pa. St. 372; *State* v. *Harper*, 6 Ohio St. 607.

(A brief for the United States was also filed at the preceding term by *Messrs. E. R. Hoar, Atty. Gen.*, and *W. A. Field, Asst. Atty. Gen.*)

Mr. Justice **Strong** delivered the opinion of the court:

Were a receiver of public moneys, who has given bond for the faithful performance of his duties as required by law, a mere ordinary bailee, it might be that he would be relieved by proof that the money had been destroyed by fire, or stolen from him, or taken by irre- 22*] sistible force. He would *then be bound only to the exercise of ordinary care, even though a bailee for hire. The contract of bailment implies no more except in the case of common carriers and the duty of a receiver, *virtute officii*, is to bring to the discharge of his trust that prudence, caution, and attention which careful men usually bring to the conduct of their own affairs. He is to pay over the money in his hands as required by law, but he is not an insurer. He may, however, make himself an insurer by express contract, and this he does when he binds himself in a penal bond to perform the duties of his office without exception. There is an established difference between a duty created merely by law and one to which is added the obligation of an express undertaking. The law does not compel to impossibilities; but it is a settled rule that if performance of an express engagement becomes impossible by reason of anything occurring after the contract was made, though unforeseen by the contracting party, and not within his control, he will not be excused. Met. Cont. 213; *The Harriman*, 9 Wall. 161, 19 L. ed. 629. The rule has been applied rigidly to bonds of public officers intrusted with the care of public money. Such bonds have almost invariably been construed as binding the obligors to pay the money in their hands when required by law, even though the money may have been lost without fault on their part. It is true that in the case of *Supervisors of Albany* v. *Dorr*, 25 Wend. 440, in the supreme court of New York, it was decided in a suit on a bond of a county treasurer, conditioned for the payment of all money that should come into his hands as treasurer, that he was not responsible for the public money feloniously stolen from his office without any negligence, want of due care, or other blame or fault whatever on his part; and this decision was affirmed in the court of appeals of that state, only, however, by an equal division. *Supervisors of Albany* v. *Dorr*, 7 Hill, 583. It was rested upon the supposed liability of the officer, *virtute officii*, which it was thought his bond did not increase, and it was supposed to be sustained by *Lane* v. *Cotton*, 23*] 1 Ld. Raym. 646; and *Whitfield* v. **Le Despencer*, Cowp. 754. It is quite plain, however, that those cases do not sustain it. They were actions upon the case against the Postmaster-General, brought not by the government, but by private individuals to recover damages for the negligent failure to deliver letters, and the defendants were held not liable for money stolen, even by their subordinates in office. At most the Postmaster-General was a mere bailee, and no question was raised respecting the effect of a bond to secure the performance of his duties. But, whatever may have been the ruling in the case of *Supervisors of Albany* v. *Dorr*, it is no longer authority, even in the state of New York. *Muzzy* v. *Shattuck*, 1 Den. 233, subsequently decided, and affirmed unanimously in the court of appeals, is utterly irreconcilable with it, and it has settled the law otherwise in that state So in Pennsylvania, in *Com.* v. *Comly*, 3 Pa. St. 372, it was ruled that the responsibility of a public receiver depends on his contract, when there is one, and not on the law of bailments. There the condition of the bond was to account and pay over, and it was held no defense by the surety of the receiver that the money was stolen, though it was kept as a prudent man would keep his own funds. It was said by Chief Justice Gibson, in delivering the judgment of the court, after referring to the fact that a lessee is not relieved from payment of rent by destruction of the demised premises by fire, "A loss by a visitation of Providence, which no vigilance could prevent, would present a more meritorious claim for relief, one would think, than a loss by robbery, which is always preceded by a greater or less degree of negligence. A receiver, or his surety, would come before a chancellor with an ill grace on that ground, even if there was a power to relieve him. The keepers of the public moneys, or their sponsors, are to be held strictly to the contract, for if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would be incessant. A chancellor is not bound to control the legal effect of a contract in any case; *and his discre- [*24 tion, were he at liberty to use it, would be influenced by considerations of general policy." *State* v. *Harper*, 6 Ohio St. 607, is to the same effect. This is precisely the ground which this court has taken. In *The United States* v. *Prescott*, 3 How. 578, it was decided that the felonious taking, stealing and carrying away the public money in the hands of a receiver of public money, without any fault or negligence on his part, does not discharge him or his sureties, and that it cannot be set up as a defense to an action on his official bond. The condition of the receiver's bond in that case, it is true, was that the receiver should pay promptly when orders for payment should be received, while the bond in the case before us is conditioned that Boyden, the receiver, had truly executed and discharged, and should continue truly and faithfully to execute and discharge, all the duties of said office according to law. But the acts of Congress respecting receivers made it their duty to pay the public money received by them when ordered by the Treasury Department, and that department, by its general orders of 1854, required payment to be made before this suit was brought. No exception was made; no contingency was contemplated. The bond, therefore, was an absolute obligation to pay the money, and differing not at all, in legal

effect, from the bond in *Prescott's Case*. A similar ruling was made in *United States* v. *Dashiel*, 4 Wall. 182, 18 L. ed. 319. What the condition of the bond on which suit was brought in that case was, does not appear in the report, but it was for the discharge of the paymaster's official duty. The doctrine of *Prescott's Case* was also recognized in *United States* v. *Keehler*, 9 Wall. 83, 19 L. ed. 574, and it must be considered as settled law. Applying it to the case now in hand, it makes it clear that the evidence offered by the defendants, tending to prove that the receiver had been robbed of the public money received by him, was rightly rejected as constituting no defense to the suit on the receiver's bond. It is true that in *Prescott's Case* the defense set up 25*] was that the money had been *stolen, while the defense set up here is robbery. But that can make no difference, unless it be held that the receiver is a mere bailee. If, as we have seen, his liability is to be measured by his bond, and that binds him to pay the money, then the cause which renders it impossible for him to pay is of no importance, for he has assumed the risk of it.

There is nothing in the second error assigned. Though under the acts of Congress of August 6, 1846 (9 Stat. at L. 59), and the amendatory act of March 3, 1857 (11 Stat. at L. 249), receivers are required to pay when required by the Secretary of the Treasury, there were general orders made for all receivers, requiring payments to be made at stated times, which were in existence when this receiver's bond was given. The declaration avers a request, and this is enough after verdict.

The judgment is affirmed.

UNITED STATES, *Appt.*,
v.
DANIEL WORMER.

(See S. C. 13 Wall. 25–29.)

Regulation for inspection of government horses —abandonment of contract.

1. Where one made a contract with the government to deliver to it sound cavalry horses, subsequent regulations by the government for their inspection, requiring them to remain in the inspection yard twenty-four hours before their inspection and that such of them as were intended as a fraud on the government, by reason of incurable disease or purposely concealed defect, should be branded with the letter R, are reasonable, and do not change the contract.

2. Where such contractor threw up his contract by reason of such regulations, he was not entitled to any damages for making preparations for its performance.

[No. 26.]

Argued Dec. 13, 1871. Decided Feb. 5, 1872.

APPEAL from the Court of Claims.

The case is stated by the court.

Messrs. **B. H. Bristow**, *Solicitor Gen.*, and **C. H. Hill**, *Asst. Atty. Gen.*, for the appellant.

Messrs. **Enoch Totten**, *Jas. Hughes*, **M. H. Carpenter**, and *Ira Harris*, for appellee:

The new mode of inspection prescribed by the defendants was in conflict with the terms of the contract, and unlawful.

This has been found as an "ultimate fact" by the court of claims, and is conclusive.

Burr v. *Des Moines Co.* 1 Wall. 99, 17 L. ed. 561.

The attempt by the United States to modify the contract by enforcing these unlawful regulations was a renunciation of the contract; and its refusal to permit the contractor to fulfil the contract except in pursuance of such unlawful regulations, excused the contractor from making a tender of the horses, and discharged him from the contract.

Jones v. *Barclay*, 2 Doug. 685; *Borden* v. *Borden*, 5 Mass. 67; *Hochster* v. *De la Tour*, 75 Eng. C. L. 678; *Cort* v. *Ambergate Railway Co.* 6 E. L. & E. 230.

The appellee is entitled to damages for the breach of the contract, and the measure of damages is the profits he would have made had he been permitted to complete his contract, or, in other words, the difference between the cost of delivering the horses and the price he would have paid for them.

Masterton v. *Mayor, etc.*, 7 Hill, 61; *R. Co.* v. *Howard*, 13 How. 308; *Cort* v. *Ambergate Ry. Co. supra.*

Mr. Justice **Bradley** delivered the opinion of the court:

The claimant [defendant in error] demands $15,000 from the the government, by way of damages for breach of contract. The principal facts *are that on the 26th day of Febru- [*26 ary, 1864, the claimant entered into a written agreement with the chief quartermaster of the cavalry bureau, to deliver at the government stables in St. Charles, Illinois, by or before the 26th of March, twelve hundred cavalry horses, sound and of certain specified ages, height, and quality and, on delivery, to be examined and inspected without unnecessary delay, by a person or persons to be appointed by the government. Rejected horses were to be removed by the contractor within one day after their rejection. Payment was to be made on completion of the contract, should Congress have made an appropriation for that purpose, or as soon thereafter as funds might be received. Instructions for inspectors of cavalry horses were issued a few days after the date of the contract, which required, amongst other things, that horses proposed for sale to the government must be placed in the inspection yard at least twenty-four hours before inspecting them; and none but the inspector and his assistants were to be allowed to enter the yard or to handle the horses, until the inspection was completed. It has also provided that all horses which were manifestly intended as a fraud upon the government, because of incurable diseases or any purposely concealed defect, should be branded on the left shoulder with the letter R. Horses rejected for being under age, in poor condition, or injured by transportation, were to be lightly branded on the fore hoof with the letter R. A large number of other directions were given to the inspectors; but these seem to have been the principal ones complained of. The claimant applied to have these rules modified or suspended in his case, as not having been promulgated when he made his contract; but his application was refused. He, therefore, threw up his contract and did not purchase any horses; but alleges that he sustained damages by not being allowed to

perform his contract untrammeled by the new regulations, to the amount of $9,000. The court of claims found that the regulations materially changed and modified the contract, by throwing upon the claimant in its performance increased delay, greater expense and largely 27*] augmented risk; and, therefore, they *gave judgment in his favor for such damages as would make him whole.

We think the court erred in this finding and judgment.

The government clearly had the right to prescribe regulations for the inspection of horses, and there was great need of strictness in this regard, for frauds were constantly perpetrated. We see nothing unreasonable in the regulations complained of. It is well known that horses may be prepared and fixed up to appear bright and smart for a few hours, and it was altogether reasonable that they should be placed in the government yard for the period required, and that no person interested in them should be permitted to manipulate them whilst under inspection. The branding was also a proper and necessary precaution to prevent the same horses being presented a second time after condemnation. The branding on the foot was of slight importance, and the brand on the shoulder was not to be applied except in cases of absolute fraud. A person guilty of fraud would have no right to complain of the regulation being carried into effect.

As the government had the right to prescribe all proper and reasonable regulations on the subject, and as the regulations prescribed do not seem to have been unreasonable, the claimant cannot complain. If he chose, under these circumstances, to fling up his contract, he must be content to suffer any incidental damage 29*] which he may have incurred *in making preparations for its performance. It was a damage voluntarily sustained, and the maxim, *Volenti non fit injuria*, applies to the case.

The decree is reversed, and the court below is directed to dismiss the petition.

SAMUEL G. WHEELER, JR., *Appt.*, *v.* GEORGE HARRIS *et al.*

(See S. C. 13 Wall. 51-56.)

Two appeals in the same case not allowed—decree, when not final.

1. Two appeals are not allowed in the same case, on the same question, and this court will determine which one of the two should be dismissed.
2. A decree of affirmance, without taxation of costs and without specifying the sum for which it is rendered, is defective and is not a final decree.

[No. 568.]

Submitted Jan. 26, 1872. Decided Feb. 5, 1872.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is sufficiently stated in the opinion.

Mr. **Charles Donohue**, for respondent, in support of motion.

Messrs. **Goodrich & Wheeler**, in opposition to motion.

Mr. Chief Justice **Chase** delivered the opinion of the court:

In this case a motion is made to dismiss the appeal, on the ground that a prior appeal was taken from the decree in the same cause. It appears that on the 19th of March, 1870, upon an appeal taken from a decree of the district court, it was decreed in the circuit court that the judgment of the district court be affirmed, with costs to be taxed. From this decree of the circuit court an appeal was taken to this court, and is now on the docket. Subsequently, on the 27th of May, 1871, another decree in the same cause was rendered by the circuit court, in which, after reciting the former decree and taxation of costs, it was decreed that the appellees have judgment against the appellants for the amount decreed, together with costs, amounting to the sum of $5,444.99. From this decree an appeal was taken, and a bond for damages and costs given on the 5th of June, and approved by the circuit judge on the 7th of June, 1871. It is this appeal which the appellees now move to dismiss.

It is quite true that two appeals are not allowed in the same case on the same question. We must determine which one of the two should be dismissed. It may be that the first appeal was from a decree which might be taken as final, if the second decree had not been rendered. *Rubber Co.* v. *Goodyear*, 6 Wall. 153, 18 L. ed. 762; *Silsby* v. *Foote*, 20 How. 290, 15 L. ed. 822. But it is obvious that the circuit judge did not regard it as final, and it was certainly defective. The second decree was rendered, not by inadvertence, but in view of the rendition of the first decree; and in order to settle the practice in the circuit court of the southern district of New York, that a decree of affirmance, without taxation of costs and without specifying the sum for which it is rendered, is not to be regarded as a final decree.

We think this the better practice and, therefore, hold that the first appeal must be dismissed as irregular.

WILLIAM A. BEVANS *et al.*, *Plffs. in Err.*, *v.* UNITED STATES.

(See S. C. 13 Wall. 56-63.)

Seizure of public moneys by Confederate government, when no defense to a receiver.

1. Where it had been the duty of a receiver of public money to pay over the money in his hands for more than a year before it was seized by the Confederate government, such seizure is no defense to an action by the government on his official bond for such moneys, as he was a defaulter before such seizure.
2. A depositary of public money cannot, by making a default, throw upon the government the risk of loss of the money by the intervention of a public enemy.

[No. 6.]

Argued Oct. 16, 1871. Decided Feb. 5, 1872.

IN ERROR to the Circuit Court of the United States for the District of Arkansas.

This was a suit brought in the district court of the United States for the eastern district of Arkansas, against Bevans and his sureties, on the official bond of Bevans as receiver of public moneys for the district of lands subject to sale at Batesville, in the state of Arkansas. By consent and agreement of the parties, it was ordered that this case be transferred to the circuit court for this district, and it was agreed

by the parties that the record and proceedings in this cause certified from the district court, be filed in the circuit court, and that the cause proceed in said court to final judgment, in all things with like effect as if it had been commenced in the circuit court.

The trial resulted in verdict and judgment for the plaintiffs, and the defendants brought the case to this court by writ of error.

The case is stated by the court.

Messrs. A. H. Garland, **M. H. Carpenter**, *Watkins & Rose* for plaintiffs in error.

Messrs. A. T. Akerman, Atty. Gen., **C. H. Hill**, *Asst. Atty. Gen.* and **B. H. Bristow**, *Solicitor Gen.*, for defendant in error.

(A brief was filed at the preceding term for the defendant in error by *Messrs. E. R. Hoar, Atty. Gen.*, and *W. A. Field, Asst. Atty. Gen.*

Mr. Justice **Strong** delivered the opinion of the court:

This was an action of debt upon the bond of a receiver of public money, conditioned for the faithful performance of all the duties of the office of receiver, according to law. The breaches assigned were, that the principal obligor had failed to account for the money he had received in his official capacity in behalf of the United States, from the time of his appointment, January 17th, 1860, to the 30th of April, 1861, and that he had failed to pay over such money, although required by law to account for the same and to pay it over. At the trial, the plaintiffs gave in evidence truly certified transcripts of official settlements of the receiver's accounts, from which it appeared that he had in hand, of public money received by him between the 17th of January, 1860, and the 31st of March, 1861, the sum of $19,737.26; that on the 31st day of March, 1860, he held an unpaid balance of $4,116.05; that on the 30th of June, 1860, the balance against him was $6,535.26; on the 30th of September, 1860, $8,346.34; on the 31st of December, 1860, $19,662.66; and on the 30th of April, 1861, $19,737.26, the unpaid balances at the end of each quarter being carried forward into the account of the next succeeding quarter. No attempt was made to impeach the correctness of these official settlements, but the defendants offered to prove that 59*] *on the 6th day of May, 1861, Bevans, the receiver, was residing at Independence, in the state of Arkansas; that on that day the people of the state, legally assembled in convention, passed a secession ordinance whereby the state of Arkansas was withdrawn from the Union; that such ordinance became of force and effect and was binding on all citizens of the state; that the convention then passed an ordinance prohibiting all officers of the United States from paying out any money of the United States in their hands, and requiring them to hold such money subject to the further order of the convention, and that, immediately after the passage of this second ordinance, he was notified thereof before he had time to account to the United States, or to remit the money in his hands as receiver. In connection with this, the defendants further offered to prove that, subsequently, the state of Arkansas was attached to what was called the Southern Confederacy, and that, in order to insure performance of her duties, as a member of said Confederacy, the convention aforesaid and the legislature of the state made provision for seizing and did actually seize the money in the hands of the said Bevans, as receiver; that under said acts and ordinances he paid to the agents of the state all the money he had in his possession belonging to the United States, as he was forced and compelled to do, the state being organized as a member of the Confederacy, she with the Confederacy having armed troops in her territory to compel him to pay, the acts and ordinances being compulsory, and the agents and officers of the state threatening that if he declined to pay they would punish him by imprisonment or otherwise; and that, in consequence of such menaces he did, on the first day of January, 1862, pay over to such agents and officers all the money he had in his hands as a receiver, which was placed in the Treasury of the state in aid of the war against the United States, at a time when he could not remit the same to the Treasury Department at Washington.

The evidence thus offered by the defendants the circuit court refused to receive, being of opinion that if all the *facts which it [*60 tended to prove were proved, they would not amount to a defense, and this decision of the court is the principal error assigned.

It is to be observed that the attempted defense was not a denial of the receiver's obligation to pay all the public money in his hands to the United States, according to the condition of his bond and the requirements of the acts of Congress, nor was it an assertion of performance of his obligation, but it was setting up an excuse for nonperformance. Was the receiver then in a condition to avail himself of the excuse which he presented? It may be a grave question whether the forcible taking of money belonging to the United States from the possession of one of her *officers, or agents [*61 lawfully holding it, by a government of paramount force, which at the time was usurping the authority of the rightful government, and compelling obedience to itself exclusively throughout a state, would not work a discharge of such officers or agents, if they were entirely free from fault, though they had given bond to pay the money to the United States. This question has been thoroughly argued, but we do not propose now to consider it, for its decision is not necessary to the case. The bond of a receiver of public money is given to insure the performance of all his duties, and those duties are defined by the acts of Congress and by Treasury regulations made under the acts.

The 6th section of the act of May 10th, 1800, made it the duty of all such receivers to transmit to the Secretary of the Treasury accounts of all public money by them received, within thirty days in case of public sale, and quarterly in case of private sales, and to transmit the money received by them, within three months after its receipt. That act of August 6, 1846, however (9 Stat. at L. 59), and subsequent acts made it the duty of such receivers (§ 6) "to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by the act, all the public money collected by them, or otherwise, at any time placed in their possession and custody, until the same is ordered by the proper

department or officer of the government to be transferred or paid out, and when such orders for transfer or payment are received, faithfully and promptly to make the same as directed." Following these acts were the Treasury Regulations of July 18, 1854 (in force when this receiver was in office), which required all receivers to deposit in the Treasury, all public money in their hands, as follows:

1. When their weekly receipts exceed $10,000, they were required to deposit at the termination of each week.

2. When the weekly receipts were less than $10,000, but exceeded $5,000, they were required to deposit at the close of each period of two weeks.

3. When the monthly receipts were more than $2,000, and less than $20,000, they were required to deposit at the end of each month.

4. When the monthly receipts were less than $2,000, they were required to deposit at the end of each quarter.

Such, then, were the duties of this receiver to the performance of which he was bound by his bond.

In view of this, it is plain that it was not in consequence of the Arkansas ordinances and acts of assembly, nor in consequence of any action of the usurping government alone, that the money in the receiver's hands was not paid to the United States. Hence the evidence offered by the defendants came short of meeting the case, for it was the default of the receiver that exposed the money to seizure by the usurping power which for a time excluded the authority of the government. The condition of the bond was broken long before the ordinance of secession was passed. It was the duty of Bevans to pay over the money in his hands, in large part, more than a year before any obstacle came in the way of his payment. Had he performed his duty, all of it would have been paid into the Treasury by the 1st of April, 1861. He was, therefore, a defaulter when the alleged seizure was made, and it was his default which concurred with the acts of the public enemy, and contributed to or facilitated the wrong which was perpetrated, or, at least, rendered it possible. Since then his bond had become absolute by his failure to perform its conditions, 62*] *and since the evidence offered tended to show, at most, an excuse for non-performance after May 6th, 1861, it is manifest that it presented an insufficient defense to the action. Seeking relief, which in its nature was equitable, as the receiver did, it was incumbent upon him to come with clean hands, and to place the obligees in the bond in as good a situation as they would have held had he made no default.

It is not to be overlooked that Bevans was not an ordinary bailee of the government. Bailee he was, undoubtedly, but by his bond he had insured the safe keeping and prompt payment of the public money which came to his hands. His obligation was, therefore, not less stringent than that of a common carrier, and in some respects it was greater. In *U. S.* v. *Prescott*, 3 How. 588, it was said by this court: "Public policy requires that every depositary of public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that he should keep safely the moneys which come to his hands. Any relaxation of this condition would open the door for frauds which might be practiced with impunity." These observations apply in full force to the present case. It cannot be allowed that a depositary of public money, who has not only assumed the common obligations of a bailee, but has given bond to keep safely the money in his hands, and to pay it over promptly, as required by law, may, by making a default, throw upon the government the risk of loss of the money by the intervention of a public enemy. We are, therefore, of opinion that the evidence offered by the defendants in the court below tended to show no sufficient defense to the claim of the plaintiffs, and that it was properly rejected.

The objection that the jury was instructed to find for the plaintiffs the amount claimed by the papers given in evidence (*viz.:* the official settlements) with interest thereon, is entirely without merit. There was no evidence to impeach the accounts stated, or to show set-off release or payment. *The instruction was, [*63 therefore, in accordance with the legal effect of the evidence, and there were no disputed facts upon which the jury could pass.

The judgment is affirmed.

Mr. Justice **Clifford** dissenting:

I dissent from the judgment in this case, because I think the plea in bar sets up a valid defense.

The Chief Justice also dissents for the same reason.

JOHN G. HALLIBURTON *et al., Plffs. in Err.,*
v.
UNITED STATES.

(See S. C. 13 Wall. 63-65.)

Prevention of payment of public moneys, by public enemies, when no defense—payments and set-offs when disallowed.

1. Bevans v. U. S. *ante*, 531, followed.
2. Where the bond of a marshal had become absolute more than a month before the ordinance of secession was passed, and during all that time the marshal was in default in paying over public moneys, after which time payment was prevented by the public enemies, such prevention is no defense to an action on such bond to recover such moneys.
3. Evidence of payments made, and of an alleged set-off not presented to the accounting officers of the treasury, and by them disallowed, was properly rejected.

[No. 5.]

Argued Oct. 16, 1871. Decided Feb. 5, 1872.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

This was a suit brought in the district court of the United States for the eastern district of Arkansas, by the United States against John G. Halliburton and his sureties, on the official bond of Halliburton as marshal of the United States for the eastern district of Arkansas.

Apr. 23, 1868, by consent and agreement of the parties, it was ordered in the district court that the cause be transferred to the circuit court, and Apr. 24, 1868, in the latter court, it was agreed by the parties that the papers and proceedings certified from the district court be filed in the circuit court, and that the case proceed in that court to final judgment in all things with like effect as if the case had been originally commenced there.

Upon the trial the jury rendered a verdict for the plaintiff, and the defendants brought the case to this court by writ of error.

The case is stated by the court.

Mr. A. H. Garland, **M. H. Carpenter**, *Watkins* and *Rose* for plaintiffs in error.

Messrs. A. T. Akerman, Atty. Gen., and **C. H. Hill**, *Asst. Atty. Gen.*, **Bristow**, *Solicitor Gen.*, for defendants in error.

(A brief for defendants in error was filed at the preceding term by *Messrs. E. R. Hoar, Atty. Gen.*, and *W. A. Field, Asst. Atty. Gen.*)

Mr. Justice **Strong** delivered the opinion of the court:

What we have said in the case of *Bevans* v. *U. S. ante*, 531, leads to the conclusion that the judgment in this case must be affirmed. The action was debt upon a marshal's bond, conditioned for faithful performance of all the duties of the office of marshal. The breaches assigned were, that on the first day of April, 1861, Halliburton, the marshal, was indebted to the United States in the sum of $3,946.65, for money had and received by him for the use of the plaintiff and upon account then stated. and for money which had previously come into his hands as marshal, which it was his duty to pay over, but which he had converted to his use. Among other defenses set up, the defendants pleaded the ordinance of secession, passed by the convention of Arkansas on the 6th of May, 1861; the ordinance of the same convention passed May 7, 1861, requiring all persons having money of the United States in their hands to hold the same subject to future action of the convention, and a subsequent ordinance of June 1, 1861, requiring all persons having, as aforesaid, to pay the same over to the treasurer of Arkansas, under severe penalty of fine and long imprisonment. The plea further averred that the convention, and the government organized thereunder, had the physical power to enforce its laws and decrees, and did enforce them as fully as any organized government might do, for a long period of time, to wit: one year; and that the defendant, Halliburton, yielded to the force and compulsion of the said government so organized, and having at that time no protection from the government of the United States, and not being able in any wise to resist the ordinance of the convention, did pay the money mentioned in the declaration, to the treasurer of Arkansas on the 21st day of June, 1861. The plea still further avers that after the 7th of May, 1861, Halliburton had no opportunity to pay the money to the United States, and that he was prevented from paying the same by public hostilities. To this plea there was a demurrer, and judgment was given against the defendant, which is the principal error assigned.

Looking to the declaration and the plea, it appears that the bond had become absolute more than a month before the ordinance of secession was passed, and that all that time Halliburton was in default. The plea does not aver that there was any obstacle in the way of payment at the time when by law the payment was required to be made, or for a considerable period thereafter. If, then, it were sufficiently averred that after the 1st of June, 1861, payment was prevented by public enemies, there would still appear a default of the obligors, for which no excuse is offered; a fault which led directly to the loss of the public money. All the reasons, therefore, which have been mentioned in the case of *Bevans* v. *United States, ante*, 531, why the evidence there offered, was insufficient to establish a defense, concur in justifying the judgment given upon this demurrer.

This disposes of the principal error insisted on. To the other error assigned, namely, the refusal of the court to admit evidence of payments made and of an alleged set-off, the 4th section of the act of Congress of March 3, 1797 (1 Stat. at L. 512), is a sufficient answer. What was offered and rejected was not any claims presenting to the accounting officers of the Treasury, and by them disallowed. And it was not pretended that the defendants were, at the trial, in possession of vouchers not before in their power to procure. The evidence was, therefore, properly rejected.

Judgment affirmed.

Mr. Justice **Clifford** dissenting:

I dissent from the judgment in this case, because I think the plea in bar sets up a valid defense.

Mr. Chief Justice **Chase** also dissents for the same reason.

CHARLES GIBSON, *Plff. in Err.*,
v.
CHARLES P. CHOUTEAU and Julia Moffit, Devisees of Pierre Chouteau, Deceased.

(See S. C. 13 Wall. 92-104.)

Statutes of limitation, when not applicable to states or the U. S. — state act cannot take away grantee's right to public land—patent conclusive evidence of right—state statute of limitation no bar to an action for the land—adverse possession—doctrine of relation.

*1. Statutes of limitation of a state do not apply to the state itself unless it is expressly designated or the mischiefs to be remedied are of such a na-

*Headnotes by Mr. Justice FIELD.

NOTE.—*Neither time nor the statute of limitations runs against the state.*

The statute of limitations does not run against the state nor the United States. Commonwealth v. McGowan, 4 Bibb. 62, 7 Am. Dec. 737; Nimmo v. Com. 4 Hen. & Mun. 57, 4 Am. Dec. 488; Saunders v. Com. 10 Gratt. 496; Levasser v. Washburne, 11 Gratt. 577; U. S. v. Hoar, 2 Mason, 311;

ture that it must necessarily be included; and they do not apply to the United States.

2. The power of Congress in the disposal of the public domain cannot be interfered with nor its exercise embarrassed by any state legislation; nor can such legislation deprive the grantee of the United States of the possession and enjoyment of the property granted, by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition.

3. The patent is the instrument which, under the laws of Congress, passes the title of the United States, and in the action of ejectment in the Federal courts for lands derived from the United States, the patent, when regular on its face, is conclusive evidence of title in the patentee. In the action of ejectment in the state courts when the question presented is, whether the plaintiff or the defendant has the superior title from the United States, the patent is also conclusive.

4. The occupation of land derived from the United States before the issue of their patent, for the period prescribed by the statutes of limitation of a state for the commencement of action for the recovery of real property, is not a bar to an action of ejectment for the possession of such land founded upon the legal title subsequently conveyed by the patent. Nor does such occupation constitute a sufficient equity in favor of the occupant to control the legal title, thus subsequently conveyed, whether asserted in a Federal court, or set up as an equitable defense to an action of ejectment in a state court.

5. The doctrine of relation is a fiction of law adopted by the courts, solely for the purposes of justice; and where several proceedings are required to perfect a conveyance of land, it is only applied for the security and protection of persons who stand in some privity of the party that initiated the proceedings and acquired the equitable claim or right to the title. It does not affect strangers, not connecting themselves with the equitable claim or right by any valid transfer from the original, or any subsequent holder.

[No. 73.]

Argued Nov. 22, 1871. Decided Feb. 5, 1872.

IN ERROR to the Supreme Court of the State of Missouri.

This was an action of ejectment originally commenced in the St. Louis land court by Gibson, the plaintiff in error, against P. Chouteau, whose devisees the present defendants in error are. The St. Louis land court rendered judgment in favor of the plaintiff. Upon appeal, the supreme court of the state of Missouri at first affirmed the judgment of the lower court; afterwards, however, a rehearing having been granted, the judgment was reversed. The original plaintiff brought the case to this court by writ of error, which was dismissed for want of jurisdiction.

See 19 L. ed. 317.

Subsequently the supreme court of the state, upon motion, annulled its former judgment, and ordered that a new judgment be entered, *nunc pro tunc*, setting out the ground of the decision. From this judgment the present writ of error is prosecuted.

Both parties derived title from the same source to wit: a New Madrid certificate. It is unnecessary, for the purposes of this case, to trace the chains of title of the respective parties. That of the original defendants was pronounced defective by the supreme court of the state, but that court decided in their favor on the ground that the original plaintiff was barred by the statute of limitations. The original plaintiff claimed directly under a patent issued to Mary McRee, June 10, 1862, upon a patent certificate which was issued on the 26th of the preceding March.

It was in evidence that the original defendant, P. Chouteau, had been in possession of the property since 1830, or before.

A further statement of the case appears in the opinion.

See also 39 Mo. 565; 45 Mo. 171.

Messrs. **M. Blair** and **F. A. Dick,** for the plaintiff in error.

Messrs. Glover & **Shepley,** for the defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

This is an action of ejectment for the possession of certain real property, consisting of sixty-four acres situated in the County of St. Louis in the state of Missouri. The plaintiff asserts title to the demanded premises, under a patent of the United States issued to his immediate grantor. The patent is founded upon a location made by the representative of one James Y. O'Carroll, under the Act of Congress of February 17th, 1815, passed for the relief of parties whose lands in the county of New Madrid, in the then territory of Missouri, had been, in 1812, materially injured by earthquakes.

3 Stat. at L. 211.

The location was made in June, 1818, on be-

Weatherhead v. Bledsoe, 2 Overt. 357; Swearingen v. U. S. 11 Gill & J. 373; U. S. v. Davis, 3 McLean, 483; U. S. v. Williams, 5 McLean, 133; McKeehan v. Com. 3 Pa. St. 153; Com. v. Johnson, 6 Pa. St. 139; Hoey v. Furman, 1 Pa. St. 295, 44 Am. Dec. 129.

Acts of limitation and bankruptcy do not bind the King nor the people. People v. Herkimer, 4 Cow. 345, 15 Am. Dec. 379.

Statute limiting time during which a judgment shall be a lien does not apply to Commonwealth. Com. v. Baldwin, 1 Watts. 54, 26 Am. Dec. 33; Josselyn v. Stone, 28 Miss. 753.

Statute of Limitations does not run against the state nor the United States so as to give title to one holding lands belonging to either. Pearson v. Arledge, 2 Bailey, 401, 23 Am. Dec. 145; Union Mill Mining Co. v. Ferris, 2 Sawy. 176, 16 Int. Rev. Rec. 114; Gibson v. Chouteau, 80 U. S. *supra.*

Time does not run against the Commonwealth. French v. Com. 5 Leigh. 512, 27 Am. Dec. 613.

Statute of limitations does not run against the sovereign power in the absence of express words to that effect. Cincinnati v. First Pres. Ch. 8 Ohio, 298, 32 Am. Dec. 718; Bagley v. Wallace, 16 Serg. & R. 245; Stoughton v. Baker, 4 Mass. 522; Hau v. Getling's Lessee, 2 Har. & J. 112; Lindsey v. Miller, 31 U. S. (6 Pet.) 666; Birch v. Alexander, 1 Wash. 34.

United States is liable to same limitation of time for commencing a suit upon commercial paper etc., as an individual. U. S. v. Cooke, 5 Am. L. T. Rep. 166.

A municipal corporation is not such a sovereign power as to claim immunity from the statute of limitations. Clements v. Anderson, 46 Miss. 581; Evans v. Erie Co. 66 Pa. St. 222; St. Charles Co. v. Powell, 22 Mo. 525; Callaway Co. v. Nolley, 31 Mo. 393; Abernathy v. Dennis, 49 Mo. 469; School Directors v. Georges, 50 Mo. 194.

Statute of limitations does not run against the United States though it sues upon note or a cause of action acquired by transfer from a private person, unless it had begun to run before the transfer. U. S. v. White, 2 Hill, 59, 37 Am. Dec. 374; 7 Op. Atty. Gen. 614.

Statute of limitations will run against the state where a bond is taken in its name, but for the use of an individual. State v. Pratte, 8 Mo. 286, 40 Am. Dec. 140; State v. Blackwell, 20 Mo. 99.

Where the debt due is barred before transfer to the United States, the statute of limitations will be a bar. U. S. v. Buford, 28 U. S. (3 Pet.) 29.

half of one Christian Wilt, who had succeeded to the interest of O'Carroll. The land had been previously surveyed by the deputy-surveyor of the territory; and in 1841, the survey and plat thereof were returned to the recorder, who issued thereon a patent certificate in favor of O'Carroll or his legal representatives. This survey did not meet the approval of the Commissioner of the General Land Office, as it did not show its interferences with conflicting claims; and under his instructions, a new survey and plat were made in 1862, upon which the patent issued.

On the trial the defendants endeavored to show that they had become, through certain legal proceedings, the owners of the interest which Christian Wilt originally possessed and, consequently, had acquired the equitable title to the land upon which they could defend against the patent under the practice which prevails in Missouri. But in this showing they 96*] failed, the *supreme court of the state holding that the conveyances under which they claimed were inoperative and void.

The defendants also relied upon a deed of Samuel McRee and wife, executed in 1838, contending that, by operation of the deed, under the statutes of Missouri, the equitable title afterwards acquired by the grantors and the legal title conveyed by the patent inured to their benefit; but the supreme court held that the deed only had the effect of a quitclaim of an existing interest, and did not affect any subsequently acquired title.

The rulings of the state court upon these grounds are not open to review in this court, as they involve no questions of Federal jurisdiction. But it also appeared in evidence that the defendants, previous to the issue of the patent, had been in possession of the demanded premises more than ten years, the period prescribed by the statute of Missouri, within which actions for the recovery of real property must be brought. By the statutes of the state, ejectment will lie on certain equitable titles. It may be maintained on a New Madrid location, against any person not having a better title.

Gen. Stats. of Mo. of 1825, ch. 151, §§ 1, 11.

The defendants, therefore, contended that the statute of limitations, which had run against the equitable title, created by the location of the O'Carroll claim, was also a bar to the present action founded upon the legal title acquired by the patent of the United States; and in this position they were sustained by the supreme court of the state, reversing the decision, in that respect, of the inferior court, where the action was brought.

99*] *It is matter of common knowledge that statutes of limitation do not run against the state. That no laches can be imputed to the King, and that no time can bar his rights, was the maxim of the common law, and was founded on the principle of public policy, that as he was occupied with the cares of government he ought not to suffer from the negligence of his officers and servants. The principle is applicable to all governments, which must necessarily act through numerous agents, and is essential to a preservation of the interests and property of the public. It is upon this principle that in this country the statutes of a state prescribing periods within which rights must be prosecuted are not held to embrace the state itself, unless it is expressly designated or the mischiefs to be remedied are of such a nature that it must necessarily be included. As legislation of a state can only apply to persons and things over which the state has jurisdiction the United States are also necessarily excluded from the operation of such statutes. *U. S.* v. *Hoar*, 2 Mas. 312; *People* v. *Gilbert*, 18 Johns. 228.

With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new states have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made. Such provision was inserted in the act admitting Missouri, and it is embodied in the present Constitution, with the further clause that the legislature shall also not interfere "with any regulation that Congress may find necessary for securing the title in such soil to the bona fide purchasers."

*The same principle which forbids any [*100 state legislation interfering with the power of Congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal in Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued.

Yet such forfeiture is claimed by the defendants in this case, and is sanctioned by the decision of the supreme court of Missouri. That court does not, it is true, present its decision in this light, but on the contrary, it attempts to reconcile its decision with positions substantially such as we have already stated respecting the power of Congress over the public lands, and the inability of the state to interfere with the primary disposal of the soil of the United States. It declares it to be well settled, that statutes of limitation of a state cannot run against the United States, nor affect their grantees, until the title has passed from the proprietary sovereignty; that these statutes operate to bar the cause of action, not to convey the title; that no cause of action upon a right of entry by virtue of the legal title by patent can exist until the patent is issued; and that the action upon the equitable title created by the location is only given by a statute of the state; and as the two rights of entry have

a different origin, that the latter, resting on the statute, might be barred, whilst that resting on the patent would continue in force, but for the operation of the fiction of relation. By a novel application of that doctrine, the court comes to the conclusion that the statute operates against both rights of entry at the same time.

By the doctrine of relation is meant that **101*]** principle by *which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last preceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had. Thus, in the present case, the patent, which was issued in 1862, is said to take effect by relation at the time when the survey and plat of the location, made in 1818, were returned to the recorder of land titles under the act of Congress. At that time the title of the claimant to the land desired by him, had its inception; and so far as it is necessary to protect his rights to the land, and the rights of parties deriving their interests from him, the patent is held to take effect by relation as of that date. *Lessieur* v. *Price*, 12 How. 74.

The supreme court of Missouri, considering that by this doctrine of relation, the legal title, when it passed out of the United States by the patent, instantly dropped back in time to the location of the first act or inception of the conveyance, and vested the title in the owner of the equity as of that date, held that the statute intercepted the title as it passed through the intermediate conveyances from that period to the patentee. "The legal title," said the court, "in making this circuit, necessarily runs around the period of the statute bar, and the action founded upon this new right is met by the statute on its way, and cut off with that which existed before." *Gibson* v. *Chouteau*, 39 Mo. 588.

The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land; and acquired the equitable claim or right to the title. *Lynch* v. *De Bernal*, 9 Wall. 315, 19 L. ed. 714; *Jackson* v. *Bard*, 4 Johns. 230; *Heath* v. *Ross*, 12 Johns. 140; *Lyttleton* v. *Cross*, 3 Barn. & Cres. 325, 328. The defendants in this case **102*]** were strangers to *that party and to his equitable claim, or equitable title, as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder. The statute of limitations of Missouri did not operate to convey that claim or equitable title to them. It only extinguished the right to maintain the action of ejectment founded thereon, under the practice of the state. It left the right of entry upon the legal title subsequently acquired by the patent wholly unaffected

In the Federal courts where the distinction between legal and equitable proceedings is strictly maintained, and remedies afforded by law and equity are separately pursued, the action of ejectment can only be sustained upon the possession by the plaintiff of the legal title. For the enforcement of equitable rights, however clear, distinct equitable proceedings must be instituted. The patent is the instrument which, under the laws of Congress, passes the title of the United States. It is the government conveyance. If other parties possess equities superior to those of the patentee, upon which the patent issued, a court of equity will, upon proper proceedings, enforce such equities by compelling a transfer of the legal title, or enjoining its enforcement, or canceling the patent. *Stephenson* v. *Smith*, 7 Mo. 610; *Barry* v. *Gamble*, 8 Mo. 886; *Cunningham* v. *Ashley*, 14 How. 377; *Lindsey* v. *Hawes*, 2 Black, 554, 17 L. ed. 265; *Stark* v. *Starrs*, 6 Wall. 402, 18 L. ed. 925; *Johnson* v. *Towsley*, *ante*, 485. But, in the action of ejectment in the Federal courts, the legal title must prevail, and the patent, when regular on its face, is conclusive evidence of that title.

So, also, in the action of ejectment in the state courts, when the question presented is whether the plaintiff or the defendant has the superior legal title from the United States, the patent must prevail. For, as said in *Bagnell* v. *Broderick*, 13 Pet. 450, "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal government in reference to the public lands declares the patent the superior and conclusive *evidence of legal title. Until its is- [***103** suance the fee is in the government, which, by the patent, passes to the grantee, and he is entitled to recover the possession in ejectment."

In several of the states, and such is the case in Missouri, equities of the character mentioned, instead of being presented in a separate suit, may be set up as a defense to the action of ejectment. The answer or plea in such case is in the nature of a bill in equity, and should contain all its essential averments. The defendant then becomes, with reference to the matters averred by him, an actor, and seeks, by the equities presented, to estop the plaintiff from prosecuting the action, or to compel a transfer of the title. *Estrada* v. *Murphy*, 19 Cal. 272; *Weber* v. *Marshall*, 19 Cal. 457; *Lestrade* v. *Barth*, 19 Cal. 671.

In *Maguire* v. *Vice*, 20 Mo. 431, where the plaintiff brought ejectment on a legal title, and gave in evidence a patent of the United States, and the defendant relied upon an equitable defense, the supreme court of Missouri said: "Although our present practice act abolishes all distinctions between legal and equitable actions, yet a party who seeks relief on a merely equitable title against a legal title must, in his pleadings, whether he is plaintiff or defendant, set forth such a state of facts as would have entitled him to the relief he seeks under the old form of proceedings. When a party, by his pleadings, sets forth a merely legal title, he cannot on the trial be let into the proof of facts which show that, having an equity, he is entitled to a conveyance of the legal title. If he wants such relief he must prepare his pleadings with an eye to obtain it,

and this must be done, whether he is seeking relief as plaintiff or defendant."

But neither in a separate suit in a Federal court, nor in an answer to an action of ejectment in a state court, can the mere occupation of the demanded premises by plaintiffs or defendants, for the period prescribed by the statute of limitations of the state be held to constitute a sufficient equity in their favor to 104*] control the legal title subsequently *conveyed to others by the patent of the United States without trenching upon the power of Congress in the disposition of the public lands. That power cannot be defeated nor obstructed by any occupation of the premises before the issue of the patent, under state legislation, in whatever form or tribunal such occupation be asserted. *Wilcox* v. *Jackson*, 13 Pet. 516, 517; *Irvine* v. *Marshall*, 20 How. 558, 15 L. ed. 994; *Fenn* v. *Holme*, 21 How. 481, 16 L. ed. 198; *Lindsey* v. *Miller*, 6 Pet. 672.

It follows that the judgment of the Supreme Court of Missouri must be reversed and the cause be remanded for further proceedings pursuant to this opinion; and it is so ordered.

HENRY B. PLANT, *Plff. in Err.*,
v.
JOSIAH STOVALL.

Where this court finds no error in the record, the judgment of the state court will be affirmed.

[No. 82.]

Submitted Jan. 22, 1872. Decided Feb. 5, 1872.

IN ERROR to the Supreme Court of the State of Georgia.

In this case no counsel appeared for the defendant in error.

Mr. **S. W. Johnston** submitted the case for the plaintiff in error upon the record, and a printed brief by himself and *Mr.* **Joseph P. Carr.**

That brief presented the case substantially as follows:

This is an action on the case brought by the defendant in error for the loss of certain lumber, shipped from Augusta, Georgia, to Savannah, on a steamboat called the Eclipse, of Savannah, belonging in part to the plaintiff in error. The defense was that the steamboat was engaged in inter-state commerce between South Carolina and Georgia, and that under the act of Congress of March 3, 1851, § 3, entitled "An Act to Limit the Liability of Ship-owners in Certain Cases," the plaintiff in error was discharged from all liability, inasmuch as the testimony showed that the loss of the steamboat was occasioned by the misconduct or negligence of her navigators, without any collusion or participation on the part of her owners. The supreme court of the state of Georgia decided that this defense availed nothing, because the case fell within the exception expressly made in the said act of Congress.

The plaintiff in error contends that this decision was erroneous. The material part of the exception in the act in question is as follows: "This Act shall not apply to the owner or owners of any canal boat, barge or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation."

What vessels were meant? Plaintiff in error contends they must be of the same sort or kind as those enumerated.

Broom, Leg. Max. 451; Lofft, Leg. Max. 419; Sedg. Const. and Stat. Law, 463; *Hunter* v. *McGoun*, 1 Bligh, 573; *Morewood* v. *Pollok*, 18 Eng. L. & E. 343; *Regina* v. *Reed*, 28 Eng. L. & E. 133; *Reed* v. *Ingham*, 26 Eng. L. & E. 164; Kames, Elem. of Crit. pp. 30–35; *Moore* v. *Amer. Transp. Co.* 24 How. 36, 16 L. ed. 680.

The plaintiff in error further contends that the term "inland navigation" refers only to the internal commerce of the state.

Mr. Chief Justice **Chase** delivered the opinion of the court:

We find no error in the record.

The judgment of the Supreme Court of Georgia is, therefore, affirmed.

WELLS, FARGO & CO., *Plff. in Err.*,
v.
A. McGREGOR, Assignee of John M. Clarkson.

(See S. C. 13 Wall. 188–190.)

Order is not final judgment—teste to writ of error.

1. An order setting aside a sheriff's return to an execution, and awarding an alias execution, is not a final judgment.
2. The teste of the chief justice of the court is indispensable to a writ of error to the supreme court of Montana.

[No. 292.]

Argued Jan. 26, 1872. Denied Feb. 5, 1872.

IN ERROR to the Supreme Court of the Territory of Montana.

The case is stated by the court.

Messrs. A. M. Woodfolk and **F. A. Dick,** for plaintiff in error.

Mr. **Robert Leech,** for defendant in error:

The record in this case shows that the writ of error is brought to revise a decision of the supreme court of the territory of Montana, affirming an order of the district court for the third judicial district of said territory sustaining a motion to set aside a sheriff's return to an execution, and awarding an alias execution.

This is not a final judgment; and under the 22d section of the judiciary act of Sep. 24, 1789, as well as the 9th section of the organic act of said territory, of May 26, 1864, this court has no jurisdiction.

McCargo v. *Chapman*, 20 How. 555, 15 L. ed. 1021; *Early* v. *Rogers*, 16 How. 599; *Boyle* v. *Zacharie*, 6 Pet. 648; *Smith* v. *Trabue*, 9 Pet. 4; *Toland* v. *Sprague*, 12 Pet. 300; *Evans* v. *Gee*, 14 Pet. 1.

The writ of error does not bear the teste of the Chief Justice of this court, but that of the clerk of the supreme court of the territory of Montana.

The writ is, therefore, a nullity; and this court has no jurisdiction in the case.

The form of the writ of error bearing the teste of the Chief Justice, was devised by

NOTE.—*What is "final decree" or judgment of state or other court from which appeal lies*—see notes, 5 L. ed. U. S. 302; 17 C. C. A. 238; 28 C. C. A. 482.

the judges of the supreme court of the United States, in pursuance of the 9th section of the act of May 8, 1792, 1 Stat. at L. 278, and has all the force and effect of positive law.

See *Barton* v. *Forsyth*, 5 Wall. 192, 18 L. ed. 546; *Mussina* v. *Cavazos*, 6 Wall. 355, 16 L. ed. 810; *Hodge* v. *Williams*, 22 How. 88, 16 L. ed. 237.

Mr. Chief Justice **Chase** delivered the opinion of the court:

The record in this case shows that the writ of error is brought to reverse the decision of the supreme court of the territory of Montana affirming an order of the district court of the third judicial district of the territory, by which a motion to set aside a sheriff's return to an execution was allowed, and an alias execution awarded.

We have often held that such orders are within the discretion of the inferior courts.

They are not final judgments, within the meaning of the judiciary act of 1789. *Cook* v. *Burnley, ante*, 29; Phillips, Pr. 66. Of course they are not within the meaning of the 9th section of the organic act of the territory. 13 Stat. at L. 89. It appears also that the writ of error bears the teste of the clerk of the supreme court of the territory of Montana, and not the teste of the Chief Justice of this court. 1 Stat. **190***] at L. 93. But the statute *makes teste of the Chief Justice indispensable, and we have no power to change its requirements.

On both grounds, therefore, the writ of error must be dismissed.

244*] THE COUNTY OF BATH and the County Court Thereof, John D. Young, Presiding Judge of said court, J. G. Hurst *et al.*, Justices of the Peace, *Plffs. in Err.*,

v.

HENRY AMY.

(See S. C. 13 Wall. 244-251.)

Power of Circuit Courts to issue mandamus—process act.

1. Circuits courts of the United States are not authorized to issue writs of mandamus as an original proceeding, nor at all except when necessary to the exercise of their respective jurisdictions.
2. The process act of May 19, 1828, does not enlarge their jurisdiction on this subject.

[No. 52.]

Argued Jan. 9, 1872. Decided Feb. 5, 1872.

IN ERROR to the Circuit Court of the United States for the District of Kentucky.

This was a proceeding in the circuit court of the United States for the Kentucky district, by the defendant in error, Henry Amy, against the county of Bath and the county court of said county, and John D. Young, presiding judge, and J. G. Hurst, G. W. Sorrell, and twelve other justices, for a mandamus, to compel the levy and collection of a tax in the county of Bath, to pay certain coupons or interest warrants attached to bonds alleged to have been issued by said county, in payment of a subscription of $150,000 to the capital stock of the Lexington & Big Sandy Railroad Company.

A notice and demand were executed upon the proper officers of the county, and upon their failure to make the levy and collection, the proceeding in court was commenced by the filing of an affidavit, in which it was alleged substantially that, under and by virtue of an act of the general assembly of the commonwealth of Kentucky, approved Jan. 9, 1852, entitled "An act to Incorporate the Lexington & Big Sandy Railroad Company," and of an amendatory act, approved Mar. 1, 1854, entitled "An Act to Amend the Charter of the Lexington & Big Sandy Railroad Company," the said county was authorized to subscribe $150,000 to the capital stock of said railroad company, to borrow money for the purpose of paying such subscription, to issue bonds as a security for the money so borrowed, or in payment of the subscription; that it was made the duty of the county court, by the terms of said acts, to levy and cause to be collected annually, a tax upon the real and personal property in the county, sufficient to pay the interest upon any bonds that might be issued; that the county made the subscription to the full amount authorized, and in payment issued one hundred fifty bonds for $1,000 each, payable to said railroad company at the Bank of America, New York, thirty years after date, with interest at the rate of six per centum per annum, payable semi-annually, for each instalment of which a coupon or interest warrant for $30 was attached to said bonds. It was further alleged that the bonds and coupons were delivered to the railroad company, and were by it indorsed and sold in the market, and that the affiant has become the owner and holder of eighty-two of the bonds, whose serial numbers were stated, with the coupons annexed; that the county had paid the coupons maturing prior to Oct. 15, 1858, and had levied a tax sufficient for that purpose in the years 1858, 1859, and 1860, but had refused to deposit the money at the Bank of America, and that all the coupons maturing since said Oct. 15, 1858, remained unpaid. He filed one of the bonds, with the coupons attached, alleging that the remaining eighty-one were in the same words and figures, and he prayed that a peremptory writ of mandamus might issue, directing the defendants to levy and cause to be collected a tax sufficient to pay off and discharge said coupons and the interest that had accrued upon them since maturity, and the costs; and commanding them to levy and collect, from year to year, a sufficient tax to pay off and discharge the several instalments of interest yet to become due.

Upon the filing of this affidavit, a rule returnable next day was issued against the defendants, requiring them to show cause why the writ of mandamus should not issue. On the same day, the defendants appeared, prayed oyer of the bonds and coupons, and moved the court to discharge the motion and rule for a mandamus. At the same time, eleven responses or pleas were filed.

After argument, the court below overruled the motion to discharge the rule, and thereupon the defendants took exceptions upon the record, according to the practice in that court. A trial was then had upon the issues of fact presented by the pleas.

475*] ARCHIBALD M. PENTZ *et al.*, *Appts.*,
v.
THE STEAMER ARIADNE, her Engine, Machinery, etc., Charles Mallory, *Claimant.*

(See S. C. *"The Ariadne,"* 13 Wall. 475–479.)

Collision — when damages divided — crowded port — duty of lookout — burden of proof — judgment of court below, when not followed.

1. In a case of loss of a brig by collision with a steamer, it appearing that the former had no proper light and the latter no sufficient lookout, both vessels being in fault, the damages must be divided.
2. In the waters near the city of New York, crowded with shipping, the greatest care and caution are necessary. The duty of the lookout is of the highest importance. In the performance of this duty the law requires indefatigable care and sleepless vigilance.
3. Every doubt as to the performance of the duty and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary.
4. Judgments of the court below are entitled to respectful consideration, but where the convictions of this court are clear, and differ from those of the judges below, this court will follow its own.

[No. 83.]

Argued Jan. 23, 1872. Decided Feb. 5, 1872.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr. **John E. Parsons** for appellants.

Mr. **E. H. Owen** for appellee.

Mr. Justice **Swayne** delivered the opinion of the court:

This is an appeal in admiralty from the decree of the circuit court of the United States for the southern district of New York. The case is one arising from a collision between the steamer Ariadne and the brig William Edwards.

The collision which is the subject of this appeal occurred in the night of the 13th of December, 1865, off the Jersey coast, about twelve miles from Barnegat and eight miles from land. The brig was on a voyage from Havre to New York. The wind was north-northeast. The brig was on her port tack, with her starboard side to the steamer, and going at the rate of four or five miles an hour. She was sailing close-hauled, as near as she could lie to the wind, and heading west-northwest or north-
476*] west. The steamer *was bound from New York to New Orleans, and was upon one of her regular trips. She was laden with freight, and carried passengers. She was on her proper course, south by west one quarter south, and running at the rate of seven or eight knots an hour. The brig did not change her course down to the time of the collision. The steamer was first made from the brig, about five points from her starboard bow. She was not discovered from the steamer until it was too late to avoid the collision. The steamer struck her on her starboard side, abaft the main chains. The

NOTE.—*Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting*—see notes, 13 L. ed. U. S. 537; 25 L. ed. U. S. 168; 28 C. C. A. 532; 29 C. C. A. 368.

Rules for avoiding collision; steamer meeting steamer—see notes, 14 L. ed. U. S. 68; 35 L. ed. U. S. 453; 30 C. C. A. 630; 60 C. C. A. 254.

some act or duty, the execution of which the court had previously determined to be consonant with right and justice. It was not, like ordinary proceedings at law, a writ of right, and the court had no jurisdiction to grant it in any case except those in which it was the legal judge of the duty required to be performed. Nor was it applicable, as a private remedy, to enforce simple common-law rights between individuals. Were there nothing more, then, in the judiciary act than the grant of general authority to take cognizance of all suits of a civil nature at common law, it might well be doubted whether it was intended to confer the extraordinary powers residing in the British court of King's bench to award prerogative writs. All doubts upon this subject, however, are set at rest by the 14th section of the same act, which enacted that circuit courts shall have "power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary to the exercise of their respective jurisdictions and agreeable to the principles and usages of law." Among those other writs, no doubt, mandamus is included; and this special provision indicates that the power to grant such writs generally was not understood to be granted by the 11th section, **249***] which conferred, *only to a limited extent, upon the circuit courts the judicial power existing in the government under the Constitution. Power to issue such writs is granted by the 14th section, but with the restriction that they shall be necessary to the exercise of the jurisdiction given. Why make this grant if it had been previously made in the 11th section? The limitation only was needed.

This subject has heretofore been under consideration in this court, and in *McIntire* v. *Wood*, 7 Cranch, 504, it was unanimously decided that the power of the circuit courts to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. The court said: "Had the 11th section of the judiciary act covered the whole ground of the Constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right arising under laws of the United States, and the 14th section of the act would sanction the issuing of the writ for such a purpose. But, although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature have not thought proper to delegate the exercise of that power to its circuit courts, except in certain specified cases." And in *McClung* v. *Silliman*, 6 Wheat. 601, this court said, when speaking of the power to issue writs of mandamus: "The 14th section of the act under consideration (the judiciary act) could only have been intended to vest the power . . . in cases where the jurisdiction already exists, and not where it is to be courted or acquired by means of the writ proposed to be sued out." In other words, the writ cannot be used to confer a jurisdiction which the circuit court would not have without it. It is authorized only when ancillary to a jurisdiction already acquired. The doctrine asserted in both these cases was conceded to be correct by both the majority and the minority of the court in *Kendall* v. *The United States*, 12 Pet. 584; *Secretary* v. *McGarrahan*, 9 Wall. 311, 19 L. ed. 583. *The power to issue a writ of mandamus [***250** as an original and independent proceeding does not, then, belong to the circuit courts.

It has been argued, on behalf of the defendant in error, that the writ of mandamus is a civil action in Kentucky; that the proceedings therein were regulated by an act of the legislature of that state, approved January 8, 1813, still in force, which directed how a traverse to the return shall be tried in the state courts, and what judgment may be pronounced, and that the act of Congress of May 19, 1828, directed that the proceedings in suits at common law in states admitted to the Union since 1789, of which Kentucky is one, shall be the same in the Federal courts as those used, when the act was passed, in the highest courts of original and general jurisdiction in those states. Hence it is inferred that the law of Kentucky respecting mandamus has been adopted as a part of the rule of practice of the United States circuit court for that state. The argument rests on a misapprehension of the meaning of the act of 1828. It was a process act, designed only to regulate proceedings in the Federal courts after they had obtained jurisdiction; not to enlarge their jurisdiction. The purpose was to make the forms of process and forms and modes of proceeding in those courts correspond with the forms and modes in use in the state courts. The words of the act are "that the forms of mesne process, except the style, and the forms and modes of proceeding in suits in the courts of the United States held in those states admitted into the Union since the 29th day of September, in the year 1789, in those of common law, shall be the same, in each of the said states respectively, as are now used in the highest court of original and general jurisdiction of the same." It is quite too much to infer from this an enlargement of jurisdiction, or an adoption of all the powers which the state courts then had. There is, then, no act of Congress which has conferred upon circuit courts authority to issue the writ of mandamus as an original proceeding, or at all, except when necessary for the exercise of the jurisdiction conferred upon them by law.

*Applying this rule to the present case, [***251** it is decisive. The relator's claim for payment had not been brought to judgment in the circuit court, nor had it been put in suit. His application for a mandamus was, therefore, an original proceeding, neither necessary nor ancillary to any jurisdiction which the court then had. For this reason it should have been denied, and the judgment that a peremptory mandamus should issue was erroneous.

This renders it superfluous to consider the other objections urged against the jurisdiction.

The judgment of the Circuit Court is reversed and the cause is remanded, with instructions to dismiss the petition for a mandamus.

475*] ARCHIBALD M. PENTZ *et al., Appts.,*
v.
THE STEAMER ARIADNE, her Engine, Machinery, etc., Charles Mallory, *Claimant.*

(See S. C. *"The Ariadne,"* 13 Wall. 475-479.)

Collision — when damages divided — crowded port — duty of lookout — burden of proof — judgment of court below, when not followed.

1. In a case of loss of a brig by collision with a steamer, it appearing that the former had no proper light and the latter no sufficient lookout, both vessels being in fault, the damages must be divided.
2. In the waters near the city of New York, crowded with shipping, the greatest care and caution are necessary. The duty of the lookout is of the highest importance. In the performance of this duty the law requires indefatigable care and sleepless vigilance.
3. Every doubt as to the performance of the duty and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary.
4. Judgments of the court below are entitled to respectful consideration, but where the convictions of this court are clear, and differ from those of the judges below, this court will follow its own.

[No. 83.]

Argued Jan. 23, 1872. Decided Feb. 5, 1872.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr. **John E. Parsons** for appellants.

Mr. **E. H. Owen** for appellee.

Mr. Justice **Swayne** delivered the opinion of the court:

This is an appeal in admiralty from the decree of the circuit court of the United States for the southern district of New York. The case is one arising from a collision between the steamer Ariadne and the brig William Edwards.

The collision which is the subject of this appeal occurred in the night of the 13th of December, 1865, off the Jersey coast, about twelve miles from Barnegat and eight miles from land. The brig was on a voyage from Havre to New York. The wind was north-northeast. The brig was on her port tack, with her starboard side to the steamer, and going at the rate of four or five miles an hour. She was sailing close-hauled, as near as she could lie to the wind, and heading west-northwest or north-**476***] west. The steamer *was bound from New York to New Orleans, and was upon one of her regular trips. She was laden with freight, and carried passengers. She was on her proper course, south by west one quarter south, and running at the rate of seven or eight knots an hour. The brig did not change her course down to the time of the collision. The steamer was first made from the brig, about five points from her starboard bow. She was not discovered from the steamer until it was too late to avoid the collision. The steamer struck her on her starboard side, abaft the main chains. The blow was of such force that it cut through into her cabin and down to the water's edge. She sunk in a short time. This libel was filed by her owners to recover damages for her loss. It was dismissed by the district court. The decree was affirmed by the circuit court. The decree of the latter has been brought here by this appeal for review. In this court the controversy between the parties has been narrowed down to two points.

It is insisted by the claimant of the steamer that the brig had no green light, or an insufficient one, on her starboard side; that the collision is due to this cause, and that the steamer is blameless.

The libelants deny this impeachment as to the light, and contend that the lookout on the steamer wholly failed to do his duty; that he could and should have seen the brig, whether she had, or had not, a sufficient green light, in season to enable the steamer to avoid the collision, and that in this particular there is fault on her part. We shall consider the case only in these aspects.

In regard to the light on the brig, the testimony, as usual in such cases, is conflicting. We think that which sustains the negative largely preponderates. We find no sufficient reason to doubt that Morgan told the truth. He testified:

"The binnacle light used to bother me—it would frequently go out. There was something about the oil that was not right. . . . When I was on the lookout I noticed our starboard light, but not until the Ariadne was very near to us. I stepped to the side of *the [**477** brig, thinking that our light might not be burning, and that the Ariadne might, therefore, run into us, and then I looked at our starboard light. The light was very dim. I was, I should judge, fifty feet from the light when I looked at it, and could see it plainly. As the light was then burning, I should not think it could be seen over two hundred feet."

This testimony is fully sustained by all the witnesses, six in number, who were on the steamer. They were in positions to see the light, and must have seen it if it were distinctly visible. The probative force of these proofs is not overcome by the testimony of the libelants. Both the courts below held the charge to be established, and we see no reason to dissent from the conclusion at which they arrived.

The steamer was about two hundred feet long. She obeyed her helm with unusual quickness. When running at her then speed, she could be easily stopped in a space of about twice her length. She approached the brig in the direction most favorable for her lookout to see the hull and sails of the latter. According to the steamer's testimony, a vessel without a light could be seen the eighth of a mile. Her testimony also shows the following facts: she had but one lookout. The second mate saw the brig first. He asked the lookout if he saw her. The lookout thereupon turned and saw her. He had not seen her before. He saw no light, and could not tell which way she was heading. Malony, who was at the wheel of the steamer, says:

"I saw the brig just a moment before the first bell struck. The second mate struck first one bell, and then a second bell, and then rung

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Rules for avoiding collision; steamer meeting steamer—see notes, 14 L. ed. U. S. 68; 35 L. ed. U. S. 453; 30 C. C. A. 630; 60 C. C. A. 254.

again. There was not a second between. It was done as quick as lightning. . . . The Ariadne swung about a point and a half, or two points, before we struck."

The lookout says the steamer ran about a length between the time when he first saw the brig and the time when the steamer struck her.

There is no controversy as to the facts thus stated. They are undisputed and indisputable. Certain inferences from them are inevitable.

478*] *The brig was not seen by the lookout or anyone else on the steamer when she was distant as far as she could have been seen. She was not seen by the lookout at all until his attention was called to her by the mate. She was not seen by either of them until almost at the moment of the collision. It is by no means certain that the lookout would have seen her before he felt the shock, but for the inquiry of the mate. He was on the port side, and had been looking, according to his own account, three minutes in the opposite direction. The discovery came too late to do any good. The catastrophe was then unavoidable. For all the purposes of this case, there might as well have been no lookout on the steamer. He could have rendered, and it was his duty to render, a service of vital importance, but he rendered none. If the brig had been seen when she became visible from the steamer, or very soon thereafter, the collision could have been avoided. It would have been the duty of the steamer to stop or slow her engine until everything as to the brig necessary to be known was ascertained. This would, doubtless, have been done; and, if so, the result which followed would have been averted. Indeed, it would have been impossible to occur. We think the conduct of the lookout was marked by gross carelessness, and that it was clearly one of the concurring causes of the disaster.

The waters near the city of New York are at all times crowded with shipping. Navigation there is not unlike the traveler threading his way through the mazes of a forest, with the difference that most of the objects to be avoided are also in motion. The greatest care and caution are necessary. The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of his vessel with all the property and the lives of all on board. The same consequence may ensue to the vessel with which his shall collide. In the performance of this duty the law requires indefatigable care and sleepless vigilance. The rigor of the require-
479*] ment rises *according to the power and speed of the vessel in question. It is applied with full force to the steamships belonging to our commercial marine. If this were not so, there would be no safety for other vessels. But it is equally important to vessels of that powerful class for their protection from one another. It is the duty of all courts charged with the administration of this branch of our jurisprudence to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty, and the effect of nonperformance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary. *The Louisiana* v. *Fisher*, 21 How. 1, 16 L. ed. 29; *Chamberlain* v. *Ward*, 21 How. 549, 16 L. ed. 211; *Genesee Chief* v. *Fitzhugh*, 12 How. 443.

The fault of the brig does not excuse the fault of the steamer, if the latter were in any degree a contributory cause of the collision. *Chamberlain* v. *Ward*, 21 How. 549, 16 L. ed. 211; *The Grey Eagle*, 9 Wall. 505, 19 L. ed. 741.

Both vessels being in fault, the damages must be divided.

We are not unmindful that both the circuit and district court came to a conclusion different from ours as to the alleged fault of the steamer.

Their judgments are entitled to and have received our most respectful consideration. Their concurrence raises a presumption, prima facie, that they are correct. Mere doubts should not be permitted to disturb them. But the presumption referred to may be rebutted. The right of appeal to this court is a substantial right, and not a shadow. It involves examination, thought and judgment. Where our convictions are clear, and differ from those of the learned judges below, we may not abdicate the performance of the duty which the law imposes upon us by declining to give our own judicial effect. *The Quickstep*, 9 Wall. 669, 19 L. ed. 768.

The decree of the Circuit Court is reversed, and the cause will be remanded to that court, with directions to enter a decree in conformity to this opinion.

THE MILWAUKEE & MINNESOTA RAILROAD COMPANY, *Appt.*,

v.

JAMES T. SOUTTER, Survivor, etc., Russel Sage, the Milwaukee & St. Paul Railroad Company, *et al.*

(See S. C. 13 Wall. 517-526.)

Fraudulent purchaser of lands cannot recover for improvements or encumbrances paid.

A fraudulent purchaser of property, when deprived of its possession, cannot recover for his repairs or improvements, nor for encumbrances paid by him while in possession.

[No. 37.]

Argued Dec. 15, 1871. Decided Feb. 5, 1872.

APPEAL from the Circuit Court of the United States for the District of Wisconsin.

The case is stated by the court.

Messrs. **George B. Smith** and **Matt. H. Carpenter**, for appellant:

It is an elementary principle of law, too well established by authorities to need elaborate argument, that money paid under a mistake of fact may be recovered back. It is equally clear that a suit in equity may be maintained in such case.

Whether money paid under a mistake of law can be recovered back, is a question upon which

NOTE.—*Subrogation; right of assignee to and as to prior encumbrances; junior encumbrancer, right of*—see note to B'k of U. S. v. Peter, 10 L. ed. U. S. 89.

half of one Christian Wilt, who had succeeded to the interest of O'Carroll. The land had been previously surveyed by the deputy-surveyor of the territory; and in 1841, the survey and plat thereof were returned to the recorder, who issued thereon a patent certificate in favor of O'Carroll or his legal representatives. This survey did not meet the approval of the Commissioner of the General Land Office, as it did not show its interferences with conflicting claims; and under his instructions, a new survey and plat were made in 1862, upon which the patent issued.

On the trial the defendants endeavored to show that they had become, through certain legal proceedings, the owners of the interest which Christian Wilt originally possessed and, consequently, had acquired the equitable title to the land upon which they could defend against the patent under the practice which prevails in Missouri. But in this showing they 96*] failed, the *supreme court of the state holding that the conveyances under which they claimed were inoperative and void.

The defendants also relied upon a deed of Samuel McRee and wife, executed in 1838, contending that, by operation of the deed, under the statutes of Missouri, the equitable title afterwards acquired by the grantors and the legal title conveyed by the patent inured to their benefit; but the supreme court held that the deed only had the effect of a quitclaim of an existing interest, and did not affect any subsequently acquired title.

The rulings of the state court upon these grounds are not open to review in this court, as they involve no questions of Federal jurisdiction. But it also appeared in evidence that the defendants, previous to the issue of the patent, had been in possession of the demanded premises more than ten years, the period prescribed by the statute of Missouri, within which actions for the recovery of real property must be brought. By the statutes of the state, ejectment will lie on certain equitable titles. It may be maintained on a New Madrid location, against any person not having a better title.

Gen. Stats. of Mo. of 1825, ch. 151, §§ 1, 11.

The defendants, therefore, contended that the statute of limitations, which had run against the equitable title, created by the location of the O'Carroll claim, was also a bar to the present action founded upon the legal title acquired by the patent of the United States; and in this position they were sustained by the supreme court of the state, reversing the decision, in that respect, of the inferior court, where the action was brought.

99*] *It is matter of common knowledge that statutes of limitation do not run against the state. That no laches can be imputed to the King, and that no time can bar his rights, was the maxim of the common law, and was founded on the principle of public policy, that as he was occupied with the cares of government he ought not to suffer from the negligence of his officers and servants. The principle is applicable to all governments, which must necessarily act through numerous agents, and is essential to a preservation of the interests and property of the public. It is upon this principle that in this country the statutes of a state prescribing periods within which rights must be prosecuted are not held to embrace the state itself, unless it is expressly designated or the mischiefs to be remedied are of such a nature that it must necessarily be included. As legislation of a state can only apply to persons and things over which the state has jurisdiction the United States are also necessarily excluded from the operation of such statutes. *U. S.* v. *Hoar*, 2 Mas. 312; *People* v. *Gilbert*, 18 Johns. 228.

With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new states have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made. Such provision was inserted in the act admitting Missouri, and it is embodied in the present Constitution, with the further clause that the legislature shall also not interfere "with any regulation that Congress may find necessary for securing the title in such soil to the bona fide purchasers."

*The same principle which forbids any [*100 state legislation interfering with the power of Congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal in Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued.

Yet such forfeiture is claimed by the defendants in this case, and is sanctioned by the decision of the supreme court of Missouri. That court does not, it is true, present its decision in this light, but on the contrary, it attempts to reconcile its decision with positions substantially such as we have already stated respecting the power of Congress over the public lands, and the inability of the state to interfere with the primary disposal of the soil of the United States. It declares it to be well settled, that statutes of limitation of a state cannot run against the United States, nor affect their grantees, until the title has passed from the proprietary sovereignty; that these statutes operate to bar the cause of action, not to convey the title; that no cause of action upon a right of entry by virtue of the legal title by patent can exist until the patent is issued; and that the action upon the equitable title created by the location is only given by a statute of the state; and as the two rights of entry have

a different origin, that the latter, resting on the statute, might be barred, whilst that resting on the patent would continue in force, but for the operation of the fiction of relation. By a novel application of that doctrine, the court comes to the conclusion that the statute operates against both rights of entry at the same time.

By the doctrine of relation is meant that **101***] principle by *which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last preceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had. Thus, in the present case, the patent, which was issued in 1862, is said to take effect by relation at the time when the survey and plat of the location, made in 1818, were returned to the recorder of land titles under the act of Congress. At that time the title of the claimant to the land desired by him, had its inception; and so far as it is necessary to protect his rights to the land, and the rights of parties deriving their interests from him, the patent is held to take effect by relation as of that date. *Lessieur* v. *Price*, 12 How. 74.

The supreme court of Missouri, considering that by this doctrine of relation, the legal title, when it passed out of the United States by the patent, instantly dropped back in time to the location of the first act or inception of the conveyance, and vested the title in the owner of the equity as of that date, held that the statute intercepted the title as it passed through the intermediate conveyances from that period to the patentee. "The legal title," said the court, "in making this circuit, necessarily runs around the period of the statute bar, and the action founded upon this new right is met by the statute on its way, and cut off with that which existed before." *Gibson* v. *Chouteau*, 39 Mo. 588.

The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land; and acquired the equitable claim or right to the title. *Lynch* v. *De Bernal*, 9 Wall. 315, 19 L. ed. 714; *Jackson* v. *Bard*, 4 Johns. 230; *Heath* v. *Ross*, 12 Johns. 140; *Lyttleton* v. *Cross*, 3 Barn. & Cres. 325, 328. The defendants in this case **102***] were strangers to *that party and to his equitable claim, or equitable title, as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder. The statute of limitations of Missouri did not operate to convey that claim or equitable title to them. It only extinguished the right to maintain the action of ejectment founded thereon, under the practice of the state. It left the right of entry upon the legal title subsequently acquired by the patent wholly unaffected

In the Federal courts where the distinction between legal and equitable proceedings is strictly maintained, and remedies afforded by law and equity are separately pursued, the action of ejectment can only be sustained upon the possession by the plaintiff of the legal title. For the enforcement of equitable rights, however clear, distinct equitable proceedings must be instituted. The patent is the instrument which, under the laws of Congress, passes the title of the United States. It is the government conveyance. If other parties possess equities superior to those of the patentee, upon which the patent issued, a court of equity will, upon proper proceedings, enforce such equities by compelling a transfer of the legal title, or enjoining its enforcement, or canceling the patent. *Stephenson* v. *Smith*, 7 Mo. 610; *Barry* v. *Gamble*, 8 Mo. 886; *Cunningham* v. *Ashley*, 14 How. 377; *Lindsey* v. *Hawes*, 2 Black, 554, 17 L. ed. 265; *Stark* v. *Starrs*, 6 Wall. 402, 18 L. ed. 925; *Johnson* v. *Towsley*, *ante*, 485. But, in the action of ejectment in the Federal courts, the legal title must prevail, and the patent, when regular on its face, is conclusive evidence of that title.

So, also, in the action of ejectment in the state courts, when the question presented is whether the plaintiff or the defendant has the superior legal title from the United States, the patent must prevail. For, as said in *Bagnell* v. *Broderick*, 13 Pet. 450, "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal government in reference to the public lands declares the patent the superior and conclusive *evidence of legal title. Until its is- [***103** suance the fee is in the government, which, by the patent, passes to the grantee, and he is entitled to recover the possession in ejectment."

In several of the states, and such is the case in Missouri, equities of the character mentioned, instead of being presented in a separate suit, may be set up as a defense to the action of ejectment. The answer or plea in such case is in the nature of a bill in equity, and should contain all its essential averments. The defendant then becomes, with reference to the matters averred by him, an actor, and seeks, by the equities presented, to estop the plaintiff from prosecuting the action, or to compel a transfer of the title. *Estrada* v. *Murphy*, 19 Cal. 272; *Weber* v. *Marshall*, 19 Cal. 457; *Lestrade* v. *Barth*, 19 Cal. 671.

In *Maguire* v. *Vice*, 20 Mo. 431, where the plaintiff brought ejectment on a legal title, and gave in evidence a patent of the United States, and the defendant relied upon an equitable defense, the supreme court of Missouri said: "Although our present practice act abolishes all distinctions between legal and equitable actions, yet a party who seeks relief on a merely equitable title against a legal title must, in his pleadings, whether he is plaintiff or defendant, set forth such a state of facts as would have entitled him to the relief he seeks under the old form of proceedings. When a party, by his pleadings, sets forth a merely legal title, he cannot on the trial be let into the proof of facts which show that, having an equity, he is entitled to a conveyance of the legal title. If he wants such relief he must prepare his pleadings with an eye to obtain it,

Gibson v. *Chouteau*, 8 Wall. 318, 19 L. ed. 318.

An act of Congress may be drawn in question by the state court, but if it does not appear that it was necessarily drawn in question, this court will not take jurisdiction.

Parmelee v. *Lawrence, supra.*

If the judgment is right, on other grounds, cognizable by the state court alone, this court will not revise the judgment.

"If the judgment should be correct, although the reasoning by which the mind of the judge was conducted to it, should be deemed unsound, that judgment would certainly be affirmed in the superior court."

Williams v. *Norris*, 12 Wheat. 120.

The opinion of the state court cannot be resorted to, for the purpose of showing that a question of Federal cognizance was decided by the state court.

Williams v. *Norris*, 12 Wheat. 120; *Rector* v. *Ashley*, 6 Wall. 142, 18 L. ed. 733; *Gibson* v. *Chouteau, supra; Ins. Co.* v. *Treasurer, ante*, 114.

The judgment of the appellate court of Kentucky does not necessarily decide any Federal question. It is eminently correct on other grounds not cognizable by this court, on error to the state court.

There was no equity in the petition of plaintiff in error.

A court of equity in Kentucky would not assist the vendee, to compel the vendor to accept a depreciated paper, in discharge of the purchase money due on a contract made in 1859, and tendered years after maturity, the parties having contracted and fixed the price with reference to the only lawful money at the time. So ruled in *Willard* v. *Tayloe*, 8 Wall. 557, 19 L. ed. 501.

It has been often held, that where the complainant has been guilty of delay amounting to laches, and the circumstances of the parties or property have so changed that to aid the complainant would work an injury to the other party, equity will dismiss him to his remedy at law.

Holt v. *Thomas*, 8 Pet. 420; *Dorsey* v. *Packwood*, 12 How. 126; *Brashier* v. *Gratz*, 6 Wheat. 528.

But the tender which constituted the sole ground of equity in Dooley's petition, and his only defense in the answer, was plainly bad.

1. It was for less than the principal and legal interest, on both occasions.

2. It was made two years in one case and six in the other, after a breach of his contract by plaintiff in error. 2 Greenl. Ev. § 607; 3 Chit. 136.

3. Readiness was not shown by the petition or answer, either before or after the tender. This was always bad in Kentucky. *Slack* v. *Price*, 1 Bibb. 273.

In this case, it is decided that the party must show in his plea that he was *tout temps prist.*

The plea ought to have alleged that, from the time of making the award "he had been ready until the time of the alleged tender, and that he had always afterwards been ready." This is the common law. 3 Chit. Pl. 922; *Giles* v. *Hartis*, 1 Ld. Raym. 254; *Giles* v. *Hart*, Salk. 622.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the court of appeals of Kentucky.

It is argued by counsel for defendant in error that no question cognizable by this court on a writ of error to a state court is presented by the record, while the counsel for plaintiff insists that the validity of the acts of Congress, making certain notes of the United States a legal tender in payment of debts, was the only question raised and decided in the court below.

We are satisfied, from a careful examination of the record, that this latter question was decided against the validity of those statutes, and that such a decision was essential to the judgment rendered by the court.

Dooley being indebted to Smith in a sum of nearly $10,000, evidenced by a note, and made a lien on land by mortgage, filed his petition in the proper state court of Kentucky, alleging that on the 6th day of January, A. D. 1868, the

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torney authorized to collect. Moffat v. Parsons, 5 Taunt. 307; Crozer v. Pilling, 4 Barn. & Cres. 26; Hoyt v. Barnes, 11 Me. 475; Jackson v. Crafts, 18 Johns. 110; Billiott v. Robinson, 13 La. Ann. 529; Wilmot v. Smith, 3 Car. & P. 453; Oatman v. Walker, 33 Me. 67; Watson v. Herrington, 1 Carr. & K. 36; McIniffe v. Wheelock, 1 Gray, 600.

To a trustee for a *cestui que trust.* Chahoon v. Hollenbeck, 16 Serg. & R. 425.

To an executor before will proved. Bac. Abr. Tender (E); 2 Chit. Cont. 9th ed. 1188; see Todd v. Parker, 1 N. J. Law, 45.

Tender should be made when the money is due, and not before. Dixon v. Clark, 5 C. B. 365; Stacey v. Graham, 14 N. Y. 492; Powe v. Powe, 42 Ala. 113; Toulmin v. Sager, 42 Ala. 127; Tillon v. Britton, 4 Halst. 120; Saunders v. Frost, 5 Pick. 267; Mitchell v. Cook, 29 Barb. 243; but see McHard v. Whetcroft, 3 Har. & McH. 85; Tracy v. Strong, 2 Conn. 659; Mayward v. Hunt, 5 Pick. 240.

When money is due on or before a specified day, tender may be made before such day, and for money due on demand tender need not be made until demand. Startup v. McDonald, 6 Man. & J. 593; Leftly v. Mills, 4 Tenn. 170.

Tender before action is commenced is sufficient. Hull v. Peters, 7 Barb. 331; Randall v. Bacon, 49 Vt. 20, 24 Am. Rep. 100; Knight v. Beach, 7 Abb. Pr. (N. S.) 241, 249; Briggs v. Calverly, 8 Term, 629; Pigot v. Cubley, 15 C. B. (N. S.) 701; Kington v. Kington, 11 Mees. & W. 233.

Tender of money due at a particular place should be made at that place. Where no place is fixed, tender must be made to the person. Slingerland v. Morse, 8 Johns. 474; Bates v. Bates, Walk. 401; Littell v. Nichols, Hard. 71; King v. Finch, 60 Ind. 420.

Tender in solvent current bank-bills is good, or in bank check if no objection is made. Polglass v. Oliver, 2 C. & J. 15, 2 Tyrw. 89; Donaldson v. Benton, 4 Dev. & B. Law, 435; Jones v. Millinix, 25 Iowa, 198; Saunders v. Graham, Gow. 111; Cooley v. Weeks, 10 Yerg. 141; Snow v. Perry, 9 Pick. 539, 542; Brown v. Simmons, 44 N. H. 475; Fosdick v. Van Husan, 21 Mich. 567; Wheeler v. Naggs, 8 Ohio, 169; Jennings v. Mendenhall, 7 Ohio St. 257; Jones v. Arthur, 8 Dowl. P. C. 442; Thorp v. Wegefarth, 56 Penn. St. 82.

Tender in gold and silver is legal, whether objected to or not. Thorndike v. U. S. 2 Mas. 1; Shelby v. Boyd, 3 Yeates, 321.

But cannot be made in cents. McLarin v. Nesbit, 2 Nott & McC. 519.

Tender of U. S. Treasury notes, commonly called "greenbacks," is good under the acts of Congress of 1862 and 1863 as to debts contracted both before and after their passage. Bowen v. Clark, 46 Ind. 405; Longworth v. Mitchell, 26 Ohio S. 334; State v. Spicer, 4 Houst. 100; Verges v. Gibboney, 38 Mo. 458; George v. Concord, 45 N. H. 434; People v. Cook, 44 Cal. 638; Murray v. Harrison, 47 Barb. 484; Murray v. Gale, 52 Barb. 427; 5 Abb. Pr.

amount due on the note was $9,843.92, and that on that day he tendered to Smith that sum in United States legal tender Treasury notes, commonly called greenbacks, which Smith refused to receive, and to surrender the note, though he had demanded it. He now brings said legal tender notes into court, and again tenders them, and prays for a delivery of his note and for such other relief as may be proper. He also alleges a prior tender in 1864, but this may be dismissed from further consideration as he offers the amount due in 1868, without reference to the first tender.

To this petition Smith filed a general demurrer.

While this suit was pending the defendant, Smith, brought an action in the same court to **606*]** recover the amount due on *the note, and to this action Dooley answered, referring to his petition in the former case and making his allegation therein, of a tender, his answer in this case, and praying that the two be consolidated, which was ordered by the court. Smith demurred generally to Dooley's answer.

On these pleadings the case was submitted to the court, which ordered both demurrers to be sustained and rendered a judgment for Smith for the amount due, with interest until paid, without regard to the tender. This judgment was affirmed by the court of appeals of Kentucky, to which the present writ of error is directed.

Some attempt is made in argument to show that the court might have rested its judgment on the insufficiency of the amount tendered without regard to the character of the currency offered; but as the petition of plaintiff, Dooley, which is adopted as his answer in the suit of Smith, expressly avers that by reason of payments already made, the sum due on the day of the tender was the precise sum tendered, this fact must be taken as confessed by the demurrer of Smith. As regards the sufficiency of the tender of 1864, it is immaterial, as it was not relied on by the plea.

So, also, the argument that the tender paid into court having been withdrawn before judgment, that fact justified the judgment, is answered by the record, which shows that it was withdrawn by a consent order of the court, which provided that the legal effect of the tender should be the same as it would be if the money remained in court.

If the tender was good its effect was to stop the running of interest, and the judgment of the court gave interest expressly, as though no tender had been made.

In short, it is not possible to examine the record and discover any ground on which the plea of tender by Dooley was held bad on demurrer but the fact that it was made in legal tender notes of the United States.

This court, therefore, has jurisdiction.

The recent decision here, overruling *Hepburn* v. Griswold, 8 Wall. 603, 19 L. ed. 513, *and holding these notes to be a valid [***607** tender in payment of contracts made before the enactment of the legal tender statutes, as well as those made since, decides the case before us on the merits, and dispenses with further argument.

The judgment of the Court of Appeals of Kentucky is reversed and the case remanded, with directions to that court for further proceedings in conformity with this opinion.

Mr. Justice **Field**, dissenting:

The Chief Justice, Mr. Justice **Clifford**, and myself dissent from the judgment of the majority of the court just rendered. The question presented is whether a contract for the payment of dollars made previous to February 25th, 1862, can be satisfied, against the will of the holder, by a tender of United States notes equal in nominal amount to the sum due on the contract. This question depends, of course, for its solution upon the validity and constitutionality of that provision of the act of 1862 which makes these notes a legal tender in payment of debts. We have recently had occasion to express on this subject our views at large, and to them we adhere. We have considered with great deliberation the views of the majority who differ from us and we are unable to yield our assent to them. With all proper deference and respect for our brethren we are constrained to say that, in our judgment, the doctrines advanced in their opinions on this sub-

(N. S.), 236; Metropolitan Bk. v. Van Dyck, 27 N. Y. 400; Knox v. Lee, and Parker v. Davis, *ante*, 287; Black v. Lusk, 69 Ill. 70; Carpenter v. Bank, 39 Vt. 46; Shollenberger v. Brinton, 52 Pa. St. 9; O'Neil v. McKewn, 1 S. C. 147.

But not for state taxes. Lane County v. Oregon, 7 Wall. 71, 19 L. ed. 101; Perry v. Washburn, 20 Cal. 318; but see Haas v. Misner, 1 Idaho T. 203; Rhodes v. O'Farrell, 1 Nev. 60.

Where a contract by its terms is payable in gold or silver, or coined money, a tender in U. S. Treasury notes is not sufficient. The tender must be made in coin. Bronson v. Rodes, 7 Wall. 229, 19 L. ed. 141; Trebilcock v. Wilson, *ante*, 460; Rankin v. Demott, 16 Penn. St. 263; McGoon v. Shirk, 54 Ill. 408, 5 Am. Rep. 122; Independent Ins. Co. v. Thomas, 104 Mass. 192; Vilbac v. Riven, 28 Cal. 410; Bank v. Van Vleck, 49 Barb. 508; Luling v. Atl. Ins. Co. 50 Barb. 520; 51 N. Y. 207; Wright v. Jacobs, 61 Mo. 19.

To make a good tender there must be actual production of the money. Ladd v. Patten, 5 U. S. 1 Cranch. 263; Walker v. Brown, 12 La. Ann. 266; Englander v. Rogers, 41 Cal. 420; Camp v. Simon, 34 Ala. 126; Finch v. Brook, 1 Bing. N. C. 253; Bakeman v. Pooler, 15 Wend. 637; Strong v. Blake, 46 Barb. 228; Steele v. Biggs, 22 Ill. 643; Alexander v. Brown, 1 C. & P. 288.

But if the creditor refuses to receive it, actual production of the money is not necessary. Hazard v. Loring, 10 Cush. 267; Jackson v. Jacob, 3 Bing. N. C. 869; Appleton v. Donaldson, 3 Pa. 381; Douglass v. Patrick, 3 Term. 683; Cornwell v. Haight, 21 N. Y. 462; unless the refusal is made on the ground of a claim of a larger sum. Dunham v. Jackson, 6 Wend. 22, 34; but see Black v. Smith, Peake, 88; Cadman v. Lubbock, 5 Dowl. & R. 289; Rudolph v. Wagner, 36 Ala. 698; Thorne v. Mosher, 20 N. J. Eq. 257.

The tender must be unconditional. If accompanied with a condition that a receipt shall be given, or that the money shall be received in full, it will not be sufficient. Roosevelt v. Bull Head Bank, 45 Barb. 579; Wood v. Hitchcock, 20 Wend. 47; Holton v. Brown, 18 Vt. 224; Thayer v. Brackett, 12 Mass. 450; Sanford v. Bulkley, 30 Conn. 344; Perkins v. Beck, 4 Cranch, C. C. 68; Laing v. Meader, 1 Car. & P. 257; Richardson v. Jackson, 8 M. & W. 298; Clark v. Mayor of N. Y. 1 Keyes, 9; Wood v. Hitchcock, 20 Wend. 47; Draper v. Hitt, 43 Vt. 439; S. C. 5 Am. Rep. 292; Nye v. Chase, 50 Vt. 306.

A tender of part of entire demand is inoperative. Dixon v. Clarke, 5 C. B. 365; 5 Dowl. & L. 155; Helprey v. Chicago R. Co. 29 Iowa, 480; Baker v. Gasque, 3 Strob. 35; Searles v. Sadgrove, 5 El. & B. 639; Tracy v. Strong, 2 Conn. 659; Thetford v. Hubbard, 22 Vt. 440; Boyden v. Moore, 5 Mass. 365.

ject are not only in conflict with the teachings of all the statesmen and jurists of the country up to a recent period, and at variance with the uniform practice of the government for nearly three quarters of a century, but that they tend directly to break down the barriers which separate a government of limited powers from a government resting in the unrestrained will of Congress.

We are, therefore, compelled by every consideration of duty which may be supposed to govern judicial officers on this Bench, to express on all proper occasions our dissent from what we regard as a wide departure from the limitations of the Constitution. Those limita-
608*] tions must be preserved, *or our government will inevitably drift from the system established by our fathers into a vast centralized and consolidated government.

W. S. HUNTINGTON *et al., Plffs. in Err.,*
v.
STATE OF TEXAS;
and
FIRST NATIONAL BANK OF WASHINGTON *et al., Plffs. in Err.,*
v.
SAME.

Reason for advancing causes in which a state is party.

It is sufficient reason for giving preference to cases in which a state is a party, that the money represented by the bonds sued for is part of the school fund, and is very much wanted for the schools.

[Nos. 429, 523.]

Argued Feb. 2, 1872. Decided Feb. 5, 1872.

IN ERROR to the Supreme Court of the District of Columbia.

Motion to advance. The case sufficiently appears in the opinion.

Messrs. R. T. Merrick, Geo. Taylor, and **T. J. Durant,** for defendant in error, in support of motion.

Messrs. W. S. Cox and **J. H. Ashton,** for plaintiffs in error, *contra.*

Mr. C. Cushing for Bank of Washington.

Mr. Chief Justice **Chase** delivered the opinion of the court:

The motion to advance these cases is made under the act giving priority to certain cases in which a state is a party in the courts of the United States. That act provides that it shall be the duty of the court, on sufficient reasons shown, to give causes, in which a state is a party, preference and priority over all other civil causes pending in such court between private parties. The question presented by these cases relates to the right of the state of Texas to certain bonds of the United States, which are said under the decision of this court in *Texas* v. *White,* 7 Wall. 700, 19 L. ed. 227, to belong to the state; and it is stated by the governor of the state that the money represented by the bonds is part of the school fund, and is very much wanted for the schools. This seems to us sufficient reason for advancing the causes.

They will, therefore, be specially assigned for hearing on Monday, the 4th of March, unless the counsel agree upon a different day.

THE TRUSTEES OF JEFFERSON COLLEGE, IN CANONSBURG, IN THE COUNTY OF WASHINGTON, Pa., *Plffs. in Err.,*
v.
WASHINGTON & JEFFERSON COLLEGE;
and
FRANCIS J. COLLIER *et al., Plffs. in Err.,*
v.
SAME.
and
DAVID C. HOUSTON, JOHN JOHNSON *et al., Plffs. in Err.,*
v.
THE TRUSTEES OF JEFFERSON COLLEGE, IN CANONSBURG, IN THE COUNTY OF WASHINGTON, Pa., and Washington & Jefferson College.

(See S. C. *"Pennsylvania College Cases,"* 13 Wall. 190–222.)

Amendment to charter, when does not impair the obligation of the contract—legislative power — supplementary act — contracts of scholarship, alterations in charters.

1. A statute amending a charter of a corporation passed with its assent, and duly accepted by a corporate vote as an amendment to the charter, does not impair the obligation of the contract of the original charter.
2. A provision in a charter that it shall not be altered in any other manner than by an act of the legislature, is equivalent to an express reservation to the state to make any alterations in the charter which the legislature may deem expedient.
3. Where an act uniting two colleges was valid, and the two original corporations became merged in one, neither of the original corporations can thereafter sue for any cause of action.
4. A supplementary act passed to make the first act available is within the provision reserving power to the legislature contained in the original charter.
5. Contracts for scholarships made with the trustees of one of the colleges before the two institutions were united in one corporation, do not vary, change or modify the right of the state reserved in such charter to alter, modify or amend such charter.
6. The existence of such contracts between the corporation and individuals would not inhibit the legislature from altering, modifying or amending the charter of the corporation by virtue of a right reserved to that effect, or with the assent of the corporation.
7. Charters may be altered, modified or amended in all cases where the power to do so is reserved in the charter or in some antecedent general law.

[Nos. 55, 56, 57.]

Argued Jan. 9, 1872. Decided Feb. 12, 1872.

IN ERROR to the Supreme Court of the State of Pennsylvania.

The cases are stated by the court.

They were argued at the same time, by the same counsel.

Messrs. **Geo. W. Woodward,** *James Veech,* **Geo. Shiras, Jr.,** and *Boyd Crumrine,* for the plaintiffs in error. (Abstract of the brief in the case of *Houston et al*):

1. The complainants are holders of valid contracts of scholarship issued by the trustees of Jefferson College, at Canonsburg, in the County of Washington, in the commonwealth of Pennsylvania.

2. The acts of assembly of the state of Penn-

NOTE.—*Constitutionality of law altering charter, as impairing obligation of contracts*—see note, 4 L. ed U. S. 644.

Reserved power to alter, amend or repeal charters—see note, 26 L. ed. U. S. 961.

sylvania, dated respectively Mar. 4, 1865, and Feb. 25, 1869, providing for a change of name, location and management of the college, impair the obligation of said contracts.

The alleged acceptance, by the board of trustees, of the said acts of assembly, is not efficacious to preclude or estop the complainants from complaining of the infringements of their contracts, and from invoking the protection of the Constitution of the United States.

The position contended for by the defendants in error, and sustained below is, that even if the legislation referred to does, in point of fact, overturn or impair the contracts of scholarship, yet the holders of such contracts cannot be heard to complain, because concluded by the act of the trustees of Jefferson college, in accepting the act of 1865. This position is put upon the supposed general right of a private corporation to surrender its franchises; and the case of *Mumma* v. *Potomac Co.* 8 Pet. 281, is relied on as sustaining the doctrine.

The parties to the contract in question are the trustees of Jefferson college, the grantors and the subscribers to the plan of endowment, the grantees named in the several scholarships. Now, it must be a strange state of the law, if one of said parties, the Trustees, can, by a voluntary dissolution, escape from the obligations of their contracts. We are not speaking of dissolution caused by an abandonment of their function, because we suppose it will be conceded by even the defendants in error, that in such a case, successors could and would be appointed to fulfil the duties of the recreant trustees. Nor are we speaking of such a case of dissolution as might occur if proceedings were instituted and carried through, to forfeit corporate franchises for acts of abuse. But the case in hand is that of an attempted dissolution by procuring and accepting an act of assembly dissolving the corporation.

See *Von Hoffman* v. *Quincy*, 4 Wall. 235, 18 L. ed. 403.

But even if the general rule be as claimed, namely: that a private corporation can, by procuring and accepting an act authorizing this dissolution, evade the obligation of its contracts held by third persons; yet, such rule cannot be successfully invoked by the defendants in the present case, because the board of trustees of Jefferson college were not possessed of the power to accept the legislation relied upon. Being merely trustees and not the owners of the college fund, their powers extend to its preservation and proper application, and not to consent to its withdrawal from the existing beneficiaries.

State v. *Adams*, 44 Mo. 570.

The managing board cannot validate any improper change. *Allen* v. *McKeen*, 1 Sumn. 300.

We also may cite in this connection, the provision contained in the 5th section of the original charter, as follows: "And the constitution of the said college herein and hereby declared and established, shall be and remain the inviolable constitution of the said college forever, and the same shall not be altered or alterable by any ordinance or law of the said trustees." By this provision it is plain, the trustees were absolutely disabled from assisting in the destruction of the subject of their trust.

3. The power to alter, reserved to the legislature of Pennsylvania in the 5th section of the act incorporating Jefferson college, does not warrant the exercise of the power of subverting the college, and bestowing its franchise and property upon another corporation.

It is contended that the act of assembly can be sustained as a valid exercise, by the legislature, of the powers reserved in the 5th section of the original charter of 1802.

To this proposition our answer is twofold. We claim first, that the provision cited does not, when properly construed, confer upon or reserve to the legislature the power to revoke and resume the franchises granted by the act of 1802, and to confer them and the property acquired under them upon a new and different corporation; and second, that even if the reserved power be construed as authorizing the legislature to overturn Jefferson college and to bestow its property upon another institution so far as the state and Jefferson college are concerned, yet that that power cannot be constitutionally exercised so as to affect subsisting rights and contracts held by third parties.

That a power to alter the constitution of the college is not a power to revoke and destroy it, would seem too plain for argument. A right to alter is plainly consistent with the perpetual existence of the college.

Allen v. *McKeen*, 1 Sumn. 300; *Sage* v. *Dillard*, 15 B. Mon. 340.

Nor can it be successfully maintained that, because the supreme court of Pennsylvania has held that the reservation in the present case does not confer power to dissolve and destroy the corporation, the Federal court is thereby concluded from looking at the reservation and overruling the decision of the court below if they deem it erroneous. *Butz* v. *Muscatine*, 8 Wall. 575, 19 L. ed. 490.

4. But conceding that the reserved power to alter is equivalent to a power to revoke; that a power to modify is the same thing with a power to terminate and destroy; yet, we contend that while then the exercise of such a reserved power might be valid, as between the college and the state, it would be invalid and unconstitutional so far as third parties holding contracts thereby affected would be concerned. The argument urged, that the holders were bound to know that the legislature might exercise its reserved power, begs the question. It is true that they were bound to know the reserved power of the legislature; but they also had knowledge of the limits of legislative power, and the restraints imposed by the Constitution of the United States for the guaranty and protection of contracts, and that the obligation of contracts was sacred and beyond the reach of legislative action.

R. Co. v. *Veazie*, 39 Me. 381; *Com.* v. *Essex Co.* 13 Gray, 239; *Durfee* v. *R. Co.* 5 Allen, 230.

Messrs. **John A. Wills** and **J. S. Black** for defendants in error.

Mr. Justice **Clifford** delivered the opinion of the court:

Jefferson college was incorporated on the 15th of January, 1802, by the name of the Trustees of Jefferson college in Canonsburg in the County of Washington, for the education of youth in the learned languages and the arts, sciences and useful literature. By the ch[illegible]

it was declared that the trustees should be a body politic and corporate, with perpetual succession, in deed and in law, to all intents and purposes whatsoever, and that the constitution of the college "shall not be altered or alterable by any ordinance or law of the said trustees, nor in any other manner than by an act of the legislature of the commonwealth."

Washington college was incorporated on the **210*]** 28th *of March, 1806, by the name of The Trustees of Washington college for the education of youth in the learned and foreign languages, the useful arts, sciences, and literature, and was located in the town of Washington, seven miles distant from Jefferson college, in the same county.

Experience showed in the progress of events that the interests of both institutions would be promoted in their union, and the friends of both united in a common effort to effect that object. Application was accordingly made to the legislature for that purpose, and on the 4th of March, 1865, the legislature passed the "act to unite the colleges of Jefferson and Washington, in the county of Washington, and to erect the same into one corporation under the name of Washington & Jefferson college." Enough is stated in the preamble of the act to show that the application was made to promote the best interests of both institutions, and that the legislative act which is the subject of complaint was passed at their united request and to sanction the union which their respective trustees had previously agreed to establish. Inconveniences resulted from the provisions contained in the 13th section of the act, which impliedly forbid any change in the sites of the respective colleges, and also provided that the studies of certain classes of the students should be pursued at each of the two institutions, and to that end prescribed certain rules for appropriating to each certain portions of the income derived from the funds of the institution, and the manner in which the same should be expended and applied by the trustees. Such embarrassments increasing, the legislature passed a supplementary act, providing that the several departments of the two colleges should be closely united, and that the united institution should be located as therein prescribed. Measures were also prescribed in the same act for determining the location of the united institution, and it appears that those measures, when carried into effect, resulted in fixing the location at Washington in the county of the same name. Certain parties are dissatisfied with the **211*]** new arrangement, and *it appears that, on the 24th of August, 1869, three bills in equity were filed in the state court, praying that the last-named act of the legislature may be declared null and void as repugnant to the 9th article of the Constitution of the state, and to the 10th section of the 1st article of the Federal Constitution. Different parties complain in each of the several cases, but the subject-matter of the complaint involves substantially the same considerations in all the cases. Those complaining in the first case are the trustees of Jefferson college. Complainants in the second case are certain members of the board of trustees of Washington & Jefferson college, who oppose the provisions of the act of the 26th of February, 1869, and deny that the board of trustees, even by a vote of two thirds of the members, as therein required, can properly remove the college or dispose of the college buildings as therein contemplated. Objections are made by the complainants in the last case to both the before-mentioned acts of the legislature, and they claim the right to ask the interposition of the court, upon the ground that they are owners of certain scholarships in Jefferson college, as more fully set forth in the bill of complainant, and they pray that both of the said acts of assembly may be declared null and void for the same reasons as those set forth in the other two cases.

I. Examination of these cases will be made in the order they appear on the calendar, commencing with the case in which the trustees of Jefferson college are the complainants. They bring their bill of complaint against the two colleges as united, under the first act of assembly passed for that purpose. Service was made and the respondents appeared and pleaded in bar that the complainants, as such trustees, duly accepted the act of assembly creating the union of the two institutions and that, having accepted the same, they, as a corporation, became dissolved and ceased to exist, and have no authority to maintain their bill of complaint. Apart from the plea in bar they also filed an answer, but as the whole issue is presented in the plea in bar it will not be necessary to enter into those details. Opposed to that plea *is the replication of the com- [***212** plainants, in which they deny the allegation that they, as a corporation, became dissolved, or that they ceased to exist as alleged in the plea in bar, and renew their prayer for relief. Both parties were heard, and the supreme court of the state entered a decree for the respondents, dismissing the bill of complaint. Decrees for the respondents were also entered in the other two cases, and the respective complainants sued out writs of error under the 25th section of the judiciary act, and removed the respective causes into this court for re-examination.

Whether the act of assembly in question in this case is or is not repugnant to the Constitution of the state is conclusively settled against the complainants by the decision in this very case, and the question is not one open to re-examination in this court, as it is not one of Federal cognizance in a case brought here by a writ of error to a state court. Nothing, therefore, remains to be examined but the second question presented in the pleadings, which is, whether the supplementary act of assembly uniting the two institutions and providing that there should be but one location of the same for any purpose, impairs the obligation of the contract between the state and the corporation of Jefferson college, as created by the original charter; or, in other words, whether it is repugnant to the 10th section of the 1st article of the Federal Constitution.

Corporate franchises granted to private corporations, if duly accepted by the corporators, partake of the nature of legal estates, as the grant under such circumstances becomes a contract within the protection of that clause of the Constitution which ordains that no state shall pass any law impairing the obligation of con-

tracts. *Dartmouth Coll.* v. *Woodward*, 4 Wheat. 700. Charters of private corporations are regarded as executed contracts between the government and the corporators, and the rule is well settled that the legislature cannot repeal, **213***] impair, or alter such a *charter against the consent or without the default of the corporation judicially ascertained and declared. *Fletcher* v. *Peck*, 6 Cranch, 136; *Terrett* v. *Taylor*, 9 Cranch, 51. Of course these remarks apply only to acts of incorporation which do not contain any reservations or provisions annexing conditions to the charter modifying and limiting the nature of the contract. Cases often arise where the legislature, in granting an act of incorporation for a private purpose, either make the duration of the charter conditional, or reserve to the state the power to alter, modify, or repeal the same at pleasure. Where such a provision is incorporated in the charter, it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power cannot be regarded as an act within the prohibition of the Constitution. Such a power also, that is, the power to alter, modify or repeal an act of incorporation, is frequently reserved to the state by a general law applicable to all acts of incorporation, or to certain classes of the same, as the case may be, in which case it is equally clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition nor any allusion to such a reservation. *Dartmouth Coll.* v. *Woodward*, 4 Wheat. 708; *Gen. Hosp.* v. *Ins. Co.* 4 Gray, 227; *Suydam* v. *Moore*, 8 Barb. 358; Ang. & Ames, Corp. (9th ed.) § 767, p. 787. Reservations in such a charter, it is admitted, may be made, and it is also conceded that where they exist the exercise of the power reserved by a subsequent legislature does not impair the obligation of the contract created by the original act of incorporation. Subsequent legislation altering or modifying the provisions of such a charter, where there is no such reservation, is certainly unauthorized if it is prejudicial to the rights of the corporators, and was passed without their assent, but the converse of the proposition is also true, that if the new provisions altering and modifying the charter were passed with the assent of the cor- **214***] poration and they were duly accepted *by a corporate vote as amendments to the original charter, they cannot be regarded as impairing the obligation of the contract created by the original charter. *Mumma* v. *Potomac Co.* 8 Pet. 286; *Dartmouth Coll.* v. *Woodward*, 4 Wheat. 712; *Slee* v. *Bloom*, 19 Johns. 474; *Riddle* v. *Locks and Can.* 7 Mass. 185; *McLaren* v. *Pennington*, 1 Paige, Ch. 107; *Lincoln & Ken. Bk.* v. *Richardson*, 1 Me. 79; *Monongahela Nav. Co.* v. *Coon*, 6 Pa. St. 379; *Com.* v. *Cullen*, 13 Pa. St. 133; *Sprague* v. *Ill. Riv. R. Co.* 19 Ill. 174; *Joy* v. *Jackson Co.* 11 Mich. 155. Private charters, or such as are granted for the private benefit of the corporators, are held to be contracts because they are based for their consideration on the liabilities and duties which the corporators assume by accepting the terms therein specified, and the grant of the franchise on that account can no more be resumed by the legislature or its benefits diminished or impaired without the assent of the corporators than any other grant of property or legal estate, unless the right to do so is reserved in the act of incorporation or in some general law of the state which was in operation at the time the charter was granted. Cool. Const. Lim. 279; *Binghamton Bridge Case*, 3 Wall. 51, 18 L. ed. 137; *Piqua Bank* v. *Knoop*, 16 How. 369; *Vincennes Univ.* v. *Indiana*, 14 How. 268; *Planters' Bk.* v. *Sharp*, 6 How. 301.

Apply those principles to the case under consideration, and it is quite clear that the decision of the state court was correct, as the 5th section of the charter, by necessary implication, reserves to the state the power to alter, modify or amend the charter without any prescribed limitation. Provision is there made that the constitution of the college shall not be altered or alterable by any ordinance of law of the trustees, "nor in any other manner than by an act of the legislature of the commonwealth," which is in all respects equivalent to an express reservation to the state to make any alterations in the charter which the legislature in its wisdom may deem fit, just, and expedient to enact, and the donors of the institution are as much bound by that provision as the trustees. *R.* v. *Dudley*, 14 N. Y. 354; *Plank Road* v. *Thatcher*, 11 N. Y. 102.

*Suppose, however, the fact were oth- [***215** erwise, still the respondents must prevail, as it is admitted that the complainants accepted the act passed to unite the two colleges and to erect the same into one corporation, which supports to every intent the respondents' plea in bar and utterly disproves the allegations of the complainants' replication denying that the complainant corporation was dissolved before their bill of complaint was filed. Doubts have often been expressed whether a private corporation can be dissolved by the surrender of its corporate franchise into the hands of the government, but the question presented in this case is not of that character, as the act of the legislature uniting the two colleges did not contemplate that either college as an institution of learning should cease to exist, or that the funds of either should be devoted to any other use than that described in the original charters. All that was contemplated by the act in question was that the two institutions should be united in one corporation, as requested by the friends and patrons of both, that they might secure greater patronage and be able to extend their usefulness and carry out more effectually the great end and aim of their creation. Authorized as the act of the legislature was by the reservation contained in the original charter, and sanctioned as the act was by having been adopted by the corporators, it is clear to a demonstration that the act uniting the two colleges was a valid act, and that the two original corporations became merged in the one corporation created by the amendatory and enabling act passed for that purpose, and that neither of the original corporations is competent to sue for any cause of action subsequent in date to their acceptance of the new act of incorporation. *Revere* v. *Copper Co.* 15 Pick. 351; *Atty. Gen.* v. *Clergy Soc.* 10 Rich. Eq. 604.

II. Sufficient has already been remarked to show that the case of the dissenting trustees of the new corporation, which is the second case, is governed by the same principles as the preceding case. They admit that the act of the 216*] legislature uniting the two colleges in one corporation was duly accepted by the original corporators, and they also admit in effect that it is a valid law. Express provision was therein made that the two colleges should be united in one corporation by the name of Washington & Jefferson college, and that the new corporation should possess and enjoy all the capacities, powers, privileges, immunities, and franchises which were possessed and enjoyed by the original institutions and the trustees thereof "with such enlargements and subject to such changes therein as are made by this act." Accepted as that act was by the trustees of the original institutions, they not only ratified the reservation contained in the 5th section of the charter of Jefferson college, but they in express terms adopted the changes made in the amended charter uniting the two institutions in one corporation.

Viewed in the light of these suggestions, the present case stands just as it would if the reservation contained in the original charter had been in terms incorporated into the new charter uniting the two institutions into one corporation, which the complainants in this case admit is a valid act of the legislature. Such an admission, however, is not necessary to establish that fact, as the act was passed by the assent of the two corporations and in pursuance of the reserved power to that effect contained in the original charter of the corporation to which the complaining corporators in the preceding case belonged. Grant that the power existed in the legislature to pass the act uniting the two institutions, and it follows that the supplementary act which was passed to render the first act practically available, is also a rightful exercise of legislative authority, as it is clear that substantially the same reservation is contained in the act providing for the union of the two institutions as that contained in the original charter by virtue of which the act was passed uniting the two institutions in one corporation. *Bailey* v. *Hollister*, 26 N. Y. 112; *Sherman* v. *Smith*, 1 Black, 587, 17 L. ed. 163. Tested by these considerations, the court 217*] here is of the opinion that *the decision of the state court in the second case is also correct.

III. Plans of various kinds were devised by the trustees of Jefferson college and put in operation for the endowment of the institution and, among others, was the plan of establishing what was called scholarships, whereby a contributor on payment of $25 became entitled to tuition for one person for a prescribed period, called a right to a single scholarship or, on payment of $50, to a family scholarship or, on payment of $100, to tuition for three years; or, on payment of $400, to a perpetual scholarship, to be designated by whatever name the contributor might select. Contracts of the kind were outstanding at the respective times when each of the two acts of the legislature in question was passed, and the complainants in the third case are owners of such

corporation do not vary or in any manner change or modify the relation between the state and the corporation in respect to the right of the state to alter, modify, or amend 219*] such a charter, *as the power to pass such laws depends upon the assent of the corporation or upon some reservation made at the time, as evidenced by some pre-existing general law or by an express provision incorporated into the charter. Cases arise, undoubtedly, where a court of equity will enjoin a corporation not to proceed under an amendment to their charter passed by their assent, as where the effect would be to enable the corporation to violate their contracts with third persons, but no such question is here presented for the decision of this court, nor can it ever be under a writ of error to a state court. Questions of that kind are addressed very largely to the judicial discretion of the court, and create the necessity for inquiry into the facts of the case and for an examination into all the surrounding circumstances. *Hascall* v. *Madison Univ.* 8 Barb. 174. Beyond doubt such a question may be presented in the circuit court in the exercise of its jurisdiction, concurrent with the state courts, but it is clear that such a question can never be brought here for re-examination by a writ of error to a state court, as such a writ only removes into this court the questions, or some one of the questions, described in the 25th section of the judiciary act. *Ward* v. *Soc. Attys.* 1 Coll. Ch. 377. Considerations of that kind must, therefore, be dismissed, as the only question presented for decision is whether the acts of the legislature mentioned in the bill of complaint impair the obligation of the contracts for scholarship made by the complainants with the trustees of Jefferson college.

Decided cases are referred to in which it is held that the trustees of such an institution, where the terms of the charter amount to a contract and the charter contains no reservation of a right to alter, modify or amend it, cannot consent to any change in the charter made by the legislature, which contemplates a diversion of the funds of the institution to any other purpose than that described and declared in the original charter. All or nearly all of such decisions are based on a state of facts where an at-220*] tempt was made to take *the control of such an institution from one religious sect or denomination and to give the control of it to another and a different sect or denomination, in violation of the intent and purpose of the original donors of the institution. *State* v. *Adams*, 44 Mo. 570. Questions of that kind, however, are not involved in the present record, nor do the court intend to express any opinion in respect to such a controversy. Charters of the kind may certainly be altered, modified, or amended in all cases where the power to pass such laws is reserved in the charter or in some antecedent general law, nor can it be doubted that the assent of the corporation is sufficient to render such legislation valid, unless it appears that the new legislation will have the effect to change the control of the institution, or to divert the fund of the donors to some new use inconsistent with the intent and purpose for which the endowment was originally made. *Pa. R. Co.* v. *Canal Comr's.* 21 Pa. St. 22. Consent of the corporation, it is conceded, is sufficient to warrant alteration, modification, and amendments in the charters of moneyed, business, and commercial corporations, and it is not perceived that the question presented in this record stands upon any different footing from such as arise out of legislation of that character, as the principal objection to the legislation in question is that the removal of Jefferson college to the newly selected location exposes the complainants, as owners of the scholarships, to increased expense and to additional inconvenience. *Allen* v. *McKeen*, 1 Sumn. 299. They do not pretend that the effect of the new legislation will be to lessen the influence and usefulness of the college, or to divert the funds to a different purpose from that which was intended by the donors, nor that it will have the effect to change the character of the institution from the original purpose and design of its founders. Pretenses of the kind, if set up, could not be supported, as the whole record shows that the two acts of assembly were passed at the earnest solicitation of the patrons of the two institutions as well as at the request of the respective boards of trustees.

*Even suppose that the consent of the [*221 corporation is no answer to the objections of the complainants, still the decree of the state court must be affirmed, as it is clear that the reservation in the charter fully warranted the legislature in passing both the acts which are the subject of complaint. *People* v. *Manhattan Co.* 9 Wend. 351; *Roxbury* v. *R. Co.* 6 Cush. 424; *White* v. *R. Co.* 14 Barb. 559. Suggestion may be made that the reservation even in the original charter is not expressed in direct terms, but the terms are the same as those employed in the charter which was the subject of judicial examination in the case of *Com.* v. *Bonsall*, 3 Whart. 566, which was decided more than thirty years ago by the supreme court of the state. Provision was made in the charter in that case that the constitution of a certain public school should not be altered or alterable by any laws of the trustees, or in any other manner than by an act of the legislature of this state. When incorporated the charter of the school provided that the trustees should be chosen by such persons as had contributed or should contribute to the amount of forty shillings for the purposes of the corporation. Pursuant to the petition of the trustees the legislature passed an act which repealed that clause of the charter, and provided that all the citizens residing within the limits of the township should be entitled to vote at all such elections, and the supreme court of the state held unanimously that the act of assembly was a valid act, even though it was not accepted by the corporation. Reference is made to that case to show that the clause in the charter of Jefferson college, called the reservation, furnished complete authority to alter, modify, or amend the charter, and certainly it must be conceded that that case is a decisive authority to that point. *State* v. *Miller*, 31 N. J. (Law) 521; *Story* v. *Jersey City*, 16 N. J. 13.

Controlled by these reasons, the court is of the opinion that the act uniting the two colleges in one corporation was a valid act even as against the complainants in the third case.

*They complain also of the supple- [*222 mentary act, but they hardly contend that the legislature, in passing the act to unite the two institutions, parted with any power which was reserved in the original charter of Jefferson college to enact any proper law to alter, modify or amend the act providing for that union. Extended argument upon that topic does not seem to be necessary, as there is not a word in the act which favors such a construction or which gives such a theory the slightest support. Proper care was taken by the legislature to protect the rights of these complainants by incorporating into the act uniting the two colleges, a provision that the new corporation should discharge and perform those liabilities without diminution or abatement. Such contracts were made with the trustees, and not with the state. and it is a mistake to suppose that the existence of such a contract between the corporation and an individual would inhibit the legislature from altering, modifying, or amending the charter of the corporation by virtue of a right reserved to that effect, or with the assent of the corporation, if, in view of all the circumstances, the legislature should see fit to exercise that power.

The decree in each case is affirmed.

1*] *PINCKNEY C. BETHELL, *Plff. in Err.*,
v.
EDWARD MATHEWS.

(See S. C. 13 Wall. 1-3.)

Party cannot object to rulings in his own favor—insufficient statement of facts.

1. A plaintiff in error cannot take advantage of rulings upon exceptions in his own favor, even if erroneous.
2. A statement of facts signed by counsel cannot be noticed upon error.

[No. 97.]

Argued Feb. 7, 1872. Decided Feb. 12, 1872.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

This suit was commenced in one of the state courts of Louisiana in the city of New Orleans by the plaintiff in error, a citizen of Louisiana, against the defendant, Edward Mathews, a citizen of New York.

The defendant, on first entering his appearance in the state court, petitioned to have the cause transferred, under the 12th section of the judiciary act of 1789, to the circuit court of the United States for the district in which the state court was held.

The proper formalities having been complied with, the cause was transferred.

The petition filed by the plaintiff in error claimed from the defendant $10,000 with interest, being the aggregate amount of two promissory notes for $5,000 each, drawn by John S. Chambliss, of Wilkinson county, Miss., the one dated New Orleans, Jan. 26, 1861, payable Nov. 1, 1861, to the order of, and indorsed by, Brander & Hubbard; the other dated Port Gibson, Miss., Oct. 4, 1861, payable six months after date to his own order, and indorsed by said Chambliss, Brander & Hubbard, in liquidation, and Brander, Chambliss, & Co.

June 24, 1868, the case came up for trial, and, after hearing evidence and argument, the court gave judgment against the defendant for the sum of $5,000, with interest from Nov. 1, 1861, and judgment in his favor on the notes for $5,000 dated Oct. 4, 1861, payable six months after date.

But this was set aside and a new trial ordered.

By written agreement between the parties, trial by jury was waived and the case tried by the court alone.

After hearing evidence and argument, the court gave judgment in favor of the defendant in full.

From this judgment the case has been brought by writ of error by the plaintiff to this court. A paper purporting to be a statement of facts, is found copied into the record.

There are in the record six bills of exception, taken in the progress of the cause, all by defendant below and defendant in error here.

Messrs. **Miles Taylor** and *Charles N. Morse* for plaintiff in error.

Mr. **Thomas J. Durant** for defendant in error.

Mr. Chief Justice **Chase** delivered the opinion of the court:

This was a suit to recover the amount of two promissory notes, and a written stipulation signed by the parties was filed, waiving a jury and submitting the cause for trial by the court.

The record shows six bills of exceptions, all by the defendant, to testimony offered by the plaintiff, and all overruled. There is also a statement of facts filed on the 10th of June, 1870, and signed by the attorneys of the parties. The judgment had been rendered on the 2d of May preceding.

It has been often decided that a plaintiff in error cannot take advantage of rulings upon exceptions in his own favor, even if erroneous. Nor can a statement of facts signed by *counsel be noticed upon error. *Generes* v. [*3 *Bonnemer*, 7 Wall. 564, 19 L. ed. 227; *Avendano* v. *Gay*, 8 Wall. 376, 19 L. ed. 422; *Kearney* v. *Case*, *ante*, 395. In this case, then, not only was the statement so signed, but it does not appear to have been made and filed until after the judgment.

There is, therefore, no error in the record, or none of which we can take notice.

The judgment of the Circuit Court for the District of Louisiana must be affirmed.

THE NORWICH & NEW YORK TRANSPORTATION CO., *Plff. in Err.*,
v.
JOHN FLINT.

(See S. C. 13 Wall. 3-6.)

Evidence proper in action for personal injury.

A passenger, injured during a *mêlée* on a steamboat, may, in an action for the injury, give evidence to show the manner in which the officers attended to their duty while the disturbance was going on, and that notice of its progress was communicated, the time that it continued, and the degree of alarm it was calculated to excite.

[No. 90.]

Argued Jan. 30, 1872. Decided Feb. 12, 1872.

IN ERROR to the Circuit Court of the United States for the District of Connecticut.

The case is stated by the court.

Messrs. **J. Halsey** and *L. F. S. Foster*, for plaintiff in error:

The evidence was inadmissible for the purpose of proving the state of affairs on deck prior to and at the time the plaintiff received his injuries.

1. As evidence of truth of the words spoken, it was mere hearsay.

2. It was not spoken in the presence and hearing of any officer of the boat. It was *res inter alios acta.*

3. It was not addresed to any agent or officer of the defendant.

4. It was no part of the *res gestæ.*

5. The declarations were not admissible as part of the transaction. What is the transaction but a description of the person who said the words, and the person to whom they were addressed?

The transaction, in and of itself, was nothing. The great danger would be, that if the declarations were allowed to go to the jury, and counsel were allowed to comment upon them as evidence of the condition of affairs on deck, the jury would regard it the same as the sworn evidence of an eye-witness.

In the conflicting claims of the parties as to the true character of the disturbance among the soldiers, those declarations might have a controlling influence on the mind of the jurors, and the issue thus be found upon testimony not under oath, and from witnesses whom the defendants had no opportunity to cross-examine.

Messrs. R. H. Dana and *Child & Powers* for defendant in error.

Mr. Justice **Bradley** delivered the opinion of the court:

The defendant in error, who was plaintiff below, brought an action on the case against the plaintiff in error, to recover damages for an injury received by him in June, 1864, while a passenger on their steamboat running from New London to New York. The plaintiff, with 4*] other *passengers from Boston, went on board of the boat at New London at about 11 o'clock in the evening. A detachment of United States soldiers, about sixty in number were on board and were behaving in a disorderly and riotous manner, having overpowered their sentries and rushed to the after deck set apart for passengers. A portion of the detachment which had been assigned as a guard over the rest were armed, and in the *mêlée* a musket was thrown upon the deck and discharged, and the ball entered the plaintiff's foot, injuring him severely. His action is based on a charge of negligence on the part of the defendants, in not providing against and quelling the disturbance. At the trial of the cause, after considerable evidence had been adduced, tending to show the transaction which occurred on the boat at the time of the injury, the plaintiff offered in evidence and the court received testimony of certain passengers, who testified that after they had gone down to the dining saloon and were at the table, a man in military uniform, whom they supposed, from the stripes on his arm, to be a sergeant, came into the saloon and saluted an officer in uniform, whom they supposed to be a lieutenant, and who was sitting at the table with another officer, whom, from his uniform, they supposed to belong to the navy, and said to him: "There is a row on deck and I cannot suppress it;" that the officer addressed, replied: "Mind your orders;" that the sergeant said: "I am afraid that some one will be hurt;" that the officer replied: "You have your orders; mind your orders." The sergeant then retired, and after a few minutes came down again into the saloon hurriedly, very soon after the report of a gun had been heard, and said to the officer: "For God's sake, come up; a man has been shot." This testimony was offered for the purpose of proving the condition of affairs on the deck; the extent and character of the disturbance; the condition and situation of the officers and soldiers on board; and the manner in which they discharged their duties prior to and at the time when the plaintiff received his injury; the time the disturbance continued and the failure of the officers of the soldiers to repress the disorder, it being admitted that no *other persons on board were directly [*5 charged with the care of preserving order among them.

The admission of this evidence is the only error relied on.

It is hardly necessary for us to enter into a lengthy discussion on the admissibility of the testimony in question. The opinion of the circuit court which has been laid before us, is sufficiently full on the subject, and need not be repeated. We have no hesitation in regarding the incident testified to as part of the *res gestæ*, and as entirely competent for the purposes for which it was offered. The statements of the sergeant were not offered in evidence for the purpose of proving the facts stated by him, but the whole incident (including those statements) was adduced in evidence for the purpose of showing the manner in which the officers attended to their duty whilst the disturbance was going on; the fact that notice of its progress was communicated; the time that it continued, and the degree of alarm it was calculated to excite in such a person as the sergeant appeared to be. These were substantially the purposes for which the evidence was professedly offered, and for these purposes, as part of the *res gestæ*, it was clearly competent.

Judgment affirmed.

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*GEORGE J. PUMPELLY, *Plff. in Err.*, [*166

v.

GREEN BAY & MISSISSIPPI CANAL COMPANY.

(See S. C. 13 Wall. 166–182.)

Plea of statute authority, what must contain—when insufficient—private property taken for public use, compensation for—what is a taking for such purpose—overflowed lands—public lands sold to purchaser.

*1. Where a plea relies on a statute authority as a defense, it must allege the facts which it asserts to be so authorized, and cannot plead generally that it complied with the statute. Hence, a plea is

*Headnotes by Mr. Justice MILLER.

NOTE.—*Eminent domain; payment for private property taken for public use generally recognized; Fifth Amendment to U. S. Constitution applies only to Federal government, and not to states*—see note to Withers v. Buckley, 15 L. ed. U. S. 816.

bad which states that defendant raised the water in a lake no higher than the statute authorized, when the state forbade the water being raised above its ordinary level.

2. As the declaration charged defendant with overflowing plaintiff's land by raising the water in the lake, the plea, containing neither denial nor authority for doing so, is bad.

3. By the general law of European nations and the common law of England, it was a qualification of the right of eminent domain, that compensation should be made for private property taken or sacrificed for public use.

4. And the constitutional provision of the United States, and of the several states which declare that private property shall not be taken for public use without just compensation, were intended to establish this principle beyond legislative control.

5. It is not necessary that property should be absolutely taken, in the narrowest sense of the word, to bring the case within the protection of this constitutional provision; but there may be such serious interruption to the common and necessary use of property as will be equivalent to taking, within the meaning of the statute.

6. The backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand or other material, or artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as, by the constitutional provisions, demands compensation.

7. This proposition is sustained by the decision of the supreme court of Wisconsin, construing the provision of the constitution of that state on the subject, and by many other adjudged cases in this country.

8. The cases which hold that remote and consequential injury to private property by reason of authorized public improvements, is not taking such property for public use, have many of them, gone to the utmost limit of that principle, and some beyond it, although the principle is a sound one, in its proper application to many injuries so originating.

9. Lands sold by the United States, with no reservation, although bordering on a navigable stream, are as much within the protection of the constitutional principle awarding compensation as other private property.

[No. 45.]

Argued Dec. 20, 1871. Decided Feb. 19, 1872.

IN ERROR to the Circuit Court of the United States for the District of Wisconsin.

The case is stated by the court.

Messrs. **J. M. Gillet** and *David Taylor*, for plaintiff in error:

If the second plea be construed to mean simply that the defendant has succeeded, by the acts of the legislature of the state of Wisconsin of Aug. 8, 1858, July 6, 1853, and Apr. 13, 1861, and the acts amendatory thereof, and by agreement between the board of public works and the said Reed and Doty, to the rights and powers conferred upon said Reed and his associates by the act of the territorial legislature of Mar. 10, 1848, then the plea is bad, for the reason that it admits, by not denying that the dam built by the said Reed and Doty, and which the defendant now claims to own and hold by purchase from them, is and was so built as to raise the water of Lake Winnebago above its ordinary level, which is the very act complained of by the plaintiff.

If it is said by counsel for the defendant that the proviso in the act of Mar. 10, 1848 is void, as repugnant to the grant of the right to raise a dam seven feet high, above ordinary high-water mark, and as repugnant to and destructive of the whole subject sought by the grant, we reply that this does not appear from the plea itself, and the defendant cannot sustain his plea by alleging matters that are not set forth therein.

The plaintiff insists that the legislature of the state of Wisconsin has no power to confer upon a corporation organized to construct a public highway, which is to be managed and controlled by the corporators for their own benefit the right to permanently appropriate private property without first making just compensation therefor; and if any such corporation attempts to do so, it becomes a trespasser, and may be proceeded against as such.

Robbins v. *R. Co.* 6 Wis. 636; *Shepardson* v. *R. Co.* 6 Wis. 605; *Powers* v. *Bears*, 12 Wis. 213; *Davis* v. *R. Co.* 12 Wis. 16; *Pettibone* v. *R. Co.* 14 Wis. 443; *Ford* v. *R. Co.* 14 Wis. 609; *Loop* v. *Chamberlain*, 17 Wis. 504 and 20 Wis. 135; *Carpenter* v. *R. Co.* 24 N. Y. 655; *Wager* v. *R. Co.* 25 N. Y. 526; *Stacey* v. *R. Co.* 27 Vt. 39; *Cushman* v. *Smith*, 34 Me. 247.

If the defendant in this action is clothed with all the rights conferred upon the board of public works, that law having provided no mode by which the owner can compel the appraisement of damages, or the payment of compensation, it is in that respect repugnant to the Constitution of the state of Wisconsin, and void.

Norton v. *Peck*, 3 Wis. 714; *Shepardson* v. *R. Co.* 6 Wis. 605; *Powers* v. *Bears*, 12 Wis. 213; *Pratt* v. *Brown*, 3 Wis. 603.

It cannot be answered that the flooding of the private land of an individual by reason of raising the waters of a public stream, so that the same overflows its banks and floods the land permanently is not a taking for public use within the meaning of the constitutional prohibition. We insist that such an occupation by flooding is as much a taking, within the prohibitory clause, as though the land itself was taken for the purpose of making lots, canals or dams, necessary for the convenient construction of the works of improvement.

Ang. Water-Courses, § 465; see *Hooker* v. *N. Hav. & N. Co.* 14 Conn. 146; *Canal Appraisers* v. *People*, 17 Wend. 604.

The supreme court of the state of Wisconsin, in *Newcomb* v. *Smith*, 1 Chand. 71, seems to take it for granted, that the flooding of lands by reason of erecting mill-dams, is a taking of private property within the meaning of the prohibitory clause of the Constitution of the state of Wisconsin.

See *Pratt* v. *Brown*, 3 Wis. 613; *Fisher* v. *Horicon Iron & Mfg. Co.* 10 Wis. 353; *Newell* v. *Smith*, 15 Wis. 104.

Messrs. Breese J. Stevens and **H. L. Palmer**, for defendant in error:

The lands of individuals bounded on this public navigable river and on the lakes through which it runs and which form a part of it, were granted to those individuals, or those under whom they claim, by the state or national government, but neither the state nor the government thereby devested itself of the right and power of improving the navigation of the river; for such grants are to be construed most favorably for the public and against the grantee; and the public, being the owner of this river, has an unquestionable right to improve the navigation of it without any liability for remote and consequential damages to individuals.

Hollister v. *Union Co.* 9 Conn. 436; *Lansing* v. *Smith*, 8 Cow. 146.

Everyone who buys property on a navigable

stream, purchases subject to the superior rights of the commonwealth to regulate and improve it for the benefit of all its citizens.

McKeen v. *Can. Co.* 49 Pa. 424.

See, also, *Nav. Co.* v. *Coons*, 6 Watts & S. 101; *Can. Co.* v. *Wright*, 9 Watts & S. 9; case of *Phila. & Tren. R. Co.* 6 Whart. 25; *Henry* v. *Bridge Co.* 8 Watts & S. 85; *Monongahela Nav. Co.* v. *Coon*, 6 Pa. 379; *Mifflin* v. *R. Co.* 16 Pa. 182; *R. Co.* v. *Young*, 33 Pa. 175; *Monongahela Bridge Co.* v. *Kirk*, 46 Pa. 112; *Watson* v. *P. & C. R. Co.* 37 Pa. 469; *Shrunk* v. *Schuylkill Nav. Co.* 14 Serg. & R. 71.

These cases from Pennsylvania, we think, are approved and followed by this court in *Rundle* v. *Canal Co.* 14 How. 80; *Canal Appraisers* v. *People*, 17 Wend. 571; see, also, *People* v. *Canal Appraisers*, 33 N. Y. 461; *Bellinger* v. *R. Co.* 23 N. Y. 42; *Fitchburg R. Co.* v. *B. & M. R. Co.* 3 Cush. 58; *Commis. of Homochitto Riv.* v. *Withers*, 29 Miss. 21; *Hanson* v. *Lafayette*, 18 La. 295; *Natchitoches* v. *Coc*, 3 Mart. La. (N. S.) 140; *Alexander* v. *Milwaukee*, 16 Wis. 247; *Bailey* v. *R. Co.* 4 Harr. (Del.) 389; Sedg. Dam. 3d ed. 113.

It seems to us clear from the authorities cited, that the state may, in the interest of the public, erect such works as may be deemed expedient for the purpose of improving the navigation and increasing the usefulness of a navigable river, without rendering itself liable to individuals owning land bordering on such river, for injuries to their lands resulting from their overflow by reason of such improvements.

The state may employ such agency as it may choose for improving a navigable river, and the agent acting within the scope of the authority conferred by the state, stands in the place of the state, and is subject to no greater liability. In this case, whatever has been done by way of improving the Fox river, whatever has been done by way of erecting and maintaining the dam in question, has been done by the state itself, or by its express authority. The state had charge of the work from 1848 to 1853; the Fox & Wisconsin Improvement Company from 1853 to 1866, and the Green Bay & Mississippi Canal Company, from 1866 until the present time. The dam in question was commenced by Reed and Doty, and was completed in or prior to 1852, by the state, and was erected and has been maintained at no greater height than was authorized by the state. No liability, therefore, attaches to the defendants for the alleged injury to the plaintiff's lands. His lands were not taken or appropriated. They are situated at a great distance from the dam, and are only affected by the overflow occasioned by the raising of the water in Lake Winnebago. Whatever may be the extent of this injury, it is remote and consequential and without remedy.

Mr. Justice **Miller** delivered the opinion of the court:

This is an action of trespass on the case, brought by plaintiff in error in the circuit court for the district of Wisconsin, charging the defendant with overflowing 640 acres of plaintiff's land, by means of a dam erected across the Fox river, the outlet of Lake Winnebago, by which the waters of the lake were raised so high as to do the damage complained of.

To this declaration the defendant filed six pleas. They were all withdrawn but the second, fourth and sixth, and on these judgment was entered for defendant on demurrer, and that judgment we are now to review.

The second plea, the most important, is technically liable to the objection that it relies on two substantially different grounds of defense, but as the demurrer was general, and *not special, and as the part of it which [*175 sets up the first of these defenses may be treated as mere inducement to the other, we will consider whether there is found in the plea any sufficient defense to the cause of action set out in the declaration.

The first part of this plea gives, *in hæc verba*, a statute of the territorial legislature of Wisconsin, approved March 10, 1848, by which Curtis Reed and his associates were authorized to construct a dam across the northern outlet of Winnebago lake, to enable them to use the waters of the river for hydraulic purposes.

The 2d section enacted that the dam should not exceed seven feet in height above high-water mark of said river, and should not raise the water in Lake Winnebago above its ordinary level, and that Reed and his associates should be subject to and entitled to all the benefits and provisions of the act of January, 1840, regulating mills and mill-dams.

The plea then avers that Reed and his associate, Doty, commenced the building of this dam and that, by certain legislation of the state of Wisconsin, it was afterwards adopted, as part of the system of improving the navigation of the Fox river, and became the property of defendants. It is alleged, also, that the dam, when so completed, was built in conformity to the act of 1848, and to a height no greater than that authorized by that statute.

This part of the plea is clearly designed to present this defense, that the dam was authorized by statute and built in conformity to the specific requirements of the act, so that the defendants are not liable for exceeding the authority which it conferred, and that for any injury to the plaintiff's property arising from this lawful erection of the dam his only remedy was the one provided in the act referred to, concerning mills and mill-dams. As this enacted that persons whose lands were overflowed might obtain compensation upon complaint before the district court of the county where the land lay, and that no action at common-law should be sustained for such damages, except as provided in the act; if the remainder of the plea is good, it is a defense to the present suit. But this part of the plea is defective in this. It is contended by the counsel for the defendants that the 2d section of the act authorizes them to build their dam seven feet above high-water mark of the river at all events, and that the restriction that the water of the lake shall not be raised above its ordinary level is only applicable to such raising, if the dam should exceed the first limitation; while the counsel for the plaintiff asserts that both limitations were effectual, and that if the dam raised the water in the lake above its ordinary level the law was violated, though it may not have reached the seven feet above high water of the river.

It will be seen that the plea, in averring that the dam, when completed, was no higher than the statute authorized, pleads a conclusion of law, and does not state the facts on which the court can construe the law for itself and ascertain if the fact pleaded is a good defense. This is bad pleading. It is also liable to the objection that it does not either deny the allegation of the declaration, that the dam raised the water in Winnebago lake so as to overflow the 176*] plaintiff's land, *nor admit that allegation and aver that they were authorized to do so by the statute. But, as we are of the opinion that the statute did not authorize the erection of a dam which would raise the water of the lake above the ordinary level, and as the plea does not deny that the dam of the defendant did so raise the water of the lake we must hold that, so far as the plea relies on this statute as a defense, it is fatally defective.

But this same plea further alleges that the legislature of Wisconsin, after it became a state, projected a system of improving the navigation of the Fox and Wisconsin rivers, which adopted the dam of Reed and Doty, then in process of construction, as part of that system; and that, under that act, a board of public works was established, which made such arrangements with Reed and Doty that they continued and completed the dam; and that, by subsequent legislation, changing the organization under which the work was carried on, the defendants finally became the owners of the dam, with such powers concerning the improvement of the navigation of the river as the legislature could confer in that regard. But it does not appear that any statute made provision for compensation to the plaintiff or those similarly injured, for damages to their lands. So that the plea, as thus considered, presents substantially the defense that the state of Wisconsin, having, in the progress of its system of improving the navigation of the Fox river, authorized the erection of the dam as it now stands, without any provision for compensating the plaintiff for the injury which it does him, the defendant asserts the right, under legislative authority, to build and continue the dam without legal responsibility for those injuries.

And counsel for the defendant with becoming candor, argue that the damages of which the plaintiff complains are such as the state had a right to inflict in improving the navigation of the Fox river, without making any compensation for them.

This requires a construction of the Constitution of Wisconsin; for although the Constitution of the United States provides that private property shall not be taken for public 177*] *use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the states. The Constitution of Wisconsin, however, has a provision almost identical in language, *viz.:* that "the property of no person shall be taken for public use without just compensation therefor." Sec. 13, art. 1. Indeed this limitation on the exercise of the right of eminent domain is so essential

diverting the water of a certain stream flowing over plaintiff's land from its usual course, because the act of the legislature which authorized it, had made no provision for compensating the plaintiff for the injury thus done to his land. And he did this though there was no 179*] provision in the *Constitution of New York such as we have mentioned, and though he recognized that the water was taken for a public use. After citing several continental jurists on this right of eminent domain, he says that while they admit that private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified. And he adds that the principles and practice of the English government are equally explicit on this point. It will be seen in this case that it was the diversion of the water from the plaintiff's land, which was considered as taking private property for public use, but which, under the argument of the defendants' counsel, would, like overflowing the land, be called only a consequential injury.

If these be correct statements of the limitations upon the exercise of the right of eminent domain, as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the Constitution it would become an instrument of oppression rather than protection to individual rights.

But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell in his work on water-courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken. Ang. Wat. § 465, *a; Hooker* v. *N. Haven and Northampton Co.* 14 Conn. 146; *Rowe* v. *Granite Bridge Co.* 21 Pick. 344; *Canal Appraisers* v. *People*, 17 Wend. 604; *Lackland* v. *North Mo. R. Co.* 31 Mo. 180; *Stevens* v. *Prop. of Middlesex Can.* 12 Mass. 466. And perhaps no state court has given more frequent utterance to the doctrine that overflowing land by backing water on it from dams built below is within the constitutional provision than that of Wisconsin. In numerous cases of this kind under the Mill and Mill-dam act of that state this question has arisen, and the right of the mill-owner to flow back the water has 180*] *been repeatedly placed on the ground that it was a taking of private property for public use. It is true that the court has often expressed its doubt whether the use under that act was a public one, within the meaning of the Constitution, but it has never been doubted in any of those cases that it was such a taking as required compensation under the Constitution. *Pratt* v. *Brown*, 3 Wis. 613; *Walker* v. *Shepardson* 4 Wis. 511; *Fisher* v. *Horicon Iron Co.* 10 Wis. 353; *Newell* v. *Smith*, 15 Wis. 104; *Goodall* v. *Milwaukee*, 5 Wis. 39; *Weeks* v. *Milwaukee*, 10 Wis. 242. As it is the Constitution of that state that we are called on to construe, these decisions of her Supreme Court, that overflowing land by means of a dam across a stream is taking private property, within the meaning of that instrument, are of special weight if not conclusive on us. And in several of these cases the dams were across navigable streams.

It is difficult to reconcile the case of *Alexander* v. *Milwaukee*, 16 Wis. 248, with those just cited, and in its opinion the court seemed to feel the same difficulty. They assert that the weight of authority is in favor of leaving the party injured without remedy when the damage is inflicted for the public good, and is remote and consequential. There are some strong features of analogy between that case and this, but we are not prepared to say, in the face of what the Wisconsin court had previously decided, that it would hold the case before us to come within the principle of that case. At all events, as the court rests its decision upon the general weight of authority and not upon anything special in the language of the Wisconsin bill of rights, we feel at liberty to hold as we do that the case made by the plaintiff's declaration is within the protection of the constitutional principle embodied in that instrument.

We are not unaware of the numerous cases in the state courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers and other highways for the public *good, there is no [*181 redress; and we do not deny that the principle is a sound one in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other state constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those states. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further.

We are, therefore, of opinion that the second plea set up no valid defense, and that the demurrer to it should have been sustained.

The fourth plea recites substantially the same statutes and acts of the defendants and their predecessors as the second plea, and avers that the dam was completed to its present height in 1852, and that the defendants have ever since had, used and enjoyed the easement of overflowing the plaintiff's lands with his acquiescence, and that they had done this under color of right, and as they lawfully might do.

If this is intended as a plea of prescription for an easement, the time is not long enough. It requires twenty years. If it is designed as a plea of disseisin it is bad, because it avers that the plaintiff has all the time been seised in fee and in possession of the land in controversy.

But the foundation of the plea seems to be

the authority conferred by the various statutes of Wisconsin mentioned in the second plea. We have already held that the defendants 182*] *were not protected by the act of March 10, 1848, because they exceeded the authority conferred by it, ad that, as to the plaintiff's rights, the subsequent statutes were void because they contained no provision for compensation. There is, therefore, no light in which we can view this fourth plea that makes it a good one. The demurrer to it should have been sustained.

The sixth plea, after setting up all the matters alleged in the second and also that by the ordinance of 1787 and the subsequent legislation of Congress, the navigable streams of that territory were to be forever preserved as free highways, then avers that the land of the plaintiff came to him through a reservation in an Indian treaty in favor of one Therese Pacquett, who received a patent from the United States in 1849. It is alleged that this title came to the plaintiff burdened with an easement in favor of improving the navigation of the Fox river, which authorized the injuries complained of, and of which, therefore, he could not complain.

We do not think it necessary to consume time in proving that when the United States sells land by treaty or otherwise, and parts with the fee by patent without reservations, it retains no right to take that land for public use without just compensation, nor does it confer such a right on the state within which it lies; and that the absolute ownership and right of private property in such land is not varied by the fact that it borders on a navigable stream.

The demurrer to this plea should also have been sustained.

The judgment of the Circuit Court is reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

FRANK B. MYERS, *Plff. in Err.*,

v.

JOHN T. CROFT.

(See S. C. 13 Wall. 291-297.)

Power of company to take title to lands—grantor cannot question—pre-emption right, when transferable.

1. It will be presumed that a land company was capable, in law, to take a conveyance of real estate.

2. Neither the grantor who made the deed, nor one who claims under him, can question the capacity of the company to take the title after it has paid to such grantor full value for the property.

3. The last clause of the 12th section of the act of Sept. 4, 1841, forbade the assignment or transfer of the right of pre-emption secured by the act, but did not prevent the pre-emptor from selling his land after the entry.

[No. 69.]

Submitted Jan. 22, 1872. Decided Feb. 12, 1872.

IN ERROR to the Circuit Court of the United States for the District of Nebraska.

The case is stated by the court.

Messrs. **N. Cobb, W. C. Goudy** and *L. Douglass*, for plaintiff in error:

One of the main questions in this case involves the construction of the 12th section of the act of Congress of Sept. 4, 1841, which provides that "all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void."

Does this intend to prohibit the pre-emptor from all alienation of the property which he has acquired under the pre-emption act, prior to the issuing of the patent, or does it intend simply to prevent the transfer of the right to pre-empt?

The first view best accords with the purpose and policy of the pre-emption privilege. The object of the government was, in fact, to induce settlements upon the public lands; but chiefly to confer the preferable right to purchase, on those persons usually in indigent circumstances, who actually settled or improved them. It was not to aid the speculator in lands. *Marks* v. *Dickson*, 20 How. 501, 15 L. ed. 1002.

This point has never been directly decided by this court. It was not ruled in *Thredgill* v. *Pintard*, 12 How. 24, or *Bush* v. *Marshall*, 6 How. 284.

This question has frequently been before the state courts, and they have with great uniformity held that the pre-emptor has no transferable interest prior to the issuing of the patent.

Arbour v. *Nettles*, 12 La. Ann. 217; *Poirrier* v. *White*, 2 La. Ann. 974; *Penn* v. *Ott*, 2 La. Ann. 233; *Stanbrough* v. *Wilson*, 13 La. Ann. 494; *Stevens* v. *Hays*, 1 Ind. 247; *McElyea* v. *Hayter*, 2 Port. 148; *Cundiff* v. *Orms*, 7 Port. 58; *Glenn* v. *Thistle*, 23 Miss. 42; *Wilkerson* v. *Mayfield*, 27 Miss. 542; *McTyer* v. *McDowell*, 36 Ala. 39; *Paulding* v. *Grimsley*, 10 Mo. 210.

If this is the true view of the statute, the deed from William P. Fraily the pre-emptor, to the Sulphur Springs Land Co., was null and void, and neither by reason of the grant it purported to make nor the covenant it contained, can it operate as an estoppel; and any interest subsequently acquired by Fraily would not inure to the benefit of the grantee named in the deed. *McElyea* v. *Hayter*, 2 Port. 148.

To hold otherwise, would enable parties easily to evade the statute and defeat its policy and purpose.

Again; the deed from William P. Fraily to the Sulphur Springs Land Co. dated September, 1857, was not sufficient to and did not pass any title to said land. The Sulphur Springs Land Co. was, in fact, an incorporated company under the territorial laws of Nebraska, but that fact does not appear in the proof. But it was incumbent on the defendant to show that it was incorporated and authorized to receive the deed, and take the land under the deed. If it was a corporation, then it could not take the fee under the deed without local legislation authorizing it.

Beaty v. *Knowler*, 4 Pet. 152; *Perrine* v. *Canal Co.* 9 How. 172; *Russell* v. *Topping*, 5 McLean, 194; *Brady* v. *Mayor, etc.*, 20 N. Y. 312; *New London* v. *Brainerd*, 22 Conn. 552; *Straus* v. *Ins. Co.* 5 Ohio St. 59.

If it was not a corporation, then the deed was void for uncertainty in the name of the grantee. For there must be a person *in esse* to take as grantee, in order to make the deed good. 3 Washb. Real Prop. 239, 3d ed.

NOTE.—*Right of private persons to contest the power of a corporation to take or hold property*—see note, 32 L. R. A. 293.

Messrs. **Redick** *&* *Briggs* and *J. M. Carlisle* for defendant in error.

Mr. Justice **Davis** delivered the opinion of the court:

This is an action of ejectment, to try the title to a quarter section of land in Nebraska. Both parties deraigned title through William Penn Fraily, the plaintiff below, who is also the plaintiff in this court, by a deed from Fraily to himself, on the 12th of June, 1860; the defendant, by deed from Fraily to the Sulphur Springs Land Company, on the 3d day of September, 1857. It was admitted at the trial, to save the trouble of proving the fact, that on the 3d day of September, 1857, Fraily entered the premises in question at the United States Land Office, for the Omaha land district, with the register thereof, under and by virtue of an act of Congress, entitled "An Act to Appropriate the Proceeds of the Sales of Public Lands, and to Grant Pre-emption Rights," approved September 4, 1841, and that the usual letters patent of the United States were issued on the first day of May, 1860, to said Fraily, under his said entry. On this state of the case the court instructed the jury that the title passed by the deed to the Sulphur Springs Land Company, as it was prior in point of time, and told them to find a verdict for the defendant. The plaintiff in error contends that this instruction was erroneous, because, in the first place, the Sulphur Springs Land Company was not a competent grantee to receive the title; and second, if it was competent, that the deed to it was, nevertheless, void, for the reason that it was made before the patent issued.

In relation to the first objection—it is sufficient to say, in the absence of any proof whatever on the subject, that it will be presumed the land company was capable, in law, to take a conveyance of real estate. Besides, neither Fraily, who made the deed, nor Myers, who claims under him, is in a position to question the capacity of the company to take the title after it has paid to Fraily full value for the property. *Smith* v. *Sheeley, ante,* 430.

The other objection is of a more serious character, and depends for its solution upon the construction to be given the last clause of the 12th section of the act of Congress of September 4, 1841. 5 Stat. at L. 453. The act itself is one of a series of pre-emption laws conferring upon the actual settler upon a quarter section of public land the privilege (enjoyed by no one else) of purchasing it, on complying with certain prescribed conditions. It had been the well-defined policy of Congress, in passing these laws, not to allow their benefit to enure to the profit of land speculators, but this wise policy was often defeated. Experience had proved that designing persons, being unable to purchase valuable lands, on account of their withdrawal from sale, would procure middle men to occupy them temporarily, with indif-
296*] ferent improvements, *under an agreement to convey them so soon as they were entered by virtue of their pre-emption rights. When this was done and the speculation accomplished, the lands were abandoned.

This was felt to be a serious evil, and Congress, in the law under consideration, undertook to remedy it by requiring of the applicant for a pre-emption, before he was allowed to enter the land on which he had settled, to swear that he had not contracted it away, not settled upon it to sell it on speculation, but, in good faith, to appropriate it to his own use. In case of false swearing the pre-emptor was subject to a prosecution for perjury, and forfeited the money he had paid for the land; and any grant or conveyance made by him, before the entry, was declared null and void, with an exception in favor of bona fide purchasers for a valuable consideration. It is contended by the plaintiff in error that Congress went further in this direction, and imposed also a restriction upon the power of alienation after the entry, and the last clause in the 12th section of the act is cited to support the position.

This section, after prescribing the manner in which the proof of settlement and improvement shall be made before the land is entered, has this proviso: "And all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void."

The inquiry is: What did the legislature intend by this prohibition? Did it mean to disqualify the pre-emptor who had entered the land from selling it at all until he had obtained his patent, or did the disability extend only to the assignment of the pre-emption right? Looking at the language employed, as well as the policy of Congress on the subject, it would seem that the interdiction was intended to apply to the right secured by the act, and did not go further. This was the right to pre-empt a quarter section of land by settling upon and improving it, at the minimum price, no matter what its value might be when the time limited for perfecting the pre-emption expired. This right was valuable and, independently of the legislation of Congress, assignable. *Thredgill* v. *Pintard,* 12 How. 24. *The object of [*297 Congress was attained when the pre-emptor went, with clean hands, to the land office and proved up his right, and paid the government for his land. Restriction upon the power of alienation after this would injure the pre-emptor, and could serve no important purpose of public policy. It is well known that patents do not issue in the usual course of business in the General Land Office until several years after the certificate of entry is given; and equally well known that nearly all the valuable lands in the new states, admitted since 1841, have been taken up under the pre-emption laws, and the right to sell them freely exercised after the claim was proved up, the land paid for, and the certificate of entry received. In view of these facts we cannot suppose, in the absence of an express declaration to that effect, that Congress intended to tie up these lands in the hands of the original owners, until the government should choose to issue the patent.

If it had been the purpose of Congress to attain the object contended for, it would have declared the lands themselves unalienable until the patent was granted. Instead of this, the legislation was directed against the assignment or transfer of the right secured by the act, which was the right of pre-emption, leaving the pre-emptor free to sell his land after the entry, if at that time he was, in good faith, the owner of the land and had done nothing inconsistent with the provisions of the law on the subject.

The judgment of the Circuit Court is affirmed.

GEORGE ALEXANDER, *Plff. in Err.*,
v.
M. ROULET, Wheeler Martin, J. P. Fuller, *et al.*

(See S. C. 13 Wall. 386–389.)

Power of prefect to grant lands.

A prefect of a district, under the appointment of the military governor of California and an election by the people of the district, had no power to grant a part of the common lands of the pueblo, after the conquest and acquisition of the country by the United States.

[No. 110.]

Submitted Dec. 12, 1871. Decided Feb. 12, 1872.

IN ERROR to the Circuit Court of the United States for the District of California.

The action was ejectment brought in the court below by Alexander, the plaintiff in error, to recover a parcel of land in the city of San Francisco, state of California. The complaint alleges title in fee, and the answers deny generally the allegations of the complaint and set up the statute of limitations. After partial trial before a jury, the cause was, by stipulation, finally tried by the court, sitting without a jury.

The court found that from and after Aug., 1849, to and inclusive of Jan. 12, 1850, by virtue of an appointment from the then military governor of the then territory of California and an election by the people of the district, Horace Hawes was acting as the prefect of the district, embracing the then pueblo, now city, of San Francisco, and, while thus acting, upon petition therefor, he granted, on Jan. 12, 1850, to Edward Carpenter, then a resident of the former Mission Dolores, the premises in controversy; that the title of Carpenter thus acquired on and before Apr. 12, 1868, became vested in the plaintiff; that these premises are within the limits of the said pueblo, now city of San Francisco; that in the month of July, 1852, the city presented a claim for said pueblo lands to the board of land commissioners, organized under the act of Congress of Mar. 3, 1851, entitled "An Act to Ascertain and Settle Private Land Claims in the State of California," and on Dec. 24, 1854, the board confirmed the claim, the confirmation including the premises in controversy; that an appeal was taken from the decree of confirmation to the United States district court, from which court the case was duly transferred to the circuit court, where the claim was again confirmed May 18, 1865, from which last decree of confirmation an appeal was duly taken to this court, and, Feb. 4, 1867, the mandate of this court, in all respects confirming the decree of the circuit court, was filed in the last-named court; that the premises in question are within the limits and part of the lands described in the so-called "Van Ness Ordinance," which was ratified by the legislature of the state of California, Mar. 21, 1858; that on Jan. 1, 1855, the defendants were in the possession of these lands and that their possession was open, notorious, and adverse to all the world, and that the defendants were vested with all title thereto, conferred by the Van Ness Ordinance and the provisions of the act Congress of July 1, 1864, entitled "An Act Expedite the Settlement of Titles to Lands the State of California."

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charge of military governors, who, with the aid of subordinate officers, exercised municipal authority; but the power to grant land or confirm titles was never vested in these military governors (*Mumford* v. *Wardwell*, 6 Wall. 435, 18 L. ed. 760) nor in any person appointed by them.

It is contended, however, that Hawes' election by the people of the pueblo to the office of prefect on the retirement of the Mexican officials, gave him all the power a Mexican prefect would have had if the country had not been conquered. Is this position maintainable? Pueblos or towns, by the laws of Mexico, were entitled to a certain quantity of lands adjoining them, which were held in trust for the benefit of their inhabitants. The nature and extent of these pueblo rights have been the subject of a great deal of controversy since the acquisition of California, and came before this court for consideration in the case of *Townsend* v. *Greeley*, 5 Wall. 336, 18 L. ed. 549. Mr. Justice Field, in delivering the opinion of the court in that case, says: "It may be difficult to state with precision the exact nature of the right or title which the pueblos held in these lands. It was not an indefeasible estate; ownership of the lands in the pueblos could not, in strictness, be affirmed. It amounted in truth to little more than a restricted or qualified right to alienate portions of the land to its inhabitants for building or cultivation and to use the remainder for commons, for pasture lands, or as a source of revenue or for other public purposes. This right of disposition and use was in all particulars subject to the control of the government of the country." Manifestly, if this right of disposition and use were subject to Mexican control while Mexican rule prevailed, it was equally subject to the control of our government when this rule was changed. It must be conceded that these pueblos had an equitable right to have their common lands confirmed to them, but they did not hold them as a private individual **389*]** *does his estate, and it needed legislative action to ripen this equitable right into a legal title. Congress has acted upon this subject and confirmed the lands of the pueblo of San Francisco, including the demanded premises, and this confirmation could not inure to the benefit of anyone claiming under a grant by an American prefect, unless there were an express declaration to that effect. As there is no pretense that the grant in this case was protected by legislation, it follows that the plaintiff has no title of any sort to rest upon, *and the judgment of the Circuit Court must be affirmed.*

151*] LUCY H. CARROLL, Admrx. of Geo. W. Carroll, Deceased, *Appt.*,

v.

UNITED STATES.

(See S. C. 13 Wall. 151-153.)

Abandoned and captured property act—right to proceeds—when aid to the Rebellion defeats.

1. Under the abandoned and captured property act of Mar. 12, 1863, the right to recover depends on proof of ownership of the abandoned or captured property, of right to the proceeds and of the fact that the owner gave no aid or comfort to the Rebellion.

2. The ownership thereby required to be proved is that which existed at the time of capture or abandonment, and the right to the proceeds is that which existed at the time of the petition filed in the court of claims.

3. Where a person claimed the ownership of the property at the time of its capture, as administratrix, and gave proof that she gave no aid or comfort to the Rebellion, she is entitled to recover the proceeds of such property in the court of claims, although her intestate gave aid and comfort to the Rebellion.

[No. 289.]

Submitted Jan. 12, 1872. Decided Feb. 19, 1872.

APPEAL from the Court of Claims.

The case is stated by the court.

Mr. **R. M. Corwine,** for appellant:

The court of claims held that the claimant is not required to establish that the cotton was not at any time the property of a disloyal person.

4 Ct. of Claims, 426; also, *Bates's Case*, same vol. 569.

The proof of loyalty is confined to the claimant of the proceeds of the property when taken by the government. Its then status is the subject of inquiry. If the title before that had passed out of the disloyal owner into a loyal owner, bona fide, the property is free from any trouble it may have labored under before then.

To make the property answerable for the political offense of the owner, proceedings to condemn it under the Confiscation Acts must be instituted in the lifetime of the owner, and while it is in his possession. After his death, new rights intervene and the property is free from whatever disability it might have labored under while in his possession. *U. S.* v. *Anderson*, 9 Wall. 66, 19 L. ed. 617.

The title is cast on the administrator and relates to the moment of Carroll's death.

Johns v. *Johns*, 1 McCord, 132; 3 McCord, 371; *Lawrence* v. *Wright*, 23 Pick. 128; *Hays* v. *Jackson*, 6 Mass. 149; *Jewett* v. *Stevens*, 12 Mass. 309; 1 Will. Exrs. 528.

At the instant of the testator's death, the interest in all chattels vests in the executor or in the administrator, as the case may be, whether he has reduced them into his actual possession or not; and, however widely dispersed or remotely situated, they are regarded in law as assets in his hands.

Toll. Law of Exrs. 152; *Lawrence* v. *Wright*, *supra*.

He may maintain trover for them against all the world.

In like manner he is deemed to be in possession of a ship at sea.

The court of claims has said that the evidence of ownership required is at least equal to that necessary to sustain an action of trespass or trover. *Margaret Bond's Case*, 2 Ct. of Claims, 522.

Tried by that rule, it is not difficult to determine that the title to this property was vested in the administratrix when it was taken; and if it was so, then the political status of George W. Carroll cannot prevail, but that of the administratrix must.

Mr. **B. H. Bristow,** *Solicitor Gen.,* for appellee.

Mr. Chief Justice **Chase** delivered the opinion of the court:

It appears from the findings of fact by the court of claims, that George W. Carroll, residing in Arkansas, during the first years of the late Civil War, raised and was owner of certain cotton. He died in September, 1863. During his life he had given aid to the Rebellion.

The cotton, upon his death, came into the possession of the claimant as administratrix, and was in her possession at the time it was captured by the United States. She offered evidence, to establish her own loyalty and that she never gave aid or comfort to the Rebellion, which seems to have been rejected by the court. **152*]** The estate was insolvent. *The creditors are numerous, and there is no proof in respect to their loyalty.

The court of claims decided, as a conclusion of law from these facts, that the claimant's rights as administratrix depended upon proof of the loyalty of the deceased, and it being shown that he voluntarily gave aid and comfort to the Rebellion, dismissed the petition.

We think that the court of claims erred in the decision given by it. The statute of March 12, 1863 (12 Stat. at L. 820), makes the **153*]** *right to recover depend on proof of ownership of the abandoned or captured property, or right to the proceeds, and of the fact that the owner gave no aid or comfort to the Rebellion. It is plain to us that the ownership to be proved was that which existed at the time of capture or abandonment, and that the right to the proceeds was that which existed at the time of the petition filed in the court of claims. These titles, in their nature, capable of separation, co-existed in the petitioner. True, her ownership was not absolute, nor was her right to the proceeds absolute. She could claim only in a representative capacity: First, in right of the intestate; and, second, as trustee for creditors and distributees. At the time of the death of the intestate the cotton was in his possession, unaffected by any proceeding in confiscation. After his death, and upon appointment of his widow as administratrix, the title vested in her unforfeited. It was a title upon which she could maintain trespass or trover. Redf. Wills, 114, 116; 1 Wm. Ex. & Adm. 596; *McVaughters* v. *Elder,* 2 Brev. 313; *Lawrence* v. *Wright,* 23 Pick. 129. And it was the only title to the property subsisting at the time of the capture and sale and payment of the proceeds into the Treasury. The statute does not make it the duty of the court to inquire whether the intestate who had been the owner gave aid and comfort to the Rebellion, but whether such aid or comfort was given by the actual owner at the time of capture. This owner, within the sense of the statute, was the administratrix. It would be much more reasonable to institute such inquiries in respect to the creditors and distributees than in respect to the intestate. But such an investigation might be endless, and could not, we think, have been contemplated by the legislature.

We think, therefore, that the Court of Claims erred in not admitting the proof offered by the petitioner, and for this cause the decree must be reversed.

CHARLES REICHE *et al., Plffs. in Err.,*
v.
HENRY A. SMYTHE, Collector of New York, etc.

(See S. C. 13 Wall. 162-165.)

Construction of statutes—acts in pari materia —duty act.

1. The meaning of general words in a statute must be restricted, whenever it is found necessary to do so, in order to carry out the legislative intention.
2. Where two acts of Congress are *in pari materia,* it will be presumed that, if the same word be used in both and a special meaning given it in the first act, it was intended that it should receive the same interpretation in the latter act.
3. The duty act of 1866 does not impose duty on birds and fowls.

[No. 119.]

Argued Feb. 13, 1872. Decided Feb. 26, 1872.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr. **Frederick Chase,** for plaintiff in error, cited *Roosevelt* v. *Maxwell,* 3 Blatchf. 391; Bac. Abr. I. 2; *De Forest* v. *Lawrence,* 13 How. 274; *Elliott* v. *Swartwout,* 10 Pet. 137.

Messrs. **B. H. Bristow,** *Solicitor Gen.,* and **C. H. Hill,** *Asst. Atty. Gen.,* for defendant in error.

Mr. Justice **Davis** delivered the opinion of the court:

In September, 1856, the plaintiffs in error imported at the port of New York certain lots of live birds, on which the collector exacted a duty of twenty per centum ad valorem, which was paid under protest. This suit is brought to recover back the money and the only inquiry is whether the living birds, at the date of this importation, were dutiable.

It is claimed that they were, under the act of May 16, 1866, entitled "An Act Imposing a Duty on Live Animals" (14 Stat. at L. 48), which was in force at the period referred to, and which provides as follows: "That on and after the passage of this act, there shall be levied, collected, and paid on all horses, mules, cattle, sheep, hogs, and other live animals imported from foreign countries, a duty of twenty per centum ad valorem: Provided, that any such animals now bona fide owned by resident citizens of the state, and now in any of the provinces of British America, may be imported into the United States free of duty, until the expiration of ten days next after the passage of this act."

This act, in its terms, is comprehensive enough to include birds and all other living things endowed with sensation and the power of voluntary motion, and if there had not been previous legislation on the subject, there might be some justification for the position that Congress did not intend to narrow the meaning of the language employed. If it be true that it is the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, there is an equal duty to restrict the meaning of general words, whenever it is found

NOTE.—*Construction of statutes*—see notes, 22 L. ed. U. S. 736; 23 L. ed. U. S. 119; 11 C. C. A. 71.

necessary to do so, in order to carry out the legislative intention.

Brewer v. *Blougher*, 14 Pet. 178. And it is fair to presume, in case a special meaning was attached to certain words in a prior tariff act, that Congress intended they should have the same signification when used in a subsequent act in relation to the same subject-matter.

The 23d section of the act of Mar. 2, 1861, ch. 68, 12 Stat. at L. 193, provides that "the importation of the articles hereinafter mentioned and embraced in this section shall be exempt from duty. . . . Animals living of all kinds. . . . Birds, singing and other, and land and water fowls. . . ."

This act was in force when the act of 1866 —the act in controversy—was passed, and it will be seen that birds and fowls are not embraced in the term "animals," and that they are free from duty, not because they belong to the class of "living animals of all kinds," but **165*]** for the *reason that they are especially designated. It is quite manifest that Congress, adopting the popular signification of the word "animals," applied it to quadrupeds, and placed birds and fowls in a different classification. Congress having, therefore, defined the word in one act, so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are *in pari materia*, and it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention. Dwar. St. 701-766.

If it be used in a different sense in the act of 1866, its meaning instead of being extended is narrowed, for all animals not *ejusdem generis* "with horses, mules, cattle, sheep, and hogs," are excluded from the operation of the revenue laws. By the act of 1861, living animals of all kinds, whether domesticated or not. could be imported without paying a duty. The law of 1866 steps in and imposes a duty on domestic quadrupeds, leaving the act of 1861 applicable to all other quadrupeds, and to birds and fowls.

The case of *Homer* v. *Collector*, 1 Wall. 486, 17 L. ed. 688, is in principle not unlike this. The object of that suit was to ascertain whether, under the tariff act of 1857, almonds were placed in the category of dried fruits, on which a small duty was imposed. It was contended as the article was popularly classed among the dried fruits of the table, with raisins, dates, etc., and as it was not named specifically in the changes in the act of 1857, that it properly belonged to the schedule providing for dried fruits. But the court held that as a duty had been imposed on almonds, *eo nomine*, in previous tariff acts, the article was not, for revenue purposes, within the general term of dried fruit, although in popular language and commercial usage such was its signification.

The judgment is reversed, and a venire de novo awarded.

FRANKLIN PHILIP *et al.*,
Plffs. in Err.,
v.
JOSEPH NOCK.

(See S. C. 13 Wall. 185-187.)

Appeals and writs of error in patent cases.

The act of July 20, 1870, does not change the patent law of Feb. 1861, which gives to parties in patent suits a writ of error or appeal to the Supreme Court of the United States, without regard to the sum in controversy.

[No. 526.]

Submitted Feb. 9, 1872. Decided Feb. 19, 1872.

IN ERROR to the Supreme Court of the District of Columbia.

This was an action in the court below by Nock, as an original inventor of a hinge for inkstands, for the infringement of his patent. The plaintiff laid his damages at $5,000. The defendants pleaded the general issue. The plaintiff obtained a verdict and judgment for $500, and the defendants sued out this writ of error.

A motion is now made to dismiss for want of jurisdiction.

Mr. Geo. W. Paschal, for defendant in error, in support of the motion:

It is insisted for the plaintiffs in error that appellate jurisdiction is given under the act of Feb. 18, 1861, 12 Stat. at L. 130, because it is a controversy in law, arising under a law of the United States, granting and confirming to an inventor the exclusive right to his invention, etc.

We submit that a suit against a naked infringer of a patent is not within the letter and certainly not within the spirit of that act. That act may well apply to the interference cases arising between rival patentees, or to controversies between such patentees, or those claiming under them, without allowing a naked trespasser the benefit of appeal, simply because he disputes the validity of the patent. The assumption really is that the validity of every patent may be attacked by any trespasser, in a collateral way, which is wholly inadmissible. The grounds of defense which may be urged, as decided by this court, are embodied in § 51 of the act of 1866.

See *Rubber Co.* v. *Goodyear*, 9 Wall. 797, 19 L. ed. 569; *Eureka Co.* v. *Bailey Co. ante*, 209.

A careful reading of the cases under § 17 of the act of 1836 leads to the conclusion that such appeals only lie in cases which properly involve the construction of the patent laws; where no amount can be said to be involved, but only the rights of inventors to the benefit of their discoveries, as against the government or other inventors.

Hogg v. *Emerson*, 6 How. 478; *Allen* v. *Blunt*, 2 Wood. & M. 155; *Wilson* v. *Sandford*, 10 How. 101.

It is insisted, however, that all doubt upon

NOTE.—*Jurisdiction of U. S. Supreme Court depending on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy*—see note to Gordon v. Ogden, 7 L. ed. U. S. 592.

the subject is removed by § 56 of the patent law of July, 1870, 16 Stat. at L. 207.

This act was not in force when the judgment was rendered, and the writ of error sued out.

The argument is that the words "touching patent rights" are sufficiently comprehensive to embrace every possible controversy in which patentees may be engaged about their patents. But, taken in connection with the preceding sections, it is clear that the appeal has reference only to such jurisdiction as is given by that act itself.

It will be seen by reference to the bills of exception that the defense was in no manner brought within the purview of § 61 of the act, and hence the appeal is not within the purview of § 56.

No defense was admissible touching patent rights, or the validity of the patent, under the pleadings, as is settled in *Silsby* v. *Foote*, 14 How. 218; *Rubber Co.* v. *Goodyear*, 9 Wall. 797, 19 L. ed. 569; *Seymour* v. *Osborne*, *ante*, 33; *Agawam Co.* v. *Jordan*, 7 Wall. 596, 19 L. ed. 179; *Teese* v. *Huntingdon*, 23 How. 10, 16 L. ed. 482.

***Mr.* R. D. Mussey** in opposition to motion.

Mr. Chief Justice **Chase** delivered the opinion of the court:

The patent law of February, 1861 (12 Stat. at L. 130), gives to parties to suits arising under any law of the United States giving to inventors the exclusive right to their inventions or discoveries, a writ of error or appeal to the Supreme Court of the United States without regard to the sum in controversy. The act of 1870 (16 Stat. at L. 207) does not alter the right of appeal or to a writ of error in this respect.

The motion to dismiss the writ of error in this case must, therefore, be denied.

264*] THE WILMINGTON & WELDON RAILROAD COMPANY, *Plff. in Err.*,

v.

JOHN A. REID, Sheriff, etc.

(See S. C. 13 Wall. 264-268.)

Contract in a charter, when violated by a tax.

Where a state law chartering a company provided that the property of the company shall be exempt from taxation, that constituted a contract between the state and the company, which was violated by taxing the franchise and rolling stock of the company.

[No. 99.]

Argued Feb. 7, 1872. Decided Feb. 26, 1872.

IN ERROR to the Supreme Court of the State of North Carolina.

This case was commenced in the superior court of Halifax Co., by a writ and complaint in the nature of an action of replevin, to obtain possession of an engine and tender seized by Reid, the defendant below, as sheriff of Halifax Co., and about to be sold for payment of taxes assessed upon the franchise and rolling stock of the company.

There is in the record an application by the

and the corporations, they cannot be impaired by the legislature.

The charters of the railroad companies are compacts or contracts by statute between the state and stockholders, and cannot be changed without the consent of each party; and such rights as are legally vested in the companies, cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved in the acts or incorporation.

Wales v. *Stetson*, 2 Mass. 143; *Enfield Toll Br. Co.* v. *Conn. Riv. Co.* 7 Conn. 28; *Fletcher v. Peck*, 6 Cranch, 87; *Bk.* v. *Knoop*, 16 How. 389; *Pawlet* v. *Clark*, 9 Cranch, 292; *Terrett* v. *Taylor*, 9 Cranch, 43; *Dart. Coll.* v. *Woodward*, 4 Wheat. 518.

This has ever been the rule of construction for such charters in North Carolina.

Mills v. *Williams*, 11 Ired. 558; *Bk. of the State* v. *Bk. of Cape Fear*, 13 Ired. 75; *Atty. Gen.* v. *Bk.* 4 Jones, Eq. 287.

Where there is no stipulation by the sovereign against taxation. taxation may be laid.

Bk. v. *Billings*, 4 Pet. 514; *State* v. *Petway*, 2 Jones, Eq. 396.

Where there is such a stipulation it is entitled to a sensible construction, so as to effect its obvious purpose, and shall be regarded as a contract if so intended.

Bk. v. *Knoop, supra; Ohio Ins. & T. Co.* v. *Debolt*, 16 How. 416, Taney's Op. p. 427; *Bk.* v. *Edwards*, 5 Ired. 516; see Op. *Gordon* v. *Appeal Tax Court*, 3 How. 148; *Home of the Friendless* v. *Rouse*, 8 Wall. 430, 19 L. ed. 495.

Messrs. **Will H. Battle** and *Kemp P. Battle* for defendant in error:

It is admitted that a charter of incorporation granted by a state creates a contract between the state and its corporators, which the state cannot violate. It becomes, then, a matter of importance to ascertain the nature of such a contract and the number and extent of the rights which are conferred upon the corporation. There are numerous cases on this subject, but it is unnecessary to refer to more than one, as in that one such rights are clearly stated and defined. In the *Binghamton Bridge Case*, 3 Wall. 75, 18 L. ed. 143, it is said by the court: "That all rights which are asserted against the state must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state." See *McRee* v. *R. Co.* 2 Jones, 186.

When a corporation claims exemption from taxation, it must show that the power to tax has been given up by the state, in the plainest and most explicit language. The reason is that the taxing power is one of the highest and most important attributes of sovereignty. It is essential to the establishment and continued existence of the government. No government can, then, devest itself altogether of such a power; it cannot commit political suicide; but it is conceded that it may, by a contract for an adequate consideration, bind itself for a longer or a shorter period, not to exercise its taxing power at all, or not beyond a certain extent, upon certain persons or things. This is, however, often a dangerous restriction upon its power, because the necessities of the government cannot always be foreseen. In the changes and chances of time and things, those who have charge of the administration may have need of all the possible resources of the country to save it from great disaster, if not from ruin. These considerations force upon the mind the propriety, nay, the absolute necessity, of the rule that every grant from the legislature, by which the integrity of the power to raise revenue is impaired, must be construed strictly in favor of the public and against the grantee.

State v. *Petway*, 2 Jones, Eq. 396; *Bk.* v. *Commonwealth*, 19 Pa. 144; *Middleton* v. *Lambert*, 1 Ad. & E. 401; Cooley, Const. Lim. 280, *et seq.; Christ Ch.* v. *Co. of Phila.* 24 How. 300, 16 L. ed. 602.

The franchise is something entirely distinct from the property of the corporation, and the distinction is clearly recognized by law. *State* v. *Rives*, 5 Ired. 297; Rev. Code of 1856, ch. 26, §§ 5–10; *State* v. *Petway, supra; Atty. Gen.* v. Bk. 4 Jones, Eq. 287.

In this case the tax is upon the franchise. The exemption extends only to the property, leaving the franchise or body politic itself liable to be taxed, just as an individual might have his property exempt, while the state might, where there was no constitutional restriction, tax his poll *ad libitum*. See *Bk.* v. *State*, 9 Yerg. 490.

Nothing less than the exemption of the franchise and all the property, real and personal, of the corporation, from taxation, can or ought to relieve it from the burden of contributing its just proportion towards the support of the government.

See *Home of the Friendless* v. *Rouse*, 8 Wall. 430, 19 L. ed. 495; *Washington University* v. *Rouse*, 8 Wall. 439, 19 L. ed. 498.

Mr. Justice **Davis** delivered the opinion of the court:

This is a writ of error to the supreme court of the state of North Carolina, and brings up the question whether the recent legislation of the state concerning the collection of taxes is, as it affects the plaintiff in error, in violation of that provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts. As early as 1833, the general assembly of North Carolina incorporated the Wilmington & Weldon Railroad Company, for the purpose of constructing a railroad in the state, and inserted a provision in the charter, "that the property of said company and the shares therein shall be exempted from any public charge or tax whatsoever."

It has been so often decided by this court that a charter of incorporation granted by a state creates a contract between the state and the corporators, which the state cannot violate, that it would be a work of supererogation to repeat the reasons on which the argument is founded. It is true that when a corporation claims an exemption from taxation, it must

show that the power to tax has been clearly relinquished by the state, and if there be a reasonable doubt about this having been done, **267***] that doubt must be solved in *favor of the state. *The Binghamton Bridge Case*, 3 Wall. 75, 18 L. ed. 143. If, however, the contract is plain and unambiguous, and the meaning of the parties to it can be clearly ascertained, it is the duty of the court to give effect to it, the same as if it were a contract between private persons, without regard to its supposed injurious effects upon the public interests.

It may be conceded that it were better for the interest of the state, that the taxing power, which is one of the highest and most important attributes of sovereignty, should on no occasion be surrendered. In the nature of things the necessities of the government cannot always be foreseen, and in the changes of time, the ability to raise revenue from every species of property may be of vital importance to the state, but the courts of the country are not the proper tribunals to apply the corrective to improvident legislation of this character. If there be no constitutional restraint on the action of the legislature on this subject, there is no remedy, except through the influence of a wise public sentiment, reaching and controlling the conduct of the law-making power.

There is no difficulty whatever in this case. The general assembly of North Carolina told the Wilmington & Weldon Railroad Company, in language which no one can misunderstand, that if they would complete the work of internal improvement for which they were incorporated, their property and the shares of their stockholders should be forever exempt from taxation. This is not denied, but it is contended that the subsequent legislation does not impair the obligation of the contract, and this presents the only question in the case. The taxes imposed are upon the franchise and rolling stock of the company, and upon lots of land appurtenant to and forming part of the property of the company, and necessary to be used in the successful operation of its business. It certainly requires no argument to show that a railroad corporation cannot perform the functions for which it was created without owning rolling stock, and a limited quantity of real estate, and that these are embraced in the general term "property." "Property" is a word of **268***] large *import, and in its application to this company included all the real and personal estate required by it for the successful prosecution of its business. If it had appeared that the company had acquired either real or personal estate beyond its legitimate wants, it is very clear that such acquisitions would not be within the protection of the contract. But no such case has arisen, and we are only called upon to decide upon the case made by the record, which shows plainly enough that the company has not undertaken to abuse the favor of the legislature.

It is insisted, however, that the tax on the franchise is something entirely distinct from the property of the corporation, and that the legislature, therefore, was not inhibited from taxing it. This position is equally unsound with the others taken in this case. Nothing is better settled than that the franchise of a private corporation—which in its application to a railroad is the privilege of running it and taking fare and freight—is property, and of the most valuable kind, as it cannot be taken for public use even, without compensation. Redf. Railw. p. 129, § 70. It is true it is not the same sort of property as the rolling stock, roadbed and depot grounds, but it is equally with them covered by the general term "the property of the company" and, therefore, equally within the protection of the charter.

It is needless to argue the point further. It is clear that the legislation in controversy did impair the obligation of the contract, which the general assembly of North Carolina made with the plaintiff in error, and it follows that *the judgment of the Supreme Court must be reversed, and the cause remanded for further proceedings in conformity with this opinion.*

THE RALEIGH & GASTON RAILROAD COMPANY, *Plff. in Err.*,
v.
JOHN A. REID, Sheriff, etc.

(See S. C. 13 Wall. 269, 270, note.)

Contract in charter exempting from taxation, when violated.

Where a state granted a charter to a company exempting its property from taxation for fifteen years, and after the expiration of that time, the state was to be at liberty to tax the shares of the stockholders whenever their annual profits exceeded eight per cent, such shares cannot be taxed until the annual profits exceed eight per cent.

[No. 100.]

Argued Feb. 7, 1872. Decided Feb. 26, 1872.

IN ERROR to the Supreme Court of the State of North Carolina.

The case is substantially the same as the next preceding case of *Wilmington & Weldon R. Co.* v. *Reid*, except as noted in the opinion. It was argued at the same time by the same counsel.

Messrs. **J. M. Carlisle** and *J. L. McPherson* for plaintiff in error.

Messrs. **K. P. Battle** and *W. H. Battle* for defendant in error.

*Mr. Justice **Davis** delivered the [**270** opinion of the court:

This case and the one just decided are of kindred character, and alike in their essential features. The difference between the two consists chiefly in the extent of the exemption. By the Wilmington charter, the property of the company could not be taxed under any state of circumstances, but the exemption in the case of the Raleigh & Gaston Company was limited to a period of fifteen years. After this limitation expired, the legislature was at liberty to tax the individual shares of the stockholders, whenever their annual profits exceeded eight per cent. And this was the only way in which the property of the company could be reached for taxation at all, for when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode. Plowd. 206, b. It was the manifest object of the legislation which incorporated this company to invite the investment of capital in the enter-

prise of building this road; and no means better adapted for the purpose could have been devised, short of total immunity from taxation. As long as the capital was unproductive it contributed nothing to the support of the government; and even after it became remunerative, its contribution was fixed by the terms of the charter, and could not, in any event, exceed twenty-five cents on the share of stock. The unwisdom of this legislation is apparent, but there is no relief to the state, for the rights secured by the contract are protected from invasion by the Constitution of the United States.

As the pleadings show that the annual profits on the shares of stock have never reached eight per cent, it follows that they were not subject to any public charge or tax.

The judgment of the Supreme Court of North Carolina is reversed, and the cause remanded, for further proceedings in conformity with this opinion.

THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, *Plff. in Err.*, *v.* HENRY K. WHITTON, Admr. of the Estate of Mary F. Whitton, Deceased.

(See S. C. 13 Wall. 270-291.)

Corporation is a citizen of state which created it—other states—state act requiring action to be brought in court of state, when does not prevent removal to U. S. court—state rule of property or rights binding on Federal courts—act for removal of causes, constitutional—legislative discretion—when refusal to instruct jury is not error — sufficient charge.

*1. Although a corporation, being an artificial body created by legislative power is not a citizen within several provisions of the Constitution, yet, where rights of action are to be enforced by or against a corporation, it will be considered as a citizen of the state where it was created, within the clause extending the judicial power of the United States to controversies between citizens of different states.

2. Where a corporation is created by the laws of a state it is, in suits brought in the Federal courts in that state, to be considered as a citizen of such state, whatever its status or citizenship may be elsewhere by the legislation of other states.

3. A statute of Wisconsin provides that "whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damage in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state, and in some court established by the Constitution and laws of the same; *held*, that the proviso, requiring that the action be brought in the court of a state, does not prevent a nonresident plaintiff from removing the action under the act of Congress of March 2, 1867, to a Federal court and maintaining it there.

4. Whenever a general rule, as to property or personal rights or injuries to either, is established by state legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court in such case is not subject to state limitation.

5. The act of March 2, 1867—amending the act of July 27, 1866—for the removal of causes in certain cases from the state courts, by which amendatory act it is provided that if suits then pending, or which might be subsequently brought in a state court "in which there is a controversy between the citizens of a state in which the suit is brought and a citizen of another state, and the matter in dispute exceeds the sum of $500 exclusive of costs," the suit may be removed to a Federal court upon petition of the nonresident party, whether plaintiff or defendant, at any time before final hearing or trial, upon making and filing in the state court an affidavit, stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court,—is constitutional and valid.

6. The judicial power of the United States, extending by the Constitution to controversies between citizens of different states, as well as to cases arising under the Constitution, treaties, and laws of the United States, the manner and conditions upon which that power shall be exercised, except as the original or appellate character of the jurisdiction is specially designated in the Constitution, are mere matters of legislative discretion.

7. It is not error for a court to refuse to give an extended series of instructions, though some of them may be correct in the propositions of law which they present, if the law arising upon the evidence is given by the court with such fullness as to guide correctly the jury in its findings; nor is a judgment to be set aside because the charge of the court may be open to some verbal criticism in particulars considered apart by themselves, which could not, when taken with the rest of the charge, have misled a jury of ordinary intelligence.

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[No. 70.]

Argued Jan. 30, 1872. Decided Feb. 19, 1872.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

The case is stated by the court.

Messrs. **Timothy O. Howe,** *B. C. Cook, Enoch Totten,* and *William Ruger,* for plaintiff in error:

The plaintiff was appointed administrator by the county court of Rock county, Wisconsin, and sues as such.

In this character, he is as much a creature of law as the defendant corporation, and there is an apparent inconsistency in holding that the habitat of the legal entity determines the question of jurisdiction in one case, while in the other it is the residence of the natural person.

The defendant's railway lies partially within and it derives its powers and franchises in part from each of the states of Illinois, Wisconsin, and Michigan. Its principal office is in the state of Illinois, and its managing officers reside there. It has one common treasury, one board of directors and officers, and one common seal. Its contracts bind all of its property and franchises, in whichever state the same may be, and it is, for all practical purposes, one indivisible corporation. These facts are set forth in the affidavits used on the motions to remand the case to the state court.

As regards this question of jurisdiction, however, it is quite immaterial whether the company be considered a separate and distinct corporation in each state or as one and the same in both.

R. Co. v. *Wheeler,* 1 Black, 297, 17 L. ed. 133.

In either case, this must be regarded as a suit between a citizen of Illinois as plaintiff,

and citizens of that state and of the state of Wisconsin, joined as defendants.

R. Co. v. *Wheeler, supra; Allegheny Co.* v. *R. Co.* 51 Pa. St. 228; *Northern Indiana R. Co.* v. *Mich. Cent. R. Co.* 15 How. 244.

If a citizen of Illinois can sue this company in the United States court for Wisconsin, by styling it a corporation of Wisconsin, of course a citizen of Wisconsin can do the same thing in Illinois, by charging it as a corporation of that state; and if this be so, it follows that the company has the corresponding right of suing a citizen of Illinois in the United States courts of that state, by averring itself a corporation of Wisconsin, and of suing a citizen of Wisconsin in the national tribunals of that state, by styling itself a corporation of Illinois.

This makes the citizenship of such a company, and the jurisdiction of the United States courts, wholly dependent upon the will or caprice of the parties, and the existence or nonexistence of the real facts, upon which both questions in law depend, of no importance whatever.

It is not enough that the Constitution extends the judicial power to a case; the right to exercise this power must also be conferred. To authorize a court to exercise this power in any case, Congress must confer upon it jurisdiction, both of the subject-matter and of the parties.

Conk. Tr. 3d ed. 177; 4th ed. 155; and cases *supra.*

The act of Mar. 2, 1867, by authority of which this case was removed, is unconstitutional and void.

It seems a gross misnomer, to style that an exercise of appellate jurisdiction, which wrenches a case from one court of original concurrent jurisdiction and takes it into another, for original action upon the subject-matter. The judicial power was extended to controversies between citizens of different states for the supposed advantage of parties so situated, and hence it is assumed that a defendant in such a controversy had the same right as a plaintiff, to insist that it be tried in the national tribunals. This being so, it follows that the jurisdiction of a state court does not fully attach until he has waived this right. If he does not waive it, but objects to the proffered jurisdiction of the state court, it never attaches at all; and when the jurisdiction of the national court does attach, it is, in strictness, an original jurisdiction.

We conclude, then, that the removal of an action before the subject-matter has been acted upon is not an exercise of the appellate jurisdiction, and, therefore, not sustained by the appellate power.

Irving v. *Lowry*, 14 Pet. 298.

Confining our argument to that class of cases to which the present belongs we think it will be found that the so-called right of removal is to be sustained, if at all, by implication founded on the reasons inducing the grant of judicial power extending to controversies between citizens of different states. The language is fully satisfied by construing it as authorizing the national courts to take cognizance of such cases, when their jurisdiction is invoked by the party bringing suit; and the only other admissible construction predicated on the meaning of the word, would force all such controversy into the national courts, even though both parties agree in preferring another forum.

These reasons warrant the implication that both parties are entitled to elect the jurisdiction of the national tribunal for the trial of controversies to which the judicial power extends and over which jurisdiction has been conferred. Any legislation necessary to secure this right to either party is, no doubt, valid; but Congress may not go further and confer privileges which cannot be implied from these reasons. The right to legislate is founded upon an implication which is derived from and limited by these reasons. The power of Congress must, therefore, be limited by the same reasons; when they are satisfied, the right to legislate is exhausted. As regards plaintiff, no legislation is necessary. Its rights may be fully attained without; the national courts are open to it and it may invoke their jurisdiction in the beginning. But after making its election and choosing the state courts, it cannot make a second election. Such a right is not given by nor to be implied from any provision of the Constitution, and the attempt to confer it is in derogation of the sovereign powers reserved to the states and vested in their judicatures.

This act of 1867, allowing a plaintiff who has exhausted his privileges as to the election of forum, and by voluntarily coming into a state tribunal, waived his right to invoke the jurisdiction of the national courts, is, therefore, unwarranted and void.

Whitton v. *Chicago, etc. R. Co.* 25 Wis. 424.

It is also repugnant to the 7th Constitutional Amendment, if it authorizes the removal of cases after judgment.

The Justices v. *Murray*, 9 Wall. 277, 19 L. ed. 660.

The language does not seem susceptible of any other construction.

Sneed v. *Brownlow* and *Sneed* v. *Pickens*, 4 Cold. (Tenn.) 253.

There is no law authorizing the maintenance of this action in any national court. The statute of Wisconsin, §§ 12 and 13, chap. 13, R. S. 1858, upon which alone the right of action depends, does not give an absolute right.

It is a domestic statute, enacted for the regulation of internal affairs. In so far as it seeks to punish wrongful acts, and insure the observance of greater care, it is a police regulation, wholly within the control of the state, and it was in accordance with the spirit and object of the act, to limit the prosecution of actions under it to the courts of the state.

But whatever the consideration influencing the adoption of this clause, it is clear that its intention and effect is to limit the prosecution of the action given to the state courts of Wisconsin.

Again, if the interpretation contended for were adopted, it would avail nothing. No action can be removed which might not have been originally commenced in the national courts. The language of the act: "And the said copies being entered as aforesaid in such court of the United States, the suit shall then proceed in the same manner as if it had been

prise of building this road; and no means better adapted for the purpose could have been devised, short of total immunity from taxation. As long as the capital was unproductive it contributed nothing to the support of the government; and even after it became remunerative, its contribution was fixed by the terms of the charter, and could not, in any event, exceed twenty-five cents on the share of stock. The unwisdom of this legislation is apparent, but there is no relief to the state, for the rights secured by the contract are protected from invasion by the Constitution of the United States.

As the pleadings show that the annual profits on the shares of stock have never reached eight per cent, it follows that they were not subject to any public charge or tax.

The judgment of the Supreme Court of North Carolina is reversed, and the cause remanded, for further proceedings in conformity with this opinion.

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The plaintiff was appointed administrator by the county court of Rock county, Wisconsin, and sues as such.

In this character, he is as much a creature of law as the defendant corporation, and there is an apparent inconsistency in holding that the habitat of the legal entity determines the question of jurisdiction in one case, while in the other it is the residence of the natural person.

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As regards this question of jurisdiction, however, it is quite immaterial whether the company be considered a separate and distinct corporation in each state or as one and the same in both.

R. Co. v. *Wheeler*, 1 Black, 297, 17 L. ed. 133.

In either case, this must be regarded as a suit between a citizen of Illinois as plaintiff,

Mayor v. *Cooper*, 6 Wall. 247, 18 L. ed. 851.

The next question is as to whether the parties to this suit possess the requisite citizenship to give this court jurisdiction; Whitton, the administrator, being a citizen of Illinois, and the plaintiff in error a corporation of Wisconsin.

This question is fully settled in our favor by the following authorities:

Coal Co. v. *Blatchford, ante*, 179; *Dodge* v. *Perkins*, 4 Mas. 435; *Childress* v. *Emory*, 8 Wheat. 642; Conk. Tr. 161; *R. Co.* v. *Wheeler*, 1 Black, 286, 17 L. ed. 130; *R. Co.* v. *Quigley*, 21 How. 202, 16 L. ed. 73; *Marshall* v. *R. Co.* 16 How. 314; *Wood* v. *Gold*, 4 McLean, 577.

We now come to the question whether the subject-matter of this suit is such that this court can take cognizance thereof.

The statute in question differs from the Illinois statute upon which the action was brought in *R. Co.* v. *Barron*, 5 Wall. 90, 18 L. ed. 591, only in the proviso that "such action shall be brought for a death caused in this state, and in some court established by the Constitution and laws of the state."

So we have only to consider the words, "in some court established by the Constitution and laws of this state." Now, we say that this latter clause is of no consequence in settling the question at issue; for without it the inference would be that the action should be brought, like all other actions, in courts established by the Constitution and laws of the state. There is no case where the statutes of Wisconsin attempt to confer jurisdiction upon any other courts than the courts of Wisconsin; and when a general rule of personal or property rights is laid down in those statutes, then if a controversy arises upon those statutes, this court assumes jurisdiction, if the amount involved is sufficient, and the parties have the requisite citizenship.

The words of the statute in question relate only to the bringing of the suit, and not to its trial, and are permissive as to the state courts, and not prohibitory as to the Federal courts.

But we deny that it is competent for legislature, after establishing a general rule of liability to be enforced, as in ordinary cases by trials before courts and juries, and under which actions may accrue equally to the resident and the non-resident, to declare after the controversy is pending in one of the courts of the state that the non-resident shall not remove the cause growing out of the statute into a United States court for trial.

Parker v. *Overman*, 18 How. 137, 15 L. ed. 318.

To hold otherwise, would enable the state legislatures to withdraw every subject of litigation at will from the Federal courts. *Parsons* v. *Lyman*, 32 Conn. 574.

An examination of the cases will show that where it has been held that a remedy was to be sought only in a particular forum, the statute conferring the remedy related to special proceedings unknown to the common law, where a new remedy was to be sought in the particular manner, by a special class of persons, and not to cases where a general right of action was conferred. Thus, *Almy* v. *Harris*, 5 Johns. 175, was upon a statute to protect ferries from disturbance, and in the nature of a police regulation. And a like case is *Calking* v. *Baldwin*, 4 Wend. 667.

People v. *Hazard*, 4 Hill, 209, was upon the state militia law, which pointed out a particular mode of collecting fines; and *Dudley* v. *Mayhew*, 3 N. Y. 9, simply decides that the United States courts have exclusive jurisdiction in patent cases. The United States courts, it is well understood, have nothing to do with the municipal regulations of the state, its police and military regulations, or special proceedings under statutes strictly local in their character. But when the subject of litigation is one of general jurisdiction, cognizable in the courts of record of the state, if a non-resident is interested, and the amount in controversy is sufficient, he has a right to remove the suit, under the act of 1867, at any time before trial, into the United States court.

But if we were to concede that the remedy of the non-resident, under the act in question, was intended to be limited to an action brought in a state court, and that it was competent for the legislature to so limit the remedy; still it would not follow, when the action had been brought in the manner pointed out by the statute, that such action might not be moved for trial into the United States court.

The views we have endeavored to sustain will be found to be supported by numerous decisions in the Supreme Court of the United States.

Bk. v. *Jolly's Admrs.* 18 How. 503, 15 L. ed. 472; *Suydam* v. *Broadnax*, 14 Pet. 67; *Hyde* v. *Stone*, 20 How. 170, 15 L. ed. 874; *Barber* v. *Barber*, 21 How. 582, 16 L. ed. 226; *Strachen* v. *Clyburn*, 3 McL. 174; *Weston* v. *Charleston*, 2 Pet. 449; *Cowles* v. *Mercer Co.* 7 Wall. 118, 19 L. ed. 86.

Mr. Justice **Field** delivered the opinion of the court:

The track of the railway of the Chicago & Northwestern Railroad Company crosses Academy street in the city of Janesville, in the state of Wisconsin. In December, 1864, the wife of the plaintiff, while attempting to pass over the track, was struck by a locomotive of the company moving on the railway and killed. The present action is brought to recover damages sustained by the plaintiff from the death of his wife. It is founded on a statute of Wisconsin, which provides that "whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damage in respect thereof, then and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action of damages, notwithstanding the death of the person injured; provided that such action shall be brought for a death caused in this state, and in some court established by the Constitution and laws of the same."

The statute also provides that "every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered shall belong and be paid over to the husband or widow of such deceased person, if such relative survive

him or her" and that "the jury may give such damages not exceeding $5,000, as they shall deem fair and just in reference to the pecuniary injury resulting from such death, to the relatives of the deceased."

The plaintiff took out letters of administration upon the estate of his wife in Wisconsin, and as such administrator brought the present action in one of the circuit courts of that state.

Whilst the cause was pending there and after issue joined, Congress passed the act of March 2, 1867, 14 Stat. at L. 558, amending the act of July 27, 1866, for the removal of causes in certain cases from state courts. By this amendatory act it was provided that in suits then pending, or which might be subse-
273*] quently brought *in a state court, "in which there is a controversy between the citizen of a state in which the suit is brought and a citizen of another state, and the matter in dispute exceeds the sum of $500, exclusive of costs, such citizen of another state, whether he be plaintiff or defendant, if he will make and file in such state court an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court, may, at any time before the final hearing or trial of the suit, file a petition in such state court" and have the suit removed to a Federal court.

Under this act the plaintiff, in September, 1868, petitioned the state court for the removal of the action to the circuit court of the United States for the district of Wisconsin, stating in his petition that he was at the time, and had been for the three previous years, a resident and citizen of the state of Illinois; that the defendant was a corporation organized under the laws of Wisconsin, and that the matter in dispute exceeded the sum of $500 exclusive of costs. The plaintiff also offered with his petition good and sufficient surety, as required by the act of Congress for entering in the circuit court at its next session copies of all process, pleadings, depositions, testimony, and other proceedings in the action, and for doing such other appropriate act as by the laws of the United States are required for the removal of a suit into the United States court. Accompanying this petition was the affidavit of the plaintiff, that he had reasons to believe and did believe "that from prejudice and local influence" he would not be able to obtain justice in the state court.

The petition was resisted upon affidavits that the defendant was a corporation created and existing under the laws of the state of Illinois, Wisconsin, and Michigan; that its line of railway was located and operated in part in each of these states, and was thus located and operated at the commencement of the action; that its entire line of railway was managed and controlled by the defendant as a single corporation; that all its powers and fran-
274*] chises were exercised *and its affairs managed and controlled by one board of directors and officers; that its principal office and place of business was at the city of Chicago in the state of Illinois, and that there was no officer for the control and management of the general business and affairs of the corporation in Wisconsin.

The local state court granted the petition and ordered the removal of the action to the Federal court, but directed a stay of proceedings upon its order, to enable the defendant to appeal from it to the supreme court of the state, and provided that, in case such appeal should be taken, all proceedings should be stayed until its determination.

The appeal was taken and the order of removal was reversed by the Supreme Court. The reversal, as appears from the opinion of the court, was placed on the ground that the plaintiff, having the right originally to pursue his remedy either in a Federal or state court, had made his election of the state court, and had thus waived the right to demand the judgment of the Federal court upon the matter in controversy.

Plaintiff, however, did not regard the stay of proceedings nor delay his action until the disposition of the appeal, but procured copies of the papers in the cause from the state court and filed them in the circuit court of the United States. The latter court thereupon took jurisdiction of the case, and a new declaration was filed by the plaintiff.

In the meantime the defendant, upon affidavit of the stay upon the order of removal made by the state court, and of the appeal from such order, moved the circuit court that the cause be stricken from its calendar, and the pleadings and proceedings be stricken from its file. But this motion the court denied, and thereupon the defendant filed a plea in abatement, setting forth an objection to the jurisdiction of the Federal court founded upon the proviso to the statute of Wisconsin, requiring the action for damages resulting from the death of the party to be brought in some court established by the Constitution and laws of that state. A demurrer *to this plea [*275 being sustained, the defendant filed a plea of the general issue. Subsequently, upon the reversal of the order of removal by the supreme court of the state, the defendant moved the circuit court to remand the cause to the state court, but the circuit court refused to relinquish its jurisdiction, and the motion was denied.

Upon the trial which followed, the plaintiff obtained a verdict and judgment, and the defendant brings the case here on writ of error. Exceptions were taken in the progress of the trial to the rulings of the court in the admission of evidence; also to its refusal to give numerous instructions which were prayed by the defendants, and also to the charge given; but the principal ground advanced by counsel for a reversal of the judgment, is the alleged want of jurisdiction of the action by the circuit court of the United States, raised by the proceedings previous to the trial which we have detailed.

*The jurisdiction of the action by the [*283 Federal court is denied on three grounds: The character of the parties as supposed citizens of the same state; the limitation to the state court of the remedy given by the statute of Wisconsin, and the alleged invalidity of the act of Congress of March 2, 1867, under which the removal from the state court was made.

First, as to the character of the parties. The plaintiff is a citizen of the state of Illinois and the defendant is a corporation created under the laws of Wisconsin. Although a corpo-

ration, being an artificial body created by legislative power, is not a citizen within several provisions of the Constitution; yet it has been held and that must now be regarded as settled law, that, where rights of action are to be enforced, it will be considered as a citizen of the state where it was created, within the clause extending the judicial power of the United States to controversies between citizens of different states. *Paul* v. *Virginia*, 8 Wall. 177, 19 L. ed. 359. The defendant, therefore, must be regarded for the purposes of this action as a citizen of Wisconsin. But it is said, and here the objection to the jurisdiction arises, that the defendant is also a corporation under the laws of Illinois, and, therefore, is also a citizen of the same state with the plaintiff. The answer to this position is obvious. In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen of Wisconsin by the laws of that state. . It is not there a corporation or a citizen of any other state. Being there sued it can only be brought into court as a citizen of that state, whatever its status or citizenship may be elsewhere. Nor is there anything against this view, but, on the contrary, much to support it, in the case of *The Ohio & Mississippi Railroad Company* v. *Wheeler*, 1 Black, 286, 17 L. ed. 130. In that case the declaration averred that the plaintiffs were a corporation created by the laws of the states of Indiana and 284*] Ohio, and that the defendant *was a citizen of Indiana, and the court, after referring to previous decisions, said that it must be regarded as settled that a suit by or against a corporation in its corporate name is a suit by or against citizens of the state which created it and, therefore, that case must be treated as a suit in which citizens of Ohio and Indiana were joined as plaintiffs against a citizen of the latter state and, of course, could not be maintained in a court of the United States where jurisdiction of the case depended upon the citizenship of the parties. The court also observed that though a corporation by the name and style of the plaintiffs in that case appeared to have been chartered by the states of Ohio and Indiana, clothed with the same capacities and powers, and intended to accomplish the same objects, and was spoken of in the laws of the states as one corporate body, exercising the same powers and fulfilling the same duties in both states, yet it had no legal existence in either state except by the law of that state; that neither state could confer on it a corporate existence in the other nor add to or diminish the powers to be there exercised; and that though composed of and representing under the corporate name the same natural persons, its legal entity, which existed by force of law, could have no existence beyond the territory of the state or sovereignty which brought it into life and endowed it with its faculties and powers.

The correctness of this view is also confirmed by the recent decision of this court in the case of *R. Co.* v. *Harris*, *ante*, 354. In that case Maryland railroad corporation was empowered by the legislature of Virginia to construct its road through that state, and by an act of Congress to extend a lateral road into the District of Columbia. By the act of Virginia the company was granted the same rights and privileges in that state which it possessed in Maryland, and it was made subject to similar pains, penalties and obligations. By the act of Congress the company was authorized to exercise in the District of Columbia the same powers, *rights, and privileges in the ex- [*285 tension and construction of the road, as in the construction and extension of any railroad in Maryland, and was granted the same rights, benefits, and immunities in the use of the road which were provided in its charter, except the right to construct from its road another lateral road. And this court held that these acts did not create a new corporation either in Virginia or the District of Columbia, but only enabled the Maryland corporation to exercise its faculties in that state and District. They did not alter the citizenship of the corporation in Maryland, but only enlarged the sphere of its operations and made it subject to suit in Virginia and in the District. The corporation, said the court, "cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented, and will be bound accordingly. For the purposes of Federal jurisdiction it is regarded as if it were a citizen of the state where it was created and no averment or proof as to the citizenship of its members elsewhere will be permitted."

Second, as to the limitation to the state court of the remedy given by the statute of Wisconsin. That statute, after declaring a liability by a person or a corporation to an action for damages when death ensues from a wrongful act, neglect or default of such person or corporation, contains a proviso "that such action shall be brought for a death caused in this state, and in some court established by the Constitution and laws of the same." This proviso is considered by the counsel of the defendant as in the nature of a condition, upon a compliance with which the remedy given by the statute can only be enforced.

It is undoubtedly true that the right of action exists only in virtue of the statute, and only in cases where the death was caused within the state. The liability of the party, whether a natural or an artificial person, extends only to cases where, from certain causes, death ensues within the *limits of the state. [*286 But when death does thus ensue from any of those causes, the relatives of the deceased named in the statute can maintain an action for damages. The liability within the conditions specified extends to all parties through whose wrongful acts, neglect or default death ensues, and the right of action for damages occasioned thereby is possessed by all persons within the description designated. In all cases where a general right is thus conferred, it can be enforced in any Federal court within the state having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such Federal court by any provision of state legislation that it shall only be enforced in a state court. The statutes of nearly every state provide for the institution of numerous suits, such as for partition, foreclosure, and the recovery of real property in particular courts and in the counties where the land is

situated, yet it never has been pretended that limitations of this character could affect, in any respect, the jurisdiction of the Federal court over such suits where the citizenship of one of the parties was otherwise sufficient. Whenever a general rule as to property or personal rights, or injuries to either, is established by state legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to state limitation.

This doctrine has been asserted in several cases by this court. In *Suydam* v. *Broadnax*, 14 Pet. 67, an act of the legislature of Alabama provided that the estate of a deceased person, declared to be insolvent, should be distributed by the executors or administrators according to the provisions of the act, and that no suit or action should be commenced or sustained against any executor or administrator after the estate had been declared to be insolvent, except in certain cases; but this court held, in a case not thus excepted, that the insolvency of the estate, judicially declared under the act, was not sufficient in law to abate **287*]** a suit instituted in the circuit *court of the United States by a citizen of another state against the representatives of a citizen of Alabama. "The 11th section of the act to establish the judicial courts of the United States," said the court, "carries out the constitutional right of a citizen of one state to sue a citizen of another state in the circuit court of the United States, and gives to the circuit court "original cognizance concurrent with the courts of the several states of all suits of a civil nature at common law and in equity, etc., etc. It was certainly intended to give to suitors having a right to sue in the circuit court, remedies co-extensive with these rights. These remedies would not be so if any proceedings under an act of a state legislature, to which a plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the circuit court."

In *Bk.* v. *Jolly*, 18 How. 506, 15 L. ed. 474, this court declared that the law of a state "limiting the remedies of its citizens in its own courts cannot be applied to prevent the citizens of other states from suing in the courts of the United States in that state for the recovery of any property or money there to which they may be legally or equitably entitled." The same doctrine was affirmed in *Hyde* v. *Stone*, 20 How. 170, 15 L. ed. 874, and in *Payne* v. *Hook*, 7 Wall. 425, 19 L. ed. 260.

Third, as to the alleged invalidity of the act of March 2d, 1867, under which the removal from the state court was made. The counsel of the defendant, while confining his special objection to this act, questions the soundness of the reasoning of Mr. Justice Story, by which any legislation for the removal of causes from a state court to a Federal court is maintained. We may doubt, with counsel, whether such removal before issue or trial can properly be called an exercise of appellate jurisdiction. It may, we think, more properly be regarded as an indirect mode by which the Federal court acquires original jurisdiction of the causes. *Dennistoun* v. *Draper*, 5 Blatchf. C. C. 340. But it is not material whether the reasoning of the distinguished jurist in this particular *is correct or [***288** otherwise. The validity of such legislation has been uniformly recognized by this court since the passage of the judiciary act of 1789, 1 Stat. at L. 73.

The judicial power of the United States extends by the Constitution to controversies between citizens of different states as well as to cases arising under the Constitution, treaties and laws of the United States and the manner and conditions upon which that power shall be exercised, except as the original or appellate character of the jurisdiction is specially designated in the Constitution, are merely matters of legislative discretion. In some cases, from their character, the judicial power is necessarily exclusive of all state authority; in other cases it may be made so at the option of Congress, or it may be exercised concurrently with that of the states. Such was the opinion of Mr. Justice Story, as expressed in *Martin* v. *Hunter's Lessee*, 1 Wheat. 334, and this conclusion was adopted and approved by this court in the recent case of *The Moses Taylor*, 4 Wall. 429, 18 L. ed. 401. The legislation of Congress has proceeded upon the correctness of this position in the distribution of jurisdiction to the Federal courts. The judiciary act of 1789 (1 Stat. at L. 73) as observed in the case of *The Moses Taylor*, declares "that in some cases from their commencement such jurisdiction shall be exclusive; in other cases it determines at what stage of procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the state courts shall be permitted. Thus, cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction and cases against consuls and vice-consuls, except for certain offenses, are placed from their commencement exclusively under the cognizance of the Federal courts. On the other hand, some cases in which an alien or a citizen of another state is made a party may be brought either in a Federal or a state court, at the option of the plaintiff, and if brought in the state court may be prosecuted until the appearance of the defendant, and then *at his option [***289** may be suffered to remain there or may be transferred to the jurisdiction of the Federal courts. Other cases, not included under these heads, but involving questions under the Constitution, laws, treaties, or authority of the United States, are only drawn within the control of the Federal courts upon appeal or writ of error after final judgment. By subsequent legislation of Congress, and particularly by the legislation of the last four years, many of the cases which by the judiciary act could only come under the cognizance of the Federal courts after final judgment in the state courts, may be withdrawn from the concurrent jurisdiction of the latter courts at earlier stages, upon the application of the defendant. The constitutionality of these provisions cannot be seriously questioned and is of frequent recognition by both state and Federal courts."

When the jurisdiction of the Federal court depended upon the citizenship of the parties, the case could not be withdrawn from the state courts after suit commenced until the passage of the act of 1867, except upon the application of the defendant. The provision of the Constitution extending the judicial power of the

United States to controversies between citizens of different states had its existence in the impression that state attachments and state prejudices might affect injuriously the regular administration of justice in the state courts. The protection intended against these influences to non-residents of a state was originally supposed to have been sufficiently secured by giving to the plaintiff in the first instance an election of courts before suit brought; and where the suit was commenced in a state court a like election to the defendant afterwards. The time at which the non-resident party should be allowed thus to make his election was evidently a mere matter of legislative discretion, a simple question of expediency. If Congress has subsequently become satisfied that where a plaintiff discovers, after suit brought in a state court, that the prejudice and local influence, against which the Constitution intended to guard, are such as are likely to prevent him from obtaining justice, he ought to be **290***] permitted to remove his case into a *national court, it is not perceived that any constitutional objection exists to its authorizing the removal and, of course, to prescribing the conditions upon which the removal shall be allowed.

It follows, from the views we have expressed, that the objection to the jurisdiction of this action by the circuit court, upon the grounds advanced by the defendant, cannot be maintained.

It only remains to say a few words upon the refusal of the court to give the instructions prayed by the defendant, and upon its ruling in the admission of certain evidence, and its charge to the jury.

The facts of the case are very few, and with respect to most of them there was little conflict of evidence.

The deceased came to her death, as already stated, in December, 1864, from injuries received from a locomotive of the defendant, while she was endeavoring to cross its railway track, in Academy street, in Janesville, Wisconsin. One Mrs. Woodward and a Mr. Rice, were standing together with her just previous to the accident, upon a cross walk on the northerly side of the street, waiting for a freight train of the Milwaukee & Prairie du Chien Railway, then in motion, to pass eastwards, so that they might proceed down the street and over the railway tracks. At that point in the street there were four parallel railway tracks lying near each other. Two of these. one of those on the northerly side, belonged to the Milwaukee & Prairie du Chien Railway Company, and the other two belonging to the defendant, the Chicago & Northwestern Railway Company.

The weather was at the time extremely cold, and a strong wind was blowing up the tracks from the southwest, and snow was falling. As soon as the freight train had passed, Rice crossed the tracks, moving at a brisk rate. In crossing, he states that he took a look at the tracks and that he neither saw nor heard any engine on the tracks of the defendant. Almost immediately after getting across, and before he had gone many steps, he heard a scream and, on turning around, saw that the women, Mrs. Whitton and Mrs. Woodward, had been knocked down by a locomotive of the defendant. This locomotive was at the time backing down in a westerly direction, opposite to that taken by the freight train which had just passed, the tender coming first, then the engine, drawing a single freight car. The persons in this locomotive did not appear to be aware of the injuries they had occasioned, and the locomotive continued on its course until their attention was called to the disaster by the efforts of Rice, when it was stopped. No person saw the locomotive strike the deceased, or noticed her conduct after Rice left her and started to cross the tracks. The injuries which both of the women received resulted in their death. Mrs. Woodward died soon afterward, and Mrs. Whitton after lingering some weeks. There was much conflict of evidence upon the point whether the bell was rung on the locomotive as it backed down the track and approached Academy street, so as to give warning to persons who might be on that street wishing to cross, and was kept ringing until the locomotive and tender crossed the street. Rice testified that he did not hear any bell or signal from this train, but that the bell of the freight train which had passed was ringing.

Upon these facts the court gave to the jury a clear and full charge upon the duties and responsibilities of the railroad company in crossing the street of the city, with its engines and trains, and upon the care, prudence and caution which it was incumbent upon the deceased to exercise in crossing the tracks; and as to the damages which the jury were authorized to find, in case they were satisfied that the employees of the company had been guilty of negligence, and that such negligence had caused the death of the deceased.

The counsel of the plaintiff had requested three special instructions to the jury, and the counsel of the defendant had requested nineteen special instructions. The court, however, declined to give any of them except as they were embraced in its general charge. Some of the instructions prayed by the defendant presented the law respecting the liability of the company correctly, and some of them were based upon an assumed condition of things which the evidence did not warrant. But it is not error for a court to refuse to give an extended series of instructions, even though some of them may be correct in the propositions of law *which they present, if the law [***291** arising upon the evidence is given to the court with such fullness as to guide correctly the jury in its findings, as was the case here; nor is a judgment to be set aside because the charge of the court may be open to some verbal criticisms, in particulars considered apart by themselves, which could not when taken with the rest of the charge have misled a jury of ordinary intelligence. The propriety of the rulings of the court in this case is fully vindicated in its opinion on the motion for a new trial.

The evidence of the condition of the deceased —that she was *enceinte* at the time of the accident—could not materially have affected the jury in the estimation of the damages, after the clear and explicit charge of the court, as to the character of the damages which only they were authorized to consider.

The other evidence in the case, to the ad-

mission of which objection was taken, was not material and could not have influenced the result.

Judgment affirmed.

THE COUNTY OF PENDLETON, *Plff. in Err.*,
v.
HENRY AMY.

(See S. C. 13 Wall. 297-306.)

Denial of ownership of negotiable paper good on general demurrer—other pleas—estoppel.

1. In an action upon coupons, pleas that the plaintiff is neither the owner, holder nor bearer, and that the bonds belonged to a third person, and that the county did not make them, are good on general demurrer.

2. Where the pleadings show that the county received, in exchange for the bonds, a certificate of stock of the railroad company, which it held about seventeen years, and still holds, the county is estopped from asserting that the conditions on which the bonds were to be issued had not been fulfilled.

[No. 66.]

Argued Jan. 17, 1872. Decided Feb. 19, 1872.

IN ERROR to the Circuit Court of the United States for the District of Kentucky.

This was an action of debt, brought in the court below, by the defendant in error, against the county of Pendleton, to recover the sum of $13,009.85, claimed to be due him on 384 coupons, representing the unpaid interest for several years on fifty bonds of $1,000 each, which had been issued by the county in payment of a subscription to the capital stock of the Covington & Lexington Railroad, the bonds being payable to bearer, and having been sold by the railroad company and bought by Amy.

The county of Pendleton filed four pleas in bar of the action, to which the plaintiff demurred, and upon the demurrer the court gave judgment for the plaintiff for the sum demanded in the declaration. The county brings this writ, and assigns as error that the court below improperly sustained the demurrers.

The case is stated by the court.

Messrs. **B. H. Bristow**, *W. Y. Fendall*, and *Menzies & Furber* for plaintiff in error.

Messrs. **John W. Stevenson** and *Harvey Myers* for defendant in error.

Mr. Justice **Strong** delivered the opinion of the court:

It must be admitted that the pleas interposed by the defendant in the court below were inartistically framed; that they were argumentative, and that they set up nothing which could not have been taken advantage of, for what it was worth, under the general issue. They might have been stricken from the record on motion, or, if special demurrers were allowable in that circuit, they would have been condemned, had the plaintiff so demurred. But the demurrers were general, and the question before us is whether any of the pleas set up a substantial defense to the action.

This suit was brought to recover the aggregate amount of certain coupons or interest warrants attached to fifty bonds, of $1,000 each. The bonds were dated October 15, 1853, payable thirty years after date, and alleged to have been made and issued by the county of Pendleton, by virtue of authority conferred by the legislature of the state. The declaration averred not only the execution of the bonds with interest warrants attached to each, payable to bearer semi-annually, on the 15th days of April and October of every year, but also that they had been delivered to the Covington & Lexington Railroad Company, in payment of a subscription made by the county to the capital stock of the company, under authority given by the act of the legislature. It was further averred that the bonds were received by the railroad company, and that a certificate for the shares of the stock subscribed as aforesaid, was issued to the county and was received by it, and that it is still owned by the county. The declaration also made the further averments that the bonds were afterwards sold by the railroad company for $50,000, and delivered to the purchaser with the coupons attached; that the plaintiff subsequently became the owner, holder and bearer of them all, and that from the 15th day of October, 1864, inclusive, until the commencement of the suit, the county had neglected and refused to pay the coupons, though often requested.

To the cause of action thus set forth the defendant pleaded, first, that the plaintiff was not at the time of filing his declaration, or at the time of entering the plea, the owner, holder or bearer of the said alleged bonds or coupons, nor of any or either of them, as in the declaration mentioned.

Now, while it is true that the defense which it sets up was only inferentially an answer to the plaintiff's complaint, and while it might as well have been set up under the general issue, it was, nevertheless, a traverse of a material averment of the declaration. The coupons were made payable to bearer, but if the plaintiff was neither the owner, nor the holder, nor the bearer, they were not promises to pay him, and the county was not indebted to him. Hence it was material to his case to aver, as he did, *that he was the bearer, and the plea [*304 took issue with this averment. It denied the title of the plaintiff, or his right of action and, though faulty in form, in substance it amounted to a defense. It was, therefore, error to overrule it upon a general demurrer.

Similar observations might be made respecting the demurrers to the second and fourth pleas.

The third plea was in effect a denial of any legislative authority to the county to subscribe to the stock of the railroad company, and to issue bonds for the payment of such subscription. It averred that although the legislature, by one act, empowered the county to subscribe to the stock of the company, and to borrow money to pay the subscription, yet the authority was coupled with a proviso that the real estate holders residing in the county should so vote by a majority, at such times as the county court might appoint, and that "the question of subscribing stock or of borrowing money to pay the same, never was submitted to the real estate holders residing in the county of Pendleton, to be determined by a vote of the majority

of them, as authorized and required by the act before any stock had been subscribed by or for said county, or any money borrowed to pay the same." The plea further averred that subject to the acts of the legislature (enacted before the subscription was made) which authorized the levy of a tax for the purpose of paying the subscriptions to the stock of the said company, also provided that, before a subscription should be made and a tax levied, the question of levying the tax should be submitted to the voters of the county, and if a majority of the votes cast should be in favor of the tax, it should be levied, and the subscription should be made; and the plea denied that the question, whether the tax or the subscription authorized by these acts, or whether any tax for the payment of the subscription of stock in said company should be imposed in the county, had ever been submitted to, or voted upon, by the voters of Pendleton county, in conformity with said acts. The plea then averred that no other acts of the legislature authorized the county, or any one for it, to subscribe stock for it in said company, or to levy a tax for payment, or to borrow money, or to issue bonds or coupons for the payment of any subscriptions of stock therein. The general demurrer to this plea raises the question whether it presented a substantial defense to the action.

It is to be noticed at the outset that the plea concedes legislative authority to the county to make a subscription, and to issue bonds in payment, although the exercise of the authority was required to be preceded by a popular vote. It concedes that the bonds were in fact made and issued. We say it concedes this, because such making and issue are alleged in the declaration, and the plea does not traverse the allegation. It concedes that the subscription was made; that the bonds were delivered to the company in payment; that they were sold for $50,000; that the plaintiff subsequently became the owner, and hence that he stands in the position of a purchaser for value; and it concedes that the county obtained for the bonds a certificate of stock in the railroad company, which it now holds.

Without legislative authority a municipal corporation, like a county, may not subscribe to the capital stock of a railroad company, and bind itself to pay its subscription, or issue its bonds in payment; and if it does, the purchase of such bonds is affected by the want of authority to make them. But it does not follow from this that when the legislature has given its sanction to the issue of bonds, provided that before their issue certain things shall be done by the officers, or the people of the county, the bonds can always be avoided in the hands of an innocent purchaser by proof that the county officers, or the people, have not done, or have insufficiently done, the things which the legis- 305*] lature required *to be done before the authority to subscribe or to issue bonds, should be exercised. A purchaser is not always bound to look further than to discover that the power has been conferred, even though it be coupled with conditions precedent. If the right to subscribe be made dependent upon the result of a popular vote, the officers of the county must first determine whether the vote has been taken as directed by law and what the vote was. When, therefore, they make a subscription and issue county bonds in payment, it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the condition which the law attached to the exercise of the power has been fulfilled. To issue the bonds without the fulfilment of the precedent conditions would be a misdemeanor, and it is to be presumed that public officers act rightly. We do not say this is a conclusive presumption in all cases, but it has more than once been decided that a county may be estopped against asserting that the conditions attached to a grant of power were not fulfilled. *Knox Co.* v. *Aspinwall*, 21 How. 539, 16 L. ed. 208; *Bissell* v. *Jeffersonville*, 24 How. 287, 16 L. ed. 664; *Moran* v. *Comrs*, 2 Black, 722, 17 L. ed. 342; *Meyer* v. *Muscatine*, 1 Wall. 384, 17 L. ed. 564; *Van Hostrup* v. *Madison City*, 1 Wall. 291, 17 L. ed. 538; *Supervisors* v. *Schenck*, 5 Wall. 772, 18 L. ed. 556. The estoppel in these cases was either by recitals in the bonds that the conditions precedent had been complied with, or by the fact that the county had subsequently levied taxes to pay interest on the bonds. In the present case it does not appear in the pleadings whether or not the bonds contained any such recitals, nor whether the officers of the county have levied taxes to pay interest on them, or whether any interest has been paid. These grounds of estoppel do not exist. But if such acts and such recitals are sufficient to protect bona fide purchasers against an attempt to set up non-compliance with the conditions attached to the grant of power to issue the bonds, it is not easy to see why the pleadings do not show an estoppel in this case. The county received in exchange for the bonds a certificate for the stock of the railroad company, which it held about seventeen years before the present suit was brought, *and which it still holds. Having ex- [*306 changed the bonds for the stock, can it retain the proceeds of the exchange, and assert against a purchaser of the bonds for value that, though the legislature empowered it to make them, and put them upon the market upon certain conditions, they were issued in disregard of the conditions? We think they cannot and, therefore, that the third plea cannot be sustained.

But for the reasons given above the case must be sent back for another trial; when, doubtless, the pleadings will be changed.

The judgment is reversed, and the cause is remitted for further proceedings.

We concur in the judgment of reversal, but do not assent to all the views expressed in the opinion of the majority.

Field, J.
Miller, J.
Chase, Ch. J.

THE PRESIDENT, MANAGERS, AND COMPANY OF THE DELAWARE & HUDSON CANAL COMPANY, *Appts.*,

v.

HENRY C. CLARK.

(See S. C. 13 Wall. 311-328.)

Trademarks—what not protected—violation—geographical names.

1. A company has not an exclusive right to the use of the words "Lackawanna coal" as a distinctive name or trademark for the coal mined by it and transported over its railroad and canal to market.

2. Where rights to the exclusive use of the trademark are invaded, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another.

3. One has no right to appropriate geographical names as a trademark, so as to restrain other producers of similar products in the same place from the use of those words in describing their goods.

[No. 95.]

Argued Feb. 6, 1872. Decided Feb. 26, 1872.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

This action was commenced in the court below by the appellants, to enjoin and restrain the defendant, who is a dealer in coal in the city of Providence, R. I., from advertising or selling or attempting to sell any coal, other than that mined by the complainants, under the name of "Lackawanna coal," and also for an accounting of profits. After hearing and argument, the circuit court dismissed the bill and the complainants appealed to this court.

A further statement appears in the opinion.

Messrs. **E. H. Owen** and **S. P. Nash,** for appellants:

The appellants have a valid title to the use of that word as a trademark, and should be protected in the use thereof against the fraudulent and deceptive act of the defendant.

It appears from the undisputed testimony in the case, that the appellants were the first to adopt and impose upon it the new and peculiar office of becoming and being thereafter the name and trademark for their coal. They so adopted and appropriated it as early as 1829, at the very commencement of their coal business. The first coal which they brought to market was called and sold by the name of Lackawanna coal, and all the coal which they have hitherto produced and brought to market, has been sold and dealt in by that name and by no other.

By such original, special, and peculiar appropriation of the word "Lackawanna" the appellants acquired a title thereto, and the right to its exclusive use in combination with the word "coal" and thereupon and thereafter, by the continued use thereof, the new compound word "Lackawanna coal" rightfully became and was and is the name and trademark for their coal, not limited by territorial bounds. *Derringer* v. *Plate*, 29 Cal. 292.

It is not necessary that the word which may be adopted as a name and trademark, should be a new creation, never before known or used, to entitle it to be so adopted. Any word in common use may be taken, if its application be original, and so far peculiar as to be capable, when known to the public, of distinguishing the property of the party so adopting it, and to which it may be attached, from that of other parties. In such case the right of the public to use the word is not abridged. It can be used as originally, and in any and every other way imaginable, except in its peculiar combination with the word "coal."

McAndrew v. *Bassett*, 10 Jur. (N. S.) 550; *Seixo* v. *Provezende*, L. R. 1 Ch. App. 192; *Messerole* v. *Tynberg*, 4 Abb. Pr. (N. S.) 410; *Newman* v. *Alvord*, 49 Barb. 592; *Williams* v. *Spence*, 25 How. Pr. 366; *Amoskeag Mfg. Co.* v. *Spear*, 2 Sandf. 599, and cases hereafter cited.

The exceptions to the right to appropriate a word for a trademark are: that it cannot be done when the word "adopted" is merely used as descriptive of quality, as in the cases of *Stokes* v. *Landgraff*, 17 Barb. 608; *Corwin* v. *Daly*, 7 Bosw. 222; *Amoskeag Mfg. Co.* v. *Spear*, *supra;* or where it is the proper name for the article, as in the case of "Schnapps" (*Wolfe* v. *Goulard*, 18 How. Pr. 64); or where it has by general use become the appropriate name of an article, which all persons manufacturing the same may use, as in the case of "Dr. Johnson's Yellow Ointment;" *Singleton* v. *Bolton*, 3 Doug. 393; the "Essence of Anchovies," *Burgess* v. *Burgess*, 17 Eng. L. & E. 257.

The word "Lackawanna," as used by the appellants, does not come within either of these exceptions. It is not the generic name, nor is it naturally the appropriate name for coal. In its original sense it does not mean coal, nor had it become by previous use the name of coal, nor does it imply, nor was it intended to indicate the quality of coal; but it was adopted for and became and was and still is the specific name thereof, indicating its origin and ownership, and by which it could be bought and sold in market; and the court below was correct, therefore, in holding, as it in effect appears to have done, that the appellants had established their title to the word as their trademark.

Nor has the defendant any color of right to sell his coal by the name of Lackawanna coal, from the mere fact that it comes from what is commonly known as the Lackawanna region; more especially since it does not come from the appellants' mines, nor through them as producers, and is not in fact the coal known in market as Lackawanna coal.

McAndrew v. *Bassett*, 18 Jur. (N. S.) 550; *Seixo* v. *Provezende*, L. R. 1 Ch. App. 192; *Newman* v. *Alvord*, 49 Barb. 588.

The defendant has not established by competent testimony, that any company or person other than himself advertises or sells their own or other kinds of coal by the name of Lackawanna coal.

Even if it be established by the testimony, which is not conceded except for the argument, that others have sold Scranton coal by the name of Lackawanna coal; yet, that did not and does not justify the defendant in so doing. It is no defense to this action that the defendant's fraud and deception has been multiplied, and hitherto courts have not shown any disposition to treat that as a defense, but rather as an aggravation.

Taylor v. *Carpenter*, 2 Wood. & M. 8; *Cocks* v. *Chandler*, L. R. 11 Eq. 445; *Gillott* v. *Esterbrook*, 47 Barb. 470.

NOTE.—*Trademark in geographical name*—see notes, 45 L. ed. U. S. 365; 17 C. C. A. 657; 35 C. C. A. 242.

That this court has jurisdiction to restrain the defendant from the further use of the appellants' trademark is beyond question. The following are some of the numerous cases in the Federal and state courts, and also in the English courts, where injunctions have been granted to restrain in the use of names which had been adopted as trademarks:

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2. A person has no right to appropriate a name which others may apply with equal truth and have an equal right to employ for the same purpose, such as a geographical name, as in this case.

3. The basis of the action of a court of equity to restrain the infringement of the right to a trademark, is fraud or imposition on the part of the defendant; fraud as against the plaintiff, or imposition on the public.

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The bill alleges, however, not only that the complainants devised, adopted, and appropriated the word, as a name or trademark for their coal, but that it had never before been used or applied in combination with the word "coal," as a name or trademark for any kind of coal, and it is the combination of the word "Lackawanna" with the word "coal" that constitutes the trademark to the exclusive use of which they assert a right.

322*] *It may be observed there is no averment that the other coal of the Lackawanna valley differs at all in character or quality from that mined on the complainants' lands. On the contrary the bill alleges that it cannot easily be distinguished therefrom by inspection. The bill is therefore an attempt to secure to the complainants the exclusive use of the name "Lackawanna coal." as applied, not to any manufacture of theirs, but to that portion of the coal of the Lackawanna valley which they mine and send to market, differing neither in nature or quality from all other coal of the same region.

Undoubtedly, words or devices may be adopted as trademarks which are not original inventions of him who adopts them, and courts of equity will protect him against any fraudulent appropriation or imitation of them by others. Property in a trademark, or rather in the use of a trademark or a name, has very little analogy to that which exists in copyrights or in patents for inventions. Words in common use, with some exceptions, may be adopted, if, at the time of their adoption, they were not employed to designate the same, or like articles of production. The office of a trademark is to point out distinctively the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer. This may, in many cases, be done by a name, a mark, or a device well known, but not previously applied to the same article.

But though it is not necessary that the word adopted as a trade name should be a new creation, never before known or used, there are some limits to the right of selection. This will be manifest when it is considered that in all cases where rights to the exclusive use of a trademark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the *authorities. *Amoskeag Mfg. Co.* v. [*323 *Spear*, 2 Sandf. S. C. 599; *Boardman* v. *Meriden Britannia Comp'y*, 35 Conn. 402; *Ferina* v. *Silverlock*, 39 Eng. L. & E. 514. Hence the trademark must either by itself, or by association, point distinctively to the origin or ownership of the article to which it is applied. The reason of this is that unless it does, neither can he who first adopted it be injured by any appropriation or limitation of it by others, nor can the public be deceived. The first appropriator of a name or device pointing to his ownership, or which, by being associated with articles of trade, has acquired an understood reference to the originator, or manufacturer of the articles, is injured whenever another adopts the same name or device for similar articles, because such adoption is in effect representing falsely that the productions of the latter are those of the former. Thus the custom and advantages to which the enterprise and skill of the first appropriator had given him a just right are abstracted for another's use, and this is done by deceiving the public, by inducing the public to purchase the goods and manufactures of one person supposing them to be those of another. The trademark must, therefore, be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association. And there are two rules which are not to be overlooked. No one can claim protection for the exclusive use of a trademark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trademark and the exclusive use of it be entitled to legal protection. As we said in the well-considered case of *Amoskeag Mfg. Co.* v. *Spear*, *supra*, "the owner of an original trademark has an undoubted right to be protected in the *exclusive [*324 use of all the marks, forms, or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or a symbol which from the nature of the fact it is used to signify, others may employ with equal truth and, therefore, have an equal right to employ for the same purpose." *Vide*, *Wolf*, v. *Goulard*, 18 How. Pr. 64; *Fetridge* v. *Wells*, 4 Abb. Pr. 144; *Town* v. *Stetson*, 5 Abb. Pr. (N. S.) 218; *Phalon* v.

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It is difficult to see the slightest difference of principle between these cases and the one under discussion. The complainants on the one hand, and the so-called Scranton and Pittston Companies on the other hand, mine their respective coals in the same valley or region, the Lackawanna. The article named and produced by each of the three companies is the same, namely, anthracite coal, and each, therefore, under the principle of the decision, has a right to call its product Lackawanna coal.

So far has this principle been carried, that the courts have refused to enjoin the defendants from using the plaintiff's own name to designate the article produced by him where, by long and general use, the plaintiff's name had become identified with the article in question itself, and not with any particular quality or description of it.

It certainly cannot be questioned, under the testimony in this case, that the name "Lackawanna coal" has, in the general understanding of dealers in and writers on coal, become the proper designation of all coal mined and produced from that valley or region, no matter by what parties it is mined, brought to market or sold.

All the cases hold that, to entitle the complainant to an injunction, there must be, if not some elements of fraud, at least some deception, whether intentional or unintentional. There must be some evidence of design to deceive the public or to wrong the original producer, by passing off an article not produced by the original manufacturer, as and for his.

Witherspoon v. *Currie*, known as the *Glenfield Starch Case*, in which the opinion of Vice Chancellor Malin, 22 L. T. R. 260, was reversed on appeal, 23 L. T. R. 443; *Candie* v. *Deere*, known as the *Moline Plough Case*, in which the supreme court of Illinois reversed the judgment granting an injunction of the circuit court, 54 Ill. 439; *Congress & Emp. Spr. Co.* v. *High Rock Cong. Spring Co.* 45 N. Y. 291.

Mr. Justice **Strong** delivered the opinion of the court:

The first and leading question presented by this case is whether the complainants have an exclusive right to the use of the words "Lackawanna coal" as a distinctive name *or [*321 trademark for the coal mined by them and transported over their railroad and canal to market.

They commenced mining on their land in the Lackawanna valley, about the year 1828, and they have ever since been engaged in taking out coal, and carrying it to the Hudson river and to the markets of the country. The averment of their bill is that about the time they commenced their operation, they sought out, devised, and adopted the name "Lackawanna coal" as a special, particular, and distinctive name, or trademark, by which their coal might be introduced to dealers as the product of their mine, in distinction from the coal of other producers, and that prior to their adoption of the word "Lackawanna" it had never been adopted or used in combination with the word "coal" as a name or trademark for any kind of coal. Their bill also avers that ever since their adoption of the name, their coal has been called and known in the market as "Lackawanna coal" and by no other name.

These averments of the bill are supported by

no inconsiderable evidence. The complainants were undoubtedly, if not the first, among the first producers of coal from the Lackawanna valley, and the coal sent to market by them has been generally known and designated as Lackawanna coal. Whether the name "Lackawanna coal" was devised or adopted by them as a trademark before it came into common use is not so clearly established. On the contrary, the evidence shows that long before the complainants had commenced their operations, and long before they had any existence as a corporation, the region of country in which their mines were situated was called "the Lackawanna valley;" that it is a region of large dimensions, extending along the Lackawanna river to its junction with the Susquehanna, embracing within its limits great bodies of coal lands. upon a portion of which are the mines of the complainants, and upon other portions of which are the mines of the Pennsylvania Coal Company, those of the Delaware, Lackawanna, & Western Railroad Company, and those of other smaller operators. The word "Lackawanna," then, was not devised by the complainants. They found it a settled and known appellative of the district in which their coal deposits and those of others were situated.. At the time when they began to use it, it was a recognized description of the region, and of course of the earths and minerals in the region.

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the goods on board of her, by collision. The following cases were suits to recover for injuries to vessels and their cargoes by collision.

Gale v. *Laurie*, 5 Barn. & C. 156; *The Mary Caroline*, 3 Wm. Rob. 101; 6 Notes of Cas. 536; *The Benares*, 1 Eng. L. & E. 637; *Brown* v. *Wilkinson*, 15 Mees. & W. 397; *The Northumbria*, L. R. 3 Ad. & Ec. 6, 24; see also the opinion of Bailey, J., in the leading case of *Wilson* v. *Dickson*, 2 B. & Ald. 2.

2. The grammatical construction of the language of the 3d section shows that the "loss, damage or injury by collision" therein mentioned, is a distinct ground for the limitation, and that it is not confined to the case of goods shipped on board. The words "or for any loss, damage or injury by collision" are merely surplusage, if confined to goods shipped on board the offending vessel. Their destruction, from whatever cause, was already provided for. The statute should be so construed as to give effect to every clause, if possible and consistent with the general intention.

3. There is nothing in the provisions of the 4th section which controls this construction of the 3d section. The provisions of the 4th section are applicable to the case of collision. But if not applicable so far as the right to assign the vessel is concerned (as was intimated by Merrick, J., in *Walker* v. *Ins. Co.* 14 Gray, 307), still it does not attempt to cut down the 3d section in any of its provisions, as shown by the same judge.

4. In a case of collision, a case of injury to another vessel, the owners could not be held liable beyond the amount of their interest in the vessel guilty of the *delictum* and her freight, then pending, and this view of the act is sustained by the opinions given in several cases in our own courts.

Allen v. *Mackay*, 16 Law Rep. 686; 1 Spr. Dec. 219; *Walker* v. *Ins. Co. supra; The Ann Caroline*, Nelson, J., Circuit Court; *Moore* v. *Transportation Co.* 24 How. 39, 16 L. ed. 681; *The Baltimore*, 8 Wall. 385, 19 L. ed. 465.

5. The 4th section evidently applies to the owners of a vessel injured by collision, as well as the shippers by the vessel in fault. The words "or any property whatever" are an addition to the "goods, wares, and merchandise" previously mentioned. The words, "and for that purpose the said freighters and owners of the property," embrace both the owners of the freight shipped and of "any property whatever" before mentioned. This construction renders the act harmonious and consistent with the great object in view in its enactment. Any other construction would render the act impracticable. As all persons sustaining damage by the collision would have a lien on the steamer for their damages, if she was seized by the owners of the schooner, how could the owners assign her for the benefit of the freighters? If, as the appellant claims, the provisions of this section apply to the cases mentioned in the 3d, no difficulty of this kind could arise.

See the opinion of Bailey, J., in *Wilson* v. *Dickson*, 2 B. & Ald. 2, the first case arising upon the 53 Geo. III.

11. The appellant is entitled to the benefit of this act in this suit. No rule of law is changed, except the extent of its liability. That can, in no case exceed the value of its interest in the steamboat and her freight, then pending. It is said by Merrick, J. (*Walker* v. *Ins. Co.* 14 Gray, 306), that "a party, if sued, can defend, and if judgment goes against him, he can limit the damages to the amount allowed by this act."

Brown v. *Wilkinson*, 15 Mees. & W. 397; *Cannan* v. *Meaburn*, 1 Bing. 465; *Allen* v. *Mackay*, 16 Law Rep. 686; 1 Spr. 219.

The libelant's claim as understood is that in such cases the appellant must file a bill in equity, or take some steps which are not very clearly indicated, to bring all parties in interest before some court. But that is a matter of the appellant's concern, and for its protection. It is liable only to the amount limited by the act. If the libelant sue in such a suit instead of adopting the proceedings they are authorized to take, they are not at liberty to say that the appellant must pay them their full damages sustained, or go into equity.

If we cannot have the relief in this action, we may not get it anywhere, and the provision of the act would be rendered useless to us. *Montgomery* v. *Anderson*, 21 How. 386, 16 L. ed. 160.

Messrs. R. H. Huntley and **C. R. Ingersoll**, for appellees:

The court below properly refused to allow the owners of the offending steamer to put in proof of the claims of its freighters for the purpose of reducing their liability to the libelants.

The act of Mar. 3, 1851, does not apply, in any of its sections, to a loss that "may happen to any other ship or vessel (than the owners' vessel) or to any goods, wares or merchandise or other thing being on board of any other ship or vessel."

The words, "loss, damage, or injury by collision," in the 3d section, are to be construed by the context, and relate only to the property to which the other branches of the section relate; that is, property "shipped or put on board such ship or vessel."

The mischief which occasioned this act was the absolute liability to which the ship-owner was held to be subject as a carrier by the decision in the case of *The Lexington*.

That the remedy was simply designed to meet this mischief, is manifest by the debate in the Senate on the passage of the bill. 23 Cong. Globe, 713.

The very last thing done in the Senate before passing the bill was the addition of the proviso "that nothing in this act contained shall prevent the parties from making such contracts as they please, extending or limiting the liabilities of ship-owners;" clearly indicating that the ship-owner's liability to be affected by the act was a liability growing out of his relations to those with whom he might making contracts of affreightment.

The construction of the act clearly evidences the same design. It is made up from the English statutes of 7 Geo. II. (1734), 26 Geo. III. (1786), and 53 Geo. III. (1813), and the Massachusetts statute of 1818, and the Maine statute of 1821; Abb. Ship. 396; Rev. Stat. Mass. 1835. 295. ch. 32; Rev. Stat. Maine, 1821, p. 92, ch. 14.

It should be premised that the act is not only in derogation of common law, but is "an

country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district or dealing in similar articles coming from the district, from truthfully using the same designation. It is only when the adoption or imitation of what is claimed to be a trademark amounts to a false representation, express or implied, designated or incidental, that there is any title to relief against it. True, it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product; but if it is just as true in its application to his goods as it is to those of another who first applied it and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth.

These principles, founded alike on reason and authority, are decisive of the present case, and they relieve us from the consideration of much that was pressed upon us in the argument. The defendant has advertised for sale and he is selling coal not obtained from the plaintiffs, not mined or brought to market by 328*] them, but coal which he purchased *from the Pennsylvania Coal Company, or from the Delaware, Lackawanna, & Western Railroad Company. He has advertised and sold it as Lackawanna coal. It is in fact coal from the Lackawanna region. It is of the same quality and of the same general appearance as that mined by the complainants. It is taken from the same veins or strata. It is truly described by the term "Lackawanna coal," as is the coal of plaintiffs. The description does not point to its origin or ownership, nor indicate in the slightest degree the person, natural or artificial, who mined the coal or brought it to market. All the coal taken from that region is known or has been known for years by the trade, and rated in public statistics as Lackawanna coal. True the Delaware, Lackawanna, & Western Railroad Company have sometimes called their coal Scranton coal, and sometimes Scranton coal from the Lackawanna, and the Pennsylvania Coal Company have called theirs "Pittston coal," thus referring to the parts of the region in which they mine. But the generic name, the comprehensive name for it all, is Lackawanna coal. In all the coal regions there are numerous collieries, owned and operated by different proprietors, yet the product is truly and rightfully described as Schuylkill, Lehigh, or Lackawanna coal, according to the region from which it comes. We are therefore of opinion that the defendant has invaded no right to which the plaintiffs can maintain a claim. By advertising and selling coal brought from the Lackawanna valley as Lackawanna coal, he has made no false representation, and we see no evidence that he has attempted to sell his coal as and for the coal of the plaintiffs. If the public are led into mistake, it is by the truth, not by any false pretense. If the complainants' sales are diminished, it is because they are not the only producers of Lackawanna coal, and not because of any fraud of the defendant. The decree of the circuit court dismissing the bill must, therefore, be affirmed.

The decree of the Circuit Court is affirmed.

THE NORWICH & NEW YORK TRANSPORTATION COMPANY, *Appts.*, *v.* WILLIAM A. WRIGHT *et al.*

(See S. C. 13 Wall. 104-128.)

Limitation of liability for collision—how discharged—jurisdiction of district court—assignment of vessel and freight.

*1. The act of Congress of 1851, limiting the liability of ship-owners, includes collisions as well as injuries to cargo; so that if a collision happens between two vessels at sea; and one of them is at fault without the privity or knowledge of her owners, the latter will only be liable for the amount of their interest in the vessel and her freight then pending; and that amount being paid into court, if insufficient to pay all the damages caused, will be proportioned *pro rata* amongst the owners of the injured vessel and of the cargoes of both vessels, in proportion to their respective losses.

2. This liability of the ship-owners may be discharged by their surrendering and assigning to a trustee for the benefit of the parties injured in pursuance of the 4th section of the act, the vessel and freight, although these may have been diminished in value by the collision or other casualty during the voyage; and it seems that if they are totally lost, the owners will be entirely discharged.

3. In this respect the act has adopted the rule of maritime law as contradistinguished from that of the English statutes on the same subject.

4. The district court, sitting as a court of admiralty, has jurisdiction of cases arising under the act, and may administer the law as provided in the 4th section.

5. The proper course of proceeding in such a case pointed out.

[No. 89.]

Argued Jan. 25, 26, 29, 1872. Decided Mar. 4, 1872.

APPEAL from the Circuit Court of the United States for the District of Connecticut.

The case is stated by the court.

Messrs. **E. H. Owen, J. Halsey,** and *George B. Hibbard,* for appellant:

The appellant claims that libelants are only entitled to recover a proportionate part of their loss, and not the whole, as adjudged by the decree, which was so held by the circuit court, provided the act of 1851 (9 Stat. at L. 635) was applicable to the owners of the schooner and her cargo. That court, however, held that such limitation applied only to the freighters of cargo upon the steamboat, who could not recover more than their just proportion of the value of the steamboat, and of her freight then pending.

I. The limitation in the 3d section of the act applies in case of damage to another vessel and her cargo, as to the goods on board of the vessel in fault. It is applicable to all claims for damages by the same collision.

1. The English statutes, from which this was borrowed, embrace both classes of injuries (Abb. Ship. 394) and the English courts have repeatedly held that they were applicable in cases of injury to another vessel and to

*Headnotes by Mr. Justice BRADLEY.

NOTE. — *Limitation of owner's liability* — see notes. 45 C. C. A. 387; 49 C. C. A. 11.

The 2d section of the Massachusetts statute from which this was copied, is taken from the statute 7 Geo. II., with only a change of phraseology. The corresponding section of statute 7 Geo. II. (and also of the Maine act of 1821) is as follows:

"That if several freighters or proprietors of any such goods, wares, or merchandise, or any property whatever, shall suffer loss or damage by any of the means aforesaid, in the same voyage, and the value of the ship or vessel, etc., shall not be sufficient, etc., then such freighter or proprietor shall receive satisfaction thereout in average, etc."

The "such goods or property" here referred to are manifestly the "goods, wares, and merchandise, or any property whatsoever" mentioned in the preceding section, and which are there identified as the property "which shall be shipped, taken in, or put on board any ship or vessel."

And it was in respect of this property that the proprietor or "owner," even though not strictly a freighter, was entitled to his average.

And no one else but these freighters and proprietors could make any claim to the average, under this provision.

3. The provision for a surrender of the vessel to a trustee is "for the benefit of such claimants;" that is, the claimants just referred to; the freighters or owners of the property put on board the owner's ship.

Although there may be several claimants, all may not prove themselves "legally entitled thereto." But one may perhaps bring himself within that requirement and, therefore, the trustee is to hold the property for "person or persons" who may eventually make good their claim.

This construction has been applied to the 4th section in the only cases where it has come under review.

Walker v. *Ins. Co.* 14 Gray, 288; *Spring* v. *Haskill*, 14 Gray, 309; *Barnes* v. *Steamship Co.* 25 Leg. Int. 196, 6 Phila. 479.

But if any such right of apportionment exists, the motion of the defendants is not "an appropriate proceeding" to enforce it.

It will be observed that the defendant is not offering to prove that it has paid to anyone the value of its vessel, or any portion of it, for losses growing out of this collision, or that it has even become liable to pay that value, or any portion of it, to anyone on account of such losses.

It simply proposes to show that certain undetermined claims for damages are pending against it in another district.

Now, these very claims are being resisted by the defendant on the very ground that the losses were not occasioned by collision. *Place* v. *Norwich*, 3 Ben. 89.

The defendant has recovered judgment on its policies of insurance on the ground that it had sustained a loss by fire. *Norwich & N. Y. Trans. Co.* v. *Western Mass. Ins. Co.* 34 Conn. 561.

Its legal position in making this motion is well illustrated by these facts: if, without paying a dollar into court and holding fast its vessel, it can substantially defeat the claim of these libelants, by apportioning to them a nominal sum for damage, and can, at the same time, defeat its freighters because the loss was not a loss by collision, and can keep in its pockets the money it has raised from the insurance companies, because of its loss by fire, it will have accomplished what its construction of this act would certainly justify, but what, it is safe to say, the framers of the act would not have supposed ever would be accomplished.

Where is the power found to convert this simple proceeding between these two parties, of which this court has jurisdiction only because of its jurisdiction over their persons, into a proceeding for the condemnation of property, or the apportionment of a fund in which hundreds of other persons, living in various jurisdictions, may claim an interest?

The City of Norwich, 1 Ben. 97; *The Saracen*, 6 Moore, P. C. 74.

Clearly, an apportionment cannot be made without an adjudication upon each claim that may be entitled to share in the apportionment.

Finally, even if the act of 1851 had the scope claimed for it by the defendants, and had conferred upon the district court the equitable powers given to the English courts by the act of 53 Geo. III., it could not be now used to take away from these libelants their priority, acquired by their judgment, to be paid in full.

Mr. Justice **Bradley** delivered the opinion of the court:

About half past three o'clock in the morning of the 18th of April, 1866, a collision occurred between the schooner General Van Vliet and the steamer City of Norwich, on Long Island Sound, off Stamford, Connecticut. Both vessels were seriously injured and sunk. The schooner was laden with oysters and was on her way to New Haven, tacking against a head wind. She went down in fifteen fathoms of water, about two hours after the accident. The steamer, before sinking, was set on fire by the rising of the water to her furnaces, and the flashing out of the flames caused thereby; and several lives, as well as a valuable cargo, were lost. She was subsequently raised and repaired. The libel in the case was filed by the owners of the schooner and her cargo, against the owners of the steamer, *in personam*. The district court made a decree in favor of the libelants, for $19,975 for the schooner, and $1,921.63 for her cargo, with interest from the date of the collision. The circuit court affirmed this decree.

The respondents, by way of defense, not only denied that the steamer was in fault, but claimed the benefit of the act of Congress, passed March 3, 1851, limiting the liability of ship-owners to the amount or value of their interest in the ship and her freight. They alleged in their answer that the steamer, at the time of the collision, had on board a large and valuable cargo belonging to various parties—much larger in value than the whole amount of the interest of the defendants in said steamer and the freight, then pending; and that the whole was lost. And before the decree was passed, the respondents filed a petition wherein they alleged that proceedings *in rem* had been commenced in behalf of said parties against the steamer, in the district court of the United States for the eastern district of New York, for the recovery of damages for the loss of said

intrenchment, so far as it goes, on the general principle of every man being entitled to recover the whole of his loss from the individual who inflicts it (*The Benares*, 1 Eng. L. & E. 639), and therefore must not be extended beyond the fair import of its language." *Morewood* v. *Pollok*, 18 Eng. L. & E. 341.

Before the enactment of the statute 7 Geo. II., the law of England, the common law, undoubtedly held the carrier by water to the same responsibilities as the carrier by land.

The general maritime law of Europe was different. For the wrongful acts of the master "that is, acts of wilful and intentional wrong, and not of mere unskilfulness and incapacity, the liability of the owner was limited to the interest he had in the ship."

The Rebecca, 1 Ware, 198.

The decision in *Boucher* v. *Lawson*, Cas. t. Hardw. 85, that the ship-owner was answerable for an embezzlement of the cargo by the master, occasioned the Statute of 7 Geo. II. Abb. Ship. 395.

This statute assimilated the law of England to what Judge Ware supposes the general maritime law of Europe to have been. It limited the owners' liability in respect of the wrongful act of the master and mariners, such as "embezzlement or other malversation."

This act is as strong as possible and was meant to protect the owners against all treachery in the master or mariners. *Sutton* v. *Mitchell*, 1 T. R. 20.

The statute of 26 Geo. III. (1786) followed the decision in *Sutton* v. *Mitchell*, and by it, the liability of the ship-owner was still further limited. Abb. Ship. 397.

The statute of 53 Geo. III. (1813) which was next passed, made important innovations.

It specifically "contemplated two descriptions of losses; one to the cargo laden on board the ship, and the other to a disconnected ship and her cargo." *Wilson* v. *Dickson*, 2 B. & Al. 12.

It also, for the first time, contemplated acts omitted to be done; "neglects" as well as acts to be done, without the fault or privity of the owner. Abb. Ship. 398.

The statutes of Massachusetts and Maine comprise, it is believed, all the legislation in the United States before the act of Congress of 1851, and the act of 1851 is copied largely from them.

Now, it was out of these materials that the act of Congress of Mar. 1851, was framed.

Striking from § 3 the words "or for any loss, damage, or injury by collision," the section remains substantially as its corresponding § in 7 Geo. II., and the Maine and Massachusetts acts, with the amendment of 26 Geo. III.

That is, it would limit the owner's liability in all cases:

1. Of "any embezzlements, loss, or destruction, by the master or mariners or any other person, of the goods on board."

2. Of "any act, matter, or thing, loss, damage. or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners."

But neither of these cases could cover a loss to the goods on board. by collision. They relate, as we have seen, to acts of malversation.

Therefore, when it was determined, in the drafting of this act, to extend the limitation of the owner's liability as a carrier to the case of collision, rarely the result of wilfulness and sometimes not of negligence, it became necessary to insert the special words in question.

But no new kind of property was introduced as the subject of the newly provided for loss, damage or injury. It was the addition of a new cause of injury to the same property that, before the addition, might have been injured by the embezzlement or other acts of malversation to which the section applied; that is, the property on board the owner's ship.

No such addition could by any rule of construction change the general subject of the act.

But upon the construction claimed by the defendants, the scope of the entire section and indeed of the entire act, is changed by this insertion. For if these words are not restricted by the qualifications of the "loss or destruction" just before described, the words following cannot be, and the limitation must be held to extend to every act, matter or thing done, occasioned, or incurred to any property whatsoever, whether on the sea or on shore.

But the framer of the act could have had no such object.

He had the act of 53 Geo. III. before him. He saw that it provided in the clearest language for a collision causing loss to any other ship and to the goods on board of it; and, as the draughtsman of the Massachusetts and Maine act had done before, he ignored it. Could there possibly be stronger evidence of his intention, that the proposed bill should have no such operation, but that it should be limited in its application, as the acts upon which it is directly based are limited, to losses whether occurring by embezzlement, collision, or any act without the owner's privity, happening to the goods shipped and put on board the owner's vessel?

II. But if the 3d section of the act shall be construed as limiting the owner's liability in respect of losses to another ship, it is submitted that the act does not require the party suffering such loss to share with the freighters of the offending ship in the value of the owner's interest, and does not interfere with the assessment of his damages, in any way, if they do not exceed the limit of the owner's liability.

It is only by the 4th section of the act that any apportionment is provided for.

1. The words "such embezzlement, loss, or destruction" in this section refer to the embezzlement, loss, or destruction by the master, etc., mentioned in the preceding section.

This part of the section is a literal copy of the Massachusetts act before referred to.

2. It is clear that no provision is made by this section for any apportionment among any other persons than the freighters and owners of the property on board the owner's ship.

It is claimed that by "owners of any property whatever" persons distinct from freighters are intended, and that the expression was designed to comprise owners of the injured ship.

A reference to the statutes from which this part of the section was taken, will show the error of this claim.

thus: "The proprietors of vessels shall be responsible for the acts of the master, but they shall be discharged by abandoning the ship and freight." Valin, in his commentary on this 117*] *passage, lib. 2, tit. 8, art. 2, after specifying certain engagements of the master which are binding on the owners, without any limit of responsibility, such as contracts for the benefit of the vessel, made during the voyage (except contracts of bottomry) says: "With these exceptions it is just that the owner should not be bound for the acts of the master, except to the amount of the ship and freight. Otherwise he would run the risk of being ruined by the bad faith or negligence of his captain, and the apprehension of this would be fatal to the interests of navigation. It is quite sufficient that he be exposed to the loss of his ship and of the freight, to make it his interest, independently of any goods he may have on board, to select a reliable captain." Pardessus says: "The owner is bound civilly for all delinquencies committed by the captain within the scope of his authority, but he may discharge himself therefrom by abandoning the ship and freight; and if they are lost, it suffices for his discharge, to surrender all claims in respect of the ship and its freight," such as insurance, etc. *Droit Commercial*, part 3, tit. 2, c. 3, § 2.

The same general doctrine is laid down by many other writers on maritime law. So that it is evident that, by this law, the owner's liability was co-extensive with his interest in the vessel and its freight, and ceased by his abandonment and surrender of these to the parties sustaining loss.

This rule, to a partial extent, was adopted in England by the act of 7 George II., passed in 1734. By this act, after reciting that it was of the greatest consequence to the Kingdom to promote the increase of the number of ships, and to prevent any discouragement to merchants and others from being interested and concerned therein, it was enacted that no ship-owner should be responsible for loss or damage to goods on board the ship by embezzlement of the master or mariners, without his privity or knowledge, further than the value of the ship and her appurtenances, and the freight due thereon for the voyage; and, if greater damage occurred, it should be averaged among those 118*] who sustained it. By 26 George *III (1786) this limitation of liability was extended to robbery and to losses in which the master and mariners had no part, and liability for loss by fire was entirely removed, as well as liability for loss of gold and jewelry, unless its nature and value were disclosed. By 53 George III. (1813), the liability limitation of ship-owners was still further extended to cases of loss by negligence of the master and mariners, and to damage done to other ships and their cargoes, including, of course, cases of collision. In the first two of these statutes it was provided that if the loss or damage fell on more than one party, either the parties injured or the ship-owners might file a bill in equity to ascertain the whole amount of loss on the one side and the value of the offending vessel and her freight on the other, so as to have a proper distribution of the latter, *pro rata*, amongst those who sustained damage. The last statute gave this remedy to the ship-owners alone, it being for their benefit and intended to prevent a multiplicity of suits against them. But they were obliged to pay the value of the vessel and her freight into court, or to give security for the amount, and to acknowledge their liability, inasmuch as the court of chancery would not investigate the question of liability. That being done, they were entitled to a stay of all suits brought against them for damages. Abb. Ship., part IV., chap. VII.

Under these statutes the English courts, since the passage of the act of 53 George III. (the question does not seem to have arisen before) have held that the value of the ship and freight was to be estimated as it stood immediately prior to the injury, so that if the ship were lost by the occurrence which caused it, or at any subsequent period before the completion of the voyage, the ship-owners were still liable for that value. The statutes contained no provision for a surrender and assignment of the ship and freight, but only for paying their value into court. Abb. Ship., part IV., ch. VII., § 5; *Wilson* v. *Dickson*, 2 Barn. & Ald. 2; *Cannan* v. *Meaburn*, 1 Bing. 465; *Brown* v. *Wilkinson*, 15 M. & W. 391; *Dobree* v. *Schroder*, 2 Myl. & C. 489; *The Mary Caroline*, 3 W. Rob. 101; *Leycester* v. *Logan*, 3 Kay & J. 446. These decisions, it will *be seen, create [*119 an important distinction between the English statute law and the maritime law.

Statutes similar in principle to the English acts were passed in 1818 and 1821 by the legislatures of Massachusetts and Maine, differing slightly in form. They limited the liability of the ship-owner to the amount of his interest in the ship and freight for any embezzlement or damage occasioned by the master or mariners without his privity or knowledge, and provided that if the loss or damage were sustained by several persons, and should be more than the value of the offending ship and its freight, either the persons so injured or the ship-owner, or both, might file a bill in equity for discovery and payment of the amount for which the owner might be liable, among those entitled thereto.

In 1841 the law of France was amended so as to operate still further to the advantage of the ship-owner, by enabling him to obtain, by abandonment of ship and freight, a complete discharge, not only from responsibility for the acts and defaults of the captain, but also for all his engagements and contracts relative to the ship and the voyage.

In the light of all this previous legislation, the act of Congress was passed in 1851. As we have seen, by the maritime law, the liability of the ship-owner was limited to his interest in the ship and freight for all torts of the master and seamen, whether by collisions or anything else, and sometimes even for the master's contracts; and his liability was so strictly limited that he was discharged by giving up that interest, or by the vessel being lost on the voyage, and the maritime courts found no difficulty in carrying this law into execution. By the English law, as constituted by acts of Parliament, the owner's liability was limited to the amount and value of ship and freight at the time of injury, for damages to cargo and damages to other vessels by collision; but from the restricted jurisdiction of the English admi-

cargo. They therefore prayed that they might be permitted to show, by proper evidence, the whole amount of damages sustained by all of said parties, including the present libelants, and the value of said steamer and her freight, then pending; and that the decree of the court might be so framed as to give the libelants such part or proportion of the amount of the damages sustained by them as the value of steamer and freight bore to the whole amount of damages sustained by all parties to the collision. In reference to this last defense, the libelants insisted: (1) That the act does not embrace injuries to other vessels by collision, but only injuries to or loss of cargo on board the offending vessel; and (2) that if it did embrace injuries by collision, the district court in that proceeding had no power to give the respondents the relief which they sought. The district court held that cases of collision are within the act, but deemed the jurisdiction of that court insufficient to give relief. The circuit court held that cases of collision are not within the act. The appeal brings up all the questions in the cause.

From an examination of the evidence in the case, we are satisfied with the finding of the district and circuit courts as to the responsibility of the steamboat for the happening of the collision. Her officers insist that the accident was inevitable on her part; that the schooner was in fault in not having a proper light; and that the night was so dark they could not see her until they were close upon her. On the contrary, there is very strong evidence to show that her light was burning brightly, it being specially examined both before and after the collision; and that the vessel could be seen and was seen by another steamer a full mile off, just before the collision happened. The steamer Electra was three fourths of a mile in the rear of the City of Norwich, directly in her track; and her officers saw the schooner some time before the occurrence. They saw her one point on their port bow, when the City of Norwich was dead ahead. This is testified by Nye, pilot of The Electra. Now, the course of the schooner was nearly at right angles to that of the two steamers.

If, therefore, she was one point on the port bow of the Electra, when a mile distant, it required but little calculation to show that at that time she must have been between an eighth and a quarter of a mile from the line of direction **115***] in which the two steamers were *sailing. As she was making three or four knots an hour, and as the City of Norwich was making twelve, it must have taken the schooner, after this, two or three minutes to get up to the line of direction of the City of Norwich, during which time the latter would traverse nearly half a mile. So that when the schooner was first seen from the Electra she must have been half a mile distant from the City of Norwich, and, therefore, the theory of the claimants that she was only to be seen by reason of the lights from the City of Norwich shining on her sails falls to the ground. If, therefore, she was seen from the Electra, more than a mile distant, she ought to have been seen from the City of Norwich, which was three fourths of a mile nearer to her. All the circumstances mentioned by the pilot of the Electra corroborate these conclusions. He says that the schooner was a mile off from the Electra when he saw her, and that this was "two minutes before the collision." He adds that the steamer City of Norwich blew her whistle immediately after the collision, and that he discovered the schooner two or three minutes before he heard the whistle. This evidence is adverted to, because it is of that circumstantial nature which often demonstrates the truth more strongly than the most positive testimony. It may be added that it is corroborated in many particulars by other evidence in the cause. As to her lights, it is admitted, or at least clearly proved, that the schooner had a green light in the proper place; but several witnesses say it was a dim light. It is proper to observe that nearly all those who say this only saw the light after the collision, the shock of which may have temporarily affected the brilliancy of the lamp. But, without pursuing the subject further, it is sufficient to say, that in our opinion the evidence is clear that the steamer was in fault in not seeing the schooner in time to prevent a collision. It was her duty to keep out of the way of the schooner; she was not only propelled by steam, but the schooner was beating against a head wind. So that every circumstance in the case casts the duty of avoiding a collision upon the steamer. Her liability is clear.

*The next question is whether the own- [***116** ers of the steamer are entitled to the benefits of the act of 1851, limiting the liability of ship-owners to the amount of their interest in the vessel and her freight; and, if so, whether they can have relief in the district court in the proceedings instituted against them. This involves the true construction of that act; and, to reach this, it may be useful to take a cursory view of previous legislation on the subject in other countries as well as in this.

The history of the limitation of liability of ship-owners is matter of common knowledge. The learned opinion of Judge Ware in the case of *The Rebecca*, 1 Ware, 187-194, leaves little to be desired on the subject. He shows that it originated in the maritime law of modern Europe; that whilst the civil, as well as the common law, made the owner responsible to the whole extent of damage caused by the wrongful act or negligence of the master or crew, the maritime law only made them liable (if personally free from blame) to the amount of their interest in the ship. So that, if they surrendered the ship, they were discharged.

Grotius, in his law of War and Peace, says that men would be deterred from investing in ships if they thereby incurred the apprehension of being rendered liable to an indefinite amount by the acts of the master and, therefore, in Holland, they had never observed the Roman law on that subject, but had a regulation that the ship-owners should be bound no farther than the value of their ship and freight. His words are: "*Navis et eorum quae in navi sunt*," "the ship and goods therein." But he in speaking of the owner's interest; and this, as to the cargo, is the freight thereon, and in that sense he is understood by the commentators. Boulay Paty, Droit Maritime, tit. 3, § 1, p. 276; book II., c. XI., § XIII. The maritime law, as codified in the celebrated French *Ordonnance de la Marine*, in 1681, expressed the rule

dise, or any property whatever, on the same voyage, and the whole value of the ship or vessel, and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel, in proportion to their respective losses, and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer all claims and proceedings against the owner and owners shall cease."

The act does not state what court shall be resorted to, nor what proceedings shall be taken; but that the parties, or any of them, may take "the appropriate proceedings in any court, for the purpose of apportioning the sum for which, etc." Now, no court is better adapted than a court of admiralty to administer precisely such relief. It happens every day that the proceeds of a vessel, or other fund, is brought into that court to be distributed amongst those whom it may concern. Claimants are called in by monition, to present and substantiate their respective claims; and the fund is divided and distributed according to the respective liens and rights of all the parties. Congress might have invested the circuit courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the state courts have not the requisite jurisdiction. Unless, therefore, the district courts themselves can administer the law, we are reduced to the dilemma of inferring that the legislature has passed a law which is in-
124*] capable of execution. *This is never to be done if it can be avoided. We have no doubt that the district courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter; and this court, undoubtedly, has the power to make all needful rules and regulations for facilitating the course of proceeding.

It is to be observed, however, that if the ship-owner desires the intervention of the court, it will not be sufficient for him simply to ask for a *pro rata* reduction of the libelants' damages, without, in some manner, tendering the corresponding *pro rata* compensation to which other parties, whose claims he sets up against the libelants, are entitled. Otherwise, he might reduce the libelants' claim without ever being obliged to respond to the other parties. The libelants are, in fact, directly interested in the existence or nonexistence of the other claims for damage. If these are established, they must suffer an abatement; if not, they will be entitled to recover their entire damage. It follows, therefore, that the ship-owner must either admit the claims for damage which he thus sets up, or must ask the court to have them adjudicated. In the English practice, as the court of chancery does not investigate demands in admiralty, it required the complainant (the ship-owner) to admit his liability in advance. This is, perhaps, not necessary in an admiralty court. But it is, at least, necessary that proceedings should be instituted for ascertaining the co-existing claims which are to antagonize and operate as a means of reducing the claim of the libelants.

But in order to proceed regularly the court must have possession of the limited liability fund—that is, the proceeds or value of the ship and freight. It cannot distribute a fund of which it has not the possession. If the vessel were libeled, and either sold or appraised and her value deposited in court, this sum, together with the amount of the freight (when proper to be added) would constitute the *res*, or fund for distribution. The case would then be free from difficulty. But the present case is a libel *in personam* in the district of Connecticut, and the steamer has, in fact, been *libeled in the [***125** eastern district of New York, and she, or her value, is detained there. The respondents have not paid, or offered to pay, the fund in the district court for the district of Connecticut. Nor do they allege that they have applied to the district court for the eastern district of New York, where the fund is, to apportion the damages incurred. Had they done this, that court might have acquired jurisdiction of the case, and made it the duty of the district court of Connecticut, on being duly certified of the fact, to suspend further proceedings and leave the libelants to present their claim in the court of New York.

The proper course of proceeding for obtaining the benefit of the act would seem to be this: When a libel for damage is filed, either against the ship *in rem* or the owners *in personam*, the latter (whether with or without an answer to the merits) should file a proper petition for an apportionment of the damages according to the statute, and should pay into court (if the vessel or its proceeds is not already there) or give due stipulation for such sum as the court may, by proper inquiry, find to be the amount of the limited liability, or else surrender the ship and freight by assigning them to a trustee in the manner pointed out in the 4th section. Having done this, the ship-owner will be entitled to a monition against all persons to appear and intervene *pro interesse suo*, and to an order restraining the prosecution of other suits. If an action should be brought in a state court the ship-owner should file a libel in admiralty, with a like surrender or deposit of the fund, and either plead the fact in bar in the state court or procure an order from the district court to restrain the further prosecution of the suit. The court having jurisdiction of the case, under and by virtue of the act of Congress, would have the right to enforce its jurisdiction and to ascertain and determine the rights of the parties. For aiding parties in this behalf, and facilitating proceedings in the district courts, we have prepared some rules which will be announced at an early day.

*The difficulty with the respondents in [***126** this case is, that they have not taken the proper steps, in the proper court, to enable them to avail themselves of the benefit of the act. The

ralty courts, in order to get complete relief where there were many persons suffering dam- 120*] age, the ship-owners were *obliged to resort to a bill in chancery. The laws of Maine and Massachusetts seem to have limited the ship-owner's liability in cases of damage to cargo alone; and for complete relief, they refer him to a proceeding in equity.

The act of Congress seems to have been drawn with direct reference to all these previous laws, and with them before us, its language seems to be not difficult of construction. The 1st section exempts ship-owners from loss or damage by fire to goods on board the ship, unless caused by their own neglect. The 2d exempts the owners and master from liability for loss or damage to jewelry, precious metals, or money put on board the ship, unless its character and value be disclosed in writing. These two provisions were substantially contained in the English law of 1786. The 3d section, which is the one in question, is in the following words: § 3. "The liability of the owner or owners of any ship or vessel, for any embezzlement, loss or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively in such ship or vessel and her freight then pending."

Here the owner's liability is limited to the amount or value of his interest in the vessel and freight, but the section does not define at what time that interest is to be taken. The limitation embraces not only loss or damage happening to goods on board, but "any loss, damage, or injury by collision." The latter claim is independent of the preceding one. It cannot be read to mean "loss or injury (to the goods on board) by collision," without an unauthorized interpolation. If it had said "loss, damage, or injury [thereto] by collision," it would have been confined to the goods on board the vessel. But it does not so read. The sec- 121*] tion as *constructed limits the ship-owners' liability in three classes of damage or wrong happening without their privity, and by the fault or neglect of the master or other persons on board, *viz.:* (1) Damage to goods on board; (2) damage by collision to other vessels and their cargoes; (3) any other damage or forfeiture done or incurred.

In view of the fact that the limited liability of ship-owners was, by the general maritime law, extended to all acts of the master except contracts for the benefit of the ship, and in most places even to these; and of the fact that the English statutes expressly extended it to cases of collision as well as to injuries to cargoes, we see no reason why the fair natural construction should not be given to the act of 1851, which makes an equally broad application of the rule, and there is nothing in the reason of the thing that should lead us to evade such a construction. The great object of the law was to encourage ship building and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount. How many enterprises in mining, manufacturing, and internal improvements would be utterly impracticable if capitalists were not encouraged to invest in them through corporate institutions by which they are exempt from personal liability, or from liability except to a limited extent! The public interests require the investment of capital in ship building, quite as much as in any of these enterprises. And if there exist good reasons for exempting innocent ship-owners from liability, beyond the amount of their interest, for loss or damage to goods carried in their vessels, precisely the same reasons exist for exempting them to the same extent *from personal [*122 liability in cases of collision. In the one case as in the other, their property is in the hands of agents whom they are obliged to employ.

We are, therefore, of opinion that the respondents were entitled to the benefit of the act of 1851, as against the claim of the libelants.

But the claim of the libelants alone is not alleged to be greater than the value of the steamer and her freight. The libelants, therefore, would be entitled to receive the whole amount of this damage if they were the only persons who sustained damage, or if, by reason of the nature of their claim, their lien was superior to that of the owners of the cargo lost on the steamer. Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, etc. But they stand on an equality with regard to each other if they arise from the same cause. Macl. Ship. 598. We think, therefore, that the lien of the libelants for the loss of the schooner and her cargo, arising from the collision, is on an equality with the lien for the loss of the cargo of the steamer from the same cause. This being so, the case for the application of the statute arises; for it is alleged by the libelants that the damage to the schooner and her cargo, together with the damage arising from the loss of the steamer's cargo, greatly exceeds the value of the steamer and her freight for the voyage.

We are, therefore, brought to the question whether the district court had jurisdiction, under the 4th section of the act, to grant the respondents relief by any proceeding to apportion the damages.

As we have seen, it is declared by the 3d section that the liability of ship-owners for loss or damage, etc., shall not exceed the amount or value of their interest in the ship and her freight then pending. And by the 4th section it is provided:

Sec. 4. "If any such embezzlement, loss or destruction shall be suffered by several freighters or owners of goods, wares, or *merchan- [*123

tion of ejectment, and that the bill of exceptions on which the writ of error was sued out was tendered by them jointly. The judgment was against the defendant in the singular; but as the verdict was joint, it is obvious that this was a mere clerical error. The judgment, doubtless, followed the verdict.

188*] *Wade Hampton alone prosecutes the writ of error, and there appears to have been no summons and severance or other equivalent proceeding. *Masterson* v. *Howard*, 10 Wall. 416, 19 L. ed. 953. It has often been held that in a writ of error to a joint judgment against several, all must join; and that the omission of one or more without such proceeding, is an irregularity for which the writ will be dismissed. *Williams* v. *Bk. U. S.* 11 Wheat. 444; *Owings* v. *Kincannon*, 7 Pet. 399; *The Protector, ante*, 47.

The motion in the present case must, therefore, be granted.

367*] WILLIAM C. HALL *et al., Plffs. in Err.*,
v.
THE NASHVILLE & CHATTANOOGA RAILROAD COMPANY.

(See S. C. 13 Wall. 367–373.)

Liability of carrier and underwriter for loss of goods—suit by underwriter.

1. As between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary.
2. An underwriter, who has paid a loss, is entitled to recover what he has paid by a suit in the name of the assured against a carrier who caused the loss.

[No. 111.]

Submitted Feb. 20, 1872. Decided Mar. 4, 1872.

IN ERROR to the Circuit Court of the United States for the Middle District of Tennessee.

The declaration in this case was filed by the plaintiffs in error in the court below. They allege that they were citizens of the state of Kentucky and commission merchants, who sue for the use of the Kentucky Marine & Fire Insurance Company and the Union Insurance Company of Louisville, corporations chartered by the state of Kentucky, and located and transacting an insurance business there; and that they bring their suit against the defendant in error, the Nashville & Chattanooga Railroad Company, a corporation located and doing business in the state of Tennessee, in an action of trespass on the case. In the first count they allege that the said defendant was a common carrier for hire by its railroad from Chattanooga to Nashville, Tennessee, and that the plaintiffs delivered to the defendant eighteen bales of cotton, the property of the plaintiffs, of the value of $10,000, to be transported by said railroad to Nashville, and there delivered to the plaintiffs; and that in consideration thereof, and of certain reward to the defendant in that behalf, it undertook and promised the plaintiff to take care of and safely carry said cotton by its cars or railroad to Nashville and there deliver the same to plaintiffs; and that although the defendant received said cotton for the purpose aforesaid, it did not take care of said cotton, and safely convey the same to Nashville, nor deliver the same to the plaintiffs there; but that by the negligence and improper conduct of the defendant and its servants, the said cotton became wholly lost to the plaintiffs.

In the second count the plaintiffs alleged that, in consideration that they, at the special instance and request of the defendant, had caused to be delivered to it eighteen other bales of cotton of like quality, description and value as those in the first count mentioned, to be taken care of and safely delivered at Nashville, by the said defendant for the said plaintiffs for certain reward to the defendant in that behalf, it undertook and promised the plaintiffs to take care of said last-mentioned cotton, and carry and deliver the same to the plaintiffs, in a reasonable time then next following; and that although said defendant had received said cotton for the purpose aforesaid, and a reasonable time for the carriage, conveyance and delivery thereof had elapsed, yet the defendant did not and would not, within such reasonable time or at any time afterward, although often requested, safely carry and deliver said cotton for plaintiffs, but had hitherto neglected and refused to deliver said cotton, whereby the same became wholly lost to the plaintiffs. And in the third count, they allege that in consideration that the defendant, at its special instance and request, had the care and custody of divers goods and chattels of the plaintiffs, *viz.:* goods and chattels of the like number, quality, quantity, description and value of those in the first count mentioned, it, the said defendant, undertook and promised the plaintiffs, while it had the care and custody of the same, to carry and deliver the same at Nashville, Tennessee, yet that the defendant, while it had the care and custody of the same, took so little and such improper care of said cotton, that the same afterward became and was totally and accidentally destroyed by fire, and thus wholly lost to the plaintiffs. And plaintiffs further averred that they had procured policies of insurance on said cotton in said insurance companies, and before the expiration of the policies of insurance on said cotton, the same was delivered to the defendant as a common carrier, which was not safely carried and delivered as aforesaid, but was totally and accidentally destroyed by fire, whereby said insurance companies became and were responsible for the value of the same, which was duly paid plaintiffs, under and by virtue of their policies of insurance, whereby the said insurance companies became entitled to demand and receive from said defendant by way of subrogation to plaintiffs' right, the amount of money paid by them as aforesaid to the said plaintiffs; hence, this suit in plaintiffs' name, to the use of said insurance companies, for $10,000 damages.

To the third count in the declaration the defendant demurred.

To the first count it pleaded not guilty.

To the second count it pleaded *non assumpsit*.

And to the first and second counts it further pleaded that about the time of the delivery of said cotton by the plaintiffs to defendant as a common carrier, the said plaintiffs insured the same against loss by fire during its transit from the point of delivery to the terminus of the voyage, and while in the possession of the defendant as common carrier, as alleged, in the said Kentucky Marine & Fire Insurance Company and the Union Insurance Company of Louisville (for whose use the suit purports to be

brought), for a good and sufficient consideration; and that said cotton was subsequently and while so insured, accidentally and without any fault of the defendant, set on fire and totally consumed and destroyed by fire, constituting a total loss within the meaning of the policies of insurance taken out thereon as aforesaid whereby the said insurance companies became bound to pay and did pay to the plaintiffs the full value of the said cotton before the commencement of this suit, whereby said plaintiffs were fully paid for the said cotton and could not again sue for and recover the value thereof against the defendants; and their right of action was extinguished and could not pass by operation of law or subrogation, nor be assigned by contract by the plaintiffs to the said insurance companies; and any contract so to assign said right was and is champertous and void.

To the third and last plea the plaintiffs demurred.

May 14, 1867, an entry was made on the minutes to the following effect:

That, by consent of parties, plaintiffs are permitted to change their cause of action to *assumpsit*, and the cause was to stand for trial at the ensuing October term next thereafter, upon demurrer.

On Nov. 20, 1868, the court rendered judgment that the defendant's demurrer be sustained, and that the plaintiffs' demurrer be overruled. From this judgment a writ of error has been sued out to this court by the plaintiffs.

Mr. **William Atwood,** for plaintiffs in error:

There being no contract exempting the carrier from loss by fire, he is responsible for a loss resulting from an accidental fire, even where it is without fault on his part.

Forward v. *Pittard*, 1 Term, 27; *Hyde* v. *Nav. Co.* 5 T. R. 389; *Gilmore* v. *Carman*, 1 Sm. & M. 279; *Harrington* v. *McShane*, 2 Watts, 443; *Patton* v. *Magrath*, Dudley (S. C.), 159; *Swindler* v. *Hilliard*, 2 Rich. 286; *Singleton* v. *Hilliard*, 1 Strob. (Law), 203; *Nav. Co.* v. *Bk.* 6 How. 344; *York Co.* v. *R. Co.* 3 Wall. 107, 18 L. ed. 170.

After the payment of the loss by the underwriters, they were subrogated to all the rights of the plaintiffs, and could use their names in a suit to recover the value of the cotton, and the payment of the underwriters was no satisfaction by the carrier.

Arm. Ins. 2d ed. (marg.), 1178, 1180, 1185, 1186; Phil. Ins. 3d ed. §§ 1707, 1711, 1723; *Randal* v. *Cochran*, 1 Ves. 98; reporting the case of *Mason* v. *Sainsbury*, 2 Marsh. Ins. 794; *Clark* v. *Inhab. of Blything*, 2 B. & C. 254; *Yates* v. *Whyte*, 4 Bing. (N. C.) 272; *Gales* v. *Hailman*, 11 Pa. 515; *Burnside* v. *Steamboat Co.* 10 Rich. 113; *Hart* v. *W. R. Co.* 13 Met. 99; *Ins. Co.* v. *Bosher*, 39 Me. 253; *Ins. Co.* v. *Frost*, 37 Ill. 333; *Ins. Co.* v. *N. Y. & N. H. R. Co.* 25 Conn. 265; *Ins. Co.* v. *Calebs*, 20 N. Y. 173; *Fretz* v. *Bull*, 12 How. 466; *The Monticello* v. *Mollison*, 17 How. 152, 15 L. ed. 68.

Consignees may sue.

Ang. Carr. 2d ed. §§ 499, 510; *Elkins* v. *R. Co.* 19 N. H. 337; *Lawrence* v. *Minturn*, 17 How. 100, 15 L. ed. 58.

Mr. **Henry Cooper,** for defendant in error:

In marine insurance, whenever a demand is rightfully made for payment under a policy, as for a total loss, the insurance company is subrogated to all the rights of the assured to the property insured. 2 Marsh. Ins. 559.

This is brought about by what is technically called an abandonment, which must in all cases be made by the assured, by notice to the insurer in a reasonable time, where the loss is not absolutely total, but merely constructively so. 2 Marsh. Ins.; Sm. Mer. L. 473.

By the abandonment the insurer becomes subrogated to all the right, title and interest of the assured in the ship or goods insured, or what may be saved of them.

Marsh. Ins. 601.

In such case and also by payment as for a total loss the title to the property passes to the insurers; and the above abandonment goes so far as to include the *spes recuperandi*, where there is anything to be recovered.

Hooper v. *Whitney*, 19 La. 267; *Mellon* v. *Bucks*, 5 Mart. N. S. 371; *Gracie* v. *N. Y. Ins. Co.* 8 Johns. 237; *Atlantic Ins. Co.* v. *Storrow*, 5 Paige, 285. But if there is an actual loss "where there is no vestige of the property left or (which is the same thing) where it has been finally condemned as lawful prize by the court of last resort, the cession has nothing to operat upon. There is neither property nor *spes recuperandi*, and therefore nothing to be subrogated to."

8 Johns. 237; *Ins. Co.* v. *Updegraff*, 21 Pa. 513.

It will thus be seen that in order to entitle the underwriter to subrogation in case of marine insurance there must be an abandonment and something to be abandoned.

Tunno v. *Edwards*, 12 East, 488.

It is obvious, upon these principles, that the doctrine of subrogation in marine insurance can have no application to the case now before the court, for two reasons: First. There is no such thing as abandonment in fire insurance on land. 37 Ill. 333. Second. There was here a total loss, and nothing consequently upon which a cession could operate. It has generally been supposed that the insurer was entitled to subrogation to the rights of the assured, where the insurance was of a mortgage debt. Sm. Mer. L. 523.

But this doctrine was based upon a *dictum* of Judge Story's in *Carpenter* v. *Ins. Co.* 16 Pet. 501, and has, upon full consideration, been overruled.

King v. *Ins. Co.* 7 Cush. 1; *Dobson* v. *Land*, 8 Hare, 216; *White* v. *Brown*, 2 Cush. 412; *Cushing* v. *Thompson*, 34 Me. 496; *Carter* v. *Rockett*, 8 Paige, 437; *Ins. Co.* v. *Tyler*, 16 Wend. 385; 16 Pet. 495; 2 Cush. 412; *Hart* v. *R. Co.* 13 Met. 99; 2 Pars. Cont. 440.

Policies against fire on land have been held from the earliest times to be personal contracts with the assured, and do not pass to an assignee or purchaser, unless by consent of the underwriters.

Lynch v. *Dalzell*, 4 Bro. P. C. 431; *Sadler's Co.* v. *Badcock*, 2 Atk. 554; Ang. Ins. § 193.

The case of *Mason* v. *Sainsbury*, 3 Doug. 61, and one or two American authorities, based upon that decision, if they can be sustained at all upon principle, rest upon the doctrine of punishing the wrong-doer.

Here the defendant has been guilty of no

wrongful act by which loss has accrued. The loss is purely accidental, and that loss has been paid by the real plaintiffs upon a contract based upon a sufficient consideration. To allow them to recover, in the name of the owner, would be to give them the benefit of the premium, without any risk. It would be, in effect, to legalize champerty. For what they claim is the right to have a right of action assigned them. It may be that where there is an equity growing out of the facts of the case the claim might be sustained; as for example, if the cotton had been maliciously burned by the company or lost by wilful neglect. But surely there can be no equity growing out of inevitable accident, and that accident expressly insured against for a valuable consideration. The action on the facts of the case is an equitable action and must, to be sustainable, be based upon inherent equity. If this is to be considered as an action for a tort in the unlawful conversion or loss of the cotton, then it is clear that it cannot be sustained, for a right of action for a tort is not assignable.

2 Story, Eq. Jur. 1040, 9; *Gardner* v. *Adams*, 12 Wend. 297.

The railroad company and the insurance company for whose use this suit is brought were, so to speak, both insurers of the property lost, against the risk which occurred. They both became liable, by independent contracts, upon independent considerations. Both are liable to the shipper, and he may recover at his election from either. But it is difficult to see any principle upon which one of these insurers can, upon payment of the loss, claim to be subrogated to the right of action of the assured, as against the other, nor why the subrogation should be in favor of one more than the other. If there is any equity as between the parties, growing out of the transactions, it would seem to be, to have the loss proportioned between them. But there is no equity in the premises, and each must abide by his contract with the shipper. The law neither subrogates the one nor the other to the rights of the shipper upon adjustment of the loss.

Mr. Justice **Strong** delivered the opinion of the court:

It is too well settled by the authorities to admit of question that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract or for non-performance of his legal duty. Standing thus, as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. Hence it has often been ruled that an insurer, who has paid a loss, may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss. It is conceded that this doctrine prevails *in cases of marine insurance, but it is [*371 denied that it is applicable to cases of fire insurance upon land, and the reason for the supposed difference is said to be that the insurer in a marine policy becomes the owner of the lost or injured property by abandonment of the assured, while in land policies there can be no abandonment. But it is a mistake to assert that the right of insurers in marine policies to proceed against a carrier of the goods, after they have paid a total loss, grows wholly, or even principally, out of any abandonment. There can be no abandonment where there has been total destruction. There is nothing upon which it can operate, and an insured party may recover for a total loss without it. It is laid down in Phillips on Insurance, § 1723, that "a mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may afterwards be recovered from other parties on account of the loss," and that "the effect of a payment of a loss is equivalent in this respect to that of abandonment." There is, then, no reason for the subrogation of insurers by marine policies to the rights of the assured against a carrier by sea which does not exist in support of a like subrogation in case of an insurance against fire on land. Nor do the authorities make any distinction between the cases, though a carrier may, by stipulation with the owner of the goods, obtain the benefit of insurance.

In *Gales* v. *Hailman*, 11 Pa. 515, it was ruled that a shipper, who had received from his insurer the part of the loss insured against, might sue the carrier on the contract of bailment, in his own right, not only for the unpaid balance due to himself, but as trustee for what had been paid by the insurer in aid of the carrier, and that the court would restrain the carrier from setting up the insurer's payment of his part of the loss as partial satisfaction. So in *Hart* v. *R. Co.* 13 Met. 99, it was held that where underwriters had paid a loss by fire caused by a locomotive of a railroad corporation, the owner might recover also from the corporation for the use of the underwriters, and that he could not release *the action [*372 brought by them in his name. There is, also, a large class of cases in which attempts have been made by insurers who had paid a loss to recover from the party in fault for it, by suit in their own right, and not in the right of the assured. Such attempts have failed, but in all the cases it has been conceded that suits might have been maintained in the name of the insured party for the use of the insurers. *Rockingham Ins. Co.* v. *Bosher*, 39 Me. 253; *Peoria Ins. Co.* v. *Frost*, 37 Ill. 333; *Conn. Mut. Life Ins. Co.* v. *N. Y. & N. H. R. Co.* 25 Conn. 265. And such is the English doctrine settled at an early period. *Mason* v. *Sainsbury*, 3 Doug. 60 (26 C. S.); *Yates* v. *Whyte*, 4 Bing. N. C. 272; *Clark* v. *Bluthing*, 2 B. & C. 254; *Randal* v. *Cockran*, 1 Ves. 98.

It has been argued, however, that these decisions rest upon the doctrine that a wrongdoer is to be punished; that the defendants against whom such actions have been maintained were wrong-doers; but that, in the present case the fire by which the insured goods were destroyed was accidental, without fault of the defendants and, therefore, that they stood, in relation to the owner, at most in the position of double insurers. The argument will not bear examination. A carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer, and even greater, but its nature is not the same. His contract is not one for indemnity, independent of the care and custody of the goods. He is not entitled to a cession of the remains of the property, or to have the loss adjusted on principles peculiar to the contract of insurance; and when a loss occurs, unless caused by the act of God, or of a public enemy, he is always in fault. The law raises against him a conclusive presumption of misconduct, or breach of duty, in relation to every loss not caused by excepted perils. Even if innocent, in fact he has consented by his contract to be dealt with as if he were not so. He does not stand, therefore, on the same footing with that of an insurer, who may have entered into his **373***] contract of indemnity, *relying upon the carrier's vigilance and responsibility. In all cases, when liable at all, it is because he is proved, or presumed to be, the author of the loss. There is nothing, then, to take the case in hand out of the general rule that an underwriter who has paid a loss, is entitled to recover what he has paid by a suit in the name of the assured against a carrier who caused the loss.

It follows that the circuit court erred in giving judgment for the defendants on their demurrer to the third count of the declaration and on the plaintiff's demurrer to the defendant's third plea.

The judgment is reversed, and the cause is remanded for further proceedings.

397*] *UNITED STATES, *Plff. in Err.*,
v.
ABIJAH TARBLE.

(See S. C. *"Tarble's Case,"* 13 Wall. 397-413.)

State and national governments, how far independent of each other—state judge has no authority to issue habeas corpus for the discharge of person held under authority of United States—marshal's duty—enlisted soldier.

*1. The government of the United States and of a state are distinct and independent of each other within their respective spheres of action although existing and exercising their powers within the same territorial limits. Neither government can intrude within the jurisdiction or authorize any interference therein by its judicial officers, with the action of the other. But whenever any conflict arises between the enactments of the two sovereignties or in the enforcement of the asserted authorities, those of the national government have supremacy until the validity of the different enactments and authorities are determined by the tribunals of the United States.

2. A state judge has no jurisdiction to issue a writ of habeas corpus, or to continue proceedings under the writ when issued for the discharge of a person held under the authority or claim and color of the authority of the United States by an officer of that government. If, upon the application for the writ, it appear that the party alleged to be illegally restrained of his liberty is held under the authority or claim and color of the authority of the United States by an officer of that government, the writ should be refused. If this fact do not thus appear, the state judge has the right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the state; and it is the duty of the marshal or other officer, having the custody of the prisoner, to give, by a proper return, information in this respect. But after he has been fully apprised by the return that the party is held by an officer of the United States, by the authority or claim and color of authority of the United States, he can proceed no further.

3. These principles applied to the case where habeas corpus was issued by a court commissioner of one of the counties of Wisconsin to a recruiting officer of the United States, to bring before him a person who had enlisted as a soldier in the Army of the United States, and whose discharge was sought on the alleged ground that he was a minor under the age of eighteen years, at the time of his enlistment, and that he enlisted without the consent of his father, the petition for the writ alleging that the prisoner had enlisted as a soldier and been mustered into the military service of the national government, and was detained by the officer as such soldier; this court held that the court commissioner had no jurisdiction to issue the writ for the discharge of the prisoner, as it thus appeared upon the petition that the prisoner was detained under claim and color of the authority of the United States by an officer of that government; and that if he was illegally detained, it was for the courts or judicial officers of the United States, and for those courts and officers alone, to grant him relief.

[No. 54.]

Argued Nov. 14, 1871. Decided Mar. 4, 1872.

IN ERROR to the Supreme Court of the State of Wisconsin.

The case is stated by the court.

Messrs. **B. H. Bristow,** *Solicitor Gen.*, *Amos T. Akerman, Atty. Gen.*, for the plaintiff in error:

It is insisted on behalf of the United States, that the supreme court of the state of Wisconsin erred in the affirmance of the order of the court commissioner.

1. Because, upon the facts disclosed in the petition of Abijah Tarble, neither the said commissioner nor any other judicial officer of the state had authority to issue the writ of habeas corpus.

2. Because the return made to the writ of Lieutenant Stone, an officer of the United States Army, having apprised the said commissioner that the prisoner was in his custody under the authority of the United States, the said commissioner had no jurisdiction to proceed further under the writ.

3. Because, upon the evidence heard by the commissioner, it appeared that the prisoner was regularly and properly in the custody of a commissioned officer of the Army of the United States, as an enlisted soldier, duly mustered into the military service of the United States, and under charges of desertion, awaiting trial by the proper military authorities.

Whatever doubt or difficulty may have existed with reference to the questions presented in this record, would seem to have been removed by the unanimous opinion of this court in the cases of *Ableman* v. *Booth* and *U. S.* v. *Booth*, 21 How. 506, 16 L. ed. 169.

The principle of *Booth's Case* has been expressly held to be applicable to the case of an

*Headnotes by Mr. Justice FIELD.

enlisted soldier in the Army of the United States, in the following cases:

In re Spangler, 11 Mich. 299; *State* v. *Zulich*, 5 Dutch, 409; *In re Hopson*, 40 Barb. 43; *In re Jordon*, 11 Am. Law Reg. 749; *In re Farrand*, 1 Abb. U. S. 141 (opinion of Ballard, Dist. Judge); see, also, charge of Mr. Justice Nelson, 1 Blatchf. (C. C.), 642; *In re Husted*, 1 Johns. Cas. 136; *In re Ferguson*, 9 Johns. 239.

Mr. Justice **Field** delivered the opinion of the court:

This case comes before us on a writ of error to the supreme court of Wisconsin. It was a proceeding on habeas corpus, for the discharge **398***] *of one Edward Tarble held in the custody of the recruiting officer of the United States as an enlisted soldier, on the alleged ground that he was a minor under the age of eighteen years, and that he enlisted without the consent of his father.

The writ was issued on the 10th of August, 1869, by a court commissioner of Bane county, Wisconsin, an officer authorized by the laws of that state to issue the writ of habeas corpus upon the petition of parties imprisoned or restrained of their liberty, or of persons on their behalf. It was issued in this case upon the petition of the father of Tarble, in which he alleged that his son, who had enlisted under the name of Frank Brown, was confined and restrained of his liberty by Lieutenant Stone, of the United States Army, in the city of Madison, in that state and county; that the cause of his confinement and restraint was that he had, on the 20th of the preceding July, enlisted and been mustered into the military service of the United States; that he was under the age of eighteen years at the time of such enlistment; that the same was made without the knowledge, consent or approval of the petitioner and was, therefore, as the petitioner was advised and believed, illegal; and that the petitioner was lawfully entitled to the custody, care and services of his son.

The writ was directed to the officer thus named, commanding him to have Tarble, together with the cause of his imprisonment and detention, before the commissioner, at the latter's office in the city of Madison, immediately after the receipt of the writ.

The officer thereupon produced Tarble before the commissioner, and made a return in writing to the writ, protesting that the commissioner had no jurisdiction in the premises, and stating as the authority and cause for the detention of the prisoner, that he, the officer, was a first lieutenant in the Army of the United States, and by a due authority was detailed as a recruiting officer at the city of Madison, in the state of Wisconsin, and as such officer had the custody and command of all soldiers re- **399***] cruited for the Army at that city; *that on the 27th of July preceding, the prisoner, under the name of Frank Brown, was regularly enlisted as a soldier in the Army of the United States, for the period of five years unless sooner discharged by proper authority; that he then duly took the oath required in such case by the law and the regulations of the Army, in which oath he declared that he was of the age of twenty-one years, and thereby procured his enlistment, and was on the same day duly mustered into the service of the United States; that subsequently he deserted the service, and being retaken, was then in custody and confinement under charges of desertion, awaiting trial by the proper military authority.

To this return the petitioner filed a reply, denying on information and belief that the prisoner was ever duly or lawfully enlisted, or mustered as a soldier into the Army of the United States, or that he had declared on oath that he was of the age of twenty-one years, and alleging that the prisoner was, at the time of his enlistment, under the age of eighteen years, and on information and belief, that he was enticed into the enlistment, which was without the knowledge, consent or approval of the petitioner; that the only oath taken by the prisoner at the time of his enlistment was an oath of allegiance; and that the petitioner was advised and believed that the prisoner was not and never had been a deserter from the military service of the United States.

On the 12th of August, to which day the hearing of the petition was adjourned, the commissioner proceeded to take the testimony of different witnesses produced before him, which related principally to the enlistment of the prisoner, the declaration which he made as to his age, and the oath he took at the time, his alleged desertion, the charges against him, his actual age, and the absence of any consent to the enlistment on the part of his father.

The commissioner, after argument, held that the prisoner was illegally imprisoned and detained by Lieutenant Stone, and commanded that officer forthwith to discharge him from custody.

Afterward, in September of the same year, that officer *applied to the supreme court [***400** of the state for a certiorari, setting forth in his application the proceedings before the commissioner and his rulings thereon. The certiorari was allowed, and in obedience to it the proceedings had before the commissioner were returned to the supreme court. These proceedings consisted of the petition for the writ, the return of the officer, the reply of the petitioner, and the testimony, documentary and parol, produced before the commissioner.

Upon these proceedings the case was duly argued before the supreme court, and in April, 1870, that tribunal pronounced its judgment, affirming the order of the commissioner, discharging the prisoner. This judgment is now before us for examination.

The important question is presented by this case, whether *a state court commissioner [***402** has jurisdiction, upon habeas corpus, to inquire into the validity of the enlistment of soldiers into the military service of the United States, and to discharge them from such service when, in his judgment, their enlistment has not been made in conformity with the laws of the United States. The question presented may be more generally stated thus: whether any judicial officer of a state has jurisdiction to issue a writ of habeas corpus, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority of the United States, by an officer of that government. For it is evident, if such jurisdiction may be exercised by any

judicial officer of a state, it may be exercised by the court commissioner within the county for which he is appointed; and if it may be exercised with reference to soldiers detained in the military service of the United States, whose enlistment is alleged to have been illegally made, it may be exercised with reference to persons employed in any other department of the public service when their illegal detention is asserted. It may be exercised in all cases where parties are held under the authority of the United States, whenever the invalidity of the exercise of that authority is affirmed. The jurisdiction, if it exist at all, can only be limited in its application by the legislative power of the state. It may even reach the parties imprisoned under sentence of the national courts, after regular indictment, trial and conviction, for offenses against the laws of the United States. As we read the opinion of the supreme court of Wisconsin in this case, this is the claim of authority asserted by that tribunal for itself and for the judicial officers of that state. It does, indeed, disclaim any right of either to interfere with parties in custody, under judicial sentence, when the national court pronouncing sentence had jurisdiction to try and punish the offenders; but it asserts, at the same time, for itself and for each of those officers, the right to determine, upon habeas corpus, in all cases, whether that court ever had such jurisdiction. In the case of *Booth*, which subsequently came 403*] before this court, *it not only sustained the action of one of its justices in discharging a prisoner held in custody by a marshal of the United States, under a warrant of commitment for an offense against the laws of the United States issued by a commissioner of the United States, but it discharged the same prisoner when subsequently confined under sentence of the district court of the United States for the same offense, after indictment, trial, and conviction, on the ground that, in its judgment, the act of Congress creating the offense was unconstitutional; and in order that its decision in that respect should be final and conclusive, directed its clerk to refuse obedience to the writ of error issued by this court under the act of Congress, to bring up the decision for review.

It is evident, as said by this court when the case of *Booth* was finally brought before it, if the power asserted by that state court existed, no offense against the laws of the United States could be punished by their own tribunals, without the permission and according to the judgment of the courts of the state in which the parties happen to be imprisoned; that if that power existed in that state court, it belonged equally to every other state court in the Union where a prisoner was within its territorial limits; and, as the different state courts could not always agree, it would often happen that an act, which was admitted to be an offense and justly punishable in one state, would be regarded as innocent, and even praiseworthy in another, and no one could suppose that a government, which had hitherto lasted for seventy years "enforcing its laws by its own tribunals, and preserving the union of the states, could have lasted a single year, or fulfilled the trusts committed to it, if offenses against its laws could not have been punished without the consent of the state in which the culprit was found."

The decision of this court in the two cases which grew out of the arrest of Booth, that of *Ableman* v. *Booth*, 21 How. 506, 16 L. ed. 169, and that of *The United States* v. *Booth*, 21 How. 506, 16 L. ed. 169, disposes alike of the claim of *jurisdiction by a state court, or by a [*404 state judge, to interfere with the authority of the United States, whether that authority be exercised by a Federal officer or be exercised by a Federal tribunal. In the first of these cases Booth had been arrested and committed to the custody of a marshal of the United States by a commissioner appointed by the district court of the United States, upon a charge of having aided and abetted the escape of a fugitive slave. While thus in custody, a justice of the supreme court of Wisconsin issued a writ of habeas corpus directed to the marshal, requiring him to produce the body of Booth with the cause of his imprisonment. The marshal made a return, stating that he held the prisoner upon the warrant of the commissioner, a copy of which he annexed to and returned with the writ. To this return Booth demurred as insufficient in law to justify his detention, and, upon the hearing which followed, the justice held his detention illegal and ordered his discharge. The marshal thereupon applied for and obtained a certiorari, and had the proceedings removed to the supreme court of the state, where, after argument, the order of the justice discharging the prisoner from custody was affirmed. The decision proceeded upon the ground that the act of Congress respecting fugitive slaves was unconstitutional and void.

In the second case, Booth had been indicted for the offense with which he was charged before the commissioner, and from which the state judge had discharged him, and had been tried and convicted in the district court of the United States for the district of Wisconsin, and been sentenced to pay a fine of a thousand dollars, and to be imprisoned for one month. Whilst in imprisonment, in execution of this sentence, application was made by Booth to the supreme court of the state, for a writ of habeas corpus, alleging in his application that his imprisonment was illegal, by reason of the unconstitutionality of the fugitive slave law, and that the district court had no jurisdiction to try or punish him for the matter charged against him. The court granted the application, and issued the writ, to which the sheriff to whom the prisoner had been committed by the marshal, returned that he *held the pris- [*405 oner by virtue of the proceedings and sentence of the district court, a copy of which was annexed to his return. Upon demurrer to this return, the court adjudged the imprisonment of Booth to be illegal, and ordered him to be discharged from custody, and he was accordingly set at liberty.

For a review in this court of the judgments in both of these cases, writs of error were prosecuted. No return, however, was made to the writs, the clerk of the supreme court of Wisconsin having been directed by that court to refuse obedience to them; but copies of the records were filed by the Attorney General, and it was ordered by this court that they should

be received with the same effect and legal operation as if returned by the clerk. The cases were afterwards heard and considered together, and the decision of both was announced in the same opinion. In that opinion, the Chief Justice details the facts of the two cases at length, and comments upon the character of the jurisdiction asserted by the state judge and the state court; by the state judge to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner committed by him for an offense against the laws of the United States; and by the state court to supervise and annul the proceedings and judgment of a district court of the United States, and to discharge a prisoner who had been indicted, tried, and found guilty of an offense against the laws of the United States and sentenced to imprisonment by that court.

And in answer to this assumption of judicial power by the judges and by the supreme court of Wisconsin thus made, the Chief Justice said as follows: If they "possess the jurisdiction they claim, they must derive it either from the United States or the state. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the state to confer it, even if it had attempted to do so; for no state can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent government. And although the state of Wis- [*406] consin *is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the general government and of the state, although both exist, and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye. And the state of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other state of the Union, for an offense against the laws of the state in which he was imprisoned."

It is in the consideration of this distinct and independent character of the government of the United States, from that of the government of the several states, that the solution of the question presented in this case and in similar cases must be found. There are within the territorial limits of each state two governments restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each state stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The Constitution and the laws passed in pursuance of it, are declared by the Constitution itself to be the supreme law of the land, and the judges of every state are bound thereby, "anything in the Constitution or laws of any state to the contrary notwithstanding." *Whenever, therefore [*407 any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the national government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States. This temporary supremacy, until judicial decision by the national tribunals, and the ultimate determination of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments." "The Constitution," as said by Mr. Chief Justice Taney, "was not framed merely to guard the states against danger from abroad, but chiefly to secure union and harmony at home; and to accomplish this end it was deemed necessary, when the Constitution was framed, that many of the rights of sovereignty which the states then possessed should be ceded to the general government; and that in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a state, or from state authorities." And the judicial power conferred extends to all cases arising under the Constitution, and thus embraces every legislative act of Congress, whether passed in pursuance of it, or in disregard of its provisions. The Constitution is under the view of the tribunals of the United States when any act of Congress is brought before them for consideration.

Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the national government to preserve its rightful supremacy in cases of conflict of authority. In their laws and mode of enforcement neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all, shall be vested in their officers, *are matters subject to their [*408 own control, and in the regulation of which neither can interfere with the other.

Now, among the powers assigned to the national government, is the power "to raise and support armies," and the power "to provide for the government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any state authority, how the armies shall be raised; whether by voluntary enlistment or forced draft; the age at which the soldier shall be received, and the period for which he shall be taken; the compensation he shall be allowed, and the service to which he shall be assigned.

And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offenses, and prescribe their punishment. No interference with the execution of this power of the national government in the formation, organization, and government of its armies by any state officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service. Probably in every county and city in the several states there are one or more officers authorized by law to issue writs of habeas corpus, on behalf of persons alleged to be illegally restrained of their liberty; and if soldiers could be taken from the Army of the United States, and the validity of their enlistment inquired into by any one of these officers, such proceeding could be taken by all of them, and no movement could be made by the national troops without their commanders being subjected to constant annoyance and embarrassment from this source. The experience of the late Rebellion has shown us that, in times of great popular excitement, there may be found in every state large numbers ready and anxious to embarrass the operations of the government and easily persuaded to believe every step, taken for the enforcement of its authority, illegal and void. Power to issue writs of habeas corpus for the discharge of soldiers in the military service, in the hands of parties thus disposed, **409***] might be used, and often would be *used, to the great detriment of the public service. In many exigencies the measure of the national government might in this way be entirely bereft of their efficacy and value. An appeal in such cases to this court, to correct the erroneous action of these officers would afford no adequate remedy. Proceedings on habeas corpus are summary, and the delay incident to bringing the decision of a state officer, through the highest tribunal of the state, to this court for review, would necessarily occupy years, and in the meantime, where the soldier was discharged, the mischief would be accomplished. It is manifest that the powers of the national government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty.

It is true similar embarrassment might sometimes be occasioned, though in a less degree, by the exercise of the authority to issue the writ possessed by judicial officers of the United States, but the ability to provide a speedy remedy for any inconvenience following from this source would always exist with the national legislature.

State judges and state courts, authorized by laws of their states to issue writs of habeas corpus, have, undoubtedly, a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application, the writ should be refused. It it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the state; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority or claim and color of the authority of the United States, and to exclude the suspicion of imposition *or [*410 oppression on his part. And the process or order, under which the prisoner is held, should be produced with the return, and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer, in good faith, under the authority or claim and color of the authority of the United States, and not under the mere pretense of having such authority.

This right to inquire by process of habeas corpus, and the duty of the officer to make a return "grows necessarily," says Mr. Chief Justice Taney, "out of the complex character of our government and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its power, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the state judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus nor any other process issued under state authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress."

Some attempt has been made in adjudications, to which our attention has been called, to limit the decision of this court in *Ableman* v. *Booth*, 21 How. 506, 16 L. ed. 169, and *The United States* v. *Booth*, 21 How. 506, 16 L. ed. 169, to cases where a prisoner is held in custody under undisputed lawful authority of the United States as distinguished from his imprisonment under claim and color of such authority. But it is evident that the decision does not admit of any such limitation. It would have been unnecessary to enforce, by any extended reasoning, such as the Chief Justice uses, the position that when it appeared to the judge or officer issuing the writ, that the prisoner was held under undisputed *lawful [*411 authority, he should proceed no further. No Federal judge even, could, in such case, release the party from imprisonment, except upon bail when that was allowable. The detention being by admitted lawful authority, no judge could set the prisoner at liberty, except in that way, at any stage of the proceeding. All that is meant by the language used is, that the state judge or state court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States; that is, an authority the validity of which is to be determined by the Constitution

and laws of the United States. If a party thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release.

This limitation upon the power of state tribunals and state officers furnishes no just ground to apprehend that the liberty of the citizen will thereby be endangered. The United States are as much interested in protecting the citizen from illegal restraint under their authority, as the several states are to protect him from the like restraint under their authority, and are no more likely to tolerate any oppression. Their courts and judicial officers are clothed with the power to issue the writ of habeas corpus in all cases, where a party is illegally restrained of his liberty by an officer of the United States, whether such illegality consist in the character of the process, the authority of the officer, or the invalidity of the law under which he is held. And there is no just reason to believe that they will exhibit any hesitation to exert their power, when it is properly invoked. Certainly, there can be no ground for supposing that their action will be less prompt and efficient in such cases than would be that of state tribunals and state officers. *Seavey* v. *Seymour*, 3 Cliff. 439; *In the Matter of Keeler*, Hemp. 306.

It follows, from the views we have expressed that the court commissioner of Dane county **412***] was without jurisdiction to *issue the writ of habeas corpus for the discharge of the prisoner in this case, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer of the United States, under claim and color of the authority of the United States, as an enlisted soldier mustered into the military service of the national government; and the same information was imparted to the commissioner by the return of the officer. The commissioner was, both by the application for the writ and the return to it, apprised that the prisoner was within the dominion and jurisdiction of another government, and that no writ of habeas corpus issued by him could pass over the line which divided the two sovereignties.

The conclusion we have reached renders it unnecessary to consider how far the declaration of the prisoner as to his age, in the oath of enlistment, is to be deemed conclusive evidence on that point on the return to the writ.

The judgment of the Supreme Court of Wisconsin must be reversed, and it is so ordered.

Mr. Chief Justice **Chase**, dissenting:

I cannot concur in the opinion just read. I have no doubt of the right of a state court to inquire into the jurisdiction of a Federal court upon habeas corpus, and to discharge when satisfied that the petitioner for the writ is restrained of liberty by the sentence of a court without jurisdiction. If it errs in deciding the question of jurisdiction, the error must be corrected in the mode prescribed by the 25th section of the judiciary act; not by denial of the right to make inquiry.

I have still less doubt, if possible, that a writ of habeas corpus may issue from a state court to inquire into the validity of imprisonment or detention, without the sentence of any court whatever, by an officer of the United States. The state court may err; and if it does, the error may be corrected here. The mode has been prescribed and should be followed.

To deny the right of state courts to issue the writ, or, what amounts to the same thing, to concede the right to *issue and to deny [*413 the right to adjudicate, is to deny the right to protect the citizen by habeas corpus against arbitrary imprisonment in a large class of cases, and, I am thoroughly persuaded, was never within the contemplation of the convention which framed or the people who adopted the Constitution. That instrument expressly declares that "the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it."

UNITED STATES, *Appt.*,
v.
THE HEIRS OF JUAN BAUTISTA VIGIL, Deceased, *et al.*

(See S. C. 13 Wall. 449–458.)

Mexican lands, rules for their disposal—power of governors, and of the departmental assembly—invalid grant.

1. The only laws in force in the territories of Mexico for the disposition of the public lands with the exception of those relating to missions and towns, are the act of the Mexican Congress of 1824, and the Regulations of 1828.
2. The power to cede public lands depended entirely on the uses to which they were to be put, which were cultivation or settlement.
3. The legal right to dispose of them for other objects was withdrawn from the local authorities, and rested alone with the supreme government.
4. These regulations conferred on the governors of the territories the authority to grant vacant lands, and did not delegate it to the departmental assembly.
5. Where a grant was the sole act of the assembly, and had not the governor's recommendation in its favor, it was invalid.

[No. 40.]

Argued Feb. 13, 1872. Decided Mar. 4, 1872.

APPEAL from the Supreme Court for the Territory of New Mexico.

This is an appeal by the United States from the judgment of the supreme court of the territory of New Mexico, confirming the land claim of the petitioners in that court, filed under the provisions of the 5th section of the act of Congress of June 21, 1860, Laws of 1859 and 1860, p. 72.

Under the provisions of § 8 of an act of Congress dated July 22, 1854 (1 Brightly, Dig. U. S. L. p. 576, § 642), this claim was first presented by the claimants May 23, 1859, to the surveyor general of New Mexico, for examination and report to Congress on its validity. After a full examination, it was rejected by him August 29, 1859, mainly on the ground that the grant having been conditional and none of the conditions having been performed by the grantees, the grant was invalid as a claim against the United States.

From this decision the claimants appealed to Congress, and, subsequently, under the provisions of the 5th section of the act of June 21, 1860, Juan B. Vigil and those claiming under him were authorized to bring suit against the United States in the supreme court of the territory of New Mexico, within two years from

the passage of that act. The present suit was instituted within that time in that court, by a petition filed Oct. 25, 1860.

In that court, Jan. 25, 1867, a judgment was rendered by it confirming the claim of the petitioners. The United States appealed. On a motion made by the appellees at the beginning of December term, 1870, to dismiss this appeal on the ground that it had not been taken in time, this court refused to dismiss the appeal, holding that it was well taken and in time.

United States v. *Vigil*, 10 Wall. 423, 19 L. ed. 954.

The case is further stated by the court.

Messrs. **B. H. Bristow,** *Solicitor Gen.*, and **John A. Wills,** special counsel, for appellant:

The judgment ought to be reversed:

1. Because the pretended land grant relied upon in this case was made by the departmental assembly of New Mexico, not only without authority of Mexican law, but contrary to the established forms of said law for making grants of national public land.

2. Because, supposing the grant to have been legally made, its existence was not legally proved in the court below by the necessary and indispensable Mexican record and archive evidence of the grant and because, on the contrary, the only written evidence of its existence which was offered by the claimants, admitted by the court and objected to by the appellants, was produced from the private possession of the claimants themselves, authenticated only by oral evidence as to the genuineness of the handwriting and of the signatures to the papers.

3. Because there is both intrinsic and extrinsic evidence of fraud in the title papers.

4. Because, the grant being conditional, and the right to a confirmation of it against Mexico or the United States being merely equitable, the claimants have no equity from want of consideration arising out of a total failure to perform the conditions of the grant, either before or since the transfer of the sovereignty in New Mexico to the United States.

5. Because assuming the authority from the governor to the judge to make it, and the document dated Sept. 16, 1846, containing the order based upon it, all to be genuine and legally proved, the order suspending the obligation of the grantees to perform the conditions of the grant was inoperative and void: (1) Because the authority to make it must have been given and executed after the said Sept. 16, 1846; and (2) because at that time, neither the Mexican nor the American governor nor the judge could legally make or execute: (1) Because the sovereignty of Mexico in New Mexico over its public lands had ceased Aug. 22, 1846, by the proclamation of General Kearney nearly a month before; and (2) because the laws of the United States conferred no such authority on either of those officers.

United States v. *Vallejo*, 1 Black, 541, 17 L. ed. 232.

The law of 1824 and the Regulations of 1828 are the only laws of New Mexico on the subject of granting public lands in the territory, excepting those regulating towns and missions, and the authority of the governors and other officers is defined by them.

1 Black, 541, 554, 17 L. ed. 232, 234, Nelson, J.; see, also, *U. S.* v. *Workman*, 1 Wall. 761, 17 L. ed. 710; *U. S.* v. *Cambuston*, 20 How. 63, 15 L. ed. 830.

The Organic Bases of June 13, 1853, conferred no new authority upon the departmental assembly of New Mexico, in the matter of national grants to the national public lands; but grants of such lands within said department were to be governed under that Constitution and as they had been before, *viz.:* by the colonization law of 1824 and the Regulations of 1828. It was so ruled in *U. S.* v. *Workman*, *supra*, and *U. S.* v. *Jones*, 1 Wall. 766, 17 L. ed. 712.

It is clear that this grant was made, not only without authority of law, but contrary to the forms prescribed by those laws.

1. The consideration of the grant was illegal.

The law of Aug. 28, 1824, commonly called the colonization law of 1824, is strictly a colonization law, under which grants were to be made in consideration of settlement cultivation and improvement of the land granted. It does not contemplate a grant of public land in consideration of public improvements, such as those proposed by the petitioners.

See *U. S.* v. *Vallejo*, 1 Black, 541, 17 L. ed. 232; *U. S.* v. *Castillero*, 2 Black, 18, 17 L. ed. 360; *U. S.* v. *Workman*, 1 Wall. 745, 17 L. ed. 705; *U. S.* v. *Jones*, 1 Wall. 766, 17 L. ed. 712.

2. The quantity of land attempted to be granted was illegal and excessive.

U. S. v. *Hartnell*, 22 How. U. S. 286, 16 L. ed. 340; *U. S.* v. *Larkin*, 18 How. 557, 15 L. ed. 485; *Roland* v. *U. S.* 7 Wall. 750, 19 L. ed. 186.

3. The grant was not made according to the Regulations of 1828.

1. It purports to have been made by the departmental assembly. Under the first and fifth regulations of 1828, the grant should have been made by the governor, with the approval of the departmental assembly.

See 10 Wall. 238, 19 L. ed. 903.

In this case this order was reversed. The most that can be claimed is, that the grant was made by the departmental assembly, with the approval of the governor.

2. It was not made in accordance with the regulations, which required a petition to the governor setting forth the qualifications of the petitioner, and a map of the land solicited; a reference of it by him to the local authorities for a report; a concession of the land by the governor; the approval of the departmental assembly; a titulo made by the governor; a record of the grant in the archives of the government. For a copy of these Regulations, see 10 Wall. 231, 19 L. ed. 902, for an abstract, see *U. S.* v. *Sutter*, 21 How. 180, 16 L. ed. 122; *U. S.* v. *Cambuston*, 20 How. 59, 15 L. ed. 828.

Messrs. **Thomas Ewing, Jr.,** and **J. S. Watts,** for appellees:

The following propositions are insisted on by the appellant:

1. That the consideration was illegal. It will be observed the grant is "for the purpose of constructing wells and cultivating the land, so far as their means will permit."

Appellant cites cases to the effect that under the colonization law and regulations, no power was given to sell public land. The 1st section of the Regulations of 1828, gave the governors

of the territories power to grant vacant lands to "either Mexicans or foreigners who may petition for them for the purpose of cultivation or settlement." The purpose named in the petition necessarily involved settlement, and the decree expressly states that the grant is made for the purpose of cultivation. If the sinking of wells, to facilitate settlements of the waste Jornado, was not of itself a legal consideration, a proposition which we do not admit, yet it was not an unlawful one; and excluding it, there remained the sufficient consideration of cultivation to support the grant.

2. Counsel for the appellant further object that the grant was not made according to the Regulations of 1828. They do not approve of the form of grant adopted by the governor, in submitting the petition to the assembly. They object that there was no map of the Jornado, though its bounds were natural objects, familiar to every New Mexican, to wit: the Rio Grande on one side and the Sandia mountains on the other, from end to end of the famous desert. And they also object that there was no reference to anyone to ascertain what was known to everyone as to its extent and character. This class of objections has heretofore been summarily disposed of by this court, and needs no discussion now.

See *Hornsby* v. *United States*, 10 Wall. 224, 19 L. ed. 900.

3. And, finally, it was objected that the quantity of land granted was illegal and excessive.

Admitting, for the present, that the 12th section of the colonization law of 1824 fixes eleven leagues as the maximum of the grant so made in a territory and to a Mexican; still, this court must decree in favor of the appellees for the whole; because,

(a) This case is to be decided not by the laws only, but also by the usages and customs of Mexico respecting these grants. 12 Stat. at L. 72.

It was the usage in California to name the number of leagues granted and to regard eleven leagues as the maximum grant to any one person. But in New Mexico the usage was different. Duran and Donaciano Vigil, who had been for many years officials of the department, testified that the custom which prevailed under the rule of Spain, to grant by boundaries without regard to quantity, was continued under the Empire and afterwards the Republic of Mexico, down to the acquisition by the United States. This statement is confirmed by the report of the Commissioner of the General Land Office, 1871, p. 63, from which it appears that out of fourteen grants in that territory, confirmed by Congress in 1860, only five were for any given or even estimated number of leagues.

This custom had the assent of the supreme government, because the grants were required, by the 9th article of the Regulations of 1828, to be reported by the departmental governor to the supreme government quarterly, and the presumption is that they were so reported. Nearly all of them were by boundaries without regard to quantity, and among them were some grants notoriously in excess of eleven leagues. The supreme government made no objection, but permitted the usage to continue for over twenty years after the colonization law was passed; and under it grew up all the titles of that country existing when it was annexed to the United States.

As Mexico recognized such grants, so will this court; for the customs and usages of the departmental and of the supreme government are of equal rank with the laws of Mexico, in determining the decision here. It makes no difference whether the custom so prevailing in New Mexico was in disregard of the colonization law; or whether the Supreme Executive neglected his duties or overstepped his powers in permitting it; or whether such custom was peculiar to that department. If, in fact, this custom existed and titles in New Mexico grew up under it, then it must control the judgment of this court under the principles of decision established by the act which gives it jurisdiction of this cause.

Moreover, this custom has been recognized by the political departments of our government. The Secretary of the Interior reported to Congress for confirmation many of the grants made under it; some of which were known to be largely in excess of eleven leagues, and the quantity of most of the others was wholly unknown. Yet, with the facts understood, no question was made by either the Executive or Congress as to excess of quantity, and the grants were confirmed.

Though the quantity be illegal and excessive, yet the title passed from the government and vested in the grantees for the whole tract described.

White v. *Burnley*, 20 How. 247, 15 L. ed. 888; 17 Vin. Abr. 104, pl. 21; *Owens* v. *Rain*, 5 Hayw. 108; 23 Tex. 234; 25 Cal. 440; 29 Cal. 309.

There is no allegation that the alleged excess is the result of fraud. Hence, not only has this court no jurisdiction, but the United States has no right to reduce or destroy this grant.

Overton v. *Campbell*, 5 Hayw. 215; *Owens* v. *Rain, supra;* 23 Tex. 234.

Mr. Justice **Davis** delivered the opinion of the court:

This is a suit to try the title to a tract of land of large dimensions in the territory of New Mexico, which the appellees insist was granted in conformity with Mexican law. The claim was first presented to the surveyor general of New Mexico for confirmation, and by him rejected. Not satisfied with this decision, the claimants applied to Congress for relief, and a law was passed for their benefit, which authorized them to institute a suit in the supreme court of the territory of New Mexico against the United States. The law went further and declared that the same principle should be applied to the determination of the controversy which Congress had prescribed for the decision of similar land claims in California, derived under the authority of the Mexican government.

The case was ably and elaborately argued, and a wide range taken in the discussion of collateral questions, which we do not think it necessary to notice, as the grant itself was unauthorized by Mexican law, and the United

States, in consequence of this, under no obligation to recognize it.

It appears by the record that Vigil, and his compeers, on the 28th of December, 1845, addressed a petition to the most excellent departmental assembly, through Armijo, governor of New Mexico, asking for a grant of the Jornada del Muerto, binding themselves, if the grant were made, to construct two wells for the relief and aid of travelers, and establish two factories for the use of the state, and to protect them from hostile invasion. The governor transmitted the petition to the assembly, but declined to recommend that favorable action should be taken upon it, on account of the unusual character of the transaction. The position of the governor was ineffectual to restrain the assembly, for on the 10th of January, 1846 it granted the Jornada to the petitioners, for the purpose of constructing wells and cultivating the lands so far as their means would permit, without being entitled to an exclusive right of pasture.

The tract of land disposed of in this way embraced an area of over two million acres.

The further history of this proceeding is unimportant, for, in our opinion, the assembly had no power to cede this territory; nor, indeed, if the cession had been by the governor and approved by the assembly, could it be upheld.

It has been repeatedly decided by this court, 451*] that the only *laws in force in the territories of Mexico for the disposition of the public lands, with the exception of those relating to missions and towns, are the act of the Mexican Congress of 1824 and the Regulations of 1828. The avowed purpose of the Congress in enacting this law, and of the supreme government in carrying it into effect, was to colonize the public domain; to preserve it for settlement or cultivation. The favor of the legislature has, doubtless, been often abused by unworthy ministers in charge of the remote territories, but this consideration in nowise detracts from the wisdom of the policy on this subject. This policy recognized the obligation resting on the government to hold the public lands as a public trust, to be administered for the benefit of those who would settle upon them or cultivate them. They could not be sold for money, nor granted away in consideration of past public services, nor on condition of making public improvements, of use to the traveling community, or of general benefit to the state. The power to cede them depended entirely on the uses to which they were to be put, and these, as we have seen, were cultivation or settlement. The legal right to dispose of them for other objects, was withdrawn from the local authorities, and rested alone with the supreme government.

If the policy of the law were wise, so were the regulations established for the purpose of carrying out its provisions. These regulations conferred on the governors of the territories, "the political chiefs" as they are called, the authority to grant vacant lands, and did not delegate it to the departmental assembly. It is true the grant was not complete until the approval of the assembly, and in this sense the assembly and governor acted concurrently, but the initiative must be taken by the governor. He was required to act in the first instance—to decide whether the petitioner was a fit person to receive the grant, and whether the land itself could be granted without prejudice to the public or individuals. In case the information was satisfactory on these points he was authorized to make the grant, and at the proper time to lay it before the assembly, who were *required to give or withhold their con- [*452 sent. They were in this respect an advisory body to the governor, and sustained the same relation to him that the Senate of the United States does to the President in the matter of appointments and treaties. The Mexican government chose to intrust to an officer appointed by it, the execution of its policy on the subject of the public domain, rather than to an elective assembly, over whose conduct it could not in the nature of things exercise the same supervision and control. It would seem, owing to the remoteness of the territories from the seat of the general government, and the sparseness of the population, that the wisdom of the selection could not be disputed; but be this as it may, it was the undoubted right of the Mexican government to decide the question for itself, and this court cannot be required to go further than to give effect to that decision.

These views dispose of this case, for the grant in controversy was the sole act of the assembly, and has not even the element of the governor's recommendation in its favor.

But if it were otherwise, and the cession were the act of the governor, it would still be invalid, because it would violate the fundamental rule on which the right of donation was placed by the law. The essential element of colonization is wanting and, besides, the number of acres granted was enormously in excess of the maximum quantity grantable under the law. The decrees of the courts of Spain are invoked as an authority for this grant, but it is sufficient to say that they were invoked for a similar purpose in *Vallejo's Case*, 1 Black, 541, 17 L. ed. 232, and were decided to be inapplicable to the state of things existing in Mexico after the Revolution of 1820. And the Organic Bases of the Mexican Republic of June 13, 1843, are equally ineffectual to support this grant. If it be conceded the powers of the departmental assembly were enlarged by these decrees, so far as the private property belonging to the department, as a municipal organization, is *concerned, yet they effected [*453 no change in the mode of disposing of the public lands, nor was the colonization policy of 1824 at all altered by them, for they expressly declare that "in alienation of lands, the existing laws will be observed, and what the colonization laws determine."

In any aspect of this case, the claim for this large tract of land has no foundation to rest upon. The departmental assembly, aided in a certain sense by the governor, usurped the prerogative of the supreme government, and no ingenuity of reasoning can sanction a proceeding which was not only without authority of law, but contrary to the forms prescribed by it.

The judgment of the Supreme Court of the Territory of New Mexico is reversed, and the cause remanded to that court, with directions to enter a decree dismissing the petition.

358*] EDWARD J. GAY *et al., Appts.,*
v.
UNITED STATES.

(See S. C. *"Gay's Gold,"* 13 Wall. 358-363.)

Treasury regulation forbidding transportation of coin—President's proclamation of pardon —effect of, on forfeited property.

*1. The treasury regulation No. 22, forbidding all transportation of coin or bullion to any state or section declared by the President's proclamation to be in insurrection was valid and was authorized by the act of May 20, 1862.

2. Gold coin in packages and not used for traveling expenses was merchandise in 1864, in point of fact, and was within the mischief to be remedied by the nonintercourse acts of July 13, 1861, and May 20, 1862.

3. The proclamation of pardon and amnesty of President Johnson of December 25, 1868, was limited to persons "who participated in the late insurrection or Rebellion" and to the offense of "treason against the United States or adhering to their enemies during the late Civil War."

4. It did not, therefore, restore to a person not engaged in the insurrection property forfeited under the nonintercourse laws, although the property remained in court in proceedings not concluded when the proclamation was issued.

[No. 113.]

Submitted Feb. 23, 1872. Decided Mar. 18, 1872.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Mr. **E. T. Merrick** for appellants.

Mr. **C. H. Hill,** *Asst. Atty. Gen.,* for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

In the month of March, 1864, George S. Dennison, special treasury agent, seized a package of gold coin amounting to $5,000, on board the steamer Empire Parish, then lying at New Orleans, about to start up the river, and caused the gold to be libeled in the district court, on the ground that it was being transported into a section of the country under the control of the rebels in violation of the act of non-intercourse, of July 13, 1861, and May 20, 1862, and of the trade regulations of the Secretary of the Treasury, made under this latter act and affirmed by the President.

A claim was entered for the gold in behalf of Edward J. Gay, by Wm. Edwards, who makes the necessary claimants' oath, and this claim denies, in general terms, that the gold is forfeited.

Edwards delivered the gold on board the vessel to one Freeman, and these two are the main witnesses on behalf of claimant. Edwards testifies that he delivered the gold to Freeman to be carried to Gay, who resided within the Federal lines, but near to the region declared by the proclamation of the President to be in insurrection. Freeman seems to have been an agent of Gay for the purchase of cotton, buying without regard to its location within rebel lines, and delivering it to New Orleans to Edwards, who was Gay's broker.

He denies that there was any intent to use this special package of gold for that purpose, and says that he was to deliver it to gay, as directed by Edwards; but his manner of testifying, his relations with the forbidden traffic and with Gay, leave little room to doubt that, whether the gold was intended to reach Gay's manual possession or not, it was destined to be used in purchasing cotton in the insurrectionary district. It is conceded that Gay was not a rebel and was, technically at least, a loyal man. He could easily have come to New Orleans and made oath to his claim for the money, and given his own testimony as to the destination of the gold. It is probable that he, or he and Freeman alone, could have sworn knowingly on that subject, and his total silence is significant. Other testimony confirms the inference arising from these facts. We are of opinion that the circuit court, which heard the case on appeal, was right in holding that the gold was being transported to a place within the rebel lines.

The question is raised whether gold was within the meaning *of the act of Con-[*362 gress prohibiting the "transportation of goods, wares or merchandise intended for any place in the possession or under the control of insurgents against the United States."

The 22d treasury regulation on this subject expressly forbids all transportation of coin or bullion to any state or section declared to be in insurrection except for military purposes, under military orders, or under special license from the President, and the question is, Was the regulation authorized by the statute?

The words, "goods, wares, and merchandise, of whatever character," used in the act of 1862, undoubtedly have the same meaning as the words "goods and chattels, wares and merchandise," in the act of July 15, 1861. The word "chattel," in its ordinary signification, includes every species of property which is not real estate or freehold (2 Kent's Com. 342), and the words "goods, wares, and merchandise" are undoubtedly used in this statute to express the same meaning. But if there could, under ordinary circumstances, be any doubt on this subject, it is a well-known fact, of which this court can surely take cognizance, that in 1864 gold coin was an article of merchandise, and as such was bought and sold at fluctuating prices, and was the object of a large and active traffic. It would be folly to say that the court could not take notice of what all the world besides knew very well; and we must, therefore, hold that gold coin in package, carried from one person to another, and not used for paying traveling expenses when intended for an insurrectionary district, was within the prohibition of both the statutes we have cited, as it was beyond doubt within the mischief intended to be prevented.

Some suggestion is made that the final proclamation of amnesty and pardon of the President, of December 25th, 1868, restores to claimant the right of property in this gold, if it had ever been forfeited. But general as the terms of that proclamation are, it is by those terms limited to persons who "participated in the late insurrection or Rebellion," and *the [*363 offenses which are pardoned are declared to be "treason against the United States, or adhering to their enemies during the late Civil War." As there is no pretense that Gay, the claimant, was one of the persons thus described, or was guilty of or charged with the offense which was pardoned, the proclamation can have no application to him or to the present case.

The decree of the Circuit Court is affirmed.

*Headnotes by Mr. Justice MILLER.

THE GREAT WESTERN INSURANCE COMPANY, *Plff. in Err.*,
v.
WILLIAM THWING.

(See S. C. 13 Wall. 672-679.)

Dunnage is part of cargo, if freight is paid thereon — warranty not to overload ship, when broken.

*1. Merchandise, although used as dunnage, must nevertheless be regarded as cargo and as part of the ship's lading.

2. Articles for which freight is paid are merchandise and part of the ship's cargo, though used as dunnage.

3. A warranty in a ship's policy, "not to load more than her registered tonnage," will be broken by the carrying more cargo in weight than such tonnage, though the excess be used as dunnage; while if such excess had been mere dunnage and not cargo, the warranty would not have been broken.

[No. 96.]

Argued Feb. 7, 1872. Decided Mar. 18, 1872.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

The case is stated by the court.

Messrs. **M. E. Ingalls,** *B. R. Curtis,* **R. H. Dana, Jr.,** and **Chas. Levi Woodbury,** for plaintiff in error:

The charge incorrectly explained the warranty to the jury. It gave to the agreements of freight and carriage which the ship-master and ship affreighter might make, the effect of determining the scope of the warranty given by the ship-owner to the insurer, in effect holding that if a bill of lading of freight paying cargo reads "received on freight," it is within the warranty as to dead weight; but if it reads "received on freight as dunnage," the warranty does not restrain the amount of dead weight laden on board, or protect the insurer from risk of a gross and dangerous over lading with dead weight under the temptations of avarice, in freight earning, and a full insurance on the ship. No such option was given the master to avoid the warranty. 2 Pars. Mar. L. 104, and cases cited.

Although the master should provide ballast when necessary for the safety of the ship, or dunnage for proper stowage of cargo, when the charterer does not, yet they are not ship's furniture.

In *Kynter's Case,* 1 Leon. 46, the reason given is, "for sometimes the ship may sail without ballast, for it may be laden with such merchandises, as are convenient ballasts in themselves, as coal, wheat, etc."

See also *Lano* v. *Neale,* 2 Stark. 105; *Towse* v. *Henderson,* 4 Exch. 892; Abb. Ship. 5.

It is the use to which the article is put that makes it dunnage; and one part of a cargo placed so as to secure the safe storage of the rest, is used as and for dunnage, but it does not thereby cease to be laden for the ship. 4 Exch. 892.

Cargo is defined as the charge or lading of a vessel. In a general ship it must include all that pays freight. *Brown* v. *Stapyleton,* 4 Bing. 119.

This coal lost none of the other characteristics of cargo in its relation to the ship, because, by shippers' agreement, damage from use as dunnage was exempted.

*Headnotes by Mr. Justice BRADLEY.

The warranty was made to limit and define the risk. It is a condition precedent. No exception not specified therein can be imported into it, to relieve the assured against its effect, or to enlarge the risk against insurer's consent.

De Hahn v. *Hartley,* 1 T. R. 344; *Rich* v. *Parker,* 7 T. R. 705; *Craig* v. *Ins. Co.* Pet. C. C. 410; *Ins. Co.* v. *Wright,* 1 Wall. 470, 17 L. ed. 508.

An exception in the policy is not a warranty. *Yeaton* v. *Fry,* 5 Cranch, 335.

An excess of dead weight is equally dangerous to the ship's safety, irrespective of whether the name given the articles in their relation to this ship is dunnage, ballast, or cargo.

Weston v. *Minot,* 3 Wood. & M. 447; *Weston* v. *Foster,* 2 Curt. 119.

Messrs. **S. Bartlett** and **D. Thaxter,** for defendant in error:

1. A policy of insurance on a vessel, whether for a voyage, as in this case, or for a period of time, contemplates the employment of the vessel in the usual way and provides for an indemnity against certain enumerated perils, while the vessel is thus employed.

2. The owner of a ship, in her employment, either as a general ship or under a letting of her entire capacity, impliedly agrees that she shall be in a condition to carry safely the cargo laden on board of her; provided that she encounters only the usual and ordinary perils of the voyage.

3. In preparing his ship for such employment, he must not only see that she is tight and stanch in her hull; that her masts, spars, rigging, and sails are sufficient; that she has suitable anchors and chains, and a full complement, including stores, etc.; but that she is in proper trim and that her cargo is properly stowed, and that she has the requisite ballast and dunnage to accomplish this.

1 Phil. Ins. 5th ed. sub. §§ 704, 706; Maude & P. Ship. 3d Eng. ed. 97, 283; Macl. Ship. 354.

4. It is as well settled that it is the duty of the owner of a vessel to furnish such ballast and dunnage as are requisite for the voyage, as it is that he shall provide anchors and chains. 1 Pars. Mar. L. 243; Maude & P. Ship. 283; Macl. Ship. 354; *Moorsom* v. *Page,* 4 Camp. 103; *Irving* v. *Clegg,* 1 Bing. (N. C.) 53.

5. This duty of the shipowner to furnish the requisite ballast and dunnage, carries with it the right to occupy the space necessary to properly dunnage and ballast the vessel with any article suitable for that purpose, and receive freight thereon, notwithstanding the whole ship is chartered to another.

Towse v. *Henderson,* 4 Exch. 890; *Southampton Col. Co.* v. *Clarke,* L. R. 6 Exch. 57; Macl. Ship. 354.

In all maritime contracts which we have found, as well as in the common acceptation of the terms "to load" or "the loading" of a ship refers solely to cargo and not to ballast (which may be iron kentledge) nor to spare chains, anchors, nor to dunnage. This is shown by the settled use of the word in charter-parties, where the whole capacity of the ship is let to the charterer. Neither the ballast nor dunnage are deemed part of the lading, although the shipowner may make a profit on them by way of freight or otherwise.

Towse v. *Henderson*, 4 Exch. 890; *Southampton Col. Co.* v. *Clarke, supra.*

In case of doubt, this warranty is to be construed in favor of the assured, since the underwriter in whose favor the warranty is made is bound to make clear a clause inserted for his own benefit, and attended with forfeiture or penalty to the assured. 1 Arn. Ins. 588, § 215.

Does the fact that the articles—planks, for instance, used for dunnage or iron kentledge used for ballast—are vendible at the end of the voyage, or that the owner, instead of purchasing the dunnage and ballast and selling them at the end of the voyage, contracts with a third party to furnish them, deliverable upon payment of freight, to the agent of such third party, at the port of destination—make those articles cargo, within the meaning of the policy which would not otherwise be cargo?

It is submitted that, in legal construction under such a warranty, dunnage is not lading or cargo; although vendible and usually sold at the end of the voyage, it does not become such lading or cargo, because the owner gets a freight upon it by contract, instead of purchasing and selling. If the purpose of the warranty was that dunnage should lose its ordinary character under such a state of facts, those who required the warranty were bound to so have expressed it in the contract.

Mr. Justice **Bradley** delivered the opinion of the court:

This was an action of assumpsit, for money had and received, brought by the plaintiffs in error, citizens of New York, against the defendant, a citizen of Massachusetts, to recover back certain insurance which the plaintiffs had paid to the defendant, in ignorance (as they alleged) of a breach of warranty by him. They had made a policy on his ship Alhambra on a voyage from Liverpool to San Francisco, which policy was dated the 6th of October, 1863, and contained, among other things, this clause: "Warranted not to load more than her registered tonnage with lead, marble, coal, slate, copper ore, salt, stone, bricks, grain or iron, either or all, on any one passage." The registered tonnage was 1,285 tons, and the vessel took on board at Liverpool, among other things, 1,064 tons of iron, 6 tons of brick, and 238 tons of cannel coal, being an excess over the registered tonnage, of twenty-three tons. The ship having sustained a partial loss on the voyage, the plaintiffs paid the money in question, in ig-[*672] norance of the amount *of cargo, and base their claim to recover it back on the ground that the payment was made under a mistake of facts.

The defense set up was that the 238 tons of cannel coal were not cargo, but dunnage.

The defendant showed a charter-party with James Starkie, of Liverpool, by which the charterer was to have the full reach of the vessel's hold, and was to pay fifty-one shillings for every ton of freight put on board; that the master agreed with the charterer, in addition to the agreement in the charter-party, that the latter should furnish 250 tons of cannel coal for dunnage of the ship for the voyage, and that under this agreement he received the said 238 tons as dunnage, and that it was used and placed along the ship's bottom, fore and aft, as dunnage; that the captain signed a bill of lading for it; that it was on his freight list; that he collected freight, fifty-one shillings per ton, for it, and delivered it in San Francisco the same as he did the rest of the cargo; that it was better for dunnage than plank. The defendant also offered evidence of experts to show that a cargo was not properly stowed, unless properly dunnaged; and that in cargoes from Liverpool, cannel coal is frequently used for dunnage, and when so used for a certain cargo, is liable to be crushed; that when cannel coal is received for cargo it is usually, although not always, stowed in a different manner from what it is when used as dunnage, and that it is sometimes taken as dunnage on the ship's account, and then is sold at the port of discharge on the ship's account.

Upon this testimony the plaintiff's counsel asked the court to instruct the jury that if freight was received and paid for this coal, it came wthin the warranty, although used as dunnage. The court declined so to rule; but ruled that if the jury believed from the evidence that the cannel coal was received and used as dunnage, and not as cargo, it would not amount to a loading under the clause of the policy referred to, and the plaintiffs could not recover. Under this ruling the jury found for the defendant. The bill of exceptions brings up the question as to this ruling.

There is considerable analogy between dunnage and ballast. The latter is used for trimming the ship, and bringing it down to a draft of water proper and safe for sailing. Dunnage is placed under the cargo to keep it from being wetted by water getting into the hold, or between the different parcels to keep them from bruising and injuring each other. Webster's definition of dunnage is, "fagots, boughs, or loose materials of any kind, laid on the bottom of a ship to raise heavy goods above the bottom, to prevent injury by water in the hold; also, loose articles of merchandise wedged between parts of the cargo to prevent rubbing, and to hold them steady." Lord Tenterden says: "It is, in all cases, the duty of the master to provide ropes, etc., proper for the actual reception of the goods in the ship. . . . The ship must also be furnished with proper dunnage (pieces of wood placed against the sides and bottom of the hold) to preserve the cargo from the effects of leakage, according to its nature and quality." Abb. Ship. pt. IV. ch. 5, § 1.

It seems to be conceded by the plaintiffs that if the cannel coal can be regarded as dunnage, there was no breach of the warranty. In other words, it is conceded that when the assured warranted "not to load more than her registered tonnage," ballast and dunnage were not included in the warranty. And it is not pretended that the cannel coal used on this occasion was more than was proper for dunnage. Had some useless articles been employed for that purpose such as chips or blocks of wood, though weighing precisely what this coal weighed, and had no freight been paid for it, the insurance company could not have complained.

It is the master's duty to provide both ballast and dunnage necessary for the safe and proper transportation of his *cargo. And it has [*675 been held that, in selecting materials for these purposes, even when he has chartered the entire

capacity of his ship for articles which require ballast or dunnage, he is not precluded from taking articles on which he can realize freight. Thus, in the case of *Towse* v. *Henderson*, 4 Exch. 890, where, upon a charter-party, it was agreed that the vessel should proceed from Singapore to Whampoa, and there load from the agents of the affreighters a full and complete cargo of tea, and the master took in as ballast eighty tons of antimony ore, for which he received freight as merchandise, it was held that, if it occupied no more space than ballast would have done, he was entitled to do it. In that case a full cargo of tea (which was all that the charterer stipulated for) still needed ballast, which it was the duty of the ship-master to supply. Hence, it could make no difference to the charterer what material was used for ballast, if it did not encroach upon the loading capacity of the vessel for tea.

The question still recurs, however, whether merchandise used for the purpose of ballasting a ship, or for the purpose of dunnage, and paying freight as merchandise, can be considered as a part of the ship's loading within the meaning of a warranty against an excess of loading beyond a limited amount, it being conceded that an equal quantity of ballast or dunnage proper would not be so regarded? Has the court a right to import into the contract an implied qualification that a reasonable amount of merchandise proper for ballast or dunnage shall not be reckoned as loading within the meaning of the contract? It is clear that the law does make the implied qualification that ballast and dunnage shall not be regarded as loading within the contract. Is it reasonable to extend that qualification to merchandise used as ballast or dunnage? If so, then, in the case of a cargo consisting of only one article, which needed no ballast or dunnage, the ship-owner would be entitled to deduct a reasonable amount for those purposes; and if there were a government regulation, that no ship should carry more **676*]** cargo in *weight than the amount of her registered tonnage, she would on the same principle be entitled not only to carry ballast and dunnage (properly such) in addition to her legal amount of cargo, but, where ballast and dunnage could be dispensed with, she would be entitled to carry an additional amount of cargo, beyond the legal allowance, equivalent to reasonable ballast and dunnage.

Such a construction could not be a sound one. It would be an arbitrary modification of the words of a law or contract. If the legislature in the one case, or the parties in the other, were willing that such a qualification should be made, it would always be very easy to make it in express terms. It would seem to be a dangerous practice for the court to make it for them.

It is not every cargo that requires ballast. Many cargoes will themselves sufficiently ballast the ship. Cargo may be so assorted that certain portions of it may act as ballast. And where a ship is doing a miscellaneous carrying business, it would seem to be the dictate of sound business judgment so to assort and arrange the cargo (if practicable) as to dispense with the use of ballast properly so called. For by this means the whole carrying capacity of the ship is saved for cargo. And when this idea is acted on, those portions of the cargo which are selected and used for trimming and settling the ship, may, in a loose and popular sense, be called ballast. But, nevertheless, they are not ballast in a legal or proper sense. They remain cargo.

Precisely the same may be said with regard to dunnage. Many kinds of cargo require no dunnage whatever. They are composed of articles which will not be injured by water, nor by contact with each other. A cargo may be so assorted that some portions of it may be placed so as to keep the other portions dry, or prevent them from coming into mutual collision. It is manifest in this case, as in that of ballast, that a prudent and skilful master of a vessel will (if practicable) so assort and arrange his cargo as to dispense with dunnage proper. And yet, in a loose sense, the articles of merchandise which he uses to perform the office of dunnage, *may be called dun- [*677 nage. Still they are not legally nor properly such. If they are merchandise, they are cargo, and form part of the vessel's lading. They will be subject to duties, and they will be covered by insurance on the cargo.

It is true that ballast or dunnage, even when clearly such, as shingle from the beach, wooden slabs, chips, or brush, may be sold for some small sum after the voyage is ended; but that will not make it any the less ballast or dunnage as contradistinguished from merchandise. No person of ordinary intelligence would find any difficulty in making the distinction. Had such articles been used in the case before us, though of the same weight as the cannel coal, the insurance company could not have complained; for it would not have been cargo. But when merchandise is used in lieu of dunnage, or to perform the office of dunnage, it does not lose its character as cargo; and the insurance company have the right to treat it as cargo. And it is evident that no form of words which the captain and the charterer might use on the subject can affect the rights of the insurance company. It would be *res inter alios acta.*

In view of these considerations, it seems to us that the charge of the court was calculated to mislead the jury on the question at issue. It was "that if they believed that the coal was received and used as dunnage, and not as cargo, it would not amount to a loading under the warranty of the policy."

The evidence justified and required the instruction asked by the plaintiffs, namely: that if freight was received and paid for the coal, it was cargo, and came within the warranty. Here was an admitted fact, which gave character to the article, stamping it as merchandise. Freight is never paid for mere dunnage any more than for the sails and rigging of the ship.

The argument that it made no difference to the insurance company whether coal or any other article was used as dunnage is unsound. It does make this difference: if coal paying freight is merchandise, it is within the warranty; if mere dunnage were used, it would not be within the warranty. And the company were entitled to the benefit of those results *which the mutual self-interest of the [*678 parties would lead them to adopt. The company made their contract in view and in anticipation of all these considerations.

Our attention has been called to another case

between the same parties on the same policy of insurance, decided by the supreme court of Massachusetts, and reported in 103 Mass. 401, in which a decision was made adverse to the views which we have expressed. With all due respect for that intelligent and learned tribunal, and after giving full consideration to the views presented in the opinion given in that case, we cannot bring ourselves to a different conclusion from that to which we have come.

The judgment of the Circuit Court is reversed, with instructions to issue a venire de novo.

Mr. Justice **Clifford**, dissenting:

Unable to concur in the views of the majority of the court in this case, and regarding the question presented as one of considerable practical importance, I deem it proper to state very briefly the grounds of my dissent.

Insurance was obtained by the defendant on his ship Alhambra, from Liverpool to San Francisco; she received injuries by perils of the sea during the voyage, and the plaintiffs, as insurers, paid the loss under protest and brought this suit to recover back the amount. The policy contained the warranty described in the opinion of the court, and the claim to recover back the amount paid for the loss is based solely upon the fact that the ship took on board twenty-three tons of the excepted articles mentioned in the warranty, in excess of her registered tonnage. Two hundred and thirty-eight tons of the loading consisted of cannel coal, which the proofs showed was often used as dunnage, and that much more in quantity of the coal than the excess mentioned was used for dunnage on this occasion. Dunnage is required in every case, and it is not shown nor pretended that any more was used in loading the cargo **679***] than was necessary for the purpose. *Deduct from the loading the amount of the coal used as dunnage, and it is conceded that the loading of the ship did not exceed her registered tonnage, and the jury have found that the excess beyond her registered tonnage was used as dunnage, and I have no doubt it was properly so used.

Beyond doubt the ship-owner in ballasting his chartered vessel may take freight paying merchandise for that purpose, provided the merchandise occupies no more space than the ballast would have done if ordinary ballast had been used instead of merchandise paying freight, and I am of the opinion that the same rule should be applied in respect to the dunnage used in stowing the cargo. *Towse* v. *Henderson*, 4 Exch. 890. Such was also the opinion of the supreme court of Massachusetts in a suit between these same parties which arose out of an insurance on the same voyage. *Thwing* v. *Great W. Ins. Co.* 103 Mass. 401.

Much discussion of the question is unnecessary, as the views which I entertain and the authorities to support them are very fully given in that opinion, and in the opinion of the district judge, in which I also concur.

Mr. Chief Justice **Chase** and Mr. Justice **Swayne** also dissent, and concur in the views here expressed.

UNITED STATES, *Plff.*, *v.* J. W. AVERY *et al.*

(See S. C. 13 Wall. 251-253.)

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Argued Mar. 19, 20, 1872. Decided Mar. 21, 1872.

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Counsel for the defendant, Riggins, having moved the court to quash the indictment, after argument upon the motion, the following questions occurred:

1. Whether the court has jurisdiction to inquire and find whether the crime of murder has been committed, as set forth and charged, in the latter portions of the second and fourth counts of said indictment, in order to ascertain the measure of punishment to be affixed to the offenses against the United States, charged in the former portions of the said second and fourth counts.

2. Whether the right to keep and bear arms is a right "granted and secured by the Constitution of the United States, so as to support the third count of said indictment, and render the offense therein charged cognizable in this court."

On which questions the opinions of the judges were opposed.

The counts designated in those questions are as follows:

Second Count. "At a stated term of the circuit court of the United States, begun and holden at Columbia, in said district, on the fourth Monday of November, A. D. 1871, the grand jurors of the United States, in and for said district, upon their several and respective corporal oaths, do present that James William Avery, etc., together with divers other evil-disposed persons, to the jurors aforesaid as yet unknown, late of York county, in the state of South Carolina, at York county, in said district, and within the jurisdiction of this court, on the 6th day of March, 1871, unlawfully did conspire together with intent to violate the 1st section of the act entitled 'An Act to Enforce the Right of Citizens of the United States to Vote in the Several States in this Union, and for Other Purposes,' approved May 31, 1870, by unlawfully hindering, preventing, and restraining divers male citizens of the United States, of African descent, above the age of 21 years, qualified to vote at any election by the people in said county, district, and state, from exercising the

right and privilege of voting, and by other unlawful means not allowing them, the said male citizens, to vote at an election by the people, to be held on the third Wednesday of October, A. D. 1872, within the county, district, and state aforesaid, contrary to the act of Congress in such case made and provided, and against the peace and dignity of the United States."

"And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said James William Avery, etc., and others to the jurors aforesaid unknown, on the day and year aforesaid, at the county and district aforesaid, and within the jurisdiction of this court, in the act of committing the offense aforesaid, as aforesaid set forth and alleged, in and upon one Jim Williams, alias Jim Rainey, in the peace of God and in the state of South Carolina then and there being, feloniously, willfully, and of their malice aforethought, did make an assault, and the said James William Avery, etc., and others, to the jurors aforesaid unknown, a certain rope about the neck of the said Jim Williams, alias Jim Rainey, then and there feloniously, willfully, and of their malice aforethought, did fix, tie, and fasten; and that the said James William Avery, etc., and others, to the jurors aforesaid unknown, with the rope as aforesaid so as aforesaid fastened on and about the neck of him, the said Jim Williams, alias Jim Rainey, then and there feloniously, willfully, and of their malice aforethought, did choke, suffocate, and strangle, of which said choking, suffocating, and strangling, he, the said Jim Williams, alias Jim Rainey, then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid do say that the said James William Avery, etc., and others to the jurors aforesaid unknown, him, the said Jim Williams, alias Jim Rainey, then and there in manner and form aforesaid, feloniously, willfully, and of their malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of South Carolina"

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The following are the provisions of the act of May 31, 1870, under which the said counts were drawn:

"Sec. 6. And be it further enacted, that if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and on conviction thereof shall be fined or imprisoned, or both, at the discretion of the court, the fine not to exceed $5,000, and the imprisonment not to exceed ten years, and shall moreover be thereafter ineligible to and disabled from holding any office or place of honor, profit, or trust created by the Constitution or laws of the United States."

"Sec. 7. And be it further enacted that if, in the act of violating any provision in either of the two preceding sections, any other felony, crime, or misdemeanor shall be committed, the offender, on conviction of such violation of said sections, shall be punished for the same with such punishments as are attached to the said felonies, crimes, and misdemeanors, by the laws of the state in which the offense may be committed."

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*Headnotes by Mr. Justice BRADLEY.

[No. 38.]

Submitted Dec. 18, 1871, and Mar. 21, 1872. Decided Apr. 8, 1872.

IN ERROR to the Supreme Court of the State of Michigan.

The case is stated by the court.

Mr. **Matt. H. Carpenter,** for plaintiff in error:

The act of February 15, 1859, held out an inducement or offer to private parties to embark in the business of manufacturing salt in that state, and when such parties did subsequently engage in that business, and actually produced and manufactured more than five thousand bushels of salt within the state, the act became a contract between the state and such parties, which the legislature of the state could not constitutionally revoke or repeal.

Gordon v. *Appeal Tax Court*, 3 How. 133; *Bk.* v. *Knoop*, 16 How. 369; *Ohio L. & T. Co.* v. *Debolt*, 16 How. 416; *Dodge* v. *Woolsey*, 18 How. 331, 15 L. ed. 401; *Bk.* v. *DeBolt*, 18 How. 380, 15 L. ed. 458.

The act must be regarded as an inducement to private parties to prosecute experiments. In this experiment thousands of dollars might be expended, and yet not a bushel of salt be produced. The experiment satisfactorily settled, it being ascertained in other words that salt could be produced, then its manufacture would be sure to follow. But the thing for which the state intended to compensate was the solution of a question whether salt could be produced. The plaintiff in error, relying upon this act, entered upon the enterprise and settled the question by the actual production of 31,740 bushels of salt, prior to Mar. 9, 1861; and thus became entitled to the compensation offered by the legislature. What was this? The act must answer:

"Section 2. All property, real and personal, used for the purpose mentioned in the 1st section (that is, boring for and manufacturing salt in this state) shall be exempt from taxation for any purpose."

When and how long exempt? But one answer can be given to this question: as long as the same shall be used for the purpose aforesaid.

But to say that the legislature could repeal the law and thus withdraw the promised compensation as soon as the party should perform on its part, by solving the question whether salt could be manufactured from the waters of the state, is to say, that when one party to a contract has realized the benefit expected, he may repudiate the obligation of making to the other party the stipulated consideration.

Any person who had engaged in this business on the faith of the act of Feb. 15, 1859, prior to the act of Mar. 15, 1861, cannot be affected by the latter act. The plaintiff in error had done and performed on its part what entitled it to perpetual exemption of all property it should thereafter employ in the business prior to the amendatory act; therefore, that act cannot impair the right vested in the plaintiff in error prior to its passage.

In the opinion of the court below the act of Feb. 15, 1859, is likened to an ordinary bounty law, on the killing of noxious animals or the manufacture of certain fabrics. This, it is respectfully submitted, is the error of the court below. The existence of foxes and bears, and the fact that wool can be manufactured into cloth, are facts universally known; therefore, when a state offers a bounty for the destruction of such animals or for the manufacture of woolen fabrics, it may at any time repeal the law, except as to animals killed or cloths manufactured while the law was in force. As to such, it is conceded in this opinion that it cannot be repealed. But in the case at bar it was not known that salt could be manufactured in that state; and as an inducement to the solution of that doubt the state promised to whomsoever should settle it favorably that all the property he should ever thereafter employ in that business should be exempt from taxation, and that all the salt he should manufacture should receive a certain bounty. Had this law been repealed before any one entitled himself to its benefits, no complaint could have been made and its repeal would have wronged no one. But as to those who, by expenditure of capital in the business, had produced the specified amount of salt, the case is wholly different. Suppose the act had promised $500,000 to every one who should manufacture, as aforesaid, $100 worth of salt. The opinion below concedes that whoever had manufactured this amount would have been entitled to this reward, and that the legislature could not repeal the law as to him, though it might as to all other persons. Now, what is the difference whether a gross sum was promised, or perpetual exemption of property from taxation, if employed in the same business. Whoever has done the thing while the law remains in force, is entitled to the reward, whatever it may be promised by the act. That the reward promised by this act was perpetual exemption of property, does not put it in the power of the legislature to deprive the party, who is entitled to it of the award.

The court below fall into the error of conceiving that our argument rests upon the theory that the legislature could not repeal the act. We do not deny this. But the question is, What is the effect of such repeal? We claim that the repeal cannot affect those who have acquired the right of exemption from taxation while the law was in force; although the right thus acquired is indefinite in point of time. Indefinite exemption as to property they may thereafter employ in that business, is the right which was acquired by the plaintiff in error while the law was in force. That cannot be taken away.

Mr. **B. J. Brown,** for defendant in error:

The act of 1759 is, neither in terms nor by necessary implication, irrepealable. There is no pledge, expressed or implied, that the power of taxation should not thereafter be exercised. Hence, it did not create a contract on the part of the state.

Christ Church v. *Phila.* 24 How. 302, 16 L. ed. 604; *Bk.* v. *Billings*, 4 Pet. 514; *Gilman* v. *Sheboygan*, 2 Black, 513, 17 L. ed. 307.

Mr. Justice **Bradley** delivered the opinion of the court:

The plaintiff in error in this case claims exemption from taxation as to certain real estate in East Saginaw, by virtue of an act passed by

the legislature of Michigan on the 15th day of February, 1859, for encouraging the manufacture of salt. The act was as follows:

"Section 1. The people of the state of Mich-
374*]igan enact that *all companies or corporations formed or that may be formed for the purpose of boring for and manufacturing salt in this state, and any and all individuals engaged or to be engaged in such manufacture, shall be entitled to the benefit of the provision of this act."

"Sec. 2. All property, real and personal, used for the purpose mentioned in the 1st section of this act, shall be exempt from taxation for any purpose."

"Sec. 3. There shall be paid from the treasury of this state, as a bounty, to any individual or company or corporation, the sum of ten cents for each and every bushel of salt manufactured by such individual, company, or corporation, from water obtained from boring in this state; provided that no such bounty shall be paid until such individual, company, or corporation shall have at least five thousand bushels of salt manufactured."

The bill in the case was filed for an injunction to restrain the city of East Saginaw from levying and enforcing any tax on the real estate in question, and for a decree establishing the exemption claimed. It alleges that in April, 1859, after the passage of the above law, the plaintiff was organized as a corporation under the general laws of Michigan, for the purpose of manufacturing salt from salt water to be obtained in the state of Michigan; that prior to the said act of Feb. 15, 1859, the state had been engaged in experiments and had spent large sums of money to ascertain whether salt could be manufactured as aforesaid but without any satisfactory results, and that the act was passed to encourage private parties to engage in the same experiments.

The bill then states as follows:

"Your orator further shows that the persons associating as hereinbefore stated, to form the 'East Saginaw Salt Manufacturing Company,' were solely induced thereto, as your orator believes, by the encouragement held out in said act, and had not said last-mentioned act been passed, no such corporation would have been formed nor any experiment made to determine whether salt could profitably be made in Michigan.

"Your orator further shows that after spending some time in erecting the necessary buildings and in procuring the requisite machinery therefor, a well was commenced by the said association, near the Saginaw river, in the county of Saginaw, in June, 1859, and that drilling continued almost constantly from that time until early in the year 1860, at which
375*] time a depth of 669 feet was *reached, where brine was found of sufficient strength and purity to warrant the company in proceeding to the manufacture of salt.

"That, relying in good faith upon the benefits promised in the said act of the legislature of 1859, said company proceeded at once to erect works for the manufacture of salt from the brine found in said well, such manufacture commencing the last of June or the first part of July, 1860, and from that date to March 9th, 1861, there was actually manufactured by said corporation, from salt water obtained in the state of Michigan, 6,348 barrels of salt, each containing five bushels. Your orator claims and avers the fact to be that in consequence of the facts hereinbefore stated, the property of your orator used for the purpose of boring for and manufacturing salt in this state is exempt from taxation; and that the right to such exemption from taxation became and was a vested right which it is not competent for the legislature to take away without your orator's consent.

"Your orator further shows that your orator is still engaged in the manufacture of salt, and has purchased and is using all its property for that purpose; said manufacture continuing at the place where it was first commenced by your orator."

The bill then gives a description of the land owned by the complainants in East Saginaw, declaring that it had been in use by it for the purpose aforesaid and states the assessment thereof for taxes by the city authorities and the threatened collection of the same, and prays for an injunction and decree as before stated.

To this bill a demurrer was filed. The court below overruled the demurrer and sustained the prayer of the bill; but the supreme court of Michigan reversed this decree and dismissed the bill. This decree of the supreme court was based upon an act of the legislature of Michigan, passed on the 15th of March, 1861, by which the act of 1859 was amended as follows: The 1st section by adding a proviso limiting its benefits to those who should be actually engaged in the manufacture of salt prior to the 1st of August, 1861; the 2d section, by limiting the exemption from taxation to five years from the organization of the company or corporation; and the 3d section (which
*granted a bounty of ten cents per bush- [*376
el) by limiting the bounty moneys that should be paid to any one individual company or corporation to the sum of $5,000.

The plaintiff in error claims that this amendatory act, as applied to the plaintiff, was unconstitutional and void by reason of its impairing the validity of a contract. It contends that the act of 1859 held out an inducement or offer to private parties to embark in the business of manufacturing salt in Michigan; and that when such parties did subsequently engage in that business and actually produce and manufacture more than five thousand bushels of salt within the state, the act became a contract between the state and such parties which the legislature could not constitutionally revoke or repeal.

This is the principal question in the cause.

It is unnecessary at this time to discuss the question of power on the part of a state legislature to make a contract exempting certain property from taxation. Such a power has been frequently asserted and sustained by the decisions of this court. *N. Jersey* v. *Wilson*, 7 Cranch, 164; *Gordon* v. *Appeal Tax Ct.* 3 How. 133; *Piqua Bk.* v. *Knoop*, 16 How. 369; *Ohio L. I. & T. Co.* v. *Debolt*, 16 How. 416; *Dodge* v. *Woolsey*, 18 How. 331, 15 L. ed. 401; *Jefferson Bank* v. *Skelly*, 1 Black, 436, 17 L. ed. 173; *McGee* v. *Mathis*, 4 Wall. 143, 18 L. ed. 314; *Home of the Friendless* v. *Rouse*, 8 Wall. 430, 19 L. ed. 495; *Wilmington R.* v. *Reid*, *ante*, 568, decided at this term.

The question in this case is whether any contract was made at all, and, if there was, whether it was a contract determinable at will, or of perpetual obligation.

Had the plaintiff in error been incorporated by a special charter, and had that charter contained the provision that all its lands and property used in the manufacture of salt 377*] *should forever, or during the continuance of its charter, be exempt from taxation, and had that charter been accepted and acted on, it would have constituted a contract. But the case before us is not of that kind. It declares, in purport and effect, that all corporations and individuals who shall manufacture salt in Michigan from water obtained by boring in that state, shall be exempt from taxation as to all property used for that purpose and, after they shall have manufactured 5,000 bushels of salt, they shall receive a bounty of ten cents per bushel. That is the whole of it. As the supreme court of Michigan says, it is a bounty law and nothing more; a law dictated by public policy and the general good, like a law offering a bounty of fifty cents for the killing of every wolf or other destructive animal. Such a law is not a contract except to bestow the promised bounty upon those who earn it so long as the law remains unrepealed. There is no pledge that it shall not be repealed at any time. As long as it remains a law every inhabitant of the state, every corporation having the requisite power, is at liberty to avail himself, or itself, of its advantages, at will, by complying with its terms and doing the things which it promises to reward, but is also at liberty at any time to abandon such a course. There is no obligation on any person to comply with the conditions of the law. It is a matter purely voluntary; and, as it is purely voluntary on the one part, so it is purely voluntary on the other part; that is, on the part of the legislature, to continue, or not to continue the law. The law in question says to all: You shall have a bounty of ten cents per bushel for all salt manufactured, and the property used shall be free from taxes. But it does not say how long this shall continue; nor do the parties who enter upon the business promise how long they will continue the manufacture. It is an arrangement determinable at the will of either of the parties, as much so as the hiring of a laboring man by the day.

If it be objected that such a view of the case exposes parties to hardship and injustice, the answer is ready at hand, and is this: It will 378*] not be presumed that the legislature of *a sovereign state will do acts that inflict hardship and injustice.

The case differs entirely from those laws and charters which have been adjudged to be irrevocable contracts.

Charters granted to private corporations are held to be contracts. Powers and privileges are conferred by the state, and corresponding duties and obligations are assumed by the corporation. And if no right to alter or repeal is reserved, stipulations as to taxation, or as to any other matter within the power of the legislature, are binding on both parties; and so corporations formed under general laws, in place of special charters, like the Ohio banks under the general banking law of that state, are entitled to the benefit of specific provisions and exemptions contained in those laws, which are regarded in the same light as if inserted in special charters. "The act is as special to each bank," says Justice McLean, delivering the opinion of this court, "as if no other institution were incorporated under it." *Bk.* v. *Knoop*, 16 How. 380. In such cases the scope of the act takes in the whole period for which the corporation is formed. The language means that during the existence of any corporation formed under the act, the stipulation or exemption specified in it is to operate.

The act under consideration cannot be interpreted on this principle. It applies to individuals as well as corporations, and to all corporations having power to manufacture salt. Now, in the case of individuals, must it be construed to mean that as long as the individual lives and manufactures salt the state will pay him the bounty of ten cents on the bushel, and exempt his property from taxation? Can the law never be repealed as to those who have once commenced the manufacture? Such a construction could never have been intended. In its nature it is a general law, regulative of the internal economy of the state, and as much subject to repeal and alteration as a law forbidding the killing of game in certain seasons of the year. Its continuance is a matter of public policy only; and those who rely on it must *base their reliance on the free and [*379 voluntary good faith of the legislature. For the benefit of sheep growers in some states, dogs are subjected to a severe tax. Could not the legislature repeal such a law? If Congress establishes a tariff for the protection of certain manufactures, does that amount to a contract not to change it?

In short, the law does not, in our judgment, belong to that class of laws which can be denominated contracts, except so far as they have been actually executed and complied with. There is no stipulation, express or implied, that it shall not be repealed. General encouragements, held out to all persons indiscriminately, to engage in a particular trade or manufacture, whether such encouragement be in the shape of bounties or drawbacks, or other advantage, are always under the legislative control, and may be discontinued at any time.

The judgment must be affirmed.

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*HIBERNIA ARMSTRONG, *Appt.*, [*154
v.
UNITED STATES.

(See S. C. 13 Wall. 154-156.)

Effect of President's proclamation of pardon—restoration of property—public act.

1. The proclamation of the President of December 25, 1868, granting to all and every person who directly or indirectly participated in the late insurrection or Rebellion a full pardon and amnesty with restoration of all rights, privileges, and immunities under the Constitution and the laws, blots out the offense.

2. The person so pardoned is entitled to the restoration of the proceeds of captured and abandoned property, if suit be brought within two years after the suppression of the Rebellion.

3. This was a public act, of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect.

NOTE.—*The effect of pardons*—see notes, 18 L. ed. U. S. 882; 15 L. R. A. 395.

[No. 492.]

Submitted Jan. 31, 1872. Decided Mar. 25, 1872.

APPEAL from the Court of Claims.

The case is sufficiently stated by the court.

Mr. **R. M. Corwine** for the appellant.

Mr. **B. H. Bristow**, *Solicitor Gen.*, for United States.

Mr. Chief Justice **Chase** delivered the opinion of the court:

This is a claim for the proceeds of certain cotton, under the abandoned and captured property act. The court of claims find that the cotton was raised by the claimant, that in the latter part of 1863, or early in 1864, there were on her cotton plantation one hundred and twenty bales of cotton, which were taken possession of by the United States military forces and removed to Little Rock; that prior to July, 1864, one hundred and two bales of this cotton were in the hands of the treasury agents, and were taken and used by the military forces in the works of defense around the city of Little Rock; that 60 bales, when taken out of the defenses, were identified as belonging to the claimant; and with other cotton identified as belonging to other parties, and 170 sacks of loose cotton, which came out of the fortification and not identified, were shipped to the treasury agent, at Cincinnati, sold, and the proceeds paid into the Treasury. The claimant was proved to have given no active aid to the Rebellion, except that on the approach of the Union Army she fled south, with thirty or forty of her slaves, to avoid emancipation. This was **155*]** in September, *1863. Judgment was rendered against her on the 4th of April, 1870, and an appeal taken to this court.

The "abandoned and captured property act" provides for the restoration of the proceeds of property on proof that the claimant has never given any aid or comfort to the present Rebellion. The court of claims seem to have thought that going south with her slaves was evidence that she did give aid or comfort to the Rebellion. On this point it is not now necessary that we express an opinion; for the President of the United States, on the 25th of December, 1868, issued a proclamation, reciting that a "universal amnesty and pardon for participation in said Rebellion, extended to all who have borne any part therein, will tend to secure permanent peace, order, and prosperity throughout the land, and to renew and fully restore confidence and fraternal feeling among the whole people, and their respect for, and attachment to, the national government, designed by its patriotic founders for the general good;" and granting, "unconditionally, and without reservation, to all and every person who directly or indirectly participated in the late insurrection or Rebellion, a full pardon and amnesty for the offense of treason against the United States, or of adhering to their enemies during the late Civil War, with restoration of all rights, privileges, and immunities under the Constitution, and the laws which have been made in pursuance thereof." 15 Stat. at L. 711.

We have recently held, in the case of *The United States* v. *Klein, ante*, 517, that pardon granted upon conditions, blots out the offense, if proof is made of compliance with the conditions; *and that the person so par- [*156 doned is entitled to the restoration of the proceeds of captured and abandoned property, if suit be brought within "two years after the suppression of the Rebellion." The proclamation of the 25th of December granted pardon unconditionally and without reservation. This was a public act of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect. The claim of the petitioner was preferred within two years. The court of claims, therefore, erred in not giving the petitioner the benefit of the proclamation.

Its judgment must be reversed, with directions to proceed in conformity with this opinion.

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*GEORGE P. STEINBACH, *Plff. in Err.*, [*183

v.

THE RELIEF FIRE INSURANCE COMPANY OF NEW YORK.

(See S. C. 13 Wall. 183-185.)

Fire-works, when not covered by policy.

Under a clause in a policy providing that fire-works should not be covered by the insurance, fire-works are not included under the name of fire-crackers, which were permitted to be kept, nor in the description of "other articles in the line of business" of the insured, used in the policy.

[No. 126.]

Argued Mar. 5, 1872. Decided Mar. 25, 1872.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

This was an action brought by the plaintiff in error, upon a policy of insurance against loss by fire made by the defendant in error, a corporation created by the laws of New York.

The suit was brought in the superior court of Baltimore, Maryland, and process served on the defendant's general agent in Baltimore.

The defendant appeared and removed the case, according to the act of Congress, into the circuit court of the United States for the Maryland district.

The policy insured the plaintiff to the amount of $5,000, in these words: "On his stock of fancy goods, toys, and other articles in his line of business, contained in the three-story brick building situated on the southeast corner of Baltimore street and Tripoletts alley, and now in his occupancy as a German jobber and importer, privilege to keep fire-crackers on sale."

The above language is in writing.

In the printed part the policy states: "If the property shall be used for storing or keeping thereon articles, goods, or merchandise denominated hazardous, extra hazardous, or specially hazardous, in the second of the classes of hazard annexed to the policy, except as herein specially provided, or hereinafter agreed to in writing upon this policy, thenceforth, so long as so used, the policy shall be of no effect."

Among the articles denominated as specially hazardous in said annexed classes, are fire-works.

At the trial of the cause the plaintiff proved loss by fire on the stock of goods in his said

NOTE.—*Oral evidence as applicable to written contracts*—see note to Bradley v. Wash. etc. Steam Packet Co. 10 L. ed. U. S. 72.

store, and that the proportion of loss falling on the defendant was $4,078.44. It also appeared in evidence that at the time of the fire the plaintiff had fire-works in store for sale, and that the fire originated in them.

The plaintiff then offered to prove that fire-works were an article in his line of business as a German jobber and importer, for the purpose of showing that they were covered by the written words of the policy. The court refused to admit the evidence, and exception was taken; and the verdict being against him after the above ruling, he took out this writ of error.

Messrs. A. Stirling, Jr., and **Alex. Wolff**, for plaintiff in error:

The written part of the policy controls the printed part.

Ang. Ins. §§ 14, 15; 1 Phil. Ins. 16; Flanders Ins. 70, 88; *Pindar* v. *Ins. Co.* 36 N. Y. 648; *Hayward* v. *Ins. Co.* 19 Abb. Pr. 116.

For the purpose of showing that the written part of the policy covered fire-works, it was proper to prove what articles were in the plaintiff's line of business as a German jobber and importer, and it was a question for the jury whether fire-works were part of the stock of fancy goods, toys and other articles in the plaintiff's line of business. Fland. Ins. 73, 76; *Ins. Co.* v. *Updegraff*, 43 Pa. 350.

Although fire-works and other articles kept on hand by plaintiff and by all persons in his line of business are enumerated in the printed part of the policy as hazardous, extra hazardous or specially hazardous, and are required in order to be insured to be specified in the policy in writing; yet, if it can be proved that fire-works were kept on sale by the plaintiff and constituted an article in his line of business, etc., then fire-works are within the language of the written part and are insured without reference to the printed part, and are, in law, specified in the policy in writing.

The insurer, instead of enumerating specially all the plaintiff's stock of goods which he intended to cover by the policy, comprised them in a general description in writing, by specifying them as all articles in the plaintiff's line of business as a German jobber and importer, and thereby insured all articles so kept by the insured and necessary for the proper carrying on of his business. Fland. Ins. 70–82; *Wall* v. *Ins. Co.* 14 Barb. 383; *Harper* v. *Ins. Co.* 17 N. Y. 194; *Bigler* v. *Ins. Co.* 20 Barb. 635; *Benedict* v. *Ins. Co.* 31 N. Y. 389; *Harper* v. *Ins. Co.* 22 N. Y. 441; *Moadinger* v. *Ins. Co.* 2 Hall (N. Y.) 490; *Delonguemare* v. *Ins. Co.* 2 Hall (N. Y.) 589; *Ins. Co.* v. *Stephenson*, 37 Pa. 198; *Ins. Co.* v. *McLaughlin*, 6 Am. Law Reg. (N. S.) 374; *Archer* v. *Ins. Co.* 43 Mo. 434; *Crosby* v. *Ins. Co.* 5 Gray, 504; *Ins. Co.* v. *Taylor*, 5 Minn. 492; *Blake* v. *Ins. Co.* 12 Gray, 265; *Ins. Co.* v. *Ins. Co.* 5 Ohio St. 450; *Collins* v. *Ins. Co.* 10 Gray, 155; *Ins. Co.* v. *Updegraff*, 43 Pa. 350; *Ins. Co.* v. *Scott*, Fland. Ins. folio 184.

Mr. William Shepard Bryan, for defendant in error:

The policy provides, in distinct terms, that it shall be made void by keeping certain prohibited articles on the premises, except as "herein specially provided for." And among the prohibited articles classed as causing the greatest degree of hazard, we find "fire-works" and with reference to them it is stated that they add fifty cents per $100 to the rate of insurance, and apparently with great carefulness it is repeated, that "to be covered, they must be specially written in the policy."

The clear result of the terms of the policy prohibits fire-works. This construction gives effect to every part, prevents any conflict between different clauses, and attributes to them all one common, harmonious intent and purpose. It must, therefore, be adopted.

2 Pars. Mar. L. 49, 53; *Goicoechea* v. *La. Ins. Co.* 6 Mart. (N. S.) 51; *Hunter* v. *Ins. Co.* 11 La. Ann. 139; *Ins. Co.* v. *Edmond*, 17 Gratt. 138; *Robertson* v. *French*, 4 East, 130; *Washburn* v. *Gould*, 3 Story, 162.

The evidence proposed to be offered was of the most inconclusive character. It was not alleged that there was any general, well known custom to keep fire-works on premises of the description occupied by the insured; nor that fire-works were necessary to enable him to carry on his business; nor that in point of fact they were on the premises at the time the insurance was effected. But it was simply proposed to show that they "constituted an article in the line of business of a German jobber and importer." By what usage? When and where did the usage prevail? Did it relate to the city of Baltimore? Was it in existence at the time of the insurance? Was it general, notorious, well established, certain, and uniform, or was it known to the insurers? The evidence did not propose to embrace any of these points. But it was an attempt simply and flatly to contradict the written contract. This was clearly incompetent.

Ins. Co. v. *Wright*, 1 Wall. 470, 17 L. ed. 508; *Foley* v. *Mason*, 6 Md. 49; *Macomber* v. *Ins. Co.* 7 Gray (Mass.) 257; *Whitmarsh* v. *Ins. Co.* 2 Allen (Mass.) 582; *Ins. Co.* v. *Gibb*, 7 Law Rep. N. S. 575.

Mr. Chief Justice **Chase** delivered the opinion of the court:

The only question in the case arises upon the construction of the policy sued upon.

The insurance was upon the plaintiff's stock of fancy goods and other articles in his business, as a German jobber and importer, with the privilege to keep fire-crackers on sale. The loss arose from a fire which originated in the fire-works for sale in the store; and upon the trial, the plaintiff offered to prove that fire-works constituted an article in the line of business of a German jobber and importer. This evidence was rejected by the court below, and judgment given for the defendant. The question is, whether the court erred.

The policy of insurance contained a clause providing that fire-works, among other things, should be specially written in the policy.

Otherwise they were not to be covered by the insurance. It is not pretended that fire-works are included under the name of fire-crackers. But the plaintiff contends that they are included in the description of "other articles in his line of business." The answer to this is, that the policy itself requires that fire-works shall be specially written in it. They are among the goods described as specially hazardous, and add fifty cents on the $100 to the ordinary rate of insurance.

It is impossible to think they are described by the general terms used in the policy. The insurance was at the ordinary rates. There can be no doubt that the evidence was properly rejected; *and the judgment of the Circuit Court must, therefore, be affirmed.*

THE UNION MUTUAL LIFE INSURANCE CO. OF MAINE, *Plff. in Err.*, *v.* HENRY WILKINSON.

(See S. C. 13 Wall. 222-236.)

Personal injury in life insurance policy, what is—insurance companies liable for acts of their agents—representations inserted in application by agent, without knowledge of applicant—parol testimony to explain.

*1. The assured in a life policy, in reply to the question had she ever had a serious personal injury, answered "No." She had, ten years before, fallen from a tree. The *criteria* of a serious personal injury considered.

2. This is not to be determined exclusively by the impression of the matter at the time, but its more or less prominent influence on the health, strength, and longevity of the party is to be taken into account, and the jury are to decide from these and the nature of the injury, whether it was so serious as to make its nondisclosure avoid the policy.

3. Insurance companies who do business by agencies at a distance from their principal place of business, are responsible for the acts of the agents within the general scope of the business intrusted to their care, and no limitations of their authority will be binding on parties with whom they deal, which are not brought to their knowledge.

4. Hence, when these agents in soliciting insurance undertake to prepare the application of the insured, or make any representation to the insured as to the character or effect of the statements of the application, they will be regarded, in doing so, as the agents of the insurance company, and not of the insured.

5. This principle is rendered necessary by the manner in which these agents are sent over the country by such companies, and stimulated by them to exertions in effecting insurance, which often lead to a disregard of the true principles of insurance as well as fair dealing.

6. In such cases the insurers cannot protect themselves under instructions to their agents that they are only agents for the purpose of receiving and transmitting the application and the premium.

7. Therefore, where the agent had inserted in the application for life insurance a representation of the age of the mother of the assured at the time of her death, which was untrue, but which the agent himself obtained from a third person, and inserted without the assent of the assured, it was the act of the company, and not of the assured, and did not invalidate the policy.

8. To permit verbal testimony to show how this was done by the agent, does not contradict the written contract, though the application was signed by the party. It proceeds on the ground that it was not his statement, and that the insurance company, by the acts of their agent in the matter, are estopped to set up that it was the representation of the assured.

*Headnotes by Mr. Justice MILLER.

[No. 589.]

Submitted Feb. 13, 1872. Decided Mar. 25, 1872.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

The case is stated by the court.

Messrs. Gilmore & Anderson and **Geo. G. Wright**, for plaintiff in error:

The question to be discussed is: had the court and jury, under any pretense whatever, any right to take into evidence the parol statements made by the applicant or others, which were contemporaneous with the signing of the application?

Let it be observed that by the terms of both instruments, the application was a part of the policy.

Both instruments, taken together, constituted one contract.

The plaintiff sues on that contract, as it stands.

It had not been reformed in equity, but stood, on the day of trial, just as the respective parties had signed it.

We have, then, this anomalous position in a

NOTE.—*Effect of agent's filling in untrue answers in application for insurance, without knowledge of assured.*

The medical examiner, at request of an agent of the company, filled up the application for life insurance. The applicant made correct answers, but the medical examiner incorrectly and untruly stated some of them in the application. In the absence of evidence to show true authority of agent, a finding, that he had authority to depute the examiner to fill the application and that the defendant was estopped from taking advantage of mistakes was upheld. Flynn v. Equitable Life Ins. Co. 78 N. Y. 568, 34 Am. Rep. 561.

The above case was previously before the court, and it was held that the medical examiner of a life insurance company is not, unless expressly authorized, the agent of the company in filling up an application for insurance, and the company is not bound by his acts or estopped by his knowledge. Flynn v. Equitable Life Ins. Co. 67 N. Y. 500, 23 Am. Rep. 134.

If the assured answers the questions truly, in the absence of fraud or collusion he is not responsible for any errors or mistakes of the agent in writing down his answers, and the company is estopped from denying the truth of the answers. Bliss on Life Ins. §§ 280-291; Plumb v. Ins. Co. 18 N. Y. 392; Rowley v. Ins. Co. 36 N. Y. 550; 3 Keyes. 557; Boos v. Ins. Co. 64 N. Y. 236; Baker v. Ins. Co. 64 N. Y. 648; Columbia Ins. Co. v. Cooper, 50 Pa. 331; Merserau v. Ins. Co. 66 N. Y. 274; Miner v. Phœnix Ins. Co. 27 Wis. 693, 9 Am. Rep. 479; Ins. Co. v. Mahone, 21 Wall. 152, 22 L. ed. 593.

The company cannot avail itself of any misstatement or omission in the application constituting a warranty on the part of the assured, when such application is prepared by the agent with knowledge of the facts, or he is intrusted by the assured to make the application; and this is so even though the by-laws of the company made known to the assured provide that the person taking the survey and preparing the application shall be the agent of the applicant. Miner v. Phœnix Ins. Co. 27 Wis. 693, 9 Am. Rep. 479; Clark v. Union Mut. Ins. Co. 40 N. H. 333; Masters v. Madison Co. Mut. Ins. Co. 11 Barb. 624; Protection Ins. Co. v. Harmer, 2 Ohio St. 452; Beal v. Park F. Ins. Co. 16 Wis. 241; Howard F. Ins. Co. v. Bruner, 23 Pa. St. 50; Hough v. City F. Ins. Co. 29 Conn. 10; May v. Buckeye Mutual Ins. Co. 25 Wis. 291, and cases last cited.

An applicant for life insurance, having correctly stated the date of his birth to the agent, is not prejudiced by the agent's mistake in writing the same in the application. McCall v. Phœnix Mut. Ins. Co. 9 W. Va. 237, 27 Am. Rep. 558; Simmons v. Ins. Co. 8 W. Va. 474.

Agent of a life insurance company with power to receive and forward applications and countersign and deliver policies or collect premiums fraudulently put down answers to material questions in the application which were untrue, and not the answers given by applicant, who signed application without reading it. Held, that the insurers were not bound by the policy. Ryan v. World Mut. Life Ins. Co. 41 Conn. 168, 19 Am. Rep. 490.

Company is responsible for erroneous answer of medical examiner where applicant stated truth to him and certified to truth of answers, and medical examiner afterwards, without applicant's knowledge, filled in the false answer. Grattan v. Metropolitan Life Ins. Co. 30 N. Y. 281, 36 Am. Rep. 617.

court of law: the plaintiff sues on a written contract, signed by himself, as one of the parties, he asks a recovery according to the terms of that contract; and yet, in the same breath, is permitted by the court to contradict and vary the terms of this written contract, by proving what was stated by himself and others, at and before the signing of the same.

Even a defendant would not be permitted to contradict or vary by parol the terms of a written instrument; much less a plaintiff who seeks a recovery under that very instrument.

There should be no exception to the rule; nor is there any such, unless it be in insurance contracts.

No reason exists in the nature of things why any distinction should be made in this class of contracts; nor has any court attempted to assign any such distinction.

The new departure is believed to have had its origin in the case of *Plumb* v. *Ins. Co.* 18 N. Y. 392.

Whether the application was, by its terms, made a part of the policy in that case, we are not informed.

This case seems to have had in it an element of fraud or mistake. On this account the application (if it was a part of the contract, which we do not know) might have been reformed in equity; or, possibly, the practice of some courts might have allowed equivalent treatment at law. But neither fraud nor mistake was charged. The decision is placed purely upon the ground of estoppel.

Doubtless, a correct result was arrived at in the determination of the case, but it was arrived at in the wrong forum and for the wrong reasons.

Critically considered, the case does not deserve to become a precedent for anything.

As a case of general agency, certainly it is no precedent in a cause where it was the duty of the agent to take applications and forward them to the company, which issued or refused to issue its policy on inspection of the application alone.

In such case it is the true rule to hold that such an agent, in the matter of filling up a statement, becomes the agent of the applicant.

No rule is better settled than that those dealing with an agent are bound to know the nature and extent of his authority.

The case of *Rowley* v. *Ins. Co.* 36 N. Y. 550, was also relied on in the court below.

The opinion in that case recites the above case in 18 N. Y. 392, and admits "that that case has changed the rule which has hitherto prevailed in New York, relating to warranties in policies of insurance."

The new case goes beyond the precedent on which it relies, and establishes still another doctrine, new to the courts, in conflict with all prior holdings.

The court says: "The written appointment of the agent, Dean, shows that he was the agent of the defendant, to take applications for insurance in the company, and receive the cash percentage to be paid thereon."

Smith v. *Ins. Co.* 25 Barb. 497, was an action on a policy of insurance. The original application was brought by the plaintiff to one V. C., the company's agent, in an incomplete state, with the understanding that the agent was "to fill in the rest of it when he got where he could write." Pursuant thereto, the agent afterwards inserted what he thought proper to make the application complete, including a statement that "there was no encumbrance except the Petrie mortgage" which was not true in fact. The application was made a part of the policy. It was held that the plaintiff constituted V. C. his agent to complete the application, and was responsible for what he in good faith inserted, and that the policy was avoided by such false statement.

The case of *Brown* v. *Ins. Co.* 18 N. Y. 385, immediately precedes the case of *Plumb* v. *Ins. Co.*, above quoted. They present a most remarkable instance of judicial somersault.

If the position taken in the circuit court is to be affirmed as a correct exposition of the rule of law which it follows, it will be a precedent just as applicable to litigated cases on promissory notes and other written contracts. In all these cases the statements and the parol agreements of the parties will be admissible to estop each other, and hence to contradict and vary the written contract.

It is believed, however, that these two decisions in New York have not met with much favor. So far as is known, the supreme court of Iowa is the only court which has cited and affirmed them. This is very distinctly done by that court in the case of *Miller* v. *The Mutual Benefit Ins. Co.*

Authorities on the other hand are numerous, and are, we submit, sound in principle.

We refer especially to *Vose* v. *Ins. Co.* 6 Cush. 42; *Smith* v. *Ins. Co.* 24 Pa. 320; *Mitchell* v. *Ins. Co.* 51 Pa. 402; *Lowell* v. *Ins. Co.* 8 Cush. 127; *Forbes* v. *Ins. Co.* 9 Cush. 470; *Lee* v. *Ins. Co.* 3 Gray, 583; *Jennings* v. *Ins. Co.* 2 Den. 75; *Vandervoort* v. *Ins. Co.* 2 Cai. 155; *Cheriot* v. *Barker*, 2 Johns. 346; *Higginson* v. *Dall*, 13 Mass. 96; *Weston* v. *Emes*, 1 Taunt. 115; *Atherton* v. *Brown*, 14 Mass. 152; *Parks* v. *Assurance Co.* 5 Pick. 34; *Flinn* v. *Tobin*, 1 Moody & M. 367.

The ninth question in the application is as follows: "Has the party ever had any serious illness, local disease, or personal injury? If so, what nature and at what age?" This is answered "No."

It will be seen by the record, that there was evidence tending to show that in 1862, Malinda fell from the top of a pecan tree a distance of about forty feet; that she was taken up insensible and was confined to her bed for some time thereafter.

It will also be seen that against the objections of defendant, the court propounded question No. 3, for the special verdict of the jury, *viz.:* "Were the effects of such fall temporary, and had these effects wholly passed away, without influencing or affecting her subsequent health or length of life prior to the time when the application for insurance in this case was taken?"

In instruction No. 5, the court says to the jury: "Now, the defendant contends that the evidence shows, that in 1862, when she was about 14 years of age, she fell from a high tree, and received serious personal injuries. The plaintiff denies that the injury caused by the fall was serious, or that it permanently affected her health, or that any vestiges of it or its effects remained at the time the application was taken."

If the effects of this fall were temporary, and

had entirely passed away before the application was taken, and if it did not affect her health or shorten her life, then the non-disclosure of the fall is no defense to this action. On the other hand, if the effects of the fall were not temporary and remained when the application was taken, or if the fall affected the general health or was so serious that it might affect the health or shorten the life, then the non-disclosure of the injury caused by it would defeat the right of recovery on the policy, although the failure to state the facts of the fall was not intentional or fraudulent.

The court instructed the jury that they were to be the judges as to the seriousness or extent of any unreported personal injury; to consider how far it affected the health or life; that they were to weigh its effect as increasing or not increasing the responsibility of the insurance; that temporary injuries were to be disregarded, and only those considered which were permanent, or which might affect the life or health of the assured in after years. In effect, it said to the jury:

It is true that the application is part of the policy, made so by the express terms of the latter; that that policy recites that it is issued upon the faith of the truthfulness of answers and statements in the application; it is true that the policy provides that if these statements shall be found in any respect untrue, then the policy shall be null and void; that careful suggestion was made to the applicant of such a condition in the original paper; it is true, gentlemen, that all these matters formed a part of the contract between the parties, but nevertheless, you are to judge how far these questions and matters inquired of, are material.

We contemplate here an association which has made life insurance its specialty through a quarter of a century; whose appropriate business it has been carefully and accurately to systematize the principles which shall enable it to estimate longevity; which, from a comparison of a multitude of examples, has learned to estimate in figures, the probable hereditary transmission of certain diseases; the effect of different occupations upon the life and health; the probable result of the various forms of accidental injury, as creating predisposition to disease; whose experience has taught it how to place an average pecuniary value on each different form of injury, on its extent, its duration and the time when it happened. This association proposes to issue life policies, and says to each applicant: "Give us accurate answers to all the questions which we propound; before we can accept or reject your application or fix your rate of insurance, you must inform us fully as to the facts of which we inquire; your personal and family history are as material as your age." The applicant answered untruly. It might have been from carelessness, or it might have been wilfully. The consequences were the same. The policy was issued to a person in name who differed from the person described in the application, just so far as the facts were concealed or perverted. "There is no contract unless the parties thereto assent" declares the principle which lies at the base of every contract. Where is the assent here? With such a case, or at least possibly such a case, the jury which tried it are instructed that they may pass upon the materiality of the answers; may, in effect, make a new contract for the parties, and then enforce it by their verdict. It is claimed by the defense that all the statements in the application are express warranties. Phil. Ins. §§ 754–756, 762, 893.

"Statements of a third party, put in by the assured as constituting, with his own statements, the basis of a contract, and so referred to in the policy, have the character of a warranty of the facts stated, and if the party so referred to by the assured, and whose positive statements are thus made a part of the contract, makes a false statement, the policy is void.

See, also, same author, §§ 542, 902; 1 Sm. Lead. Cas. 635–638; 3 Kent, Com. 288; *Miles* v. *Ins. Co.* 3 Gray, 580; *Chase* v. *Ins. Co.* 20 N. Y. 52; *Daniels* v. *Ins. Co.* 12 Cush. 416; *Ins. & Loan Co.* v. *Snyder*, 16 Wend. 481; *Stout* v. *Ins. Co.* 12 Iowa, 383; *Vose* v. *Ins. Co.* 6 Cush. 42; *Huckman* v. *Fernie*, 3 Mees. & W. 505; *Hutton* v. *Ins. Co.* 1 Fost. & F. 735; *Cazenove* v. *Brit. etc. Ass. Co.* 6 Com. B. (N. S.) 437; *Anderson* v. *Fitzgerald*, 17 Jur. 995; *Wilson* v. *Ins. Co.* 4 R. I. 141; Ang. Ins. § 307.

Messrs. **McCrary**, *Miller & McCrary*, *J. H. Craig*, and *W. J. Cochran*, for defendant in error:

One of the three defenses on which defendant relied at the trial is based on the answer to the ninth question of the application: "Has the party ever had any serious illness, local disease, or personal injury; if so, of what nature and at what age?" Answer, "No."

Defendant claimed that said Malinda Jane Wilkinson did sustain serious personal injuries by falling from a tree in 1862, when she was about fourteen years of age. This was denied and controverted. At the request of the defendant's attorney the court submitted this plain issue of fact to the jury. The following is the question submitted and the answer of the jury:

"Did Malinda Jane Wilkinson, in the year 1862, receive a serious personal injury by falling from a tree?" Answer. "Yes, injured; not seriously."

The counsel for defendant claim that the court erred in its instruction as to this point of the defense, and also in submitting to the jury the third question (being the second special finding in the verdict). This is the second branch of their printed argument. It is a misconception of the point of controversy presented by the record, as well as a misconception of the instructions of the court. It assumed that there was a breach of warranty, while the real points of inquiry are: what is the precise thing warranted, and has there been any breach at all? The court below expressly instructed the jury as follows:

"The law is that the specific questions asked by the applicant must be truly answered, and if answers in any respect untrue were given to such questions, they would avoid the policy, although relating to matters not materially affecting the risk, although they were not designedly untrue, nor made with a view to deceive or mislead the company."

According to the true grammatical construction of the ninth question of the application, the adjective "serious" qualifies, not only the word "illness," but also the words "disease" and

"injury." This was conceded in the court below; the counsel admit it in their printed arguments, and it is required by the rules of legal construction as applied to warranties and conditions in contracts of insurance. Then leaving out of said ninth question what is not pertinent to this issue, it stands: "Has the party ever had any serious personal injury?" Answer. "No." Was this answer true or false? That was the precise issue submitted to the jury on the evidence.

The jury found that the answer given to the ninth question was true—that Malinda Jane Wilkinson had not had any serious personal injury, and hence there was no breach of warranty. The jury did not pass upon the materiality of the answer to said ninth question. They simply found that the answer given in the application was true.

If the jury had found that the assured had received a serious personal injury and, notwithstanding, had found a general verdict in favor of plaintiff, then the counsel might legitimately show error in the instruction; they would be entitled to say that they were prejudiced by such error; but when the jury effectually disposed of this part of the defense without going into the questions suggested in the instructions, it is difficult to see how that defense was prejudiced, even admitting that there was error in said instructions.

Wilkinson v. *Ins. Co.* 30 Ia. 119; *Carleton* v. *Bington*, 24 Iowa, 173.

Our second answer to this point of the counsel's argument is, that there is no error in the 5th instruction. It is true that when the jury found that the assured never had any serious personal injury, the inquiry as to the effect of such injury could not arise; but if the jury had believed from the evidence that the assured had had any "serious personal injury" then the instruction was legitimate and pertinent, to direct the jury as to whether such a serious personal injury was within the fair and reasonable construction of the ninth question in the application. The counsel here misconceived the point of controversy. It is not whether such question and answer is a warranty, or as to the effect of a breach of warranty; but it is: what is the precise fact which the parties intended to warrant as true? Was the question designed to include every personal injury which, though it might have been serious at the time, was only temporary and soon passed away and was perhaps forgotten?

Wilkinson v. *Conn. Mut. Ins. Co.* 30 Ia. 119; *Ross* v. *Bradshaw*, 1 Wm. Bl. 312; *Wall* v. *Ins. Co.* 14 Barb. 385; *Carter* v. *Ins. Co.* 17 Ia. 461.

Provisions for a forfeiture where the intent is doubtful, are to receive a strict construction against those for whose benefit they are introduced.

Livingston v. *Stickles*, 7 Hill, 254; 1 Sumn. 434; *Breasted* v. *Farmer's L. & T. Co.* 8 N. Y. 305; *Hoffman* v. *Ins. Co.* 32 N. Y. 405; Pow. Cont. 389.

It only remains to examine that part of the defense which relates to the mother of Malinda Jane Wilkinson. As the jury found that the mother did not die of consumption, there can be no controversy as to that part of the application. There remains the simple point as to the age at which the mother died. There appears in a diagram in the application, in a column under the printed words "age of mother at death," the figures 40. The jury found that the mother in fact died at the age of twenty-three years. The court permitted the plaintiff to introduce certain evidence, not to change or vary the terms of the contract as the counsel argued, but to show that the defendant was not in a situation to avail itself of this answer to this question in the application, although it was untrue; or in other words, that the defendant was estopped from making this defense. The admission of this evidence and the instruction of the court in regard to it, the counsel claim was error. The counsel admit, in their printed argument, that the later decisions of New York sustain the ruling of the court below. They claim, however, that the cases of *Plumb* v. *Ins. Co.* 18 N. Y. 392, and *Rowley* v. *Ins. Co.* 36 N. Y. 550, have not met with much favor; that the supreme court of Iowa is the only court which has cited and affirmed them.

The latest decision on the subject in Missouri is *Combs* v. *Ins. Co.* 43 Mo. 149. In this case, a recovery was resisted on the ground of false representations and warranties; that the application stated the title to be an unencumbered fee simple title, when it was, in fact, an encumbered equitable title. In reply to this defense, the court permitted the plaintiff against the objections of defendant, to introduce evidence tending to show that one Rush solicited the insurance as agent of defendant; that plaintiff apprised him of the true state of the title; that he filled the application in his own language, assuring plaintiff that it was all right, and that plaintiff, believing it so, signed it without being aware of the words "fee simple" and "no encumbrance" were in it. There was a verdict for the plaintiff.

The Supreme Court said: In our view the doctrine of estoppel *in pais* is applicable to the case and ought to be applied.

2 Am. Lead. Cas. 5th ed. 1871, p. 914, contains the latest and most complete list and review of the cases on this subject which we have been able to find. It is there stated: "The better opinion would accordingly seem to be, that the insurers cannot take advantage of the misstatement or omission of any fact which it was their duty to set forth and state correctly in view of all the circumstances, and that this will be true even when the defect occurs in the application or other document which, though signed by the insured, is prepared by themselves, or by anyone whom they have duly authorized, with a knowledge of or an opportunity to know, all the material circumstances.

The following cases are then cited: *Rowley* v. *Ins. Co.* 36 N. Y. 550; *Walsh* v. *Kelly*, 40 N. Y. 557; *Peck* v. *Ins. Co.* 22 Conn. 575; *Bebee* v. *Ins. Co.* 25 Conn. 51; *Iron Works* v. *Ins. Co.* 25 Conn. 465; *Bk.* v. *Ins. Co.* 31 Conn. 517; *Perry Co. Ins. Co.* v. *Stewart*, 19 Pa. 45; *Ins. Co.* v. *Bruner*, 23 Pa. 50; *Ins. Co.* v. *Spencer*, 53 Pa. 353; *Franklin* v. *Ins. Co.* 42 Mo. 457; *Combs* v. *Ins. Co.* 43 Mo. 148; *Beal* v. *Ins. Co.* 16 Wis. 241; *Clark* v.

Ins. Co. 40 N. H. 333; *Ins. Co.* v. *Crane,* 16 Md. 269.

That Ball, in making out the application, was the agent of the insurance company, and that the company is responsible for his acts while so doing, is fully established by the above cases. This is the settled doctrine of New York.

Rowley v. *Ins. Co. supra; Masters* v. *Ins. Co.* 11 Barb. 624; *Sexton* v. *Ins. Co.* 9 Barb. 191; *McEwen* v. *Ins. Co.* 5 Hill, 101; see, also, *Bk.* v. *Ins. Co.* 31 Conn. 517.

The record abundantly shows that the applicant and his wife, when asked the question in controversy, told the agent the exact truth and declined to answer in any other way; that the agent, without their consent and without their knowledge, inserted the answer on which the defendant depends, received the premium, and collected the annual premiums down to the death of the wife. This action of the agent was a fraud on the plaintiff and his wife. The parties cannot now be put *in statu quo.*

There is no use for the principle of equitable estoppel, if it is not applicable to such a case. In addition to the authorities above cited, see *Barnes* v. *Ins. Co.* 45 N. H. 21; *Campbell* v. *Ins. Co.* 37 N. H. 35; *Ins. Co.* v. *Hall,* 12 Mich. 202; *Ins. Co.* v. *Bruner,* 23 Pa. 50; *Keeler* v. *Ins. Co.* 16 Wis. 523; *Ins. Co.* v. *Schettler,* 38 Ill. 166; *Ins. Co.* v. *Cooper,* 50 Pa. 331; *Geib* v. *Ins. Co.* 1 Dill. (C. C.) 443; all showing that the knowledge of the agent is to be taken as the knowledge of the company, and that the company may be estopped by the acts of the agent.

Mr. Justice **Miller** delivered the opinion of the court:

This was an action on a policy of insurance, obtained by defendant in error on the life of his wife, from the corporation which is here as plaintiff.

The making of the policy and the death of the wife being admitted, the defendant below assumed the burden of a defense, which rested upon the falsehood of certain answers to questions found in the application of plaintiff.

By the terms of the policy it became void if any of those representations proved to be untrue. The plea of defendant sets up some ten or twelve of these responses as false, but the questions presented here, relate to but two of these.

In answer to interrogtatory No. 9—"Has the party ever had any serious illness, local disease or personal injury; if so. of what nature, and at what age?"—the parties answered, "No."

In regard to this the defendant asserted that in the year 1862, some five or six years before the application was made, and when the wife was about fourteen years old, she had been seriously injured by a fall from a tree.

Under a rule of practice in the state courts of Iowa, adopted by the circuit court of that district, the judge required the jury to respond to the following interrogatory:

"Did Malinda Jane Wilkinson (the wife), in the year 1862, receive a serious personal injury by falling from a tree?" To which they answered, "Yes; injured, not seriously."

As the defendant concedes that to defeat the action the injury must have been serious, the response of the jury would seem to be conclusive. But the counsel for defendant argue that the jury were misled in making this response by the instruction of the court on that subject, and by the further question which it propounded to them in regard to the same matter. This other question is thus stated in the record: "Were the effects of such fall temporary, and had these effects wholly passed away without influencing or affecting her subsequent health, or length of life, prior to the time when the application for insurance in this case was taken?" To this the jury answered, "Yes."

And on this branch of the case the court said to the jury that, if the effects of the fall were temporary, and had entirely passed away before the application was taken, and if it did not affect Mrs. Wilkinson's health or shorten her life, then the non-disclosure of the fall was no defense to the action. On the other hand, if the effects of the fall were not temporary, and remained when the application was taken, or if the fall affected the general health, or was so serious that it might affect the health or shorten life, then the non-disclosure would defeat recovery, although the failure to mention the fall was not intentional or fraudulent.

It is insisted by counsel for the defendant that if the injury was considered serious at the time, it is one which must be mentioned in reply to the interrogatory, and that whether any further inquiry is expedient on the subject of its permanent influence on the health, is for the insurer to determine before making insurance But there are grave and obvious difficulties in this construction. The accidents resulting in personal injuries, which at the moment are considered by the parties serious, are so very numerous that it would be almost impossible for a person engaged in active life to recall them at the age of forty or fifty years; and if the failure to mention all such injuries must invalidate the policy, very few would be sustained where thorough inquiry is made into the history of the party whose life is the subject of insurance. There is, besides, the question of what is to be considered a serious injury at the time. If the party gets over the injury completely, without leaving any ill consequence, in a few days, it is clear that the serious aspect of the case was a mistake. Is it necessary to state the injury and explain the mistake to meet the requirements of the policy?

On the other hand, when the question arises, as in this case, on a trial, the jury, and not the insurer, must decide whether the injury was serious or not. In deciding this, are they to reject the evidence of the ultimate effect of the injury on the party's health. longevity, strength, and other *similar considera- [*231 tions? This would be to leave out of view the essential purpose of the inquiry, and the very matters which would throw most light on the nature of the injury, with refernce to its influence on the insurable character of the life proposed.

Looking, then, to the purpose for which the information is sought by the question, and to the difficulty of answering whether an injury was serious, in any other manner than by ref-

erence to its permanent or temporary influence on the health, strength, and longevity of the party, we are of opinion that the court did not err in the criterion by which it directed the jury to decide the interrogatory propounded to them. *Wilkinson* v. *Conn. Mut. Life Ins. Co.* 30 Ia. 119.

The other answer, which defendant alleges to have been false, is made to an inquiry as to the age of the mother at the time of her death, and the disease of which she died.

The application shows that it was answered that she died at forty, of a fever. Evidence was given by defendant, tending to prove that she died much younger, of consumption. In avoidance of this, plaintiff was permitted to prove that the agent of the insurance company, who took down the answers of the applicant and his wife to all the interrogatories, was told by both of them that they knew nothing about the cause of the mother's death, or her age at the time; that the wife was too young to know or remember anything about it, and the husband had never known her. But that there was present, at the time the agent was taking the application, an old woman who said she had knowledge on that subject, and that the agent questioned her for himself, and from what she told him he filled in the answer which is now alleged to be untrue, without its truth being affirmed or assented to by plaintiff or the wife. The jury find all this in their special verdict, and also find that the mother died at the age of twenty-three years, and did not die of consumption. The husband and wife had all been slaves, and it is found that the applicant did not know when the application was signed, how the answer to the question had been filled in.

And on this subject the court instructed the jury, that if the applicant did not know at what age her mother died, and did not state it, and declined to state it, and that her age was inserted by the agent upon statement made to him by others, in answer to inquiries he made of them, and upon the strength of his own judgment based upon data thus obtained, it was no defense to the action to show that the agent was mistaken, and that the mother died at the age of twenty-three years.

To the introduction of the oral testimony regarding the action of the agent, and to the instructions of the court on that subject the defendant excepted and assigns the ruling of the court as error on the ground that it permitted the written contract to be contradicted and varied by parol testimony.

The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate and prudent in making their contracts, against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability of misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident or mistake or fraud, the principle has been long recognized that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence adopted by the *courts as a protection [*232 against fraud and false swearing, would, as was said in regard to the analogous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. It is upon this principle that courts of equity proceed in giving the relief just indicated; and though the courts, in a common-law action, may be more circumscribed in the freedom with which they inquire into the origin of written agreements, such an inquiry is not always forbidden by the mere fact that the party's name has been signed to the writing offered in evidence against him.

In the case before us a paper is offered in evidence against the plaintiff containing a representation concerning a matter material to the contract on which the suit is brought, and it is not denied that he signed the instrument, and that the representation is untrue. But the parol testimony makes it clear beyond a question, that this party did not intend to make that representation when he signed the paper, and did not know he was doing so, and, in fact had refused to make any statement on that subject. If the writing containing this representation had been prepared and signed by the plaintiff in his application for a policy of insurance on the life of his wife, and if the representation complained of had been inserted by himself, or by some one who was his agent alone in the matter, and forwarded to the principal office of the defendant corporation, and acted upon as true, by the officers of the company, it is easy to see that justice would authorize them to hold him to the truth of the statement, and that as they had no part in the mistake which he made, or in the making of the instrument which did not truly represent what he intended, he should not, after the event, be permitted to show his own mistake or carelessness to the prejudice of the corporation.

If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself *wrote out all these representations, [*233 and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract; and that it was made by the defendant, who procured the plaintiff's signature thereto.

It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels *in pais*. The principle is, that where one party has by his representations or his conduct induced the other party to

a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim.

It has been applied to the precise class of cases of the one before us in numerous well-considered judgments by the courts of this country. *Plumb* v. *Cattaraugus Ins. Co.* 18 N. Y. 392; *Rowley* v. *Empire Ins. Co.* 36 N. Y. 550; *Woodbury Sav. Bk.* v. *Charter Oak Ins. Co.* 31 Conn. 526; *Combs* v. *Hannibal Ins. Co.* 43 Mo. 148. Indeed, the doctrine is so well understood and so often enforced that, if in the transaction we are now considering, Ball, the insurance agent, who made out the application, had been in fact the underwriter of the policy, no one would doubt its applicability to the present case. Yet the proposition admits of as little **234***] doubt that if Ball was the agent of *the insurance company, and not of the plaintiff, in what he did in filling up the application, the company must be held to stand just as he would if he were the principal.

Although the very well-considered brief of counsel for plaintiff in error takes no issue on this point, it is obvious that the soundness of the court's instructions must be tested mainly by the answer to be given to the question, "Whose agent was Ball in filling up the application?"

This question has been decided differently by courts of the highest respectability in cases precisely analogous to the present. It is not to be denied that the application, logically considered, is the work of the assured, and if left to himself or to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. On the other hand, it is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one state, and having in that state their principal business office, send these agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy, rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company, in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argument *be- [*235 ing that, as to all other acts of the agent, he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine, in its full force, to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are prima facie, co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. *Bebee* v. *Ins. Co.* 25 Conn. 51; *Lycoming Ins. Co.* v. *Schollenberger*, 44 Pa. 259; *Beal* v. *Ins. Co.* 16 Wis. 241; *Davenport* v. *Ins. Co.* 17 Ia. 276. An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business, for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal. *Sav. Bk.* v. *Ins. Co.* 31 Conn. 517; *Hortwitz* v. *Ins. Co.* 40 Mo. 557; *Ayres* v. *Ins. Co.* 17 Iowa, 176; *Howard Ins. Co.* v. *Bruner*, 23 Pa. 50.

In the fifth edition of American Leading Cases, 917, after a full consideration of the authorities, it is said:

"By the interested or officious zeal of the agents employed by the insurance companies in the wish to outbid each other and procure customers, they not unfrequently mislead the insured, by a false or erroneous statement of what the application should contain; or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding *from the insured, be regarded as the act [*236 of the insurers." *Rowley* v. *Ins. Co.* 36 N. Y. 550.

The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.

The judgment of the Circuit Court is affirmed.

Ex parte: In the Matter of ALEXANDER McNIEL, *Petitioner.*

(See S. C. 13 Wall. 236-243.)

Pilot regulations—half pilotage—state pilot laws constitutional—admiralty jurisdiction —state law.

1. Pilot regulations are regulations of commerce, and half pilotage is a necessary and usual part of every system.
2. State pilotage laws are constitutional and valid, and are subject to the power of Congress over the matter.
3. Courts of admiralty have jurisdiction of all marine contracts and torts, including contracts relating to pilotage.
4. A state law may give a substantial right, which may be enforced in the proper Federal tribunal.

[No. 7. Orig.]

Argued Jan. 26, 1872. Decided Mar. 25, 1872.

PETITION for writ of prohibition to the Judges of the District Court of the United States for the Eastern (Southern) District of New York.

The case is stated by the court.

Mr. **C. Donohue,** for petitioner:

The claim advanced by the libellant below is under the laws of the state of New York.

See Laws N. Y. 1865, ch. 115, § 4, amending § 10 of old act.

No power whatever existed at any time in the state after the adoption of the Constitution, for passing such law.

The power thus exercised is clearly a regulation of commerce, both between the states and with foreign nations.

This power is an exclusive one. *Gibbons* v. *Ogden,* 9 Wheat. 1.

But we shall be told by our opponents, that the state has that power delegated by an act of Congress (1 Stat. at L. 34, § 4; 5 Stat. at L. 153, §§ 1, 5) and that the case of *Cooley* v. *Wardens,* 12 How. 299, recognizes this power. We say, in answer, that with deference to that opinion the power delegated to the general government by the grant of power to regulate commerce, cannot be delegated by the United States, and that all acts delegating or attempting to delegate it are void. The people in their power or the states in their power, whichever it may be, have delegated power to one general government, and that the delegation was made with a full knowledge of what it was; and it does not rest in the Federal government to fritter away that power by a division of it. nor by permitting the states to use it. As well might the United States delegate to the states a concurrent right to make war or establish post-roads or coin money, or allow the states, in the absence of a declaration of war by Congress, the right to make it.

That Congress supposed the states had no power without their sanction to legislate about pilotage, is shown by the very existence of the acts attempting to vest the right in the states, and if no power existed to delegate the right to the states, then these acts are void and no power passed under them to the states.

But suppose the states did take any power under these acts, then the exercise, by the United States, of the power to regulate pilotage to any extent, at once ousts the state of all right in the matter. It is not a question whether Congress covered the whole ground in the act to regulate pilotage, which Congress had passed. It is sufficient that the United States has legislated on the subject.

Sec. 10, Stat. at L. 61; 14 Stat. at L. 228, § 9; *N. Y.* v. *Miln,* 8 Pet. 118; *People* v. *Brooks,* 4 Den. 477; *Brown* v. *Md.* 12 Wheat. 419; *Passenger Cases,* 7 How. 392.

The case of *Steamship Co.* v. *Joliffe,* 2 Wall. 450, 17 L. ed. 805, may be cited against us, but we submit that it was not by a full court; that question should be considered an open one; *Steamship Co.* v. *Port Wardens,* 6 Wall. 34, 18 L. ed. 750, is directly with us. The state cannot compel payment where service is not performed.

It is submitted that if any power as to pilots is grantable at all to the states, no permission can be inferred from the act (1 Stat. at L. 34, § 4) to make the taking of a pilot compulsory on vessels, or in the absence of taking a pilot, to make it a penalty.

The demand is really for a penalty; and while some expression in the case of *Steamship Co.* v. *Joliffe, supra,* used by the judge who delivered the opinion of the court, is to the contrary, yet it is submitted that on authority the claim is a penalty.

No state statute can confer jurisdiction on the admiralty nor make a cause of action which was not before known in the admiralty, cognizable in that court.

The admiralty is an exclusive grant, and the states can neither make admiralty courts nor admiralty contracts.

The Moses Taylor, 4 Wall. 411, 18 L. ed. 397; *The Ad. Hine,* 4 Wall. 555, 18 L. ed. 451.

Mr. **F. A. Wilcox,** opposed to motion:

This court has passed on the merits of this motion in the following cases:

Cooley v. *Wardens,* 12 How. 312; *Steamship Co.* v. *Joliffe, supra; Steamship Co.* v. *Port Wardens, supra.*

This action is not brought to recover a penalty, as is fully shown by the cases cited above.

The language of the statute herewith submitted in no way indicates that it was the intent of the legislature to create a penalty, and as Judge Benedict in his opinion remarks, its legal effect is to render the respondent debtor to the libellant for the half pilotage here demanded.

Mr. Justice **Swayne** delivered the opinion of the court:

This is a petition for a writ of prohibition to the district court of the United States for the (southern) eastern district of New York.

Alexander S. Banter filed his libel in the district court *above named, against the [*237 owners of the bark Maggie McNiel, wherein it was fully set forth that the libellant was a pilot of the port of New York, duly licensed under the laws of the state of New York; to pilot vessels by way of Hellgate, and that the respondents were the owners of the bark; that on the 27th day of February, 1870, the libellant, at a point on Long Island sound, tendered his services and offered to the master of the bark to pilot her by way of Hellgate to the port of New York, and notwithstanding that the libellant was the first pilot so offering his services they were refused; that the bark was a registered vessel for-

NOTE.—*Liability of vessel or owner for compulsory pilotage fees*—see note, 39 L. R. A. 177.

eign to the port of New York, and drew more than thirteen feet of water, so that there became due to the libellant by reason of the premises the sum of $23; that payment has been demanded and refused, and that the premises are within the admiralty and maritime jurisdiction of the United States and of the court to which the libel was addressed.

Process was issued according to the prayer of the libel, and the respondents not being found the vessel was attached. Alexander McNiel intervened as claimant and answered the libel. The answer denies that the action is founded upon a contract civil and maritime. It admits that the bark was sailing under a register, and alleges that she was towed through Hellgate by a steam-tug, which had on board a duly licensed pilot, and that the master of the bark paid for the service. It insists that the cause of action set forth in the libel is not enforceable by the district court and not within its jurisdiction. Testimony was taken, the cause proceeded to hearing, and the court gave judgment for the amount claimed by the libellant. The respondent applies for a writ of prohibition to restrain the district court from enforcing the judgment.

The grounds relied upon are:

(1) That the district court has no jurisdiction of the cause of action stated in the libel.

(2) That no lien existed on the vessel enforceable in a court of admiralty.

The statute of the state upon which the libel **238*]** was founded *is entitled "An Act Concerning the Pilots of the Channel of the East River, Commonly Called Hellgate, Passed April 15, 1847, as Amended March 12, 1860, March 14, 1865, April 16, 1868, and April 5, 1871." It is a carefully digested system of regulations, covering the whole subject of pilotage, and was designed to secure the appointment of qualified persons and to insure as far as possible the faithful performance of their duties. All appointments are required to be made upon the recommendation of the board of wardens of the port of New York to the governor, the nomination by him to the Senate of the state of the persons so recommended, and their confirmation by that body. Apprentices are required to serve three years, to be examined twice during the last year by the board of wardens, and to serve two years afterwards as deputies before they can be appointed pilots. The 7th section of the act provides that a pilot who shall first tender his services may demand from the master of any vessel of one hundred tons burden and upwards, navigating Hellgate, to whom the tender was made and by whom it was refused, half pilotage, the amount to be ascertained according to the rules prescribed by the act. Certain exceptions are made which do not affect this case and which it is, therefore, not necessary to consider.

It is not denied that the case made by the libel is within the statute, nor that it was established by the testimony, but it is insisted that the statute is in conflict with the power of Congress to regulate commerce and is, therefore, void.

It must be admitted that pilot regulations are regulations of commerce. A pilot is as much a part of the commercial marine as the hull of the ship and the helm by which it is guided; and half pilotage, as it is called, is a necessary and usual part of every system of such provisions. Pilots are a meritorious class, and the service in which they are engaged is one of great importance to the public. It is frequently full of hardship, and sometimes of peril; night and day, in winter and summer, in tempest and calm, they must be present at their proper places and ready to perform the *duties of their [**239** vocation. They are thus shut out for the time being from more lucrative pursuits and confined to a single field of employment.

It is not complained anywhere, so far as we are advised, that the sum of what is allowed them is oppressive, or that including half pilotage, it is more than sufficient to secure the services of persons of proper qualifications and to give them a reasonable compensation.

There is nothing new in provisions of the same character with the one here under consideration. They have obtained from an early period and are to be found in the laws of most commercial states. The obligation on the captain to take a pilot, or be responsible for the damages that might ensue, was prescribed in the Roman Law. Digest, book 19, tit. 2, Edict of Ulpian, I. 110; in the Laws of Oleron, I. 232; in the *Consulate de Mer*, II. 250; and in the Maritime Law of Denmark, III. 363 (Pardessus). The Hanseatic Ordinances, about 1457, required the captain to take a pilot under the penalty of a mark of gold. The maritime law of Sweden, about 1500, imposed a penalty for refusing a pilot of 150 thalers, one third to go to the informer, one third to the pilot who offered, and the residue to poor mariners. By the Maritime Code of the *due pays bas*, the captain was required to take a pilot under a penalty of 50 reals, and to be responsible for any loss to the vessel. By the maritime law of France, Ordinance of Louis XIV., 1681, corporal punishment was imposed for refusing to take a pilot, and the vessel was to pay 50 livres, to be applied to the use of the marine hospital and to repair damages from stranding. In England (3 George I. ch. 13) if a vessel were piloted by any but a licensed pilot, a penalty of £20 was to be collected for the use of superannuated pilots, or the widows of pilots. In the United States provisions, more or less stringent, requiring the payment of a sum when no pilot is taken, are to be found in the statutes of ten of the states. The earliest of these statutes is that of Massachusetts of 1783, and the latest, to which our attention has been called, the statute of New York here under consideration.

*But, conceding that this provision is[**240** a regulation of commerce and within the power of Congress upon that subject, it by no means follows that it involves the constituional conflict insisted upon by the counsel for the petitioner. In the complex system of polity which prevails in this country the powers of government may be divided into four classes:

Those which belong exclusively to the states.

Those which belong exclusively to the national government.

Those which may be exercised concurrently and independently by both.

Those which may be exercised by the states, but only until Congress shall see fit to act upon the subject. The authority of the state then

retires and lies in abeyance until the occasion for its exercise shall recur.

The commercial power lodged by the Constitution in Congress is, in part, of this character. Some of the rules prescribed in the exercise of that power must, from the nature of things, be uniform throughout the country. To that extent the power itself must, necessarily, be exclusive; as much so as if it had been so declared to be, by the organic law, in express terms. Others may well vary with the varying circumstances of different localities. In the latter contingency the states may prescribe the rules to be observed until Congress shall supersede them; the Constitution and laws of the United States in such case, as in all others to which they apply, being the supreme law of the land. This subject, in some of its aspects, was fully considered in *Gilman* v. *Philadelphia*, 3 Wall. 713, 18 L. ed. 96. What is there said need not be repeated. In that case it was held that the state of Pennsylvania might competently authorize a bridge to be built across the Schuylkill river in that city, but that Congress, in the exercise of its paramount power, might require it to be removed, and prohibit and punish the erection of like structures, whenever it was deemed expedient to do so. It is the exercise and not the existence of the power that is effectual and exclusive.

241*] *The Constitution took effect on the first Wednesday of March, 1789. Pilot laws existed in several of the states at that time, and were subsequently enacted in others. In all such states, it is believed, they have been changed from time to time according to the will of the respective legislatures. Suits in the state courts have been founded upon them and recoveries had, and many such cases are reported. In none of them have we found that the question was raised or a doubt expressed as to the validity of the laws or the authority of the states to enact them. 4 Met. 416; *Smith* v. *Swift*, 8 Met. 329; *Martin* v. *Hilton*, 9 Met. 371; *Nickerson* v. *Mason*, 13 Wend. 64; *Low* v. *Comrs. Pilotage*, R. M. Charl. 307; *Hunt* v. *Mickey*, 12 Met. 346.

The legislation of Congress upon the subject is as follows: The 4th section of the act of August 7, 1789 (1 Stat. at L. 54), provided that pilots should be regulated by the existing laws of the states, or such as the states should thereafter enact, "until further legislative provision should be made by Congress." Whatever may be the effect of the provision looking to future state legislation, it is clear that the body which passed the section did not doubt the power of the states to legislate upon the subject. This was the first Congress which sat under the Constitution, and many of its members were members of the convention which framed that instrument. The act of March 2, 1837 (5 Stat. at L. 153), declares that a vessel, approaching or leaving a port situate upon waters which are the boundary between two states, may employ a pilot licensed by either of such states, "any law, usage, or custom to the contrary notwithstanding." The act of August 30, 1852 (10 Stat. at L. 63), regulates the appointment of pilots upon certain steamboats, and is a complete system as to the class of vessels to which it applies. The act of June 23, 1864 (13 Stat. at L. 120), regulates the fee to be paid by a pilot for his certificate under the act of 1852. It also requires pilots of the vessels of the class named to be licensed according to the provisions of that act. The act of July 13, 1866 (14 Stat. at L. 93), declares that no regulation shall be *adopted by any state making a discrim- [*242 ination as to the rule of half pilotage between the vessels therein described, and such existing regulations were thereby annulled. The act of February 25, 1867 (14 Stat. at L. 412), contains a pilot regulation touching the sea-going vessels there described, with a proviso that certain state regulations should not be thereby affected. The act of July 25, 1866 (14 Stat. at L. 227), provides for the revocation of the pilot's license for the offenses specified. These several acts assert and exercise the plenary power of Congress over the subject. This early and long-continued practical construction of the Constitution by both national and state authorities, as affecting the validity of the statutory provision here in question, if a doubt could otherwise exist upon the subject, would be entitled to the gravest consideration.

The precise question we are considering came before this court in *Cooley* v. *Board of Wardens*, 12 How. 299. The suit was for half pilotage under a statute of Pennsylvania, substantially the same, in this particular, with the statute of New York. The plaintiff recovered in the lower court, and the supreme court of the state affirmed the judgment. The case was brought here for review by a writ of error under the 25th section of the judiciary act, and was argued with exhaustive learning and ability. This court, after the fullest consideration of the subject, also affirmed the judgment. We are entirely satisfied with that adjudication, and re-affirm the doctrines which it lays down. It is conclusive upon this branch of the case before us.

The other objections taken to the judgment relate to the jurisdiction of the court. It is said there is no jurisdiction in admiralty to maintain a libel for a penalty. It was not a penalty that was recovered. There was a tender of services upon which the law raised an implied promise to pay the amount specified in the statute. *Com.* v. *Ricketson*, 5 Met. 419; *Steamship Co.* v. *Joliffe*, 2 Wall. 450, 17 L. ed. 805; *Cooley* v. *Wardens*, 12 How. 312. Courts of admiralty have undoubted jurisdiction of all marine contracts and torts. *The Belfast*, 7 Wall. 624, 19 L. ed. 266; *Ins. Co.* v. *Dunham*, *ante*, 90. *That contracts relating to pilotage are [*243 within the sphere of the admiralty jurisdiction has not been controverted by the counsel for the petitioner. The question is not an open one in this court. *Hobart* v. *Drogan*, 10 Pet. 120.

It is urged further that a state law could not give jurisdiction to the district court. That is true. A state law cannot give jurisdiction to any Federal court; but that is not a question in this case. A state law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal whether it be a court of equity of admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurispr-

dence. A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality. *Robinson* v. *Campbell*, 3 Wheat. 223; *U. S.* v. *Knight*, 14 Pet. 315; *The Orleans* v. *Phœbus*, 11 Pet. 184; *Thompson* v. *Phillips*, 1 Bald. 272, 204; *Lorman* v. *Clarke*, 2 McLean, 568; *Ex parte Biddle*, 2 Mas. 472; *Johnston* v. *Vandyke*, 6 McLean, 423; *Prescott* v. *Nevers*, 4 Mas. 327; *Clark* v. *Sohier*, 1 Woodb. & M. 368. In no class of cases has the application of this principle been sustained by this court more frequently than in those of admiralty and maritime jurisdiction. *The St. Lawrence*, 1 Black, 522, 17 L. ed. 180; *The General Smith*, 4 Wheat. 438; *Peyroux* v. *Howard*, 7 Pet. 324; Rules of Practice in Admiralty, established by this court, Nos. 12 and 92.

The application for the writ is denied and the petition is dismissed.

In the Matter of the Application of HENRY W. LOUD for a writ of Prohibition to the District Court of the U. S., for the Eastern District of New York.

[No. 8 Original.]

This case differs in no particular from the case of the like application of Alexander McNiel, just decided. The same considerations apply and the result must be the same.

The application is denied and the petition dismissed.

JOEL C. SLAUGHTER, Administrator of Henry B. Slaughter, Deceased, *Appt.*,
v.
JULIUS GERSON.

(See S. C. 13 Wall. 379-386.)

Material misrepresentation to avoid sale—character of—purchaser's means of knowledge.

*1. The misrepresentation which will vitiate a contract of sale and prevent a court of equity from aiding its enforcement, must relate to a material matter constituting an inducement to the contract, and respecting which the complaining party did not possess at hand the means of knowledge; and it must be a misrepresentation upon which he relied and by which he was actually misled to his injury.

2. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say in impeachment of the contract of sale, that he was deceived by the vendor's misrepresentations.

[No. 114.]

Argued Feb. 23, 1872. Decided Mar. 25, 1872.

APPEAL from the Circuit Court of the United States for the District of Maryland.

The case is stated by the court.

Mr. **William Schley**, for appellant:

The doctrine of *caveat emptor* ought not to be applied to this case. In the position in which the boat was lying, near the landing of a ferry boat and in a rough and agitated sea, it was impossible to make an accurate measurement of the draft of water. And as to the boiler it was so covered up that, until the boiler deck was removed, it was not practicable to examine its condition. Besides this, the rule of *caveat emptor*, however potent in actions *ex contractu*, is comparatively of small force in an action based on fraudulent misrepresentation.

Williamson v. *Allison*, 2 East, 446; *Jones* v. *Bright*, 5 Bing. 533; *Brown* v. *Edgington*, 2 M. & G. 279; *Shepherd* v. *Pybus*, 3 Man. & G. 867; *Gallagher* v. *Waring*, 9 Wend. 20; *Howard* v. *Hoey*, 23 Wend. 350; *Thayer* v. *Turner*, 8 Met. 550; *Hazard* v. *Irwin*, 18 Pick. 95; *Harrington* v. *Stratton*, 22 Pick. 510; *Misner* v. *Granger*, 4 Gilm. 69; 1 Sm. Lead. Cas. 299, notes to *Chandelor* v. *Lopus*, 2 Sm. Lead. Cas. 92, notes to *Pasley* v. *Freeman*; *Fuller* v. *Wilson*, 3 Q. B. 58; *Evans* v. *Collins*, 5 Q. B. 804; *Fitzsimmon* v. *Joslin*, 21 Vt. 130; *Flight* v. *Booth*, 1 Bing. N. C. 370; 2 Ross, Com. Law, 441; Fland. Mar. L. 62, and cases cited in ch. 3.

If there was no fraud, legal or moral, on the part of Gerson, or his agents, still it is clear from the testimony, that Slaughter would not have purchased the boat at any price, if he had known that she would not answer the purpose for which he wished to procure a boat. Upon the hypothesis that Gerson was acting honestly, the case presented is one of mutual mistake.

A vendor is bound to know that he has that which he professes to sell.

Allen v. *Hammond*, 11 Pet. 63; *Hitchcock* v. *Giddings*, Dan. Exch. 1; *Smith* v. *Richards*, 13 Pet. 27; *Ainslie* v. *Medlycott*, 9 Ves. 21; *Dale* v. *Roosevelt*, 5 Johns. Ch. 174; 1 Story, Eq. Jur. sec. 201; *Joynes* v. *Statham*, 3 Atk. 388; Batten, Cont. 255.

Mr. **B. W. Huntington**, for appellee:

It having been patent to the eyes of the appellant's intestate, that the vessel drew more than three and a half feet of water, when fully laden, he could not have a rescission of the contract on that ground, even if the appellee had falsely represented in this particular.

Jennings v. *Broughton*, 5 De G. M. & G. 126, 17 Beav. 234; *Dyer* v. *Hargrave*, 10 Ves. 505.

The appellant's intestate not having rested upon any representations on the part of the appellee but having examined for himself, with every facility for such examination afforded by the appellee, he would not be in a position to claim a rescission of the contract, even if the alleged representations were false.

Lowndes v. *Lane*, 2 Cox, 363; *Dobell* v. *Stevens*, 3 Barn. & C. 625; Story, Eq. Jur. 10 ed. 194, § 191; *Trower* v. *Newcome*, 3 Mer. 704; *Smith* v. *Richards*, 13 Pet. 26.

Mr. Justice **Field** delivered the opinion of the court:

On the 12th of July, 1864, Henry B. Slaughter, since deceased, purchased of the complainant, Julius Gerson, a steamboat named *the George Law, for a consideration of [*380 $40,000. Of this sum he paid $15,000 in cash, and for the balance he gave to the complainant his bond, conditioned to pay the same in two instalments of $12,500 each, within three and

*Headnotes by Mr. Justice FIELD.

NOTE.—*Fraud or illegal consideration, how far will avoid contract*—see note to Armstrong v. Toler, 6 L. ed. U. S. 468.

Elements necessary to constitute fraud—see note to Wickson v. Patterson, 40 L. ed. U. S. 543.

six months thereafter. To secure the payment of these sums, he at the same time executed to the complainant two mortgages, one upon the steamboat which he purchased, and the other upon a steamboat named the Chester, which he formerly owned. The first instalment on the boat not being paid at its maturity, the present bill was filed to enforce the mortgages by a sale of the steamboats, and the application of the proceeds to the demand of the complainant.

The answer of the defendant admitted the execution of the bond and the mortgages, but set up as a defense to their enforcement that they were obtained from him by deceit and fraud, and detailed the particulars in which such alleged deceit and fraud consisted. The substantial averments in this respect are these: that the defendant had established a line of steamboats from Baltimore to various landings on Chester river on the eastern shore of Maryland and landings on tributaries to that river; that the most important of these landings was at Queenstown; that no boat drawing more than three feet of water could reach the wharf at this place except in case of an extraordinary high tide; that he purchased the George Law of the complainant for that route, upon the representation that it drew only this number of feet when fully laden; that this representation was false and fraudulent and that the steamer when placed on the route grounded in five feet of water; and that as soon as precise information of this fact was obtained, the defendant called upon the complainant to cancel the contract, offering at the same time to return the steamboat purchased.

A large amount of evidence was taken in this case bearing upon the averments in the answer of misrepresentation and fraud on the part of the complainant; and it is in many respects conflicting. But the rules of law applicable to cases of alleged misrepresentation by a vendor with respect to property sold are well settled, and render of easy solution the questions upon which this case must turn.

This misrepresentation which will vitiate a contract of sale, and prevent a court of equity from aiding its enforcement, must not only relate to a material matter constituting an inducement to the contract, but it must relate to a matter respecting which the complaining party did not possess at hand the means of knowledge and it must be a misrepresentation upon which he relied, and by which he was actually misled to his injury. A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness and been misled by over-confidence in the statements of another. *Volenti non fit injuria* is the maxim in such cases in all courts. And the same reasoning applies when the complaining party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained.

The facts disclosed by the uncontradicted testimony of both parties bring this case clearly within the principle here stated. Previous to the execution of the contract of purchase, and with the view of examining the steamboat, the *defendant went from Baltimore to [*384 New York, taking with him his son, who subsequently became captain of the boat, and two ship-carpenters, and a square to measure her draught of water. Whilst there every opportunity was given him to examine the boat with his carpenters, and a most thorough and careful examination was made by them. On two occasions they measured the draught of the boat, and they witnessed her speed by accompanying her on one of her trips. The owner went with them to the boat on their arrival in New York, and told them to look for themselves, and to go anywhere they pleased about her. If, under these circumstances, the defendant did not learn everything about her, and ascertain her true draught, it was his own fault, and it would be against the plainest principles of justice to allow him to set up, in impeachment of the validity of his contract, loose statements respecting the draught before its execution, even though they were false in point of fact.

In *Attwood* v. *Small*, 6 Cl. & F. 262, the doctrine was laid down by the House of Lords after great consideration substantially as we have stated it. In that case the defendant had sold to the complainants, constituting a company of numerous persons, certain freehold and leasehold property, including mines and iron works, and had made certain statements respecting the capabilities of the property. The purchasers, not relying upon these statements, deputed some of their directors, together with experienced agents, to ascertain the correctness of his statements. These persons examined the property and works and the accounts kept by the defendant, receiving from him and his agents every facility and aid for that purpose, and they reported that the defendant's statements were correct. Upon a bill filed to rescind the contract, on the ground of fraud, the House of Lords decided that the contract could not be rescinded, reversing, in that respect, the decree of the court of exchequer, not merely because there was no proof of fraud, but because the purchasers did not rely upon the vendor's statements, but tested their accuracy; and, after having knowledge, or the means of knowledge, *declared that they were sat- [*385 isfied of their correctness; holding that if a purchaser choosing to judge for himself, did not avail himself of the knowledge, or means of knowledge open to him or to his agents, he could not be heard to say he was deceived by the vendor's representations, the doctrine of *caveat emptor*, applying in such case, and the knowledge of his own agents being as binding as his own knowledge.

The doctrine, substantially as we have stated it, is laid down in numerous adjudications. Where the means of information are at hand and equally open to both parties and no concealment is made or attempted, the language of the cases is, that the misrepresentation fur-

nishes no ground for a court of equity to refuse to enforce the contract of the parties. The neglect of the purchaser to avail himself, in all such cases, of the means of information, whether attributable to his indolence or credulity, takes from him all just claim for relief.

We have thus far assumed that the evidence in the case before us discloses false representations on the part of the vendor, but justice to him requires us to say that the evidence is insufficient to warrant this conclusion. The vendor stated to the purchaser that he was not a steamboat man, meaning evidently, from the context, that he was not familiar with the particulars in regard to which the purchaser desired information, and referred him to the statements of the captain, at the time inviting him and his party to examine the boat in every particular. The measurement made by one of his carpenters showed that the boat drew four feet and six inches of water at midships whilst lying unloaded at the dock. The measurement by the other carpenter showed that the boat then drew, forward and aft, three feet and six inches, and both of these measurements were reported to the defendant, and the latter was accompanied by the declaration that the boat drew too much water for his purpose. The captain of the boat also took the defendant on to the dock, by which the boat was lying, and pointed out to him that she was coppered three **386*]** feet and *nine inches from the keel, and that she then showed only three inches out of water, and, of course that she then drew, forward and aft, unloaded, three feet and six inches. The purchase was thus made by the defendant, with his eyes open, after every opportunity had been afforded him for the inspection of the vessel.

It follows that the decree must be affirmed; and it is so ordered.

JOHN H. BUTLER, *Plff. in Err.*,
v.
FRANCIS WATKINS and The Patent Nut and Bolt Company.
(See S. C. 13 Wall. 456-465.)

Action for fraud—necessary evidence—what admitted—evidence of other frauds.

1. A manufacturer may not fraudulently nor by deceitful representations, induce another to withhold from sale his products, without being answerable for the injury occasioned by the fraud.
2. In order to maintain an action for fraud, it is sufficient to show that the defendant was guilty of deceit, with a design to deprive the plaintiff of some profit or advantage and to acquire it for himself, whenever loss or damage has resulted from the deceit.
3. In actions for fraud, large latitude is always given to the admission of evidence.
4. If it be shown that a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another, at about the same time and in relation to a like subject, was actuated by the same spirit.

[No. 122.]

Argued Mar. 4, 1872. Decided Mar. 25, 1872.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

This action was brought by Butler, the plaintiff in error in the state court of Louisiana, in the fourth district court for the parish of Orleans.

The defendants, as alien subjects of the Queen of Great Britain, removed the case to the United States circuit court for the district of Louisiana. The case was tried in Feb., 1870, upon pleadings filed in the circuit court, and resulted in a verdict for the defendant. The plaintiff filed several bills of exception, and Feb. 19, took an order to show cause why a new trial should not be had, and filed written reasons therefor Apr. 12, 1870. A motion for a new trial was heard Apr. 14, and denied, and judgment signed for the defendants Apr. 16, 1870. To review that judgment, the plaintiff brought this writ of error.

It appears that the patent Nut & Bolt Company is a corporation formed under the limited liability act of Great Britain, for the manufacture of iron, at Birmingham, England. The defendant, Watkins, is what is termed a managing director. In Jan., 1868, he was at New Orleans, Louisiana, and had some intercourse with the plaintiff, who had one or more patents for fastening cotton bales with iron ties.

The petition of the plaintiff charged that the defendant deliberately attempted to induce plaintiff to believe that they would make a contract with him, and to induce him thereby to neglect other opportunities of introducing his tie into market and to keep him in a condition of expectancy and hope until the cotton season had passed, and that, all the time, the defendant's acts and promises had been in bad faith, without any intention ever to fulfil the same, and solely to defraud the plaintiff. That the plaintiff had relied on them, and had been thus defrauded.

The bill of exceptions to the instructions of the court below, states that there was evidence before the jury tending to show that there was an understanding had between the plaintiff and Watkins, acting for himself and the company, for the manufacture and sale of the plaintiff's tie upon the terms and conditions set forth in a document attached and marked "A;" that when this document was handed to Watkins, he wrote the letter marked "B;" that the plaintiff expressed his willingness to sign the same; but that Watkins told him that the document "A" would have to be sent to England and undergo certain formalities to make it complete in form only and that the paper was taken to England and was never completed in form, and that the acts of the defendant, from the beginning to the end, were fraudulent and deceptive.

"A" is a paper, not signed nor dated, in the form of a proposed contract whereby the plaintiff, Butler, of the first part, agrees to give the defendants the right of manufacturing and selling hoops and buckles or iron cotton ties, under his patent. The defendants were to manufacture the same at as low price as possible in sufficient quantity to supply the demand for the same, and to make vigorous exertions to introduce the ties in all countries where they could be sold. There were also provisions for accounts, statements, and divisions of profits.

"B" is the answer of Watkins to this document. He says that he has read the draft agreement and that it seems to be about the thing; that he will have the same put in shape on his arrival home and let plaintiff

NOTE.—*What necessary to sustain action for deceit*—see note, 29 L. ed. U. S. 740.

have two copies, one to retain, the other to return to him.

The case further appears in the opinion.

Messrs. **Peckham,** *Lacey, and Butler,* for plaintiff in error.

Messrs. John A. Campbell, **P. Phillips,** and **D. G. Campbell** for defendants in error.

Mr. Justice **Strong** delivered the opinion of the court:

We are unable to discover error in the instructions given to the jury by the court below, or in the answers made to the prayers of the defendants, except in a single particular. What the court said may have been inadequate to a full presentation of the case, but the plaintiff asked for no instructions, and he cannot, therefore, now be heard to complain that full instructions were not given. The bills of exceptions bring upon the record only that which was said to the jury, and to that alone can error be assigned.

It is quite true that the suit was not brought upon any contract. The theory of the plaintiff was that no agreement had ever been made, and that the defendants had never intended making one, though all the while during the negotiation deceptively and fraudulently holding out to the plaintiff a profession of intention to conclude an agreement, and that this was done with the purpose of keeping the plaintiff's "cotton tie" out of the market. The answers to the defendants' prayers, so far as they tend to show that no contract had been concluded were, therefore, favorable rather **463*]** *than hurtful to the plaintiff's case, and they furnish no just ground for complaint.

The court, however, erred in charging the jury that if they believed "the corporation never gave any authority to the defendant, Watkins, to assent to the proposal, or draft agreement, in their behalf, and in their name, and never sanctioned the same as a corporate act, the suit could not be maintained against them." If by this it was meant that no suit upon the contract could be maintained, the instruction was correct, but this could not have been so understood by the jury. No such question was before them. It does not follow, because the corporation never authorized or sanctioned a contract, that they may not be responsible for such a fraud as was alleged in the petition. We have not all the evidence before us, but it does appear that some evidence was given tending to show that the acts and conduct of the defendants (Watkins and the corporation) were deceitful and fraudulent, designed to mislead, and done for the purpose of keeping the plaintiff's cotton tie out of the market, in order that they might secure heavy sales of the Beard tie, in which they were largely interested. If the evidence did establish or tended to establish such deceit and fraud, for such a purpose, and if the plaintiff was injured thereby, as his petition alleged, it was erroneous to charge the jury that the suit could not be maintained. Competition in efforts to secure the market is doubtless lawful. A manufacturer may by superior energy, or enterprise, supply all the buyers of a particular article, and thus leave no market for similar articles manufactured by others. But he may not fraudulently or by deceitful representations induce another to withhold from sale his products without being answerable for the injury occasioned by the fraud. Whether negotiations for a purchase never concluded were in fact fraudulent; whether they were commenced and continued solely with the purpose of dishonestly inducing the plaintiff to forego offering his goods until the market had been supplied, and whether such was the consequence of the defendants' fraudulent conduct, were questions of fact which should have been submitted *to the jury on the evidence. **[*464** If answered affirmatively, the action was sustainable. In order to maintain an action for fraud it is sufficient to show that the defendant was guilty of deceit, with a design to deprive the plaintiff of some profit or advantage, and to acquire it for himself, whenever loss or damage has resulted from the deceit. This was well illustrated in *Barley* v. *Walford,* 9 Ad. & El. N. S. 197. There it appeared that a plaintiff, who was a dealer in silk goods, had been hindered in his trade and induced to refrain from making goods with a certain ornamental design, by a false representation made by the defendant, and known by him to be false, and that a pattern of the goods had been registered by another, and it was ruled that an action would lie to recover damages for the injury, especially when the deceit was with a view to secure some unfair advantage to the defendant.

We think also the court erred in refusing to receive in evidence the defendants' letters to Wailey in connection with Wailey's testimony. It was an important inquiry in the case what was the purpose or *animus* of the defendants in their negotiations with the plaintiff? Was it to mislead him by holding out false hopes of consummating an arrangement by which his cotton tie could be introduced into the market, and was this in order to secure the defendants themselves against competition? Deceit in effecting such a purpose lay at the basis of the action. But how can such a purpose be shown when it has not been avowed? Actual fraud is always attended by an intent to defraud, and the intent may be shown by any evidence that has a tendency to persuade the mind of its existence. Hence, in actions for fraud, large latitude is always given to the admission of evidence. If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person it may justly be inferred that similar conduct towards another, at about the same time and in relation to a like subject, was actuated by the same spirit. If, therefore, it be true that in *the spring or early summer of 1868 the **[*465** defendant had similar negotiations with Wailey respecting his cotton tie, and conducted towards him deceitfully in order to keep his tie out of the market that year, the fact tends to show that in their conduct towards the plaintiff, there was the same *animus,* and that they had the same object in view. That the evidence offered was admissible for that purpose is abundantly proved by the authorities. *Castle* v. *Bullard,* 23 How. 172, 16 L. ed. 424; *Lincoln* v. *Claflin,* 7 Wall. 132, 19 L. ed. 106.

The judgment is reversed and a new trial is ordered.

THE COMMONWEALTH OF KENTUCKY,
Petitioner,
v.
GEORGE S. BOUTWELL, Secretary of the Treasury of the United States.

(See S. C. 13 Wall. 526-531.)

Mandamus to Secretary of Treasury, to compel payment—repeal of law.

1. Where the Secretary of the Treasury was not asked to pay money until the time limited in the law for the appropriation to take effect had expired a writ of mandamus to compel payment by him will not be issued.

2. After Congress has withdrawn the appropriation for refunding to states expenses incurred in raising volunteers during the late Rebellion, this court will not order the Secretary to deliver a warrant to one of the states for the payment of such expenses.

[No. 6. Orig.]

Argued Mar. 8, 1872. Decided Mar. 25, 1872.

PETITION for writ of mandamus.

The case is stated by the court.

Messrs. **Jos. Casey,** *George McKee,* **Allen A. Burton,** and *Bartley & Carey* for petitioner.

Messrs. **Geo. H. Williams,** *Atty. Gen.,* **B. H. Bristow,** *Solicitor Gen.,* and **C. H. Hill,** *Asst. Atty. Gen.,* for United States.

Mr. Justice **Davis,** delivered the opinion of the court:

The state of Kentucky, through its constituted authority, asks this court, in the exercise of its original jurisdiction, for a peremptory writ of mandamus, to compel the defendant to deliver to the state a warrant to which it is entitled, for expenses incurred in defense of the Union. This application is based on the provision of an act of Congress, of July 27, 1861, 12 Stat. at L. 276, directing the Secretary of the Treasury to refund to the governor of any state the expenses properly incurred in raising troops to aid in the suppression of the late Rebellion.

The petition in this case, after setting forth the nature of the claim of Kentucky under this law, its approval by the Secretary of War and the accounting officers of the Treasury Department, alleges that the acting Secretary of the Treasury, on the 30th of June, 1871, caused to be issued and signed a warrant upon the Treasurer of the United States for the sum due the state, which, after being countersigned by the First Comptroller, was withheld from the relator by direction of the defendant. The purpose of this proceeding is to obtain possession of this warrant, or, if this cannot be done, to procure the delivery of another warrant of like amount to the agent of the state.

The defendant, in his return to the alternative writ of mandamus, previously ordered in the case, among other things, denies that the acting Secretary of the Treasury, on the 30th day of June, 1871, or on any other day, caused to be issued a warrant as alleged in the petition, but says that as he is informed and believes the facts in regard to the said pretended warrant are these:

On said 30th June, Fayette Hewitt, the agent of said state of Kentucky, about the close of business hours, applied to the chief of the warrant division in the office of respondent to prepare a warrant for said sum, and said chief declined to prepare such warrant at *that time, unless specially directed to [*528 do so by the acting Secretary; and said agent applied to said acting Secretary, who determined not to issue such a warrant, on the ground that by the act of July 27, 1861, the matter was lodged specially in the judgment and discretion of the Secretary himself, who was absent, and that the propriety of the issuing of said warrant would be determined by him on his return; but in view of the urgent request of said agent, and representations by him that after said 30th of June, the appropriation would be no longer available for the payment of said claim, said acting Secretary determined to confer with the officers of the department, and if deemed advisable and proper, to prepare and sign a warrant on said day, in order to save the appropriation, which warrant should not be issued nor registered nor recorded, but should be retained in the office of said acting Secretary, subject to approval or rejection by the Secretary on his return; and said acting Secretary did, accordingly, call together said officers at his office, at about 8 o'clock in the evening of said day, and it was then and there agreed that a warrant should be prepared and signed, and should not be registered or delivered, but should be so detained and submitted to the Secretary on his return, to be by him approved and issued or canceled, as he should determine; and said warrant was accordingly prepared and signed and countersigned at the office of said acting Secretary, and was so retained.

And he further says that on his return to Washington, about the middle of July, 1871, said prepared warrant was presented to him for approval by said acting Secretary, in accordance with the understanding between the acting Secretary and Hewitt, and upon mature consideration said claim was rejected, and said prepared warrant was canceled by him.

And as a conclusion from these facts, the defendant denies that it is the legal right of the said commonwealth of Kentucky to have said warrant, and to receive said sum of money as alleged, and says that he cannot now deliver the warrant conditionally *signed [*529 as aforesaid, as prayed for by the relator, because the same was officially canceled by him on rejection of the claim, and that he cannot now prepare and deliver another warrant upon the Treasurer of the United States, because he says that there is not now any appropriation out of which it can be paid.

This answer must, in the state of the pleadings, be taken as true, so far as its statement of facts is concerned and, therefore, presents a complete defense against the demand of the writ.

It seems very clear, if no warrant were ever issued, and the condition of the law on the subject at the present time does not authorize the Secretary to issue one, that the prayer of the petition cannot be granted. If it be conceded, as is argued by the counsel for the petitioner, that the decision of the accounting officers was conclusive upon the Secretary, and that he should have paid the money, if applied to in proper season, still the fact exists that he was not asked to pay the money until the time limited in the law for

the appropriation to take effect had expired. It will not do to say that the proceedings by the acting Secretary vested a right in the state, which could not be defeated by the refusal of the Secretary to approve the prepared warrant, because the validity of this proceeding depended entirely on the future action of the Secretary. By the very terms of the agreement the warrant was to be retained in the office, subject to the approval or rejection by the Secretary on his return to Washington. If the acting Secretary had the power, in the absence of his principal, to sign **530*]** and deliver the warrant—a *point on which we express no opinion—he did not choose to exercise it, but preferred in a matter of such consequence to leave the ultimate decision of the question to the Secretary himself. Nothing fairer than the arrangement which was made could have been expected of a subordinate officer, anxious to preserve the rights of all the parties concerned, but unwilling to take the responsibility of paying so large a claim during the temporary absence of the head of the department, and nothing better for the interest of the state could have been looked for under the circumstances. As the appropriation was not available after the 30th of June, the papers were arranged to save it, if the Secretary should on his return approve the warrant, and order it to be issued. On the contrary, if the transaction did not meet with his approbation the warrant was to be canceled and held for nought. In this state of the case, it is quite clear, that the warrant could have no effect without the Secretary's approval, and as he decided adversely as soon as his attention was called to the subject, it follows, as a necessary consequence, that this warrant, if it had any life before, ceased to have it after this decision was made, and that the allegation in the petition, that the warrant was wrongfully withheld from the relator, is not sustained.

It is insisted, however, that the court should now order the Secretary of the Treasury to deliver to the relator another warrant in place of the one thus canceled.

This proposition would present an important question, if there were money in the Treasury appropriated to pay this claim but as Congress has seen fit to withdraw the appropriation for refunding to states expenses incurred in raising volunteers during the late Rebellion, it is difficult to see on what ground it can be based. If it be conceded that the state had a right on the 30th of June, 1871, to demand of the Secretary of the Treasury, in person, payment of the amount due her under the terms of the act of July 27, 1861 (12 Stat. at L. 276) and that the claim was in such a condition of settlement that he had no power to revise it, still it is manifest that he was justified in refusing compliance with a demand **531*]** *made after that day. Congress, on the 12th of July, 1870, repealed the law on which this claim is founded. 16 Stat. at L. p. 250. It cannot be supposed that this legislation was directed against the ultimate payment of the promised indemnity, for the repealing act did not go into operation until the 1st of July, 1871. 16 Stat. at L. 250. For nearly a year, therefore, the appropriation was continued, and the constituted authorities of the states were told to hasten their action if they wished to avail themselves of the benefits of law. It was easy for them to see that if by delay, or from any other cause, they suffered the appropriation to expire without getting a settlement of their claims, that additional legislation would be necessary to furnish them relief, for the effect of the repealing law after the limitation expired, was not only to take the subject out of the control of the Secretary, but to place it within the control of Congress.

These views dispose of this case. It is proper to observe, in conclusion, that many important questions are presented in the pleadings, and were argued at the bar, on which we have purposely refrained from expressing an opinion, and which are open for consideration in any future case that may arise, where they are applicable.

The demurrer to the answer is overruled, and a peremptory writ of mandamus is denied.

Ex parte JOHN H. RUSSELL, *Petitioner*,

(See S. C. 13 Wall. 664-672.)

Power of court of claims to grant a new trial after decision of this court—mandamus to it, when issued—dismissal of appeal—when motion made.

1. The court of claims may grant a new trial after a decision by this court on appeal from it, notwithstanding the filing of the mandate of this court.
2. Where a court declines to hear a case or motion, alleging its own incompetency to do so, or that of the party to be heard, mandamus is the proper remedy.
3. Dismissal of appeal is the proper remedy where it has been improperly allowed.
4. A party wishing to move the dismissal of an appeal, need not await the arrival of the term to which the record ought to be returned.

[No. 9. Orig.]

Argued Mar. 1, 1872. Decided Mar. 25, 1872.

PETITION for writ of mandamus.

The case is stated by the court.

Mr. **W. Penn Clarke**, for petitioner:

I. Appeals from the court of claims are only authorized in cases of final judgment.

Act of Mar. 3, 1863, § 5, 12 Stat. at L. 765; act of June 25, 1868, § 2, 15 Stat. at L. 75.

The term "final judgment" used in the statutes does not mean the last act or order of the court in a cause; but that decision which determines the right of the parties, and virtually settles the litigation. 2 Burr. Law Dic. 106.

II. A motion to grant a new trial is addressed to the sound discretion of the court, and the action of the court thereon cannot be assigned as error, and will not be considered by the appellate tribunal.

Barr v. *Gratz*, 4 Wheat. 213; *Blunt* v. *Smith*, 7 Wheat, 248; *Henderson* v. *Moore*, 5 Cranch, 11; *Ins. Co.* v. *Young*, 5 Cranch, 187; *Ins. Co.* v. *Hodgson*, 6 Cranch, 206; *Wyle* v. *Coxe*, 14 How. 1.

III. The allowance of the appeal is a violation of the mandate of the Supreme Court.

The inferior court is bound to obey the mandate of the Supreme Court, and must carry it into execution.

Ex parte Sibbald v. *U. S.* 12 Pet. 488; *Ex parte Story*, 12 Pet. 339; *Skillern* v. *May*, 6 Cranch, 267; *Chaires* v. *U. S.* 3 How. 611; *West* v. *Brashear*, 14 Pet. 51; *Cook* v. *Burnley*, *ante*, 29; *Ex parte D. & P. R. R. Co.* 1 Wall. 69, 17 L. ed. 514.

IV. The 2d section of the act of June 25, 1868, above cited, does not change the law in relation to the right of appeal from the court of claims. The 1st section expressly confines the right of appeal to final judgments, and is thus in harmony with the right as conferred in the act of 1863. The 2d section only extends the time within which the government may exercise the right of appeal. The extension is: (1) "While any suit or claim is pending before or on appeal from said court" (of claims); or (2) "within two years next after final disposition of any such suit or claim." Final disposition where? In the court of claims. The act relates only to court of claims, and the limitation is twofold. If the two limitations were united by the conjunction "and," instead of the preposition "or," the section would then bear the construction contended for by the government.

Messrs. **William McMichael**, *Asst. Atty. Gen.*, **C. H. Hill**, *Asst. Atty. Gen.* and *B. H. Bristow*, *Solicitor Gen.*, for United States:

We contend that the judgment in question comes within the provisions of the law in reference to appeals from the court of claims.

Act of Mar. 3, 1863, § 5, 12 Stat. at L. 765; act of June 25, 1868, § 1, 15 Stat. at L. 75.

The appeal is not from an order of the court of claims, overruling a motion for a new trial after hearing upon its merits, but is from a judgment dismissing such a motion for want of jurisdiction. The object of the appeal is not to control the decision of the court below upon the merits of the motion, but to induce a hearing upon it.

The court of claims has never, as a court, passed upon the merits of the motion for a new trial. Its action of Dec. 13, 1871, was to grant a reargument of it. Judges Peck and Nott dissented; but this was the dissent of a minority, and so far as the rights of the defendant were concerned, the motion was in the same position as if it had never been argued; and when, more than a month later, it was reached for the reargument which the court had accorded, it was the right of the defendant to be heard upon the merits of the motion. The court might then, upon hearing, overrule the motion upon its merits, but cannot deny that hearing, and dismiss the motion for want of jurisdiction, because a minority of its number had dissented from the action of the court of Dec. 13, 1871, and when it says that they are concluded by that dissenting opinion and give to it, in the face of the record, the effect of a previous judgment, by which it is estopped, its judgment is properly subject of appeal "not for error in the exercise of their discretion, but for the error of deciding that they had no discretion to exercise."

Beach v. *Chamberlain*, 3 Wend. 366; and see, also, *McElwain* v. *Corning*, 12 Abb. 20; *Perdue* v. *Mayor, etc.* 12 Abb. 29; *Bk.* v. *Treadwell*, 34 Barb. 557; *Powell* v. *Jopling*, 2 Jones (N. C.) 400; Hill. New Tr. 575.

The mandate of the Supreme Court has reference only to the affirmance of the judgment of the court of claims of Dec. 6, 1869, and does not affect the rights of the defendant under the 1st and 2d sections of the act of June 25, 1868. By the 2d section of this act the court of claims is empowered and, as we contend, directed to grant a new trial to the defendant under certain conditions, "within two years next after the final disposition of any suit or claim." The words "final disposition" in this section do not relate alone to the action of the court of claims, but where cases are appealed to the Supreme Court, cannot be regarded as finally disposed of until this court has expressed its judgment, and the two years recited in the statutes are to be measured from that time. In the present case that limitation has not yet expired, and the motion for a new trial was not only made within it, but also within two years from the judgment of Dec. 6, 1869, in the court of claims.

Mr. Justice **Bradley** delivered the opinion of the court:

It appears from the affidavit and exhibits on which this motion was based, that in October, 1867, Russell filed a petition in the court of claims, to recover from the United States for the use of certain steamboats, and that he obtained a judgment for $41,355.33 on the 6th of December, 1869; that afterwards an appeal was taken to this court on behalf of the United States, and the judgment of the court of claims was affirmed, on the 20th of November, 1871; that, pending the appeal, the counsel for the United States applied to the court of claims for a new trial, but the *motion was not [*666 argued until after the decision of the case here and the appeal, although it was argued before the mandate was issued; that the motion for a new trial failed by an equal division of the court; that the mandate from this court was filed in the court of claims on the 12th day of December, 1871, and on the next day that court ordered a rehearing of the motion for a new trial; and that on the 29th of January, 1872, the court of claims dismissed the motion for a new trial as for want of jurisdiction, on the ground that after it was made, the mandate of the Supreme Court had been filed affirming the judgment and also on the ground that the motion had failed on the prior hearing by an equal division of the court. From this last decision the counsel for the United States appealed to this court, and the appeal was allowed by the court of claims. Thereupon the claimant moved that court to vacate the allowance of the appeal, but the court refused to do so. He now moves this court for a mandamus, to compel the court of claims to vacate its order allowing the appeal; and the grounds on which the appeal is made, are:

First, that an appeal does not lie from an order refusing a new trial, because it is not a final judgment; second, that the granting of a new trial rests in the discretion of the court; third, that the allowance of the appeal was a violation of the mandate of this court.

*We think that the court of claims [*668 erred in dismissing the motion for a new trial as for want of jurisdiction; that the counsel for the United States mistook their remedy in appealing from that decision: and that the claimant has equally mistaken his remedy in applying for a mandamus to vacate the allowance of the appeal.

The difficulty has arisen out of the anomalous

provisions of the 2d section of the act of June 25, 1868, which enacts as follows:

"That the said court of claims, at any time while any suit or claim is pending before or on appeal from said court, or within two years next after the final disposition of any such suit or claim, may, on motion, on behalf of the United States, grant a new trial in any such suit or claim, and stay the payment of any judgment therein, upon such evidence (although the same may be cumulative or otherwise) as shall reasonably satisfy said court that any fraud, wrong or injustice in the premises has been done to the United States; but, until an order is made staying the payment of a judgment, the same shall be payable, and paid as now provided by law."

The policy of this act was undoubtedly dictated by the fact that the government agents are at a great disadvantage in defending suits in the court of claims on account of their personal ignorance of the facts, and of the witnesses and evidence necessary to rebut the petitioner's case; for all which they have to depend on distant and uninterested parties, or parties whose sympathies and, perhaps, whose interests are with the claimants, whilst the claimants have had years to prepare and get up their cases and to select the most favorable proofs to sustain them. From these causes, no doubt, the government is often greatly defrauded, and claims are proved and adjudged against it which have really no just grounds, or which have long since been settled and paid. But whatever reason Congress may have had for passing the act, of its right to pass it there is no question. The erection of the court of claims itself, and the giving to parties the privilege of suing the government therein, though dictated by a sense of justice and good faith, were purely voluntary on the part of Congress; and it has the right to impose such conditions and regulations in reference to the proceedings in that court as it sees fit.

The section in question was undoubtedly intended to give the government an advantage, which, in respect to its form, is quite unusual, if not unprecedented, but which Congress undoubtedly saw sufficient reason to confer. It authorizes the court of claims, on behalf of the United States, at any time while a suit is pending before or on appeal from said court, or within two years next after the final disposition of such suit, to grant a new trial upon such evi- **669*]** dence as shall *satisfy the court that the government has been defrauded or wronged. The question is: What is meant by the final disposition of the suit from which the two years of limitation is to date? And it seems to us there is hardly room for a doubt. Looking at the words in their collocation with the previous words, it seems evident that the final determination of the suit has reference to its final determination on appeal (if an appeal is taken) or, if none is taken, then to its final determination in the court of claims. The natural meaning of the words leads to the same conclusion. The final determination of a suit is the end of litigation therein. This cannot be said to have arrived as long as an appeal is pending. Neither the existence nor the determination of the appeal interferes with the right, on the part of the government, to apply for a new trial; and, of course, the mandate from this court cannot affect it.

It has been objected that the granting of a new trial after a decision by this court is, in effect, an appeal from the decision of this court. This would be so if it were granted upon the same case presented to us. But it is not. A new case must be made; a case involving fraud or other wrong practised upon the government. It is analogous to the case of a bill of review in chancery to set aside a former decree, or a bill impeaching a decree for fraud.

We are of opinion, therefore, that the court of claims had jurisdiction to grant a new trial, notwithstanding the filing of the mandate of this court.

The other ground on which the court dismissed the motion, namely: that on the first hearing the court was equally divided was no valid reason for not proceeding after an order for a rehearing had been made.

The next question is as to the proper remedy of the counsel for the United States upon the dismissal of their motion. To us it seems clear that they should have applied to this court for a mandamus. An appeal was not the proper remedy. The court of claims did not reach the consideration of the motion for a new trial on its merits; but stopped *short of that [*670 point by reaching the conclusion that, under the circumstances, they had no jurisdiction to entertain the motion, and therefore they dismissed it. The only proper remedy, therefore, which was left to the United States was to move for a mandamus to direct the court to proceed with the motion. Where a court declines to hear a case or motion, alleging its own incompetency to do so, or that of the party to be heard, mandamus is the proper remedy. A writ of error or appeal does not lie; for what has the appellate court to review where the inferior court has not decided the case, but has refused to hear it? Where a final judgment or decree to which a writ of error or an appeal can be taken is based on a supposed want of jurisdiction, that question, as well as other questions, may be examined by the appellate court. But that, as we have shown, is not the case here.

If this view as to the proper course of proceeding is correct, it follows that the appeal taken by the counsel for the government was not well taken, and that this court would dismiss it upon proper application here.

But we cannot grant a mandamus to the court of claims to cause them to vacate their allowance of the appeal. That would be to use the writ for the purpose of compelling the inferior court to decide a case or question in a particular manner. If we should grant a mandamus in the case at all, it would be adverse to the claimants, namely: a mandamus to vacate the allowance of the appeal, and to proceed with the hearing of the motion for a new trial. Perhaps, on the principle of going back to the first error, we might do this; especially, as by their appeal, the defendants, though not in the proper mode, have asked us to do substantially the same thing by reversing the order dismissing their motion for new trial.

However, since the appeal has been actually allowed, and the court below has thus lost possession of the case, and as it is now within the control of this court, we think the more orderly and proper course would be for one or the other party to move to dismiss the appeal, and for the counsel of the United States, if they see fit,

671*] to move for a distinct *mandamus to require the court of claims to proceed. A motion to dismiss the appeal where it has been improperly allowed is an adequate remedy, and this is an additional reason why a mandamus commanding the court below to vacate the allowance thereof should not be granted.

It is suggested that a party wishing to move the dismissal of an appeal is obliged to await the arrival of the term to which the record ought to be returned, which occasions great delay. But as the case is virtually in the possession and subject to the control of this court as soon as the appeal is effectively taken, we see no reason why the appellee should not at any time when the court is in session, apply to have the appeal dismissed, provided the question can be properly presented to the court. Of course the court would not hear the motion without having the record before it; but that could be procured and presented by the appellee as is done where the appellant has failed to have the record filed in due time. In many cases the court might decline to hear the motion until the records were printed; but that could also be done by the appellee, if he desired to have a speedy hearing of the matter. Unless some unforeseen inconvenience should arise from the practice, we shall not refuse to hear a motion to dismiss before the term to which, in regular course, the record ought to be returned. It would be likely to prevent great delays and expense, and further the ends of justice.

The motion for mandamus must be denied.

If the counsel for the United States desire to dismiss their appeal and ask for a mandamus to the court of claims to proceed with the motion for a new trial, it will be granted. But probably counsel will be able, in view of the suggestions now made, to come to some mutual arrangement by which further process or delay may be avoided.

Mr. Chief Justice **Chase** dissenting:

I dissent from the opinion of the court, because I think the act of Congress does not warrant the granting of a new trial on a petition filed subsequent to an appeal and the return of the mandate from the court.

Mr Justice **Clifford** concurs in this dissent.

PETER MONGER, *Appt.*,
v.
THOMAS SHIRLEY.

Appeal dismissed as insufficient.

When the record does not show that an appeal was asked for or rendered, and the appeal bond was not approved, and there was no citation, the appeal will be dismissed.

[No. 355.]

Submitted Mar. 1, 1872. Decided Mar. 25, 1872.

APPEAL from the Circuit Court of the United States for the Eastern District of Tennessee.

This suit was instituted by Shirley on the equity side in the circuit court of the United States for the eastern district of Tennessee, Jan. 28, 1871. A decree was entered declaring the rights of the parties and ordering an account.

Mr. **John Baxter**, for appellee:

The motion to strike from the docket is based on the following grounds:

1. An appeal bond, reciting that the appellant had prayed an appeal, seems to have found its way into the file, and has been copied into the record. But no appeal was asked for or granted; there was no acceptance of the appeal bond by the court; nor is there any citation or writ of error in the case.

2. The decree is merely declaratory of the rights of the parties; it does not order a transfer of the possession of the property in controversy, or direct the payment of money; is not final, and no appeal will lie from it.

Phil. Pr. ch. 7, pp. 66-72, inclusive, and authorities there cited.

Messrs. **H. Maynard** and *T. A. R. Nelson*, for appellant:

Under the act of 1803, the appeal is a matter of right, to be allowed upon the prayer of the party complaining of the decree, and its allowance may be inferred from the state of the record.

R. Co. v. *Bradley*, 7 Wall. 575, 19 L. ed. 274; *Hudgins* v. *Kemp*, 18 How. 530, 15 L. ed. 511.

The case of *The U. S.* v. *Adams*, 6 Wall. 101, 18 L. ed. 792, relates to appeals from the court of claims under the act of Mar. 3, 1863; but it is believed that the principles announced in the opinion are of general application.

The clerk certifies that at the January term, 1871, the following proceeding was had, *viz.*: a "final decree," Jan. 30, and Feb. 10 an "appeal bond" was filed, reciting, among other things, that an appeal had that day been "prayed." Thereupon all action in the case was suspended. The July term of the court came and nothing was done; and August 15 following, he certified this "full, true, and perfect" copy of the proceedings. Does there remain reason for doubt that the appeal was "allowed?"

Mr. Chief Justice **Chase** delivered the opinion of the court:

Appeal from the circuit court of the United States for the eastern district of Tennessee.

The record does not show that an appeal was asked for or rendered. An appeal bond was filed, but there was no approval of it by the court, nor was there any citation. It is unnecessary to say more than that the appeal must be dismissed. *Brackett* v. *Brackett*, 2 How. 238; *Palmer* v. *Donner*, 7 Wall. 541, 19 L. ed. 99; *Castro* v. *U. S.* 3 Wall. 49, 18 L. ed. 163.

MAX KLINGER, *Plff. in Err.*,
v.
STATE OF MISSOURI.

(See S. C. 13 Wall. 257-263.)

State judgment, when this court will take jurisdiction over—disloyalty, when sufficient reason for discharge of juror.

*1. Where the judgment of a state court might have been based either upon a state law repugnant to the Constitution or laws of the United States, or upon some other independent ground and it appears that the court did, in fact, base it upon the latter ground, this court will not take jurisdiction of the case even though it should think the decision of the state court erroneous, and so, also, where it does not appear on which of the two grounds the judgment was, in fact, based, if the independent ground is a good and valid one of

*Headnotes by Mr. Justice BRADLEY.

itself, this court will not take jurisdiction; but if not, it will presume that the judgment was based on the state law in question, and will take jurisdiction.

2. By the Constitution of Missouri, adopted in 1865, a test oath was prescribed to be taken by public officers, jurors, etc., which this court in Cummings v. Missouri, 4 Wall. 277, 18 L. ed. 356, decided to be unconstitutional. A juror on a trial for murder, in the state court, refused to take it, but on being examined as to the reason of his refusal, he alleged not only that he had sympathized with the late Rebellion and, therefore, could not take it truthfully, but that those were his feelings still, and stronger than ever; whereupon the court discharged him. Held, that his avowed present disloyalty to the government was a sufficient cause of itself for his discharge, irrespective of his refusal to take the oath; and as it did not appear that he was discharged for the latter cause, the Supreme Court of the United States refused to take jurisdiction of the case.

[No. 106.]

Argued Feb. 15, 1872. Decided Apr. 1, 1872.

IN ERROR to the Supreme Court of the State of Missouri.

The case is stated by the court.

Messrs. **W. H. H. Russell** and *George Taylor* for plaintiff in error:

No counsel appeared for defendant in error.

Mr. Justice **Bradley** delivered the opinion of the court:

The plaintiff in error was indicted for the murder of one Henry Werder, in the county of St. Louis, in Missouri, and was convicted in October, 1869, and sentenced to be executed on the 16th of December, 1869; but having taken a bill of exceptions and a writ of error to the supreme court of Missouri, his sentence was respited. Ten errors were assigned before that court, none of which were cognizable by this court, except the last, which was that the court below erred in excluding and discharging from the jury, against the objection and consent of the defendant, one Andrew Park, for no other reason than that the said Park declined to take the oath prescribed in the 6th section of the 2d article of the Constitution of the state of Missouri.

It does not seem, from the report of this case in the Missouri Reports, that the point taken before us was raised or passed upon by the supreme court of that state, yet being found in the record, and arising out of the transactions at the trial, as exhibited in the bill of exceptions, it is our duty to examine it.

The oath referred to, which the juror, Park, declined to take, was what is known as the oath of loyalty, or test oath, prescribed by the 6th section of article 2 of the Constitution of Missouri, adopted in April, 1865.

By the 3d section of that article it was declared, in substance, that no person who had ever engaged in the Rebellion, or had manifested any sympathy therefor, in any way, should be deemed a qualified voter, or be capable of holding any office, or being a councilman, director, or trustee of any corporation, or of being a professor or teacher in any seminary of learning, or of holding property in trust for a church or congregation. By the 6th section, the one referred to, an oath was prescribed to be taken by all persons occupying or entering upon the positions referred to in section 3d, beginning as follows: "I, A. B., do solemnly swear, that I am well acquainted with the terms of the 3d section of the 2d article of the Constitution of the state of Missouri, adopted in the year 1865, and have carefully considered the same; that I have never directly or indirectly done any of the acts in said section specified; that I have always been truly and loyally on the side of the United States, against all enemies thereof, foreign and domestic, etc., etc." By the 11th section of the same article it is declared "that every court, in which any person shall be summoned to serve as a grand or petit juror, shall require him, before he is sworn as a juror, to take the said oath in open court; and no person, refusing to take the same, shall serve as a juror." By the 12th section—"If any person shall declare that he has conscientious scruples against taking an oath, or swearing in any form, the said oath may be changed into a solemn affirmation, and be made by him in that form."

The plaintiff in error insists that this oath was unconstitutional, as declared by this court in the case of *Cummings* v. *The State of Missouri*, 4 Wall. 277, 18 L. ed. 356, and that the imposition of it upon the juror, in obedience to the state Constitution, against the plaintiff's protest, was an invasion of his rights as well as those of the juror; that to exclude the juror because he declined to take the oath was to decide in favor of the validity of a state law repugnant to the Constitution and laws of the United States, etc., and hence that this court has jurisdiction to review the decision of the supreme court of Missouri.

Conceding, for the sake of argument, all this to be true, still, before we enter upon that duty it is necessary to look carefully at the record and see whether the plaintiff's allegation is true, that the court below excluded the juror for no other reason than that he declined to [*262 take the oath referred to. For we do not assume jurisdiction to review the judgment of a state court, unless it clearly appears from the record that a question has been raised and passed upon which is within the cognizance of this court, as provided for in the 25th section of the judiciary act, 1 Stat. at L. 73, or the corresponding act passed February 5, 1867, 14 Stat. at L. 385. If such a question was really raised and passed upon in this case, it is somewhat singular that no notice is taken of it in the report of the case before referred to.

The only portion of the bill of exceptions relating to this subject is the first paragraph, which is as follows: "Be it remembered that this cause coming on to be heard and tried in said court, the marshal proceeded to call the jurors summoned in the same, and whilst impaneling the jury, it was found that one of said jurors, named Andrew Park, refused to take the oath of loyalty prescribed by the Constitution of this state; whereupon the said Park was duly sworn to answer such questions as might be propounded to him, and being asked by the court why he refused to take said oath, he stated and declared that during the late Rebellion he was a sympathizer with the Confederate cause, and earnestly desired its success; that these were his opinions and sentiments then; that he thinks so stronger now than he did then; that he was born in the

south; that his heart was with the southern cause, and that for these reasons he could not conscientiously take the proffered oath. Thereupon the court, of its own motion, discharged the said juror, against the consent and objection of the defendant; to which action of the court the defendant excepted."

Now, it does not clearly appear from this statement there made that the juror was discharged "for no other reason than that he declined to take the oath." The reasons assigned by him for not taking the oath were twofold: first, that he was a rebel in his sympathies during the war; and, second, that he was so still, and even stronger than ever. A man who makes such an avowal as that, thus manifesting a settled hostility to his country and its government, may well have been deemed by the court, irrespective of his refusal to take the oath, an unfit person to act as a juryman, and a participant in the administration of the laws.

Had the juror refused to take the oath simply because he had sympathized with or aided the Rebellion during the war, and had he been discharged on that account, then the questions would have fairly arisen of which this court could take cognizance. The repugnancy of the test oath to President Johnson's proclamation of amnesty, and to the prohibition against *ex post facto* laws, etc., would have been fairly brought into question. But as he also refused to take it because he was still a more bitter rebel than ever, the avowal of such a feeling was inconsistent with the upright and loyal discharge of his duties, as much so as if he had expressed his disbelief in the obligation of an oath, and had declined to take it for that reason. Surely, if he had done that, there could have been no doubt that his discharge was justifiable, whatever view might be taken of the constitutionality of the test **263***] oath. *It certainly would have been in the discretion of the court, if not its duty, to discharge him. And so we think it was in this case.

The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the state court based its judgment on the law raising the Federal question, and this court will then take jurisdiction. *Magwire* v. *Tyler*, 8 Wall. 650, 19 L. ed. 320; *Neilson* v. *Lagow*, 12 How. 110; *R. Co.* v. *Rock*, 4 Wall. 177, 18 L. ed. 381; *R. Co.* v. *McClure*, 10 Wall. 511, 19 L. ed. 997; *Ins. Co.* v. *Treas. ante*, 112; *Crowell* v. *Randell*, 10 Pet. 368; *Suydam* v. *Williamson*, 20 How. 427, 15 L. ed. 978; *Williams* v. *Oliver*, 12 How. 123.

In this case it appears that the court below had a good and valid reason for discharging the juror, independent of his refusal to take the test oath; and it does not appear but that he was discharged for that ground. It cannot, therefore, with certainty, be said that the supreme court of Missouri did decide in favor of the validity of the said clause of the state Constitution, which requires a juror to take the test oath.

Therefore the writ of error must be dismissed.

SOLOMON G. KITCHEN, *Plff. in Err.*,
v.
HENRY H. BEDFORD and Randolph Webber.

(See S. C. 13 Wall. 413–418.)

Agreement to purchase lands with bonds—effect of — restoration.

1. Where a person receives a certain sum in bonds and coupons, which said sum he promised to expend in purchase of lands at $5 per acre, he is bound to purchase lands with them at their face value.
2. His selling them at six cents on the dollar and investing the proceeds in lands at $5 an acre is not a fulfilment of the contract.
3. The purchaser of them, knowing the circumstances, is bound to restore the bonds to the original owner on demand.

[No. 103.]

Argued Feb. 8, 1872. Decided Apr. 1, 1872.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

The case is stated by the court.

Messrs. **J. M. Carlisle** and **J. D. McPherson** for plaintiff in error.

Mr. **Thomas T. Gantt** for defendants in error.

Mr. Justice **Bradley** delivered the opinion of the court:

This was an action of trover, brought by the plaintiff in error, a citizen of Arkansas, against the defendants in error, and one Daniel B. Miller, for the conversion of 119 bonds of the Cairo & Fulton Railroad Company, for $1,000 each, dated October 1, 1859, and payable in New York in 1882, with semi-annual interest, represented by interest warrants annexed to the bonds. The conversion is laid on the 1st of December, 1866. The defendants pleaded "not guilty." The plaintiff having entered a *non pros.* as to Miller, and a jury being waived, the cause was tried by the court in May, 1870, and *judgment rendered for [***414** the defendant. A bill of exceptions was taken, however, from which it appears that on the trial, evidence was given tending to establish the following facts: The plaintiff, on the 16th of March, 1866, being owner of the bonds described in the declaration, gave them to his wife and put them in the hands of one W. C. Rayburn, on the terms and for the purposes

set out in the following writing, which Rayburn executed under seal, to wit:

"Walcot, Ark., March 16, 1866.

"Received from Martha Kitchen, the sum of $119,000 in bonds of the Cairc & Fulton Railroad Company of Missouri; and I also received $50,405 of coupons or interest warrants due and owing by said company amounting in the aggregate to the sum of $169,405, which said sum I promise to expend in the purchase of lands from John Moore, John Wilson, and Albert G. Waterman, trustees of the said Cairo & Fulton Railway Company of Missouri, at or near the average price of $5 per acre, taking the deeds in my own name; and I further promise to sell all the land purchased as aforesaid as soon as possible, at such prices as the said Kitchen may direct, and if I should fail to sell all said lands as soon as said Kitchen may desire then I promise to sell the same at public auction whenever so directed by the said Kitchen, and after deducting the expenses of stamps and the necessary traveling expenses, to pay unto the said Martha Kitchen or her legal representatives seven eighths of all the money that I may sell the said lands for.

"Given under my hand and seal the date above written.

"W. C. Rayburn." (Seal.)

Rayburn, having received the bonds for the purpose thus indicated, in December, 1866, sold and delivered them to the defendant, Bedford, for $10,000; and he sold and delivered them to defendant, Webber, who afterwards sold them for $26,340; each knowing, when purchasing, the purposes for which Rayburn held **415***] them, as expressed in the writing. *A demand for the bonds and coupons was made by the plaintiff of the defendants before the suit was brought.

The court declared that on this evidence the plaintiff could not recover, and the plaintiff excepted.

Supposing the facts upon the evidence of **417***] which the court *below declared that the plaintiff could not recover to have been sufficiently proven, it seems to us that the court erred in taking the view of the case which it did. Rayburn had possession of the bonds for the purpose of purchasing therewith, for the benefit of Mrs. Kitchen, lands of the railroad company which had issued them, "at or near the average price of $5 per acre." Instead of doing this, as he was bound, he sold them to Bedford for six cents on the dollar; and Bedford sold them to Webber at a hundred and fifty per cent advance, both knowing the object for which Rayburn held the bonds. A clearer case of fraudulent breach of trust it is difficult to conceive, and the defendants being *participes criminis* were bound to deliver the bonds and coupons to the plaintiff when he demanded them.

It is contended that by the fair construction of the paper, Rayburn was to sell the bonds for what he could get and invest the proceeds in lands, and *non constat* that he has not done so; or at all events, the defendants as purchasers from Rayburn, have good title to the bonds, because he was invested with a trust to sell them. But the paper does not so read. It declares that Rayburn had received "the sum of $119,000 in bonds of the Cairo & Fulton R. Co., and 50,405 of coupons, etc., amounting in the aggregate to the sum of $169,405, which said sum I promise to expend in the purchase of lands, etc., at or near the average price of $5 per acre." In other words, he was to purchase lands with the bonds and coupons at $5 per acre, not with the proceeds of them, after being sold at a nominal price. He was to procure an acre for every $5 of the bonds and coupons. That was the trust which he assumed. If he was unable to perform it, he should have returned the bonds, and not have sold them at six cents on the dollar. The defendants, when they bought them under these circumstances, did so at their peril, and were bound to restore the bonds to the plaintiff. *Having refused to do this, they were [***418** liable to him for the fair value of the bonds at the time of the demand.

Mrs. Kitchen was not a necessary party to the suit. The bonds were never hers in law. By the laws of Arkansas, a husband cannot legally make a gift to his wife during the marriage. He could not do so at the common law and the statute of Arkansas which enables a married woman to take and hold property in her own right, expressly provides that no conveyance from a man to his wife, directly or indirectly, shall entitle her to any benefits or privileges of the act. Digest of Statutes of Ark. p. 765, tit. *Married Women.*

Perhaps he might have made an equitable gift for her benefit. But in this case, the husband had not parted with the legal title to the bonds, and had a right to call any person to account who unlawfully converted them.

The judgment must be reversed, with directions to the Circuit Court to award a venire de novo.

Mr. Justice **Strong**, dissenting:

I am unable to construe the contract upon which the plaintiff relies as it is construed by a majority of the court and for that reason, among others, I dissent from the judgment.

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*JOHN BLYEW and George Kennard, [***581**
Pltfs. in Err.,
v.
UNITED STATES.

(See S. C. 13 Wall. 581-601.)

Construction of act—criminal jurisdiction—witnesses.

1. A criminal prosecution for a public offense is not a cause "affecting" persons who may be called to testify therein, within the meaning of the act of Congress of Apr. 9, 1866.
2. Under such act, the United States circuit court had no jurisdiction of the crime of murder committed in the district of Kentucky, merely because two persons who witnessed the murder were citizens of the African race, and for that reason incompetent, by the law of Kentucky, to testify in the courts of that state.
3. Witnesses in a criminal prosecution are not persons affected by the cause, within the meaning of that act.

[No. 35.]

Argued Feb. 21, 1872. Decided Apr. 1, 1872.

IN ERROR to the Circuit Court of the United States for the District of Kentucky.

The case is stated by the court.

Messrs. **J. S. Black** and **Isaac Caldwell**, for plaintiffs in error:

(Mr. Caldwell was employed by the governor of Kentucky, pursuant to a resolution of the legislature of that state, to argue especially the constitutionality of the civil rights act. As that question was not passed upon by the court, his argument on that point is omitted.)

The indictment alleges certain facts, from which it is insisted that the court must infer that some of the requisite persons are affected by the cause. That is: (1) That the witnesses or some of them were persons whose right to give evidence is denied in the state courts, in contravention of the act; or (2) that the person slain was one of that class. We deny that either the witnesses or the deceased are affected by this cause, and the case of *U. S.* v. *Ortega*, 11 Wheat. 467 is conclusive on this point.

We not only insist that the act does not confer jurisdiction, on the ground that a negro may be an important witness in the case, but also that such was not the intention of the act. If this ground gave jurisdiction, white citizens could sue other white citizens in the United States courts in all forms of action, for any sum large or small, and give jurisdiction by alleging that a citizen of the African race, whose right to give evidence in the state courts was denied, was a material witness for the plaintiff and in all these cases a final appeal would lie to this court. Again, in all prosecutions, whether for misdemeanors or felonies, against white citizens, a like allegation would give like jurisdiction with the like right of appeal.

But we do believe that Congress intended to confer the jurisdiction upon the United States courts in all cases affecting persons who are denied, in the state courts, any of the rights enumerated in the 1st section of the act. That is: all causes, civil and criminal, in which that class of persons has a "concern, either in the event of the cause or in the costs attending it;" and if they have no such concern, then they are not affected, and necessarily the jurisdiction does not attach.

The manifest purpose of that portion of the 3d section, now under consideration, was to give to the class of persons intended to be protected thereby, the right of trial in the United States courts, in all cases in which they had a concern, and to take away state jurisdiction in such cases, so that persons of the class in question should, in all civil cases in which they are parties in interest, and in all penal and criminal prosecutions against them, have the right of trial in courts in which they stood equal before the law with the white citizen. That they should not be tried, in cases of criminal charges against them before courts in which the white citizen can testify against them, whilst they are denied the right to testify against the white citizen. That they should not have their property rights determined in courts where, if in litigation with white citizens, the white witnesses of the latter can give evidence, while the negro witnesses of the party of African descent cannot give evidence. This, in our opinion, is the true construction of the clause, and that the jurisdiction given is exclusive and without regard to the grade of the offense or the amount in controversy.

If this is the true construction, it follows that no jurisdiction attached in the case against Blyew and Kennard, and that they were unlawfully taken from the state courts, and unlawfully tried in the United States circuit court for the district of Kentucky.

Messrs. **Akerman,** *Atty. Gen.*, and **B. H. Bristow,** *Solicitor Gen.*, for defendant in error:

It has been said that this was not "a cause . . . affecting persons who are denied or cannot enforce, in the state or locality where they may be, any of the rights secured to them by the 1st section of this act," and the case of *The U. S.* v. *Ortega*, 11 Wheat. 467, is relied upon in support of this position. It is to be observed that the word "cases" is used in the clause of the Constitution, the construction of which was before this court in the *Ortega Case*, whereas the 3d section of the act now under consideration employs the phrase "causes, civil and criminal." This is broader language and, taken in connection with the title and subsequent sections of the act, must be understood in the sense of causes in civil action and causes of criminal prosecution. It cannot be said that in no case is anyone affected by a cause, who is not a party to the legal proceeding growing out of such cause. The question whether or not one is affected by the cause, always depends upon the circumstances of the particular case. This court has recognized the correctness of this proposition in the case of *Osborn* v. *Bk.* 9 Wheat. 854, where it is said that, "If the suit affect a foreign minister, it must be dismissed; not because he is a party to it, but because it affects him." This court can take cognizance of all cases affecting foreign ministers and, therefore, jurisdiction does not depend upon the party named in the record.

It has been insisted that none are affected in criminal cases, other than the state and the accused. Hence that, under this section of the act of Apr. 9, 1866, only colored persons can be prosecuted under its provisions. The history of the times, the title of the act itself, the subsequent sections of the act, the object to be accomplished, all forbid this construction of the 3d section. At the time of the passage of this act, there was no state in which ample provision did not exist by law for the trial and punishment of persons of color, for all possible offenses; nor was there any locality in which there existed any difficulty in enforcing the law against them. Congress was not called upon to pass laws to secure the punishment of colored persons. No necessity existed for the exercise of such power by Congress.

Subsequent sections of this act invoke the powers of the Freedmen's Bureau, an institution, the history of which is well known to this court; one confessedly designed for the amelioration and protection of colored persons. It has also made it the special duty of marshals, district attorneys and deputies, to institute proceedings at the expense of the United States against all persons violating the provisions of this act, and requires the circuit courts of the United States to increase the number of commissioners, giving to such commissioners power to appoint officers to execute their processes, which is declared by the act itself (§ 4) to be done "with a view to afford-

set out in the following writing, which Ra: burn executed under seal, to wit:

"Walcot, Ark., March 16, 1866.

"Received from Martha Kitchen, the sum ($119,000 in bonds of the Cairc & Fulton Rai road Company of Missouri; and I also receive $50,405 of coupons or interest warrants du and owing by said company amounting in tl aggregate to the sum of $169,405, which sai sum I promise to expend in the purchase (lands from John Moore, John Wilson, and A bert G. Waterman, trustees of the said Cai & Fulton Railway Company of Missouri, a or near the average price of $5 per acre, takin the deeds in my own name; and I furthe promise to sell all the land purchased as afor said as soon as possible, at such prices as tl said Kitchen may direct, and if I should fa to sell all said lands as soon as said Kitche may desire then I promise to sell the same a public auction whenever so directed by tl said Kitchen, and after deducting the expens of stamps and the necessary traveling e: penses, to pay unto the said Martha Kitche or her legal representatives seven eighths of a the money that I may sell the said lands fo:

"Given under my hand and seal the dat above written.

"W. C. Rayburn." (Seal.)

Rayburn, having received the bonds for th purpose thus indicated, in December, 186(sold and delivered them to the defendant, Bec ford, for $10,000; and he sold and delivere them to defendant, Webber, who afterward sold them for $26,340; each knowing, when pu chasing, the purposes for which Rayburn hel 415*] them, as expressed in the writing. *. demand for the bonds and coupons was mad by the plaintiff of the defendants before th suit was brought.

The court declared that on this evidenc the plaintiff could not recover, and the plair tiff excepted.

Supposing the facts upon the evidence c 417*] which the court *below declared that th plaintiff could not recover to have been suff ciently proven, it seems to us that the cour erred in taking the view of the case which i did. Rayburn had possession of the bonds fo the purpose of purchasing therewith, for th benefit of Mrs. Kitchen, lands of the railroa company which had issued them, "at or near th average price of $5 per acre." Instead of doin this, as he was bound, he sold them to Bedfor for six cents on the dollar; and Bedford sol them to Webber at a hundred and fifty per cen advance, both knowing the object for whic Rayburn held the bonds. A clearer case c fraudulent breach of trust it is difficult to cor ceive, and the defendants being *participe criminis* were bound to deliver the bonds an coupons to the plaintiff when he demande them.

It is contended that by the fair constructio of the paper, Rayburn was to sell the bonds fo what he could get and invest the proceeds i lands, and *non constat* that he has not don so; or at all events, the defendants as pu chasers from Rayburn, have good title to th bonds, because he was invested with a trus to sell them. But the paper does not so read It declares that Rayburn had received "the sun of $119,000 in bonds of the Cairo & Fulton R

(Mr. Caldwell was employed by the governor of Kentucky, pursuant to a resolution of the legislature of that state, to argue especially the constitutionality of the civil rights act. As that question was not passed upon by the court, his argument on that point is omitted.)

The indictment alleges certain facts, from which it is insisted that the court must infer that some of the requisite persons are affected by the cause. That is: (1) That the witnesses or some of them were persons whose right to give evidence is denied in the state courts, in contravention of the act; or (2) that the person slain was one of that class. We deny that either the witnesses or the deceased are affected by this cause, and the case of *U. S.* v. *Ortega*, 11 Wheat. 467 is conclusive on this point.

We not only insist that the act does not confer jurisdiction, on the ground that a negro may be an important witness in the case, but also that such was not the intention of the act. If this ground gave jurisdiction, white citizens could sue other white citizens in the United States courts in all forms of action, for any sum large or small, and give jurisdiction by alleging that a citizen of the African race, whose right to give evidence in the state courts was denied, was a material witness for the plaintiff and in all these cases a final appeal would lie to this court. Again, in all prosecutions, whether for misdemeanors or felonies, against white citizens, a like allegation would give like jurisdiction with the like right of appeal.

But we do believe that Congress intended to confer the jurisdiction upon the United States courts in all cases affecting persons who are denied, in the state courts, any of the rights enumerated in the 1st section of the act. That is: all causes, civil and criminal, in which that class of persons has a "concern, either in the event of the cause or in the costs attending it;" and if they have no such concern, then they are not affected, and necessarily the jurisdiction does not attach.

The manifest purpose of that portion of the 3d section, now under consideration, was to give to the class of persons intended to be protected thereby, the right of trial in the United States courts, in all cases in which they had a concern, and to take away state jurisdiction in such cases, so that persons of the class in question should, in all civil cases in which they are parties in interest, and in all penal and criminal prosecutions against them, have the right of trial in courts in which they stood equal before the law with the white citizen. That they should not be tried, in cases of criminal charges against them before courts in which the white citizen can testify against them, whilst they are denied the right to testify against the white citizen. That they should not have their property rights determined in courts where, if in litigation with white citizens, the white witnesses of the latter can give evidence, while the negro witnesses of the party of African descent cannot give evidence. This, in our opinion, is the true construction of the clause, and that the jurisdiction given is exclusive and without regard to the grade of the offense or the amount in controversy.

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ing reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race, or color, or previous condition of slavery or involuntary servitude, except as to punishment for crime, whereof the party shall have been duly convicted."

The 9th section of the act authorizes the President, or such person as he may empower for that purpose, to employ the land and naval forces of the United States or militia, whenever necessary, to prevent a violation and enforce the due execution of this act.

Can it be seriously contended that all this legislation had no other object than the punishment of colored persons charged with crime for whose punishment sufficient provision had already been made by the laws of the various states? It is obvious that the intention of Congress was to create equality of civil rights throughout the country. In some of the states colored persons (notwithstanding they had been emancipated, made freemen by an act of national sovereignty) were denied the right to testify against white persons who had committed crimes affecting colored persons.

This was a substantial denial of justice. Congress met this evil by giving to colored persons the same right to testify that is enjoyed by white citizens; and in order to enforce this grant of right, gave jurisdiction to the courts of the United States of all causes, civil and criminal, affecting them.

This, then, is a remedial statute, and should be so construed as to effectuate the purpose and intention of Congress. Its purpose is to remedy an existing mischief, and to give more speedy remedy for a right. Bac. Abr., tit. *Statutes*, 251.

Even a penal statute must not be construed so strictly as to defeat the obvious intention of the Legislature.

U. S. v. *Wiltberger*, 5 Wheat. 96; *U. S.* v. *Morris*, 14 Pet. 475; *Com.* v. *Loring*, 8 Pick. 374; *U. S.* v. *Hartwell*, 6 Wall. 385, 18 L. ed. 830; *U. S.* v. *Kirby*, 7 Wall. 482, 19 L. ed. 278; 1 Bish. Cr. L. 236.

If the true construction of the 3d section of the act in question be not as herein contended for, it is difficult, if not impossible, to perceive what Congress intended in the enactment of said section.

Mr. Justice **Strong** delivered the opinion of the court:

The plaintiffs in error, defendants below, were indicted in the circuit court for the district of Kentucky, for the murder within that district of a colored woman named Lucy Armstrong. The indictment contained three counts, all of them charging the murder in the usual form of indictments for that offense, and with sufficient certainty. But in order to show jurisdiction in the circuit court of the United States, an averment was made in the first count that the said Lucy Armstrong was a citizen of the United States, having been born therein, and not subject to any foreign power; that she was of the African race and above the age of seventy-five years; that Blyew and Kennard (the persons indicted) were white persons, each of them at the time of the alleged killing and murder above the age of eighteen years; that the said killing and murder done and committed as averred, was seen and witnessed by one Richard Foster and Laura Foster, citizens of the United States, having been born therein and not subject to any foreign power, both of the African race; and that the said Lucy Armstrong, Richard Foster, and Laura Foster were then and there denied the right to testify against the said Blyew and Kennard, or either of them, concerning the said killing and murder, in the courts and judicial tribunals of the state of Kentucky, solely on account of their race and color. The second and third counts contain substantially the same averments.

To this indictment the defendants pleaded specially, that before it was found, they had been in custody of the authorities *of the state [*584 and, after examination, had been held to answer for the killing of Lucy Armstrong, which was the same offense as that charged in the circuit court; but on demurrer, the plea was overruled, and the case went to trial upon the issues found by a replication to the plea of not guilty. During the progress of the trial, the court sealed several exceptions to the admission of evidence offered by the United States, and a verdict of "guilty" having been returned, a motion was made in arrest of judgment, which the court also overruled. The ground alleged for this motion was, that "the facts stated in the indictment did not constitute a public offense within the jurisdiction of the court." There are thus three questions presented by the record. They are:

First, whether the circuit court had jurisdiction of the offense charged in the indictment; second, whether the court erred in sustaining the demurrer to the defendant's special plea; third, whether the evidence, to which the defendants objected, should have been received.

Addressing ourselves to the first of these questions, it may be remarked that clearly the circuit court had no jurisdiction of the crime of murder committed within the district of Kentucky, unless it was conferred by the 3d section of the act of Congress of April 9, 1866, entitled "An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication." The first of that act declared all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, to be citizens of the United States, and it enacted that "such citizens, of every race and color, shall have the same rights in every state and territory in the United States to make and enforce contracts; to sue, to be parties and give evidence; to inherit, to purchase, lease, sell, hold and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding."

The 2d section enacted "that any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject or cause to be subjected any inhabitant of any state or territory to the deprivation of any right, secured or protected by the act, or to different punishment, pains, or penalties on account of such

person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished" as therein prescribed.

Then followed the 3d section which contains the enactment "that the district courts of the United States, within their respective districts, shall have, exclusively of the court of the several states, cognizance of all crimes and offenses committed against the provisions of this act, and also concurrently with the circuit court of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the state or the locality where they may be, any of the rights secured to them by the 1st section of the act." The section then provided for removal into the Federal courts, of any suit or prosecution, civil or criminal, which had been or might thereafter be commenced against any such person for any cause whatever.

It must be admitted that the crimes and offenses of which the district courts are, by this section, given exclusive jurisdiction, are only those which are against the provisions of the act, or those enumerated in the 2d and 6th sections, and that the "causes, civil and criminal," over which jurisdiction is, by the 2d clause of the section, conferred upon the district and circuit courts of the United States concurrently, are other than those of which exclusive jurisdiction is given to the district court. They **591***] are described *as causes "affecting persons who are denied, or cannot enforce in the courts or judicial tribunals of the state, or locality, where they may be, any of the rights secured to them by the 1st section of the act.

Was, then, the prosecution, or indictment, against these defendants a cause affecting any such person or persons? If it was, then by the provisions of the act it was within the jurisdiction of the court; and if it was not, that court had no jurisdiction.

It was, the record shows, an indictment for the murder of Lucy Armstrong, a citizen of the United States of the African race, and it contained an averment that other citizens of the United States of the same race, witnessed the alleged murder. It contained also an averment that those other persons, namely: Richard Foster and Laura Foster, as well as the deceased Lucy Armstrong, were, on account of their race and color, denied the right to testify against the defendants, or either of them, of and concerning the killing and murder in the courts and judicial tribunals of the state of Kentucky.

We are thus brought to the question whether a criminal prosecution for a public offense is a cause "affecting" within the meaning of the act of Congress, persons who may be called to testify therein. Obviously the only parties to such a cause are the government and the persons indicted. They alone can be reached by any judgment that may be pronounced. No judgment can either enlarge or diminish the personal, relative, or property rights of any others than those who are parties. It is true there are some cases which may affect the rights of property of persons who are not parties to the record. Such cases, however, are all of a civil nature, and none of them even touch rights of persons. But an indictment prosecuted by the government against an alleged criminal, is a cause in which none but the parties can have any concern, except what is common to all the members of the community. Those who may possibly be witnesses, either for the prosecution or for the defense, are no more affected by it than is every other person, for anyone *may be called as a witness. It will not [***592** be thought that Congress intended to give to the district and circuit courts jurisdiction over all causes both civil and criminal. They have expressly confined it to causes affecting certain persons. And yet, if all those who may be called as witnesses in a case, and who may be alleged to be important witnesses, were intended to be described in the class of persons affected by it, and if the jurisdiction of the Federal courts can be invoked by the assertion that there are persons who may be witnesses, but who, because of their race or color, are incompetent to testify in the courts of the state, there is no cause either civil or criminal of which those courts may not at the option of either party take jurisdiction. The statute of Kentucky which was in existence when this indictment was found, and which denied the right of Richard Foster and Laura Foster to testify in the courts of the state, enacted as follows: "That a slave, negro, or Indian shall be a competent witness in the case of the commonwealth for or against a slave, negro, or Indian, or in a civil case to which only negroes or Indians are parties, but in no other case." It will be observed that this statute prohibits the testimony of colored persons either for or against a white person in any civil or criminal cause to which he may be a party. If, therefore, they are persons affected by the cause, whenever they might be witnesses were they competent to testify, it follows that in any suit between white citizens, jurisdiction might be taken by the Federal courts whenever it was alleged that a citizen of the African race was or might be an important witness. And such an allegation might always be made. So in all criminal prosecutions against white persons a similar allegation would call into existence the like jurisdiction. We cannot think that such was the purpose of Congress in the statute of April 9, 1866. It would seem rather to have been to afford protection to persons of the colored race by giving to the Federal courts jurisdiction of cases, the decision of which might injuriously affect them either in their personal, relative, or property rights, whenever they are denied in the state courts any of the rights *mentioned and assured to them in the [***593** 1st section of the act.

Nor can it be said that such a construction allows little or no effect to the enactment. On the contrary, it concedes to it a far reaching purpose. That purpose was to guard all the declared rights of colored persons, in all civil action to which they may be parties in interest, by giving to the district and circuit courts of the United States jurisdiction of such actions whenever in the state courts any right enjoyed by white citizens is denied them. And in criminal prosecutions against them, it extends a like

protection. We cannot be expected to be ignorant of the conditions of things which existed when the statute was enacted, or of the evils which it was intended to remedy. It is well known that in many of the states, laws existed which subjected colored men convicted of criminal offenses to punishments different from and often severer than those which were inflicted upon white persons convicted of similar offenses. The modes of trial were also different, and the right of trial by jury was sometimes denied them. It is also well known that in many quarters prejudices existed against the colored race, which naturally affected the administration of justice in the state courts, and operated harshly when one of that race was a party accused. These were evils, doubtless, which the act of Congress had in view, and which it intended to remove. And so far as it reaches, it extends to both races the same rights, and the same means of vindicating them.

In view of these considerations we are of opinion that the case now before us is not within the provisions of the act of April 9, 1866, and that the circuit court had not jurisdiction of the crime of murder committed in the district of Kentucky, merely because two persons who witnessed the murder were citizens of the African race, and for that reason incompetent by the law of Kentucky to testify in the courts of that state. They are not persons affected by the cause.

We need hardly add that the jurisdiction of the circuit court is not sustained by the fact averred in the indictment that Lucy Armstrong, the person murdered, was a citizen of **594*]** *the African race, and for that reason denied the right to testify in the Kentucky courts. In no sense can she be said to be affected by the cause. Manifestly the act refers to persons in existence. She was the victim of the frightful outrage which gave rise to the cause, but she is beyond being affected by the cause itself.

The conclusions to which we have come are sustained, we think, fully by the judgment of this court in *United States* v. *Ortega*, 11 Wheat. 467, in which the opinion was delivered by Mr. Justice Wasnington. It was the case of an indictment in the circuit court for offering violence to the person of the Spanish minister contrary to the law of nations and the act of Congress. The 2d section of the 3d article of the Constitution ordains that the judicial power of the United States shall extend to all cases affecting ambassadors, other public ministers, and consuls, and that in all cases affecting ambassadors, other public ministers, and consuls, the Supreme Court shall have original jurisdiction. The defendant was convicted, and on motion in arrest of judgment, the question was presented to this court (and it was the only one decided) whether it was a case affecting an ambassador, or other public minister. The court unanimously ruled that it was not. The violence out of which the indictment grew was committed upon a public minister, and he was a competent and material witness. But he was ruled to be not a person affected by the case, because it was a public prosecution instituted and conducted by and in the name of the United States, and for the purpose of vindicating the laws of nations and that of the United States, in the person of a public minister, offended by an assault committed on him by a private individual. It is, said the court, a case, then, which affects the United States and the individual whom they seek to punish; but one in which the minister himself, although he was the person injured by the assault, has no concern, either in the event of the prosecution or in the costs attending it. What was meant by the phrase, "a case affecting." *was thus early defined; and we are [***595** bound to presume that Congress, when they used the same word "affecting" in the act of 1866, intended to have it bear its defined meaning. This is according to a well-known rule of construction.

An attempt has, however, been made to discriminate between the words "case affecting" as found in the constitutional provision, and the words "cause affecting" contained in the act of Congress. We are unable to perceive any substantial ground for a distinction. The words "case" and "cause" are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in court; a suit or action. Surely no court can have jurisdiction of either a case or a cause until it is presented in the form of an action. We regard, therefore, *The United States* v. *Ortega* as an authority directly in point to the effect that witnesses in a criminal prosecution are not persons affected by the cause. It necessarily results from this that jurisdiction of the offense for which these defendants were indicted, was not conferred upon the circuit court by the act of Congress.

It is unnecessary, therefore, to consider the other questions presented by the record.

The judgment of the Circuit Court is reversed.

The Chief Justice was not present at the argument, and he has taken no part in the decision.

Mr. Justice **Bradley**, dissenting:

I dissent from the opinion of the court in this case for the following reasons:

The case was an indictment found in the circuit court of the United States for the district of Kentucky, for October term, 1868, charging the defendants (the now plaintiffs in error) with the murder of Lucy Armstrong, a citizen of the United States, of the Arrican race, the defendants being white persons, and the witnesses of the murder being of the African race, having no right to testify against the defendants in a court of Kentucky by the laws thereof, said right being denied them on account of their race and color. The evidence in the case demonstrated the fact that the defendants went to the cabin of Jack Foster, a colored man, in the evening, and, after sitting a while, coolly proceeded to kill the family, and succeeded in killing Lucy Armstrong, a blind woman over ninety years old, Foster's mother-in-law; also Jack Foster and his wife and their son Richard; two of the children escaped and were witnesses in the cause. One of the defendants was heard to say to the other, a short time previous to the occurrence, that he thought that there would soon be another war about the niggers; that when it did come he intended to go to killing niggers; and he was not sure that he would not begin his work of killing them before the war should actually commence.

By the laws of Kentucky at the time the indictment was found, negroes could not testify against white persons. The indictment was

found and prosecuted under the civil rights bill, passed April 9, 1866.

The bill referred to was primarily intended to carry out, in all its length and breadth, and to all its legitimate consequences, the then recent constitutional amendment abolishing slavery in the United States, and to place persons of African descent on an equality of rights and privileges with other citizens of the United States. To do this effectually it was not only [596*] necessary *to declare this equality and impose penalties for its violation, but, as far as practicable, to counteract those unjust and discriminating laws of some of the states by which persons of African descent were subjected to punishments of peculiar harshness and ignominy, and deprived of rights and privileges enjoyed by white citizens.

This general scope and object of the act will often furnish us a clue to its just construction. It may be remarked, however, that the terms of the act are broad enough to embrace other persons as well as those of African descent, but that is a point not now in question in this case.

The 1st section declares that all persons born in the United States, not subject to a foreign power, and not including untaxed Indians, are citizens of the United States, and that such citizens, of every race and color, without regard to previous condition of slavery, shall have the same right, in every state and territory in the United States, to make and enforce contracts; to sue, be parties, and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law or custom to the contrary notwithstanding.

This is the fundamental section of the act. All that follows is intended to secure and vindicate, to the objects of it, the rights herein declared, and to establish the requisite machinery for that end.

This section is in direct conflict with those state laws which forbade a free colored person to remove to or to pass through the state, from having firearms, from exercising the functions of a minister of the gospel, and from keeping a house of entertainment; laws which prohibited all colored persons from being taught to read and write, from holding or conveying property, and from being witnesses in any case where a white person was concerned; and laws which subjected them to cruel and ignominious punishments not imposed upon white persons, such [597*] as to be sold as vagrants, to *be tied to the whipping post, etc., etc. All these, and all other discriminations, were intended to be abolished and done away with.

The 2d section makes it a misdemeanor, punishable by fine or imprisonment, for any person, under color of any law or custom, to deprive any inhabitant of a state or territory of any right secured by the act, or to subject him to different punishment or penalties on account of his having been a slave, or by reason of his color or race, than is prescribed for the punishment of white persons.

The 3d section proceeds to confer upon the district courts of the United States, exclusive of the state courts, jurisdiction to try these offenses, and then follows the clause under which the indictment in the present case was found, declaring that the said district courts shall also have cognizance, concurrently with the circuit courts of the United States, "of all causes, civil and criminal, affecting persons who are denied, or cannot enforce in the courts or judicial tribunals of the state, or locality where they may be, any of the rights secured to them by the 1st section," with right of removal of causes from state courts, etc. It is evident that the provisions of the 2d section, making it a criminal offense to deprive a person of his rights, or to subject him to a discriminating punishment, would fail to reach a great number of cases which the broad and liberal provisions of the 1st section were intended to cover and protect. The clause in question is intended to reach these cases, or, at least, a large class of them. It provides a remedy where the state refuses to give one; where the mischief consists in inaction or refusal to act, or refusal to give requisite relief; whereas, the 2d section provides for actual positive invasion of rights. Thus, if the state should refuse to allow a freedom to sue in its courts, thereby denying him judicial relief, or should fail to provide laws for the punishment of white persons guilty of criminal acts against his person or property, thereby denying him judicial redress, there can be no doubt that the case would come within the scope of the clause under consideration. Suppose that, in any state, *assault and battery, mayhem—nay, [*598 murder itself, could be perpetrated upon a colored man with impunity, no law being provided for punishing the offender, would not that be a case of denial of rights to the colored population of that state? Would not the clause of the civil rights bill now under consideration give jurisdiction to the United States courts in such a case? Yet, if an indictment should be found in one of those courts against the offender, the technical parties to the record would only be the United States as plaintiff and the criminal as defendant. Nevertheless, could it be said, with any truth or justice, that this would not be a cause affecting persons denied the rights secured to them by the 1st section of the law?

The case before us is just as clearly within the scope of the law as such a case would be. I do not put it upon the ground that the witnesses of the murder, or some of them, are colored persons, disqualified by the laws of Kentucky to testify, but on the ground that the cause is one affecting the person murdered, as well as the whole class of persons to which she belonged. Had the case been simple assault and battery, the injured party would have been deprived of a right, enjoyed by every white citizen, of entering a complaint before a magistrate, or the grand jury, and of appearing as a witness on the trial of the offender. I say "right," for it is a right, an inestimable right, that of invoking the penalties of the law upon those who criminally or feloniously attack our persons or our property. Civil society has deprived us of the natural right of avenging ourselves, but it has preserved to us, all the more jealously, the right of bringing the offender to justice. By the common law of England the injured party was the actual prosecutor of criminal offenses, although the proceeding was

in the King's name; but in felonies, which involved a forfeiture to the Crown, of the criminal's property, it was also the duty of the Crown officers to superintend the prosecution. And, although in this country it is almost the universal practice to appoint public and official prosecutors in criminal cases, yet it is the right of the injured party, and a duty he owes to 599*] society, to *furnish what aid he can in bringing the offender to justice; and an important part of that right and duty consists in giving evidence against him.

To deprive a whole class of the community of this right, to refuse their evidence and their sworn complaints, is to brand them with a badge of slavery; is to expose them to wanton insults and fiendish assaults; is to leave their lives, their families, and their property unprotected by law. It gives unrestricted license and impunity to vindictive outlaws and felons to rush upon these helpless people and kill and slay them at will, as was done in this case. To say that actions or prosecutions intended for the redress of such outrages are not "causes affecting the persons" who are the victims of them, is to take, it seems to me, a view of the law too narrow, too technical and too forgetful of the liberal objects it had in view. If, in such a raid as I have supposed, a colored person is merely wounded or maimed, but is still capable of making complaint, and on appearing to do so, has the doors of justice shut in his face on the ground that he is a colored person, and cannot testify against a white citizen, it seems to me almost a stultification of the law to say that the case is not within its scope. Let us read it once more: "The district courts shall, concurrently with the circuit courts, have cognizance of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the state or locality where they may be, any of the rights secured to them by the 1st section of this act."

If the case above supposed is within the act (as it assuredly must be), does it cease to be so when the violence offered is so great as to deprive the victim of life? Such a construction would be a premium on murder. If mere violence offered to a colored person (who, by the law of Kentucky, was denied the privilege of complaint) gives the United States court jurisdiction, when such violence is short of being fatal, that jurisdiction cannot cease when death is the result. The reason for its existence is stronger than before. If it would have been a cause affecting him when living, it will 600*] *be a cause affecting him though dead. The object of prosecution and punishment is to prevent crime, as well as to vindicate public justice. The fear of it, the anticipation of it, stands between the assassin and his victim like a vindictive shade. It arrests his arm and loosens the dagger from his grasp. Should not the colored man have the ægis of this protection to guard his life, as well as to guard his limbs or property? Should he not enjoy it in equal degree with the white citizen? In a large and just sense, can a prosecution for his murder affect him any less than a prosecution for an assault upon him? He is interested in both alike. They are his protection against violence and wrong. At all events, it cannot be denied that the entire class of persons under disability is affected by prosecutions for wrongs done to one of their number, in which they are not permitted to testify in the state courts.

I am well aware of the case of *Ortega*, who was indicted in the circuit court for offering violence to the person of the Spanish minister. The defendant claimed that it was "a case affecting a public minister," and under the Constitution cognizable only in the Supreme Court. But the court, taking the strict and technical view, decided that, being a criminal case, in which the United States was plaintiff and offender was defendant, they only were the parties whom the case affected. Conceding that this decision was good law for the purposes of that case, I do not feel that I am bound by it in this. The effect of that decision was that the Constitution, in giving the Supreme Court jurisdiction in cases affecting ambassadors, other public ministers, and consuls, only intended to give these public persons the right to sue and be sued in the Supreme Court. In the case before us, I think Congress meant a great deal more than this when it gave the United States courts cognizance of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts of the state any of the rights secured by the 1st section of the act.

I have considered the case irrespective of the fact that the witnesses of the transaction were all colored people, who, at *the time this [*601 indictments was found, were denied the right to testify against white persons in Kentucky. I have placed it on the sole ground, that prosecutions for crimes committed against colored persons are causes which, in the sense of the civil rights bill, most seriously affect them; and that in Kentucky they were denied the privilege of being witnesses in these causes. I do not mean to be understood as saying that every cause in which a colored person may be called as a witness, for that reason belongs to the cognizance of the United States courts. In ordinary cases of a civil character, the party calling such a person as a witness is the person affected. Such party, be he black or white, may except to the rejection of his witness, and bring the case to this court by writ of error from the state court of last resort under the 25th section of the judiciary act. A defendant in a criminal prosecution may do the same thing where a bill of exceptions is allowed in criminal cases.

To conclude, I have no doubt of the power of Congress to pass the laws now under consideration. Slavery, when it existed, extended its influence in every direction, depressing and disfranchising the slave and his race in every possible way. Hence, in order to give full effect to the national will in abolishing slavery, it was necessary in some way to counteract these various disabilities and the effects flowing from them. Merely striking off the fetters of the slave, without removing the incidents and consequences of slavery, would hardly have been a boon to the colored race. Hence, also, the amendment abolishing slavery was supplemented by a clause giving Congress power to enforce it by appropriate legislation. No law was necessary to abolish slavery; the amendment did that. The power to enforce the amendment by appropriate legislation must be a power to do away with the incidents and consequences of

slavery, and to instate the freedmen in full employment of that civil liberty and equality which the abolition of slavery meant.

In my opinion the judgment of the circuit court should be affirmed.

I am authorized to state that Justice **Swayne** concurs in this opinion.

MARGARET JACOWAY, Admrx. of Benjamin J. Jacoway, Deceased, *Plff. in Err.*,

v.

TILFORD DENTON.

Jurisdiction over state judgment for price of slaves.

This court has no jurisdiction over a state judgment rendered for the price of slaves sold, in which the defenses were that by the Constitution of the state and of the United States slaves were emancipated, and the consideration of the obligation thereby failed, and that the contract was originally null and void.

[No. 47.]

Submitted Nov. 14, 1871. Decided Apr. 1, 1872.

IN ERROR to the Supreme Court of the State of Arkansas.

The case is stated by the court.

Messrs. A. H. Garland and *P. Phillips* for plaintiff in error.

Mr. Justice **Swayne** delivered the opinion of the court:

This case is also before us upon a motion to dismiss the writ of error for want of jurisdiction.

The defendant in error brought suit in the circuit court of Yell county, to the September term, 1866, upon the writing obligatory executed to him by William D. Jacoway, deceased, on the 4th of October, 1860, for the sum of $4,500, payable one year from date, with interest at the rate of ten per cent per annum from the maturity of the obligation until its payment. The administrator interposed three pleas:

(1) That the consideration of the obligation was the purchase of slaves, and that they were all emancipated by the Constitution of Arkansas, adopted in 1864.

(2) That the slaves were emancipated by an amendment to the Constitution of the United States, and that the consideration of the obligation thereby wholly failed.

(3) That the contract was originally null and void.

The plaintiff demurred. The court sustained the demurrers and gave judgment against the defendant for the amount claimed in the declaration. The defendant appealed to the supreme court of the state, and that court affirmed the judgment.

After what we have said in *Smith's Adm.* v. *Jordan's Adm.*, just decided, it is sufficient to remark that the record discloses no question cognizable by this court.

The writ of error is, therefore, dismissed.

THE STEAMBOAT ST. JOHN, her Engine, etc., The New Jersey Steamboat Company, *Claimant, Appt.*,

v.

ABRAHAM E. HASBROUCK.

Steamer held in fault for a collision.

Where a steamboat on the Hudson river selected her own course in passing a propeller with boats in tow, and instead of going to the right, as was usual, went to the left of the propeller, and ran into and sunk one of the boats in tow of the propeller; *held*, that the steamer ought to have kept far enough to the left to be sure of avoiding a collision, and, not having done so, a judgment against her for the damages was affirmed.

[No. 131.]

Argued Mar. 6, 1872. Decided Apr. 1, 1872.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr. **Charles Jones** for appellant.

Messrs. **C. Donohue** and *C. Swan* for appellee.

Mr. Justice **Bradley** delivered the opinion of the court:

Abraham E. Hasbrouck, the libelant in this case, was the owner of a barge called the Ulster County, which was sunk in the Hudson river, near West Point, on the 20th November, 1864, by collision with the steamer St. John, while said barge was in tow of the steam propeller Pluto. The libel was filed against the steamer to recover damages for the injury sustained. The St. John was a large passenger steamer, on her downward trip from Albany to New York. The Pluto was moving up the river, with the barge Ulster County lashed to her larboard side and another barge to her starboard side, and a canal boat astern of the latter. The collision took place about 3 o'clock in the morning, in a clear moonlight night. At West Point there is an abrupt bend in the Hudson river, making nearly a right angle. Below this bend its course is southerly; above it, proceeding up the river, it is westerly for nearly a mile and then northerly. The Pluto, with her tows, was still below the point, proceeding slowly up the river, nearer to the eastern than to the western shore, when the St. John was discovered up the western reach of the river. The St. John blew two whistles, signifying that she would go to the left or eastward of the Pluto. The men on the Pluto say that the signal was answered by two whistles on their part, and that the helm was put to starboard accordingly, turning the head of the Pluto more to the west. The collision took place directly off West Point, at the abrupt bend of the river, about the middle of the channel. The St. John struck the larboard bow of the barge Ulster County, and cut into her about ten feet. The witnesses for the libelant, the pilot and others, say that when the St. John approached them, she seemed to sheer to the west, and thus ran into the tow. This is denied on the other side.

On the part of the St. John, it is testified by the pilot and wheelman that they discovered the light of the Pluto below West Point, over the land, as they, the St. John, rounded Magazine Point, where the river turns to the east;

and that they kept the helm of the St. John hard a-starboard until the collision occurred, thus keeping up all the time a sheer to the eastward. This could not have been so, for it would have carried the St. John to the east side of the channel, whereas, it is conceded that the collision occurred in about mid channel. The St. John selected her own course; instead of going to the right of the Pluto, as is usual, she concluded to go to the left, miscalculating the precise position of the Pluto and supposing her to be nearer to the western shore than she was. Having selected her course, the St. John ought to have kept far enough to the eastward or left, to be sure of avoiding a collision. Instead of this, she kept in the middle of the channel, evidently expecting the propeller to keep out of her way. In rounding the point, she hugged too near, and did not give the Pluto a chance to get inside of her.

The case is purely one of fact, and it can serve no instructive purpose to review the evidence in detail. We have carefully examined it, and are satisfied that the result reached by the circuit and district courts was correct.

The decree of the Circuit Court is affirmed, with interest on the amount.

JOHN FRANK PARGOUD, *Appt.*,
v.
UNITED STATES.

(See S. C. 13 Wall. 156–158.)

President's proclamation of pardon, effect of.

1. The President's proclamation of Dec. 25, 1868, granting pardon and amnesty unconditionally and without reservation to all who participated, directly or indirectly, in the late Rebellion, relieves claimants of captured and abandoned property, from proof of adhesion to the United States during the late Civil War.
2. It is unnecessary, therefore, for such claimants to prove such adhesion or personal pardon for taking part in the Rebellion against the United States.

[No. 36.]

Argued Apr. 20, 21, 1871. Decided Apr. 8, 1872.

APPEAL from the Court of Claims.

The petitioner claimed the proceeds of eighty-five bales of cotton, taken from his plantation in Louisiana, in the summer of 1865. He had participated in the Rebellion, but received amnesty and pardon Jan. 11, 1866. These facts were alleged in his petition, which was dismissed by the court of claims, without a trial on the merits, sustaining the motion of the solicitor of the United States to dismiss.

From this judgment petitioner sought an appeal, which the court of claims denied him; whereupon he applied for and obtained a mandamus from this court, ordering the court of claims to send up the transcript of appeal. The case was argued and decided at the same time with *Ex parte Zellner*, 9 Wall. 244. 19 L. ed. 665.

A motion is made to dismiss the case for want of jurisdiction, pursuant to a proviso in the act of Congress of July 12, 1870. See *U. S.* v. *Klein*, *ante*, 519, with which case the present one was argued.

The arguments of counsel were devoted almost exclusively to the question of the validity of this proviso in the act of 1870, above referred to. That question, however, was not directly passed upon in the decision of this case nor in the decision (*Armstrong* v. *U. S. ante*, 614) upon which it was based.

Messrs. **P. Phillips** and **Thomas J. Durant** for appellant.

Messrs. **Akerman**, *Atty. Gen.*, and **B. H. Bristow**, *Solicitor Gen.*, for the United States.

Mr. Chief Justice **Chase** delivered the opinion of the court:

The decision of the court of claims in this case was against the claimant, on the ground that the petition did not aver that he had given no aid or comfort to the Rebellion, nor sufficiently aver a pardon by the President.

But we have recently decided, in the case of *Armstrong* v. *United States*, *ante*, 614, that the President's proclamation of December 25, 1868 (15 Stat. at L. 711), granting pardon and amnesty unconditionally and without reservation to all who participated, directly, *or in- [*158 directly, in the late Rebellion, relieves claimants of captured and abandoned property from proof of adhesion to the United States during the late Civil War. It was unnecessary, therefore, to prove such adhesion or personal pardon for taking part in the Rebellion against the United States.

The judgment of the Court of Claims dismissing the petition is reversed.

JOSEPH H. BRADLEY, *Plff. in Err.*,
v.
GEORGE P. FISHER.

(See S. C. 13 Wall. 335–357.)

Order striking attorney's name from roll, effect of—judges, when not liable to suits for judicial acts—excess of jurisdiction—power to remove attorneys—practice on—obligations of attorneys—threat by attorney to judge out of court.

*1. An order of the criminal court of the District of Columbia, made in 1867, striking the name of an attorney from its roll, did not remove the attorney from the bar of the supreme court of the District, the criminal court being at that time a separate and independent court; and in an action by the attorney against the judge of the criminal court, that order was inadmissible to show a removal by order of the defendant, or by order of the court held by him from the supreme court, notwithstanding that an act of Congress, passed in 1870, changed the independent character of the criminal court and declared that its judgments, decrees, and orders should be deemed judgments, decrees, and orders of the supreme court of the District. The act of Congress, in enlarging the operation of the order, did not alter its original character.
2. Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction as to their liability made between acts done by them in excess of their jurisdiction and acts done by them in the clear absence of all jurisdiction over the subject-matter.
3. The power to remove attorneys from the bar is possessed by all courts which have authority to

*Headnotes by Mr. Justice FIELD.

NOTE.—*The effect of pardons*—see note to Armstrong's Foundry v. U. S. 18 L. ed. U. S. 882.

NOTE.—*Disbarring an attorney*—see notes, 19 L. ed. U. S. 214; 13 L. R. A. 767.

admit attorneys to practice; but except where the matters constituting the grounds of its action occur in open court in the presence of its judges, the power of the court should not be exercised without notice to the offending party of the grounds of a complaint against him, and affording him ample opportunity of explanation and defense.

4. The obligations which attorneys assume when they are admitted to the bar, is not simply to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but includes abstaining, out of court, from insulting language and offensive conduct towards the judges personally for their judicial acts. A threat of personal chastisement made by an attorney to a judge out of court, for his conduct during the trial of a cause pending, is good ground for striking the name of the attorney from the rolls of attorneys practising in the court. Such an order is a judicial act for which the judge is not liable to the attorney in a civil action.

[No. 118.]

Argued Feb. 26, 27, 1872. Decided Apr. 8, 1872.

IN ERROR to the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. Joseph H. Bradley, P. P., **R. T. Merkric**, and **J. M. Harris**, for plaintiff in error:

First. The defendant had no power or jurisdiction, after the jury was discharged in the case of John H. Surratt, to do any act as a court.

1. The statute (10 Stat. at L. 160) gave him power and jurisdiction to try that case; but he could not and did not hold a court for the transaction of any other business.

2. The proceeding to punish an attorney for contempt or for misbehavior in office, is a judicial proceeding and constitutes a case when the proceedings are regular. See authorities cited below on other points.

3. The case of Surratt having been disposed of, the functions of the court before which it was tried ceased, and the court could not lawfully sit any longer.

Second. If the court had no jurisdiction of the case, and the judge who was presiding knew of the facts, he is liable in this action, although he did not act corruptly or maliciously. *Houlden* v. *Smith*, 14 Q. B. 841.

Third. If the proceeding was to punish for a contempt, the defendant was prohibited by the act of March 3, 1831 (4 Stat. at L. 487), from passing judgment.

1. The criminal court of the District of Columbia is a court of the United States.

See Const. art. 1, § 8; *Cohens* v. *Va.* 6 Wheat. 326-329; *Kendall* v. *U. S.* 12 Pet. 619; *Ex parte Bradley*, 7 Wall. 374, 19 L. ed. 218; act Feb. 27, 1801; 2 Stat. at L. 106, §§ 3, 5, 8.

2. The alleged offense is not charged to have been committed in open court, nor so near thereto as to disturb the administration of justice.

3. The whole act looks to misconduct or contempt which interferes with the administration of justice; and to assault a judge out of court is a criminal offense, but not a contempt of court.

4. If the punishment was for misbehavior in office as attorney, this does not take the case out of the provision of the statute prohibiting a summary proceeding except in the cases therein mentioned.

Fourth. The record does not show that the court was sitting when the alleged offense was committed, nor that any notice or process of any kind was served on the plaintiff in error, nor that he had in any way "a day in court," nor that he voluntarily appeared, and therefore there was no case for the judgment of the court; if the court had been sitting at the time the order and decree (as it is called in the plea) was made by the defendant; and the whole proceeding was *coram non judice* and void.

1. This was a summary proceeding The summary jurisdiction given by law does not mean arbitrary power in the court nor unlimited will or discretion, without any process of law; but is the exercise of that discretion vested by law in the court, to proceed by summary process for the more expeditious dispensation of justice, without the intervention of a jury.

Bl. Com. book IV., ch. 20; Sullivan's Lect. § 39, p. 356; *Ex parte Secombe*, 19 How. 9, 15 L. ed. 565.

"Where there is no jurisdiction there can be no discretion, for discretion is incident to jurisdiction." *Piper* v. *Pearson*, 2 Gray, 120. "The discretion vested in courts, where private rights are concerned, is judicial, not unlimited."

Harvie v. *Cammack*, 6 Dana, 243. "It must not be arbitrary, vague and fanciful." *Rex* v. *Wilkes*, 4 Burr. 2539; *Witman* v. *Ely*, 4 Serg. & R. 265.

"If this discretion be wilfully abused, it is criminal." *Rex* v. *Young*, 1 Burr. 563; Bouv. Dic. tit. *Discretion*, cases cited.

2. Notice to put the party on his defense is an indispensable rule of justice, and without this the court had no jurisdiction of the person.

"A judge or any person acting by authority as such, where he has over the subject-matter and over the person, a general jurisdiction which he has not exceeded, will not be liable to have his judgment examined in an action brought against him; but if the jurisdiction be wanting over the subject-matter and over the person, such judgment would be examinable.

Dynes v. *Hoover*, 20 How. 83, 15 L. ed. 845; *Rex* v. *Lediard*, Sayers. 6; *Willis* v. *Gipps*, 5 Moore, P. C. 391: Crompton, Justice, and Lord Chancellor Chelmsford, in *Queen* v. *The Saddler Co.* 10 H. of L. Cas. 404; *Rex* v. *Gaskin*, 8 T. R. 209; *Queen* v. *Smith*, 5 Q. B. 621; *Capel* v. *Child*, 2 Cromp. & J. 578, 584; Lindhurst, 573, 576; *Bragg's Case*, 11 Coke, 93, *b.* 99 *a*; *Rex* v. *Benn*, 6 T. R. 198; *Bonaker* v. *Evans*, 16 Q. B. 171; *Ex parte Ramshay*, 18 Q. B. 187; *Greene* v. *Briggs*, 1 Curt. 337.

"It is contrary to natural justice that a party should be proceeded against and degraded without being heard, and which cannot be done without summoning the party and giving him an opportunity to be heard. *Rex* v. *Chan. of Cambridge*, 2 Ld. Raym. 1348.

In the case at bar, it is impossible to say whether the defendant meant to find the plaintiff guilty of the contempt, or of misconduct in office. If the former, he is met directly and squarely by the act of March 3, 1831. If the latter, he falls, on the other hand, into the dilemma of an entire absence of any notice to the plaintiff.

There is no difference at common law in pro-

ceedings in courts against attorneys and other persons who are in possession of rights or franchises; and to remove an attorney from his office has, with great uniformity, been regarded as a proceeding criminal in its nature; but whether criminal or civil, always as a strictly judicial proceeding, to be effected only by "due process of law" and by the exercise of the judicial discretion of the court, and not the arbitrary power of the judge. That the charges in a regular complaint against an attorney ought not to be received and acted upon unless made on oath, is admitted. It is a course of proceeding which is recommended by considerations too obvious to require that they should be urged.

Ex parte Burr, 9 Wheat. 529; *State* v. *Chapman*, 11 Ohio, 530.

In order to revoke or suspend the license of an attorney, the law requires that there should be an accusation and charges, a notice and a day in court, and it cannot be done summarily by the order of the court.

State v. *Start*, 7 Iowa, 499; see also *Howard* v. *Gosset*, 10 Q. B. 359; Sm. Lead. Cas. (ed. 1866) 676, 835.

These authorities fully establish the propositions, that the law makes no difference between an attorney and others holding office during good behavior, and other vested rights or franchises subject to be taken away by "due process of law," and requires in every case of proceeding to take away such office, right, or franchise, that the party to be proceeded against shall have notice and an opportunity to be heard, before the court can acquire jurisdiction to adjudicate; and that jurisdiction is limited to the exercise of a legal discretion by a court, and does not include the arbitrary acts of a judge.

An action on the case may be maintained at common law for the disturbance of the party in the lawful possession and enjoyment of an office. Though a case be of first impression, if it shows a concurrence of loss and injury from the act complained of, the action will be maintainable. *Lynch* v. *Knight*, 9 H. of L. Cas. 577.

If the proceedings are void against an attorney, he would have an action for damages, if interrupted or deprived of the privileges and emoluments conferred by the license. 1 Cal. 190.

If the alleged trespasser be a judge of a court of record, the only question is: Was the act done a judicial act, within his jurisdiction? Of this he is not the judge. If it was not, and "he has acted without his jurisdiction, he has ceased to be a judge."

See *Randall* v. *Brigham*, 7 Wall. 523, 19 L. ed. 285.

The extent of his power and jurisdiction was to punish by fine or imprisonment or both. He could not disbar for a contempt only; and he could not take away the franchise of attorney without due process of law. But if, from malicious and corrupt motives, he usurped jurisdiction knowingly, the fact that he claimed to be acting as a court, and acted erroneously, cannot afford him any protection. *Yates* v. *Lansing*, 9 Johns. 407-413. 432.

If he were holding a court of record with such jurisdiction as a criminal court of this district has, and had jurisdiction and discretion to adjudge and punish for a contempt or misbehavior in office, and although the record on its face may show that the person and offense in the particular case were both within his jurisdiction if he acted wilfully and corruptly in the matter, and with express malice toward the plaintiff, and with intent to injure him, it is competent for the plaintiff, on proper and fitting allegations in his declaration, to prove those facts; to contradict the record by parol proof and show that, in point of fact, the whole statement contained therein is a fabrication and false.

1. Because no man is to be condemned under the law of the land without an opportunity of being heard.

2. No court can create a jurisdiction for itself by its own statement of facts put on record, without any proceeding as the basis of such record.

3. Wilful abuse of power, corrupt exercise of office, express malice towards an individual, and working intentional injury to him by means of false entries made by a judge on the records of a court of general jurisdiction, are not judicial acts and are not within the discretion of the judge; and satisfactory proof of those facts is admissible in evidence in actions to usurp the wrong done by such acts; to show that, in the particular case, the judge attempted to create for himself a jurisdiction and discretion not given by the law.

10 Rep. 76, *a*, *b*; 2 Str. 994; 3 Willes, 345; 2 T. R. 225; 5 Taunt. 500; 1 Marsh. 220; Rep. T. Hardw. 64; 3 M. & S. 411; 1 Barn. & C. 169; 14 Ad. & El. (N. S.) 841; 15 Ad. & El. (N. S.) 240; 2 Stark. Ev. 807; 5 Johns. 282; 9 Johns. 392; 12 Johns. 257; 3 Maine, 330; 24 Vt. 143; 2 Gray, 120; 2 Gray, 570; 4 Gray, 83; 11 Cush. 315; 2 Harr. (N. J.) 58; 7 Oh. (N. S.), 45, and the cases before cited.

Messrs. **William Cook** and **A. G. Riddle** for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

In 1867, the plaintiff was a member of the Bar of the supreme court of the District of Columbia, and the defendant was one of the justices of that court. In June, of that year, the trial of one John H. Suratt, for the murder of Abraham Lincoln, was commenced in the criminal court of the District, and was continued until the tenth of the following August, when the jury were discharged in consequence of their inability to agree upon a verdict. The defendant held that court, presiding at the trial of Suratt from its commencement to its close, and the plaintiff was one of the attorneys who defended the prisoner. Immediately upon the discharge of the jury, the court, thus held by the defendant, directed an order to be entered on its records striking the name of the plaintiff from the roll of attorneys practising in that court. The order was accompanied by a recital that on the second of July preceding, during the progress of the trial of Suratt, immediately after the court had taken a recess for the day, as the presiding judge was descending from the Bench, he had been accosted in a rude and insulting manner by the plaintiff, charging him with having offered the

plaintiff a series of insults from the Bench from the commencement of the trial; that the judge had then disclaimed any intention of passing any insult whatever, and had assured the plaintiff that he entertained for him no other feelings than those of respect, but that the plaintiff, so far from accepting this explanation, or disclaimer, had threatened the judge with personal chastisement.

The plaintiff appears to have regarded this order of the criminal court as an order disbarring him from the supreme court of the District; **345***] and the whole theory of the *present action proceeds upon that hypothesis. The declaration in one count describes the criminal court as one of the branches of the supreme court, and in the other count represents the order of the criminal court as an order removing the plaintiff from the office of an attorney at law in the supreme court of the District. And it is for the supposed removal from that court, and the assumed damages consequent thereon, that the action is brought.

Yet the criminal court of the District was at that time a separate and independent court, and as distinct from the supreme court of the District as the circuit court is distinct from the Supreme Court of the United States. Its distinct and independent character was urged by the plaintiff and successfully urged in this court, as ground for relief against the subsequent action of the supreme court of the District based upon what had occurred in the criminal court. And because of its distinct and independent character, this court held that the supreme court of the District possessed no power to punish the plaintiff on account of contemptuous conduct and language before the criminal court, or in the presence of its judge. By this decision, which was rendered at the December term of 1868 (*Ex parte Bradley*, 7 Wall. 364, 19 L. ed. 214, the groundwork of the present action of the plaintiff is removed. The law which he successfully invoked, and which protected him when he complained of the action of the supreme court of the District, must now equally avail for the protection of the defendant when it is attempted to give to the criminal court a position and power which were then denied. The order of the criminal court, as it was then constituted, was not an order of the supreme court of the District, nor of one of the branches of that court. It did not, for we know that in law it could not, remove the plaintiff from the office of an attorney of that court, nor affect his right to practise therein.

This point is distinctly raised by the special plea of the defendant, in which he sets up that **346***] at the time the order *complained of was made, he was regularly and lawfully holding the criminal court of the District, a court of record, having general jurisdiction for the trial of crimes and offenses arising within the District, and that the order complained of was an order of the criminal court, made by him in the lawful exercise and performance of his authority and duty as its presiding justice, for official misconduct of the plaintiff, as one of its attorneys, in his presence; and upon this plea the plaintiff joined issue.

The court below, therefore, did not err in excluding the order of removal as evidence in the cause, for the obvious reason that it did not establish nor tend to establish the removal of the plaintiff by any order of the defendant, or of the court held by him, from the Bar of the supreme court of the District. And the refusal of the court below to admit evidence contradicting the recitals in that order could not be the ground of any just exception, when the order itself was not pertinent to any issue presented. Nor is this conclusion affected by the act of Congress passed in June, 1870, nearly three years after the order of removal was made, and nearly two years after the present action was commenced, changing the independent character of the criminal court and declaring that its judgments, decrees, and orders should be deemed the judgments, decrees, and orders of the supreme court of the District. 16 Stat. at L. 160. If the order of removal acquired from this legislation a wider scope and operation than it possessed when made, the defendant is not responsible for it. The original act was not altered. It was still an order disbarring the plaintiff only from the criminal court, and any other consequences are attributable to the action of Congress, and not to any action of the defendant.

But this is not all. The plea, as will be seen from our statement of it, not only sets up that the order of which the plaintiff complains was an order of the criminal court, but that it was made by the defendant in the lawful exercise and performance of his authority and duty as its presiding *justice. In other words, it [***347** sets up that the order for the entry of which the suit is brought was a judicial act, done by the defendant as the presiding justice of a court of general criminal jurisdiction. If such were the character of the act, and the jurisdiction of the court, the defendant cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff. For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility. *Taaffe* v. *Downes*, 3 Moore, P. C. 41, n.

The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country.

It has, as Chancellor Kent observes, "a deep root in the common law." *Yates* v. *Lansing*, 5 Johns. 291.

Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The

purity of their motives cannot in this way be the subject of judicial inquiry. This was adjudged in the case of *Floyd and Barker*, reported by Coke, in 1608 (12 Coke, 25) where it was laid down that the judges of the realm could not be drawn in question for any supposed cor-
348*] ruption impeaching *the verity of their records, except before the King himself, and it was observed that if they were required to answer otherwise, it would "tend to the scandal and subversion of all justice, and those who are the most sincere, would not be free from continual calumniations."

The truth of this latter observation is manifest to all persons having much experience with judicial proceedings in the superior courts. Controversies involving not merely great pecuniary interests, but the liberty and character of the parties and, consequently, exciting the deepest feelings, are being constantly determined in those courts, in which there is a great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which imposes upon the judge the severest labor, and often create in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. When the controversy involves questions affecting large amounts of property or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision, often finds vent in imputations of this character, and from the imperfection of human nature this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.

349*] *If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of an inferior jurisdiction—that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party.

Some just observations on this head by the late Chief Justice Shaw, will be found in *Pratt* v. *Gardner*, 2 Cush. 68, and the point here was adjudged in the recent case of *Fray* v. *Blackburn*, 3 Best & S. 576, by the Queen's bench of England. One of the judges of that bench was sued for a judicial act, and on demurrer one of the objections taken to the declaration was, that it was bad in not alleging malice. Judgment on the demurrer having passed for the defendant, the plaintiff applied for leave to amend his declaration by introducing an allegation of malice and corruption; but Mr. Justice Compton replied: "It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges, and prevent them being harrassed by vexatious actions;" and the leave was refused. *Scott* v. *Stansfield*, L. R. 3 Exch. 220.

*In this country the judges of the su- [***350**
perior courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. If in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment and suspended or removed from office. In some states they may be thus suspended or removed without impeachment, by a vote of the two Houses of the legislature.

In the case of *Randall* v. *Brigham*, 7 Wall. 523, 19 L. ed. 285, decided by this court at the December term of 1868, we had occasion to consider at some length the liability of judicial officers to answer in a civil action for their judicial acts. In that case the plaintiff *had been [***351**
removed by the defendant, who was one of the justices of the superior court of Massachusetts, from the Bar of that state, and the action was brought for such removal, which was alleged in the declaration to have been made without lawful authority, and wantonly, arbitrarily and oppressively. In considering the questions presented the court observed that it was a general principle, applicable to all judicial officers, that they were not liable to a civil action for any judicial act done by them within their jurisdiction; that with reference to judges of limited and inferior authority it had been held that they were protected only when they acted within their jurisdiction; that if this were the case with respect to them, no such limitation existed with respect to judges of superior or general authority; that they were not liable in civil actions for their judicial acts, even when such acts were in excess of their jurisdiction "unless, perhaps, when the acts in excess of jurisdiction are done maliciously or corruptly." The qualifying words were inserted upon the suggestion that the previous language laid down the doctrine of judicial exemption from liability to civil actions in terms broader than was necessary for the case under consideration, and that if the language remained unqualified it would require an explanation

of some apparently conflicting adjudications found in the reports. They were not intended as an expression of opinion that in the cases supposed such liability would exist, but to avoid the expression of a contrary doctrine.

In the present case, we have looked into the authorities and are clear, from them, as well as from the principle on which any exemption is maintained, that the qualifying words used were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over **352*]** *the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed, some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons.

The distinction here made between acts done **353*]** in excess of jurisdiction and acts where no jurisdiction whatever over the subject-matter exists, was taken by the court of King's bench, in *Ackerly* v. *Parkinson*, 3 M. & S. 411. In that case an action was brought against the vicar-general of the Bishop of Chester and his surrogate, who held the consistorial and episcopal court of the Bishop, for excommunicating the plaintiff with the greater excommunication for contumacy in not taking upon himself the administration of an intestate's effects, to whom the plaintiff was next of kin, the citation issued to him being void, and having been so adjudged. The question presented was whether, under these circumstances, the action would lie. The citation being void, the plaintiff had not been legally brought before the court, and the subsequent proceedings were set aside, on appeal, on that ground. Lord Ellenborough observed that it was his opinion that the action was not maintainable if the ecclesiastical court had a general jurisdiction over the subject-matter, although the citation was a nullity, and said that "no authority had been cited to show that the judge would be liable to an action where he has jurisdiction, but has proceeded erroneously, or, as it is termed, *inverso ordine*." Mr. Justice Blanc said there was "a material distinction between a case where a party comes to an erroneous conclusion in a matter over which he has jurisdiction and a case where he acts wholly without jurisdiction;" and held that where the subject-matter was within the jurisdiction of the judge, and the conclusion was erroneous, although the party should, by reason of the error, be entitled to have the conclusion set aside and to be restored to his former rights, yet he was not entitled to claim compensation in damages for the injury done by such erroneous conclusion, as if the court had proceeded without any jurisdiction. *Calder* v. *Halket*, 3 Moore, P. C. 28.

*The exemption of judges of the supe- [***354**
rior courts of record from liability to civil suit for their judicial acts, existing when there is jurisdiction of the subject-matter, though irregularity and error attend the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into, judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must in such cases resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed.

If, now, we apply the principle thus stated, the question presented in this case is one of easy solution. The criminal court of the district, as a court of general criminal jurisdiction, possessed the power to strike the name of the plaintiff from its rolls as a practising attorney. This power of removal from the Bar is possessed by all courts which have authority to admit attorneys to practice. It is a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself or a proper regard for the integrity of the pro-

fession. And, except where matters occurring in open court in presence of the judges constitute the grounds of its action, the power of the court should never be exercised without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defense. This is a rule of natural justice, and is as applicable to cases where a proceeding is taken to reach the right of an attorney to practise his **355***] profession as *it is when the proceeding is taken to reach his real or personal property. And even where the matters constituting the grounds of complaint have occurred in open court, under the personal observation of the judges, the attorney should ordinarily be heard before the order of removal is made, for those matters may not be inconsistent with the absence of improper motives on his part, or may be susceptible of such explanation as would mitigate their offensive character, or he may be ready to make all proper reparation and apology. Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession, it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. A removal from the Bar should, therefore never be decreed where any punishment less severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired.

But, on the other hand, the obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the Bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts. "In matters collateral to official duty," said Chief Justice Gibson, in the case of *Austin and others*, "the judge is on a level with the members of the bar as he is with his fellow-citizens, his title to distinction and respect resting on no other foundation than his virtues and qualities as a man. But it is, nevertheless, evident that professional fidelity may be violated by acts which fall without the lines of professional functions, and which may have been performed out of the pale of the court. Such would be the **356***] *consequences of beating or insulting a judge in the street for a judgment in court. No one would pretend that an attempt to control the deliberation of the Bench, by the apprehension of violence, and subject the judges to the power of those who are, or ought to be, subordinate to them, is compatible with professional duty, or the judicial independence so indispensable to the administration of justice. And an enormity of the sort, practised but on a single judge, would be an offense as much against the court, which is bound to protect all its members, as if it had been repeated on the person of each of them, because the consequences to suitors and the public would be the same; and whatever may be thought in such a case of the power to punish for contempt, there can be no doubt of the existence of a power to strike the offending attorney from the roll."

The order of removal complained of in this case, recites that the plaintiff threatened the presiding justice of the criminal court, as he was descending from the Bench, with personal chastisement for alleged conduct of the judge during the progress of a criminal trial then pending.

The matters thus recited are stated as the grounds for the exercise of the power possessed by the court to strike the name of the plaintiff from the roll of attorneys practising therein. It is not necessary for us to determine in this case whether under any circumstances the verity of this record can be impeached. It is sufficient to observe that it cannot be impeached in this action or in any civil action against the defendant. And if the matters recited are taken as true, there was ample ground for the action of the court. A greater indignity could hardy be offered to a judge than to threaten him with personal chastisement for his conduct on the trial of a cause. A judge who should pass over in silence an offense of such gravity would soon find himself a subject of pity rather than of respect.

The criminal court of the district erred in not citing the plaintiff, before making the order striking his name from the roll of its attorneys, to show cause why such order should not be made for the offensive language and conduct stated, *and affording him opportunity [***357** for explanation or defense or apology. But this erroneous manner in which its jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act; nor did it render the defendant liable to answer in damages for it at the suit of the plaintiff, as though the court had proceeded without having any jurisdiction whatever over its attorneys.

We find no error in the rulings of the court below, and its judgment must, therefore, be affirmed; and it is so ordered.

Mr. Justice **Davis**, dissenting:

I agree that judicial officers are exempt from responsibility in a civil action for all their judicial acts in respect to matters of controversy within their jurisdiction. I agree, further, that judges of superior or general authority are equally exempt from liability, even when they have exceeded their jurisdiction, unless the acts complained of were done maliciously or corruptly. But I dissent from the rule laid down by the majority of the court, that a judge is exempt from liability in a case like the present, where it is alleged not only that his proceeding was in excess of jurisdiction, but that he acted maliciously and corruptly. If he did so, he is, in my opinion, subject to suit the same as a private person would be under like circumstances.

I also dissent from the opinion of the majority of the court for the reason that it discusses the merits of the controversy, which, in the state of the record, I do not consider open for examination.

I am authorized to say that Mr. Justice **Clifford** concurs in this dissent.

F. W. ROBINSON, E. N. Robinson, and S. F. Butterworth, *Plffs. in Err.*,
v.
UNITED STATES.

(See S. C. 13 Wall. 363-366.)

Custom or usage, when receivable to explain contract—may be proved by one witness.

1. Custom or usage may properly be received to ascertain and explain the meaning and intention of the parties to a contract, whether written or parol, the meaning of which could not be ascertained without the aid of such extrinsic evidence, where the parties knew of the existence of the custom or usage, and contracted in reference to it.
2. Parties who contract on a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary.
3. Usage may be proved by a single witness, who has full knowledge and a long experience on the subject.

[No. 143.]

Submitted Mar. 22, 1872. Decided Apr. 15, 1872.

IN ERROR to the Circuit Court of the United States for the District of California.

The case is stated by the court.

Mr. **Edmond L. Goold,** for plaintiffs in error:

The testimony did not establish the existence of a custom of a certain, uniform, public, fixed character, reasonable and notorious, so far as to justify a presumption of the knowledge of its existence by the parties sought to be charged.

A distinction is to be made between custom and usage. There may be a usage without a custom, but there can be no custom without a usage, for custom is the result of usage. To establish a custom, there must have existed a uniform, long established, widely, universally and notoriously known and recognized commercial habit to transact business in a certain way, in order that this habit may be considered an incident to a mercantile contract without being mentioned, and so become one of its elements.

Edie v. *E. I. Co.* 2 Burr. 1216; *Smetz* v. *Kennedy*, Riley, 38; n. q. 2 Pars. Cont. 544; *Cope* v. *Dodd*, 13 Pa. 37; *Garrison* v. *Ins. Co.* 19 How. 317, 15 L. ed. 658; *Adams* v. *Otterback*, 15 How. 545; *U. S.* v. *Buchanan*, 8 How. 102; *Coxe* v. *Heisley*, 19 Pa. 246; *Walker* v. *Barren*, 6 Minn. 513; 1 Duer, Ins. 182.

The testimony as to usage was inadmissible for want of an averment in the pleadings.

The fact of the existence of a usage was indispensable to a recovery. An omission of its averment was fatal.

Mann v. *Morewood*, 5 Sandf. 564; *Bk.* v. *Smith*, 11 Wheat. 161; *N. C. Co.* v. *Kidd*, 37 Cal. 304; *Green* v. *Palmer*, 15 Cal. 413; *Wallace* v. *Morgan*, 23 Ind. 403; *Renner* v. *Bk.* 9 Wheat. 594; *Templeman* v. *Biddle*, 1 Harr. (Del.) 522.

The testimony of one witness is insufficient to establish a custom, or prove that any fact is notoriously known.

Lee v. *Merrick*, 8 Wis. 234; *Halwerson* v. *Cole*, 1 Speers, 321; *Wood* v. *Hickok*, 2 Wend. 501; *Bissell* v. *Ryan*, 23 Ill. 569; *Watts* v. *Lindsey*, 7 Wheat. 162.

Usages, adding new incidents to contracts, should be sparingly adopted. Thy are not regarded with favor by courts of justice.

Rogers v. *Mech. Ins. Co.* 1 Story, 608; *Donnell* v. *Ins. Co.* 2 Sumn. 377; *Crawford* v. *Clark*, 15 Ill. 567; *Bolton* v. *Colder*, 1 Watts, 363; *Power* v. *Kane*, 5 Wis. 265; *Caldwell* v. *Dawson*, 4 Met. (Ky.) 121; *Thompson* v. *Riggs*, 5 Wall. 679, 18 L. ed. 707.

The contract being plain, clear, and free from ambiguity, requires no explanation; and therefore parol testimony is not admissible to interpret its language.

The alleged custom is void for uncertainty.

Wallace v. *Morgan*, 23 Ind. 403.

Messrs. **Geo. H. Williams,** *Atty. Gen.*, and **B. H. Bristow,** *Solicitor Gen.*, for defendant in error:

The known and established usage of trade, prevailing in the place where a contract is made respecting matters to which such usages relate, must be considered to be tacitly annexed to the terms of the contract, unless it is expressly excluded.

Add. Cont. 851; Chit. Cont. 10th ed. by Perkins, 18, 19; *Croucher* v. *Wilder*, 98 Mass. 325; 2 Pars. Cont. 5th ed. 337; *Hutton* v. *Warring*, 1 Mees. & W. 466; *Humfrey* v. *Dale*, 7 El. & Bl. 275; *Conner* v. *Robinson*, 2 Hill (S. C.) 254; *Dalton* v. *Daniels*, 2 Hilt. 474.

The only qualification of the principle is that the usage must not be repugnant to or inconsistent with the written contract; for as the office of the usage is simply one of exposition, to ascertain the understanding of the parties with reference to the terms of the contract, where a repugnancy or inconsistency exists, the express stipulation of the parties will necessarily prevail.

Accordingly, parol evidence of the usage of a particular trade, where such usage is not inconsistent with the written contract, is always admissible. *Humfrey* v. *Dale, supra.*

The cause of action was founded, not upon the usage, but upon the bond and the alleged breach of the condition thereof, and it was sufficiently set forth in the complaint. No authority is cited by the counsel where it has been ruled that, in a suit on a written contract, a usage of trade must be pleaded before it can be received in evidence to explain the instrument sued on, while the contrary has been directly and distinctly held.

See *Lowe* v. *Lehman*, 15 Ohio St. 179; 2 Archb. (N. P.) 208; 2 Steph. (N. P.) 1549, n. 2.

Another objection urged is that the testimony of one witness is insufficient to establish a custom.

But as a rule of law, governing the proof of usages of trade, this proposition cannot be sustained upon principle or authority.

If a single witness testifies fully and explicitly to the existence of a usage, and is not contradicted, it cannot be assumed, as a legal conclusion, that the proof is insufficient.

NOTE.—*Usage and custom; admissibility in construction of contracts*—see note to Adams v. Otterback, 14 L. ed. U. S. 805.

Marston v. *Bk.* 10 Ala. 284; *Vail* v. *Rice*, 5 N. Y. 158; *Partridge* v. *Forsyth*, 29 Ala. 203.

Mr. Justice **Davis** delivered the opinion of the court:

In June, 1867, Robinson & Co., merchants of San Francisco, entered into a written agreement with Major T. T. Hoyt, Assistant Quartermaster of the United States, to deliver "on his order" 1,000,000 bushels of first quality clear barley. The barley according to the terms expressed in the contract, was to be delivered between the 1st of July, 1867, and the 30th of June, 1868, in such quantities and at such times as might be required for the use of the government troops, and at certain posts named; the precise points at those posts to be designated by the acting quartermasters at the posts themselves. But there was no specification in the instrument, of any particular manner in which the barley was to be delivered, as whether loose, or in what is known as "bulk," or in sacks.

Under this contract, Robinson & Co. deliv-**364*]** ered in sacks all *the barley required, between July 1, 1867, and the 1st of January, 1868; how much, exactly, did not appear, but it was more than 30,000 pounds. On the 10th of January, 1868, being required to deliver 30,000 pounds more, they tendered the quantity in bulk, that is to say, loose in wagons. The officer at the post where it was tendered, refused to receive it, because it was not in sacks. Thereupon, the contractor refused to deliver any more, and abandoned his contract altogether.

On suit brought by the United States, the government counsel asked a witness engaged in the grain business in California in 1867 and 1868, this question: "Do you know the usage of the trade with respect to the delivery of barley?" The question was objected to on the ground, among others, that it was incompetent for the plaintiff to vary the terms of the contract by usage, but the objection was overruled. The witness then testified that it was the custom in California as of course to deliver grain in sacks, and had always been the custom; that he never knew it to be delivered in any other way, unless by special agreement; the custom of the trade being to deliver by sacks altogether; that there has been a few experiments at shipping wheat in bulk, but that these were exceptional, and that the vessels plying around the bay were not constructed for thus carrying grain; that sacks cost about seventeen cents apiece, and held from 100 to 112 pounds.

There was no other witness produced to show the usage set up. The court (which by consent of the parties had been substituted in the place of a jury) found that, at the time of this contract, it was the usage in California, and always had been prior to that time, to deliver barley in sacks, unless it was expressly stipulated otherwise in the contract, and that therefore a tender in bulk did not satisfy the contract.

Judgment being accordingly given for the United States, the defendant brought the case here on exceptions to the evidence and finding.

In *Bernard* v. *Kellogg*, 10 Wall. 383, 19 L. ed. 987, this court decided that proof of a custom or usage inconsistent with a contract, and which either expressly or by necessary implica-

tion contradicts it, cannot be received in evidence to affect it; and that usage is not allowed to subvert the settled rules of law. But we stated at the same time that custom or usage was properly received to ascertain and explain the meaning and intention of the parties to a contract, whether written or parol, the meaning of which could not be ascertained without the aid of such extrinsic evidence, and that such evidence was thus used on the theory that the parties knew of the existence of the custom or usage and contracted in reference to it. This latter rule is as well settled as the former (*Coggs* v. *Bernard*, 1 Sm. L. Cas. 782) and under it the evidence was rightly received.

It is obvious by the steps which the plaintiffs took to perform their contract, that there are two modes in which barley may be delivered, for they delivered part in sacks and tendered part in bulk. And it is equally obvious, on account of the additional cost, that they would not have delivered the barley in sacks for a period of six months, if the contract, on its face, was satisfied by delivery in bulk. *The contract, by its terms, is silent as [***366** to the mode of delivery, and although there are two modes in which this can be done, yet they are essentially different, and one or the other and not both must have been in the mind of the parties at the time the agreement was entered into. In the absence of an express direction on the subject, extrinsic evidence must of necessity be resorted to in order to find out which mode was adopted by the parties; and what extrinsic evidence is better to ascertain this than that of usage? If a person of a particular occupation in a certain place makes an agreement by virtue of which something is to be done in that place, and this is uniformly done in a certain way by persons of the same occupation in the same place, it is but reasonable to assume that the parties contracting about it, and specifying no manner of doing it different from the ordinary one, meant that the ordinary one and no other should be followed. Parties who contract on a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary.

The evidence in the present case did not tend to contradict the contract, but to define its meaning, in an important point, where, by its written terms, it was left undefined. This, it is settled, may be done.

It is objected that the usage was proved by a single witness. But we cannot assert, as a rule of law governing proof of usages of trade, that if a witness have a full knowledge and a long experience on the subject about which he speaks, and testifies explicitly to the antiquity, duration, and universality of the usage, and is uncontradicted, the usage cannot be regarded by the jury as established. On the contrary, the authorities are that in such a case it may be. *Cooper* v. *Chitty*, 1 Sm. L. Cas. 382, 7th ed.; *Vail* v. *Rice*, 5 N. Y. 156; *Marston* v. *Bk. Mobile*, 10 Ala. 284; *Partridge* v. *Forsyth*, 29 Ala. 200.

Judgment affirmed.

ISAAC A. DAVENPORT, *Appt.*,
v.
JOHN R. LAMB, Emma S. Lamb, Ida Squires,* and her Guardian, William E. Cooper, James P. O. Lownsdale, *et al.*

(See S. C. 13 Wall. 418-432.)

Patents for land issued in name of deceased parties—donation act—rights of heirs and of husband or wife—construction of covenant against claims—covenant to convey.

*1. The act of Congress of 1836, authorizing the issue of patents for land in the name of deceased parties, who in their lifetime became entitled to such patents, applies to patents under the act of Congress of September 27, 1850, called the donation act of Oregon; and such patents inure to the parties designated in the donation act, and not solely to the parties designated in the act of 1836.

2. The donation act declared that in case husband or wife should die before the patent issues, the survivor and children or heirs, should be entitled to the share or interest of the deceased in equal proportions, except where the deceased should otherwise dispose of the property by will; held, that each of the children and the surviving husband or wife took equal shares, and that the property of the deceased was not to be divided so as to give one half to the surviving husband or wife, and the other half to the children or heirs of the deceased.

3. The covenant to "warrant and defend" property for which a quitclaim deed is executed "against all claims, the United States excepted" only applies to claims from other sources than the United States. It does not cover any interest of the United States, nor preclude its acquisition by the covenantors or their heirs for themselves.

4. A covenant that if the grantors "obtain the fee simple" to property conveyed "from the government of the United States, they will convey the same" to the grantee, his heirs or assigns "by a deed of general warranty," only takes effect in case the grantors acquire the title directly from the United States, and does not cover the acquisition of the title of the United States from any intermediate party.

[No. 128.]

Argued Mar. 5, 6, 1872. Decided Apr. 15, 1872.

APPEAL from the Circuit Court of the United States for the District of Oregon.

The case is stated by the court.

Messrs. **W. W. Chapman** and *J. S. Smith*, for appellant:

The first covenant protects the covenantee and assigns, in the possession against Lownsdale and all other persons, and against any title engrafted upon it through his instrumentality. He filed his notification including it, dating his settlement and residence from Sept. 22, 1848, to and including the date of the covenant. This appropriated the possession and the block to his own use, against which he had covenanted to warrant and defend.

2 Sugd. 541; 1 Chit. Cont. 274; 1 Y. & C. Ch. 222; 2 Vern.

He was not obliged to do this. He could as easily have omitted it as to have embraced it, and he knew, when he did so, that his wife would thereby become entitled to an interest in her own right, and deprive the covenantee of the possession and title, unless by the happening of a contingency provided for by the law (then unlikely to occur) by which the title and possession might revest in him. In the face of this covenant he took this risk. In consequence of the peculiar form of the covenant, the covenantee might not have been able to maintain an action at law, and because the subject was, for the time, supposed to be out of reach of the arm of a court of equity. But the contingency did happen. The same possession, with a title engrafted upon it through his instrumentality, revested in him, and it is now within the reach of a court of equity, perfect and complete, as contemplated by the parties in the formation of the second covenant and, therefore, his warranty should estop him and his heirs from asserting a right to the possession thus defined into a title through his act.

In respect to the second covenant, we claim under it, that if the fee vested in the covenantor by whatever means or through whatever channel, then, in equity and good conscience, he and those claiming under him are estopped to assert it; if not, under the pleadings they are bound to convey it.

2 Casey, 178; 1 Casey, 466; 8 Serg. & R. 425; 1 Jones, 300; 3 Haines, 319; General Laws of Oregon, 246, §§ 5, 130; 3 Haines, 319; 3 Md. 359, Stat. 1855, 367, §§ 1, 27, 45.

While it is admitted on the other side that, as survivor, Daniel H. Lownsdale, the covenantor, took by purchase, direct from the United States, and was to the extent of his interest, brought within the operation of this covenant, they object that the release by Isabella to him, who was her co-tenant in common, has created in him a new title directly from the United States and, therefore, not to be affected by this latter covenant to convey the fee simple obtained from the United States.

We controvert this proposition throughout.

Then, as to the so-called indirectness of the title from the United States obtained through Isabella. Admitting, for the sake of the argument, that it is so, it is not a good reason why, having so obtained it, he should not be held to convey it. There is nothing in the deeds or covenants that bound him to apply directly or indirectly to the United States for the fee simple. It was known to be in the United States, and if obtained from it he was to convey it. Neither was there any expression in the covenants or deed, that could be construed as intending to prevent him from obtaining it through some other person or channel, or that points out any other particular mode of obtaining it, whether by purchase or donation, or if obtained by purchase, that obligated the grantee to re-imburse any expense that might be incurred in so doing.

On the contrary, the expressed consideration is presumed to be an equivalent for obtaining and conveying the fee simple, and that the contract was made to that end.

The court below ruled that he was entitled, as survivor, to but one fifth of the whole tract. We contend that he was entitled to one half. The language of the law is: "The survivors and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions." 9 Stat. at L. p. 496, § 496. This, we claim, requires that the Nancy Lownsdale tract shall be equally divided between the survivors on the one part, and the children or heirs upon the other, and, with the interest of Isabella under such a division of the tract, would entitle him to five eighths of the whole instead of one fifth of it; and under the ruling of the court below, that he only took

*Headnotes by Mr. Justice FIELD.

the block and interest proportioned to his interest in the entire tract, the appellant should have decreed to him five eighths of the block.

This interest, whatever it may have been, was subject to the contingency of partition; and his covenants prior to, like a deed of bargain and sale, after he became invested with title, were subject to the same contingency, either by agreement or decree of court. If, upon designation and partition, the three children of Nancy should take their share outside of it, Lownsdale had it all and every part of it. If it should be in the part allotted to the children of Nancy, Lownsdale had nothing in it. It could not be claimed that his right in the property was measured by one half, two fifths, one fifth nor five eighths, any more than by ten tenths, or by no part at all. The covenants, therefore, operated upon the entire interest of Lownsdale, and conferred upon his covenantee or assignee, the benefits of the contingency, no less than left him and them to its risks.

A release by the children of Nancy to Lownsdale, of the block "G," and as well in the case of Isabella, subjected the block to the operation of the covenants. A partition by decree has the same effect.

Johnson v. *Stevens*, 7 Cush. 431.

The release by Isabella operated only to withdraw her claim; it created no new title. Lownsdale took his interest subject to partition. 15 Cal. 364.

But it is contended on behalf of the complainants and other heirs of D. H. Lownsdale, that, by the partition and release of Isabella, a new title was created, or that their ancestor, had he been alive, did and would have acquired, and they have in his place acquired, an additional three fifths or four fifths (according as Isabella's interest may or may not be included as subject to the covenants) interest in this block by exchange with Nancy's three children, which, as they say, are not, under any view of the subject, liable to the covenants of Daniel respecting this block. Their position is that partition is a conveyance or operates on the title.

This position is controverted. There is nothing in the nature or object of partition to warrant this view of it, and preponderance of authority is against it. The object of partition is to sever possession; each tenant after partition, as before, holds by virtue of his antecedent estate, and not of his cotenant. 15 Ohio, 337.

Two or more tenants in common may agree on boundaries and partition simply by parol, and this, if followed by possession, is between the parties sufficient and effectual.

Jackson v. *Bradt*, 2 Cai. 169; *Jackson* v. *Harder*, 4 Johns. 202; *Ryerss* v. *Wheeler*, 25 Wend. 434; *Mount* v. *Morton*, 20 Barb. 123; 2 Pat. & H. 197.

Such a proceeding between the tenants would not originate a new title for either.

The release is not an alienation, but a mere discharge of the claims of the one to the other. Hence, a fee arises out of the original conveyance.

2 Hill. Real Prop. 316, ed. 1865; 1 Met. (Ky.) 145; 5 Ohio, 243; 9 Ohio, 178; 17 Ohio, 130; *Goundie* v. *Northampton*, 7 Barn. 233, cited in note to Hilliard, 612; *Mitchell* v. *Hazen*, 4 Conn. 495; *Contee* v. *Godfrey*, 1 Cranch (C. C.) 478; 13 Ohio, 546.

Mr. **Geo. H. Williams**, for appellees:

The deed in question is a quitclaim deed and the "heirs" of the grantors are not named in the covenants. They are not, therefore, bound.

3 Co. Litt. § 733; 384 *a*; § 734; 386 *a*; 2 Hill. Real Prop. 359; § 13; p. 400, § 102; *Dart* v. *Dart*, 7 Conn. 250, and cases cited.

The first covenant is "to warrant and defend said property against all claims, the United States excepted." When this covenant was made the title was in the United States, and necessarily, therefore, if not an absurdity, it applies only to possession. It is, in effect, a covenant against everything but the title. Chapman's grantee can claim nothing upon this covenant. Lownsdale's heirs have a title, derived from the United States, and it was agreed in the deed that this covenant should not cover that title. The plain meaning of this covenant is, that it shall not bind, if the United States does not give the title to the covenantors. This the United States did not do, but gave it to the heirs of Nancy Lownsdale. This is like the case of *Cole* v. *Hawes*, 2 Johns. Cas. 203.

The second covenant is that, if the grantors obtain the fee simple to said property from the government of the United States, they will convey the same by deed of general warranty. They did not obtain the fee simple to said property, but it was granted by the government to the heirs of Nancy Lownsdale. Nancy Lownsdale's children do not hold under or through Lownsdale, Coffin, and Chapman, or either of them, but derive their title directly from the United States. There is no privity of contract or estate between them and the grantors in said deed, or either of them.

These covenants do not operate as an estoppel. Estoppel, in such cases, occurs only when a party has conveyed a precise or definite legal title by solemn assurance that he will not be permitted to deny.

Gilmer v. *Poindexter*, 10 How. 257.

No estate is described as conveyed in the deed where these covenants are found; but, on the contrary, the deed shows upon its face that the grantors had no title.

Covenants of warranty are limited by the nature of the estate conveyed.

Lewis v. *Baird*, 3 McLean, 78; *Comstock* v. *Smith*, 13 Pick. 116; *Blanchard* v. *Brooks*, 12 Pick. 67; *Sweet* v. *Brown*, 12 Met. 175; *Allen* v. *Hotton*, 20 Pick. 458; 2 Wash. (C. C.) 665; *Clark* v. *Baker*, 14 Cal. 628.

Nothing was or could be conveyed by said deed June 25, 1850.

There is nothing in the decree of partition to affect this question. Block "G," with other property, was by that decree assigned to the heirs and vendees or claimants under D. H. Lownsdale, according to their respective interests. The rights of these heirs or vendees were left for future adjustment or litigation. The decree does not in any way enlarge those rights.

Dawson v. *Lawrence*, 13 Ohio, 546; *Jackson* v. *Christman*, 4 Wend. 284.

Mr. Justice **Field** delivered the opinion of the court:

This is a suit on the equity side of the court, to obtain a partition of certain real property

situated in the city of Portland, in the state of Oregon, and to have the undivided interest owned by the complainant set apart to them in severalty. The material facts out of which the suit arises, are these: In June, 1850, three persons, named Daniel H. Lownsdale, Stephen Coffin, and William W. Chapman, were the owners of a land claim embracing a portion of the tract upon which the city of Portland is situated. The legal title to the property was then in the United States, but the parties asserting their claims to the possession under the law of the provisional government of the territory, expected that legislation would be taken at an early day by Congress for the transfer of the title to them or some of them. This expectation of legislation on their behalf was common with all occupants of land in Oregon, whose rights were merely possessory, the fee of the entire land in the territory being in the United States. With this expectation these claimants on the 25th day of that month executed a deed to Chapman, one of their own number, of numerous lots and blocks in Portland, into which a portion of their claim had been divided, including among them the premises in controversy, which are designated in the pleadings and proceedings as the south half of block G. The deed purports for the consideration of $60,000 to "release, confirm and quitclaim" to Chapman, his heirs and assigns, the described property; and contains two covenants on the part of the grantors, one to warrant and defend the property to their grantee, his heirs and assigns, against all claims, except the United States; and the other "that if they obtain the fee simple to aid property from the government of the United States they will convey the same to the grantee, his heirs or assigns, by deed of general warranty." The appellant, Davenport, is the assignee by various mesne conveyances of the interest thus acquired by Chapman in the property in controversy.

At the time this deed was executed, Lownsdale was a widower, having three children named James, Mary, and Sarah. At the same time there lived in the same town a widow, named Nancy Gillihan, having two children named William and Isabella.

In July, 1850, the widow and the widower intermarried, and they had as the issue of this marriage two children, named Millard and Ruth.

On the 27th day of September, 1850, Congress passed an act which is generally known in Oregon as the donation act, under which the title to a large portion of the real estate is held. It was entitled "An Act to Create the Office of Surveyor General of the Public Lands of Oregon, and to Provide for the Survey and to Make Donation to the Settlers of the Said Public Land." 9 Stat. at L. 496.

By the 4th section of this act, a grant of land was made to every white settler or occupant of the public lands in Oregon above the age of eighteen years who was a citizen of the United States, or had made a declaration according to law of his intention to become a citizen, or should make such declaration on or before the first day of December, 1851, and who was at the time a resident of the territory, or might become a resident on or before the 1st of [431*] December, 1850, *and who should reside upon and cultivate the land for four consecutive years and otherwise conform to the provisions of the act. The grant was of three hundred and twenty acres of land, if the settler or occupant was a single man, but if a married man, or if he should become married within a year from the 1st of December, 1850, then the grant was of six hundred and forty acres, one half to himself and the other half to his wife, to be held by her in her own right.

By the same section the surveyor general was required to designate, of the land thus granted, the part inuring to the husband and the part inuring to the wife, and to enter the same in the records of his office; and it was provided that in all cases where such married persons complied with the provisions of the act so to entitle them to the grants, whether under the previous provisional government or afterwards, and either should die before the issue of a patent, the survivor and children or heirs of the deceased should be entitled to the share or interest of the deceased in equal proportion, except when the deceased should otherwise dispose of the same by will.

Under this act, Lownsdale was a donation claimant, and dated the commencement of his settlement on the 22d of September, 1848. This settlement became complete on the 22d of September, 1852, at the expiration of the four years prescribed. The proof of the commencement of the settlement and the continued residence and cultivation required by the act was regularly made; and of the land the east half was assigned to Lownsdale, and the west half to his wife, Nancy. Within the portion thus assigned to the wife, the premises in controversy were included. The tract thus claimed and settled upon, embraced a fraction over one hundred and seventy-eight acres, and for it, in October, 1860, a patent certificate was given to Lownsdale and wife, and in June, 1865, a patent of the United States was issued to them, giving and granting in terms to Daniel H. Lownsdale, the east half of the property, and to his wife, Nancy Lownsdale, the west half.

Neither of the patentees were living at the time the patent for the donation claim in this case was issued, Lownsdale having died in May, 1862, and Nancy having died in April, 1854. At common law the patent would have been inoperative and void from this circumstance. *Galt* v. *Galloway*, 4 Pet. 345; *McDonald* v. *Smalley*, 6 Pet. 261; *Galloway* v. *Finley*, 12 Pet. 298; *McCracken* v. *Beall*, 3 A. K. Marsh. 210; *Thomas* v. *Wyatt*, 25 Mo. 26. By that law the grant to a deceased party is as ineffectual to pass the title of the grantor as if made to a fictitious person; and the rule would apply equally to grants of the government as to grants of individuals, but for the act of Congress of May 20, 1836, 5 Stat. at L. 31, which obviates this result. The act declares: "That in all cases where patents for public lands have been or may hereafter be issued, in pursuance of any law of the United States, to a person who has died, or who shall hereafter die, before the date of such patent, the title to the land designated therein, shall inure to, and become vested in, the heirs, devisees and assigns of such deceased patentee, as if the patent had issued to the deceased person during life." This act makes the title inure in a manner different from that provided by the donation act upon

the death of either owner before the issue of the patent, for we do not understand that the survivor of the deceased husband or wife was at the time his or her heir by any law of Oregon. If the act of 1836 can be considered as applying to patents issued under the donation act, where the party originally entitled to the patent has died before the patent issues—and on this point no question is made by either party—then its language must be construed in connection with and be limited by the provisions of the donation act, giving the property of a deceased husband or wife to the survivor and children or heirs of the deceased, unless otherwise disposed of by will; and in that case the patent here must be held to inure in favor of these parties instead of the heirs solely.

428*] *The four children of Nancy Lownsdale, the two by her first husband, Gillihan, and the two by her last husband, survived her, and these, with her surviving husband, became entitled, on her death, to her property in equal proportions, she having died intestate. This is, indeed, the express language of the statute, and in consequence each of the five persons named took an undivided fifth interest in the property. The learned counsel of the appellant, however, contends that the statute should be construed as dividing the property equally between the survivor on the one part, and the children or heirs upon the other. But the construction we give is the more natural one, and is in accordance with the uniform ruling of the courts, state and Federal, in Oregon.

In January, 1860, Lownsdale purchased the interest in this property of Isabella Gillihan (then Isabella Potter, she having intermarried with William Potter) and thus became owner of two undivided fifths. On his death these two undivided fifths passed to his heirs, he having died intestate, unless they were controlled by his covenant in the deed to Chapman.

In 1864 a suit was brought in a circuit court of the state of Oregon, by one of the children of Nancy by her first husband, for partition of the property which was assigned to her of the donation claim—the Nancy Lownsdale tract, as it is termed. In that suit the heirs of both Daniel and Nancy, and numerous other persons, purchasers and occupants under Daniel and the appellant, Davenport, were made parties. The suit resulted in a decree setting off, so far as practicable, the two undivided interests of Daniel to his heirs and vendees in lots and blocks as they were claimed, without any determination, however, of the extent of the respective rights and interests of these heirs and vendees between themselves; and in setting apart the remaining undivided three fifths in severalty to the children of Nancy who had retained their interests, owelty being allowed and paid for the inequalities existing in the partition. The tract set apart for the two fifths of Lownsdale included the premises **429*]** *in controversy. The heirs of Lownsdale were his two children living, by his first wife, two children of a deceased daughter by his first wife, named Emma S. Lamb and Ida Squires, and his two children by his second wife. Against these heirs the only claimant of the premises in controversy was the appellant, Davenport, who, as already stated, derived his interest by various mesne conveyances from Chapman.

The present suit is brought by the children of the deceased daughter of Lownsdale by his first wife, they having inherited her interest.

For its determination it is necessary to consider the effect upon the interest claimed by Davenport of the covenants contained in the deed of Lownsdale, Coffin, and Chapman, executed to Chapman on the 25th June, 1850.

So far as that instrument purports to be a conveyance from Chapman to himself, it is, of course, ineffectual for any purpose. Its execution by him left his interest precisely as it existed previously. But this superfluous insertion of his name in the deed as a grantor, does not impair the efficacy of the instrument as a conveyance to him from Lownsdale and Coffin, nor their covenants with him and his heirs and assigns. These covenants must be treated as the joint contracts of the two actual grantors.

Whether these covenants bind the heirs of the covenantors, they not being named, may, perhaps, admit of question. Rawle, Cov., tit. 579; *Lloyd* v. *Thursby*, 9 Mod. 463; *Morse* v. *Aldrich*, 19 Pick. 450. The court below held that, to the extent that the covenants affected the land, the heirs were bound by them, and as they have not appealed from this decision, it is unnecessary for the disposition of the case that the question should be determined by us.

What, then, is the effect and operation of the covenants? The first covenant, as already stated, is "to warrant and defend" the property released to Chapman, his heirs and assigns "against all claims, the United States excepted." At the time this covenant was executed the title to the property, as we have mentioned, was in the United States, and this fact was well known to the *parties. **[*430** Land was then occupied by settlers throughout the territory of Oregon, under laws of the provisional government, which were generally respected and enforced. These laws could of course only confer a possessory right, and no one pretended to acquire any greater interest under them. It was against the assertion of claims from this source and any other source, except the United States, the owner of the fee, that the covenant in question was directed. By it the grantors were precluded from asserting any interest in the premises against the grantee and his heirs and assigns, unless such interest were acquired from the United States. The warranty does not cover that interest and did not preclude its acquisition by the covenantors or either of them, or by their heirs or its enjoyment by them or either of them when acquired.

The second covenant is that if the grantors "obtain the fee simple" to the property "from the government of the United States, they will convey the same" to the grantee, his heirs, or assigns "by deed of general warranty." This covenant is special and limited. It takes effect only in case the grantors or their heirs (if the covenant binds the heirs) acquire the title directly from the United States; it does not cover the acquisition of the title of the United States from any intermediate party, and this was evidently the intention of the parties. They expected, as already stated, to obtain by the legislation of Congress the title of the United States to lands in their possession, and in case their expectations in this respect were realized,

they contracted to convey the same to their grantee, or to his heirs or assigns. They could not have intended, in case their expectations were disappointed and the title passed from the United States to other parties, to render it impossible for them to acquire that title in all future time from those parties without being under obligation to instantly transfer it to the grantee or his successors in interest. *Comstock* v. *Smith*, 13 Pick. 116. And such would be the effect of their covenant if it were given an operation beyond the precise limitation specified.

431*] *As already stated, Lownsdale took under the donation act, as the survivor of his deceased wife, one undivided fifth interest in her property, and he subsequently purchased a similar interest from Isabella Gillihan, a daughter of his wife by her first husband. The interest he thus purchased is not covered by the covenant. He did not acquire it directly from the United States. Whether the interest which he received as survivor of his deceased wife, Nancy Lownsdale, is within the covenant, depends upon the question whether he took that interest by descent, as heir of Nancy, or directly as donee from the United States. The court below held that he took as donee, and not as heir, and that in consequence the interest was within the operation of the covenant, and Davenport, his assignee, was entitled to have such interest transferred to him, and that interest was accordingly set apart in severalty to him.

Whether this ruling is correct it is unnecessary for us to determine. The appellant does not, of course, controvert it, and the heirs of Lownsdale, who alone could in this case question its correctness, have not appealed from the decree of the court below.

The parol evidence offered, of an alleged contract, in 1860, on the part of Lownsdale with Davenport, to confirm the title to the latter to the whole of block G, and of Lownsdale's declarations at that time as to the title, is entirely insufficient to create any estoppel *in pais* against the assertion of the interest claimed by his heirs to portions of that property. The alleged contract of Lownsdale was simply to confirm the title of Davenport to all lands to which he, Lownsdale, deemed the title doubtful; and the ground of complaint appears to be that he did not consider the title of Davenport to block G as doubtful, and so declared and, therefore, did not include that block in the property covered by his confirmatory deed. The declarations are at best but the expression of his opinion in relation to a subject upon which Davenport was equally well informed, or possessed equally with him the means of information. If the evidence of such declarations could be re-

432*] ceived years after the death of the *party who is alleged to have made them, to control the legal title which has descended to his heirs, a new source of insecurity in the tenure of property would be created, and heirs would often hold their possessions upon the uncertain testimony of interested parties, which it would be difficult and sometimes impossible to meet and explain after an interval of years, instead of holding them upon the sure foundations of the records of the country. *Boggs* v. *Mining Co.* 14 Cal. 376.

The decree of the court below must be affirmed; and it is so ordered.

*JETER CLINTON *et al.*, *Plffs. in Err.*, [***434**

v.

PAUL ENGLEBRECHT *et al.*

(See S. C. 13 Wall. 434-449.)

Jury law of territory, obligatory upon Federal courts—territorial courts—challenge to the array.

1. The law of a territorial legislature, prescribing the mode of obtaining panels of grand and petit jurors, is obligatory upon the district courts of the territory.
2. Although the judges of the supreme court of a territory are appointed by the President under an act of Congress, yet the courts they are authorized to hold are not courts of the United States.
3. Where a jury was not selected and summoned in conformity with the territorial law, a challenge for that reason to the array should have been allowed, and where such challenge was disallowed, the judgment in the case will be reversed.

[No. 379.]

Argued Mar. 7, 1872. Decided Apr. 15, 1872.

IN ERROR to the Supreme Court of the Territory of Utah.

The case is stated by the court.

Messrs. **C. J. Hillyer** and *Thos. Fitch* for plaintiffs in error.

Mr. **R. N. Baskin** for defendants in error.

Mr. Chief Justice **Chase** delivered the opinion of the court:

The principal question for consideration in this case is raised by the challenge of the defendants to the array of the jury in the third district court of the territory of Utah.

The suit was a civil action for the recovery of a penalty for the destruction of certain property of the plaintiffs by the defendants. The plaintiffs were retail liquor dealers in the city of Salt Lake, and had refused to take out a license as required by the ordinance of the city. The defendants, acting under the same ordinance, thereupon proceeded to the store of the plaintiffs and destroyed their liquors, to the value, as alleged, of more than $22,000. The statute gave an action against any person who should wilfully, or maliciously injure or destroy the goods of another, for a sum *equal to [***435** three times the value of the property injured or destroyed. Under this statute the plaintiffs claimed this threefold value. The act of the territorial legislature, passed in 1859, and in force when the jury in this cause was summoned, required that the county court in each county should make out from the assessment rolls, a list of fifty men qualified to serve as

NOTE.—*Challenges to jurors; challenges to the array and to the panel; challenges to individual jurors; peremptory and for cause*—see note, 41 L. ed. U. S. 104.

Causes of challenge of jurors and their qualifications.

Allenage is a good cause of challenge. Shumaker v. State, 5 Wis. 324; Johr v. People, 26 Mich. 427; Hill v. People, 16 Mich. 351; Guykowski v. People, 1 Scam. 476; State v. Quarrel, 2 Bay, 150, 1 Am. Dec. 637; 1 Bish. Crim. Prac. § 923.

Relationship to one of the parties is also ground of challenge. Hall v. Thayer, 105 Mass. 223.

It is good ground of challenge to a juror that he is interested in the case from having a claim against the defendant, which the same facts that will warrant a decision in plaintiff's favor will support. Davis v. Allen, 11 Pick. 466, 22 Am. Dec. 386.

A decided opinion held by a juror, positive, not hypothetical, upon the merits of the case, from personal knowledge, statements of witnesses or parties, or from rumors, which will probably pre-

jurors; and that, thirty days before the session of the district court, the clerk of that court should issue a writ to the territorial marshal or any of his deputies, requiring him to summon twenty-four eligible men to serve as petit jurors.

These men were to be taken by lot, in the mode pointed out by the statute, from the list previously made by the clerks of the county court, and their names were to be returned by the marshal to the clerk of the district court. Provision was further made for the drawing of the trial panel on this further list, and for its completion by a new drawing or summons, in case of nonattendance or excuse from service upon challenge or for other reason.

For the trial of the cause, the record shows that the court originally directed a *venire* to be issued in conformity with this law, and that a *venire* was issued accordingly, but not served or returned. The record also shows that, under an order subsequently made, an open *venire* was also issued to the Federal marshal; which was served and returned with a panel of eighteen petit jurors annexed. These jurors were summoned from the body of the county at the discretion of the marshal. Twelve jurors of this panel were placed in the jury-box, and the defendants challenged the array on the ground that the jurors had not been selected or summoned in conformity to the laws of the territory, and with the original order of the court. This challenge was overruled. Exception was taken and the cause proceeded. Both parties challenged for cause. Each of the defendants claimed six peremptory challenges. **436*]** This claim was also overruled, *and exception was taken. Other exceptions were also taken in the progress of the cause. Under the charge of the court, a verdict was rendered for the plaintiff, under which judgment was entered for $59,063.25, and on appeal was affirmed by the supreme court of the territory. A writ of error to that court brings the cause here.

It is plain that the jury was not selected, or summoned in pursuance of the statute of the territory. That statute was, on the contrary, wholly and purposely disregarded, and the controlling question raised by the challenge to the array is whether the law of the territorial legislature, prescribing the mode of obtaining panels of grand and petit jurors, is obligatory upon the district courts of the territory.

It was insisted in argument that the challenge to the array was waived by the defendants through the exercise of their right to challenge peremptorily and for cause; and we were referred to the judgment of the supreme court of New York, in the case of *The People* v. *McKay*, 18 Johns. 217, as an authority *for [*441 this proposition. But that case appears to be an authority for the opposite conclusion. "We are not of opinion," says the court, "that the prisoner's peremptory challenge of jurors was a waiver of his right to object now to the want of a *venire*." In that case there had been no *venire*, but the jury had been summoned in a mode not warranted by law. In the case before us there was a *venire*, but if it was not authorized by law it was a nullity; and we are not prepared to say that the efforts of the defendants to secure as far as they could, by peremptory challenges and challenges for cause, a fair trial of their case, waived an inherent and fatal objection to the entire panel.

We are, therefore, obliged to consider the question whether the district court, in the selection and summoning of jurors, was bound to conform to the law of the territory.

The theory upon which the various governments for portions of the territory of the United States have been organized, has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress. As early as 1784, an ordinance was adopted by the Congress of the Confederation providing for the division of all the territory ceded, or to be ceded, into states, with boundaries ascertained by the ordinance. These states were severally authorized to adopt for their temporary government the Constitution and laws of any one of the states, and provision was

vent him from giving an impartial verdict, is cause of challenge. Smith v. Eames, 3 Scam. 76, 36 Am. Dec. 515; Leach v. People, 53 Ill. 311.

Unless regulated by statute, the opinion which disqualifies a juror must be of fixed and determined character, deliberately formed, still entertained, and one that shuts out a different belief. O'Mara v. Commonwealth, 75 Pa. 424; Brown v. Com. 2 Leigh, 769; State v. Kingsbury, 58 Me. 238; People v. King, 27 Cal. 507; State v. Millian, 3 Nev. 409; Proffat on Jury Trials, § 187; McGregg v. State, 4 Blackf. 101; Staup v. Com. 74 Pa. 458.

It makes no difference that the opinion is based on rumor or newspaper reports of the cause of action. Armistead v. Com. 11 Leigh, 657, 37 Am. Dec. 633; People v. Reynolds, 16 Cal. 129; People v. Edwards, 41 Cal. 640; People v. Johnston, 46 Cal. 78; Wormeley's Case, 10 Gratt. 658; Jackson v. Com. 23 Gratt. 919; Wright v. Com. 32 Gratt. 941; State v. Benton, 2 Dev. & Bat. 196.

It is held in most states that an opinion founded on rumor or newspaper report does not disqualify a juror if he says he can try the case fairly and impartially, unbiased by his opinion. Guetig v. State, 66 Ind. 94, 32 Am. Dec. 99; State v. Williams, 3 Stew. 454; Grissom v. State, 4 Tex. App. 374; State v. Caulfield, 23 La. Ann. 148; State v. Bunger, 14 La. Ann. 461; People v. McCauley, 1 Cal. 379; O'Mara v. Com. 75 Pa. 424; State v. Anderson, 5 Har. 493; Waters v. State, 51 Md. 430; O'Connor v. State, 9 Fla. 215; Montague v. State, 17 Fla. 662; Ulrich v. People, 39 Mich. 245; Balbo v. People, 19 Hun, 424; State v. Davis, 29 Mo. 391; State v. Collins, 70 N. C. 24, 16 Am. Rep. 771; Van Vacter v. McKelly, 7 Blackf. 578; Curry v. State, 5 Neb. 412; State v. Ellington, 7 Ired. 61; Com. v. Lenox, 3 Brewst. 249; Clem v. State, 32 Ind. 418; State v. Bone, 7 Jones, L. 121; U. S. v. McHenry, 6 Blatchf. 503; *contra*, State v. Clark, 42 Vt. 629.

An impression on the mind, or hypothetical opinion, dependent on the truth or falsity of reports, unless there is actual bias, does not disqualify. Gold Mining Co. v. Natl. Bk. 96 U. S. 640; Thomas v. People, 67 N. Y. 218; State v. Kingsbury, 58 Me. 238; Howerton v. State, Meigs, 262; People v. Reynolds, 16 Cal. 132; Reynolds v. U. S. 98 U. S. 145; People v. Mather, 4 Wend. 229, 21 Am. Dec. 122; Thomas v. People, 67 N. Y. 218; State v. Sater, 8 Iowa, 420; State v. Ostrander, 18 Iowa, 435; Mann v. Glover, 14 N. J. L. 195; People v. Mallon, 3 Lans. 224; State v. Potter, 18 Conn. 166; Lee v. State, 45 Miss. 114; Loach v. People, 53 Ill. 311; State v. Kingsbury, 58 Me. 238; State v. Medlicott, 9 Kan. 257; Gray v. People, 26 Ill. 344.

If it influence his mind and require evidence to remove it, he is disqualified. Greenfield v. People, 6 Abb. N. C. 1, 74 N. Y. 277.

A juror related to counsel whose fees depend upon recovery, is disqualified. Melson v. Dickson, 63 Ga. 682, 36 Am. Rep. 128.

One who has expressed an opinion that a person imprisoned for a criminal offense has been punished enough, and who has signed a petition for his pardon, is not a competent juror in a civil action against the prisoner founded upon the same charge. Asbury L. Ins. Co. v. Warren, 66 Me. 523, 22 Am. Rep. 590.

made for their ultimate admission by delegates into the Congress of the United States. We thus find the first plan for the establishment of governments in the territories, authorized the adoption of state governments from the start, and committed all matters of internal legislation to the discretion of the inhabitants, unrestricted otherwise than by the state Constitution originally adopted by them.

This ordinance, applying to all territories ceded or to be ceded, was superseded three years later by the ordinance of 1787, restricted in its application to the territory northwest **442**[2] *of the river Ohio—the only territory which had then been actually ceded to the United States.

It provided for the appointment of the governor and three judges of the court, who are authorized to adopt for the temporary government of the district, such laws of the original states as might be adapted to its circumstances. But, as soon as the number of adult male inhabitants should amount to five thousand, they were authorized to elect representatives to a House of Representatives, who were required to nominate ten persons from whom Congress should select five to constitute a legislative council; and the House and the council thus selected and appointed were thenceforth to constitute the legislature of the territory, which was authorized to elect a delegate in Congress with the right of debating, but not of voting. This legislature, subject to the negative of the governor and certain fundamental principles and provisions embodied in articles of compact, was clothed with the full power of legislation for the territory.

The territories south of the Ohio, in 1790 (1 Stat. at L. 123); of Mississippi, in 1798 (1 Stat. at L. 549); of Indiana, in 1800 (2 Stat. at L. 58); of Michigan, in 1805 (2 Stat. at L. 309); of Illinois, in 1809 (2 Stat. at L. 514); were organized upon the same plan, except that the prohibition of slavery, embodied in the ordinance of 1787, was not embraced among the fundamental provisions in the organization of the territories south of the Ohio; and the people in the territories of Michigan, Indiana, and Illinois were authorized to form a legislative assembly, as soon as they should see fit, without waiting for a population of five thousand adult males.

Upon the acquisition of the foreign territory of Louisiana, in 1803, the plan for the organization of the government was somewhat changed. The governor and council of the territory of Orleans, which afterwards became the state of Louisiana, were appointed by the President, but were invested with full legislative powers, except as specially limited. A district court of the United States distinct **443***] from *the courts of the territory was instituted. 2 Stat. at L. 283. The rest of the territory was called the district of Louisiana, and was placed under the government of the governor and judges of Indiana. 2 Stat. at L. 287.

Jurisdiction of cases in which the United States were concerned, subject to appeal to the Supreme Court of the United States, was for the first time expressly given to a territorial court in 1805. 2 Stat. at L. 338. The territory of Missouri was organized in 1812 (2 Stat. at L. 743) and upon the same plan as the territories acquired by cessions of the states. In the act for the government of this territory appears for the first time a provision concerning the qualifications of jurors. The 16th section of the act provided that all free white male adults not disqualified by any legal proceeding, should be qualified as grand and petit jurors in the courts of the territory and should be selected, until the general assembly should otherwise direct, in such manner as the courts should prescribe.

The territory of Alabama, in 1817 (3 Stat. at L. 371), was formed out of the Mississippi territory, and upon the same plan. The superior court of the territory was clothed with the Federal jurisdiction given by the act of 1805. The territory of Arkansas was organized in 1819 (3 Stat. at L. 493) in the southern part of Missouri territory. The powers of the government were distributed as executive, legislative, and judicial, and vested respectively in the governor, general assembly, and the courts. The governor and judges of the superior court were to be appointed by the President, and the governor was to exercise the legislative powers until the organization of the general assembly. The act for the organization of the territorial government of Florida made the same distribution of the powers of the government as was made in the territory of Arkansas and contained the same provision in regard to jurors as the act for the territorial government of Missouri.

In all the territories full power was given to the legislature *over all ordinary sub- [***444** jects of legislation. The terms in which it was granted were various, but the import was the same in all.

Except in the acts relating to Missouri and Arkansas, no power was given to the courts in respect to jurors, and the limitation of this power until the organization of the general assembly indicates very clearly that, after such organization, the whole power in relation to jurors was to be exercised by that body.

In 1836 the territory of Wisconsin was organized under an act, which seems to have received full consideration, and from which all subsequent acts for the organization of territories have been copied, with few and inconsiderable variations. Except those in the Kansas and Nebraska acts in relation to slavery, and some others growing out of local circumstances, they all contained the same provisions in regard to the legislature and the legislative authority, and to the judiciary and the judicial authority, as the act organizing the territory of Utah. In no one of them is there any provision in relation to jurors.

The language of the section conferring the legislative authority in each of these acts is this:

* "The legislative power of said territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States, and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil. No tax shall be imposed upon the property of the United States, nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents."

As there is no provision relating to the selection of jurors in the Constitution or the organic act, it cannot be said that any legislation

upon this subject is inconsistent with either. The method of procuring jurors for the trial of cases is, therefore, a rightful subject of legislation, and the whole matter of selecting impaneling and summoning jurors is left to the territorial legislature.

The action of the legislatures of all the ter- **445*]** ritories *has been in conformity with this construction. In the laws of every one of them from that organized under the ordinance of 1787 to the territory of Montana are found acts upon this subject.[1] And it is worth while to remark that in three of the territories, Nevada, New Mexico, and Idaho, the judge of the probate has been associated with other officials in the selection of the lists for the different counties.

This uniformity of construction by so many territorial legislatures of the organic acts in relation to their legislative authority, especially when taken in connection with the fact that none of these jury laws have been disapproved by Congress though any of them would be annulled by such disapproval, confirms the opinion, warranted by the plain language of the organic act itself, that the whole subject-matter of jurors in the territories is committed to territorial regulation.

If this opinion needed additional confirmation it would be found in the judiciary act of 1789. The regulations of that act in regard to the selection of jurors have no reference whatever to territories. They were framed with reference to the states, and cannot, without violence to rules of construction, be made to apply to territories of the United States. If, then, this subject were not regulated by territorial law, it would be difficult to say that the selection of jurors had been provided for at all in the territories.

It is insisted, however, that the jury law of Utah is defective in two material particulars: first, that it requires the jury lists to be selected by the county court, upon which the organic law did not permit authority for that purpose to be conferred. Second, that it requires the jurors to be summoned by the territorial mar- **446*]** shal, who was elected by the *legislature, and not appointed by the governor. We do not perceive how these facts, if truly alleged, would make the mode actually adopted for summoning the jury in this case legal. But we will examine the objections.

It the first place, we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute book for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the secretary of the territory to transmit to that body copies of all laws, on or before the first of the next December in each year. The imple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body.

In the next place, we are of opinion that the making of the jury lists by the county courts was not a judicial act. Conceding that it was not in the power of the territorial legislature to confer judicial authority upon any other courts than those authorized by the organic law, and that it was not within its competency to organize county courts for the administration of justice, we cannot doubt the right of the territorial legislature to associate select men with the judge of probate, and to call the body thus organized a county court, and to require it to make lists of persons qualified to serve as jurors. In making the selection, its members acted as a board, and not as a judicial body.

Nor do we think the other objection sound, *viz.:* that the required participation of the territorial marshal in summoning jurors invalidated his acts because he was elected by the legislature, and not appointed by the governor. He acted as territorial marshal under color of authority, and if he was not legally such, his acts cannot be questioned indirectly.

But, we repeat, that the alleged defects of the Utah jury law are not here in question. What we are to pass upon is the legality of the mode actually adopted for impaneling the jury in this case. If the court had no authority to adopt that mode, the challenge to the array was well taken, and should have been allowed.

*Acting upon the theory that the su- [***447** preme and district courts of the territory were courts of the United States, and that they were governed in the selection of jurors by the acts of Congress, the district court summoned the jury in this case by an open *venire*. We need not pause to inquire whether this mode was in pursuance of any act of Congress, for, if such act was not intended to regulate the procuring of jurors in the territory, it has no application to the case before us. We are of opinion that the court erred both in its theory and in its action.

The judges of the supreme court of the territory are appointed by the President under the act of Congress, but this does not make the courts they are authorized to hold, courts of the United States. This was decided long since in *The American Insurance Company* v. *Canter*, 1 Pet. 546, and in the later case of *Benner* v. *Porter*, 9 How. 235. There is nothing in the Constitution which would prevent Congress from conferring the jurisdiction which they exercise, if the judges were elected by the people of the territory, and commissioned by the governor. They might be clothed with the same authority to decide all cases arising under the Constitution and laws of the United States, subject to the same revision. Indeed, it can hardly be supposed that the earliest territorial courts did not decide such questions, although there was no express provision to that effect, as we have already seen, until a comparatively recent period.

There is no Supreme Court of the United States, nor is there any district court of the United States, in the sense of the Constitution, in the territory of Utah. The judges are not

1.—Wisconsin, organized April 20, 1836, 5 Stat. at L. 10; Iowa, organized June 12, 1838, 5 Stat. at L. 235; Oregon, organized August 14, 1848, 9 Stat. at L. 323; Minnesota, organized March 3, 1849, 9 Stat. at L. 403; New Mexico, organized September 9, 1850, 9 Stat. at L. 446; Utah, organized September 9, 1850, 9 Stat. at L. 453; Nebraska, organized May 30, 1854, 10 Stat. at L. 277; Kansas, organized May 30, 1853, 10 Stat. at L. 277; Washington, organized March 2, 1853, 10 Stat. at L. 172; Colorado, organized February 28, 1861, 12 Stat. at L. 172; Nevada, organized March 2, 1861, 12 Stat. at L. 209; Dakota, organized March 2, 1861, 12 Stat. at L. 239; Arizona, organized Feb. 24, 1863, 12 Stat. at L. 664; Idaho, organized March 3, 1863, 12 Stat. at L. 808; Montana, organized May 26, 1864, 13 Stat. at L. 85.

appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the Constitution or the general government. The courts are the legislative courts of the territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the territories belonging to the United States. *Am. Ins. Co.* v. *Canter*, 1 Pet. 545.

448*] *The supreme court of the territory was doubtless misled by the inadvertent use of the words "marshal of the district court of the United States for the territory of Oregon" in the organic law. This act defines the duties, liabilities, and fees of the marshal for the territory by reference to those of the marshal of the district court of the United States for the territory of Oregon. On reference to the act organizing that territory, we find that the duties of the marshal were to be the same as those of the marshal for the district court of the United states for the territory of Wisconsin. On reference to the act organizing the last-named territory, the duties, liabilities, and fees of the marshal were described to be the same as those of the "marshal of the district court of the United States for the northern district of New York." Hence, the words "marshal of the district court of the United States" have crept into the various acts organizing these territories. But the description of the court which was proper in a state would be improper in a territory.

The organic act authorized the appointment of an attorney and a marshal for the territory, who may properly enough be called the attorney and marshal of the United States for the territory; for their duties in the courts have exclusive relation to cases arising under the laws and Constitution of the United States.

The process for summoning jurors to attend in such cases may be a process for exercising the jurisdiction of the territorial courts when acting, in such cases, as circuit and district courts of the United States; but the making up of the lists and all matters connected with the designation of jurors are subject to the regulation of territorial law. And this is especially true in cases arising, not under any act of Congress, but exclusively, like the case in the record, under the laws of the territory.

There is nothing in this opinion inconsistent with the cases of *Orchard* v. *Hughes*, 1 Wall. 73, 17 L. ed. 560, or of *Hunt* v. *Palao*, 4 How. 589, **449***] properly *understood. The first of these cases went upon the ground that the chancery jurisdiction conferred upon the courts of the territories by the organic act was beyond the reach of territorial legislation; and the second, in which the territorial court of appeals was called a court of the United States was only intended to distinguish it from a state court.

Upon the whole, we are of opinion that the jury in this case was not selected and summoned in conformity with law, and that the challenge to the array should have been allowed. This opinion makes it unnecessary to consider the other questions in the case.

The judgment of the Supreme Court of the Territory of Utah must be reversed.

LOUISA CHEW, *Plff. in Err.*,
v.
RICHARD A. BRUMAGEN.

(See S. C. 13 Wall. 497-506.)

State judgment, effect of, in other state—cestui que trust.

1. The same legal effect must be given to a New York judgment, in New Jersey, as would be given to it in New York.
2. Where, by the laws of New York, a trustee of an express trust may bring an action without making the *cestui que trust* a party, a judgment in such action is conclusive against the *cestui que trust*, not only in that state, but in all other states.

[No. 117.]

Submitted Feb. 23, 1872. Decided Apr. 15, 1872.

IN ERROR to the Court of Chancery of the State of New Jersey.

The case is stated by the court.

Messrs. Edward P. Cowles, John Sherwood, and **John H. Reynolds,** for plaintiff in error:

The rule recognized and followed by the courts of New York is:

1. That Wood, as assignee in the courts of New York, could maintain suit on the bond in his sole name as plaintiff, without joining Walker or his administratrix as a party, either plaintfff or defendant.

2. That both by general law and by § 112 of the N. Y. Code, Chew could set up in that suit whatever defense he had against Walker, and that the judgment in that suit concluded Walker, his personal representatives and assigns.

Hasting v. *McKinley*, 1 E. D. Smith, 273-277; see, also, *Sheldon* v. *Wood*, 2 Bosw. 272; *Boynton* v. *Ins. Co.* 16 Barb. 254; *St. John* v. *Ins. Co.* 13 N. Y. 31; *Cummings* v. *Morris*, 25 N. Y. 625; *Poor* v. *Guilford*, 10 N. Y. 373; *Grant* v. *Tallman*, 20 N. Y. 191; *Nelson* v. *Eaton*, 26 N. Y. 410; *Voorhis* v. *Childs*, 17 N. Y.

A distinction is to be observed between cases where the entire title is conveyed, and those cases where only a fractional interest in the thing is conveyed.

In that class of cases where the assignee holds but one third, one half, or some fractional interest in the bond, he never could at law nor in equity, and cannot now, recover a judgment for his fractional interest, without bringing in the other parties, either as co-plaintiffs or defendants, since he does not represent the entire, but a fractional portion of the subject-matter of the suit, and the splitting up of demands is not permitted.

Mr. **Edward T. Green,** for defendant in error:

The plaintiff in error insists that the judgment in New York operated as an extinguishment of the bond, and that upon the payment thereof, the debt secured by the mortgage was satisfied, and the mortgage thereby discharged. On the other hand, the defendant in error claims that the whole effect of the judgment was simply the reduction *pro tanto* of the amount due upon the bond, and that he has the right to look to the security for the balance.

Was Wood a necessary party to the suit upon the bond, instituted by Wood against Chew in New York?

It is a well-settled principle, that to make a

judgment binding and effective, the court must have jurisdiction over both the cause and all necessary parties thereto; or, as it is sometimes expressed over the parties and the things to be affected.

Flanders v. *Ins. Co.* 3 Mason, 158; Story, Confl. L. 492.

When an adjudication is made upon a particular subject-matter, the rights of all parties whose interests are immediately connected with that adjudication and affected by it, shall be provided for, as far as they reasonably may be.

Bissell v. *Briggs*, 9 Mass. 462; *Newell* v. *Newton*, 10 Pick. 472; *Healy* v. *Root*, 11 Pick. 390; *Kilburn* v *Woodworth*, 5 Johns. 41; *Fenton* v. *Garlick*, 8 Johns. 197; *Borden* v. *Fitch*, 15 Johns. 121; *Shumway* v. *Stillman*, 4 Cow. 294; *S. C.* 6 Wend. 449; *Starbuck* v. *Murray*, 5 Wend. 148; *Mervin* v. *Kumbel*, 23 Wend. 293; *Adams* v. *Rowe*, 11 Me. 95; *Whittier* v. *Wendell*, 7 N. H. 257; *Aldrich* v. *Kinney*, 4 Conn. 380; *Wernwag* v. *Pawling*, 5 Gill. & J. 500; *Hodges* v. *Deaderick*, 1 Yerg. 125; *Rogers* v. *Coleman*, Hard. (Ky.) 413; *Rust* v. *Frothingham*, 1 Breese, 259; *Miller* v. *Miller*, 1 Bailey, 244; *Oakley* v. *Aspinwall*, 4 N. Y. 513; *Hulbert* v. *Ins. Co.* 4 How. Pr. 275; *Brewster* v. *R. R. Co.* 5 How. Pr. 183; *Rose* v. *Himely*, 4 Cranch, 269; *D'Arcy* v. *Ketchum*, 11 How. 165.

Wood was interested in the bond to the extent of $1,900, it having been assigned to him as collateral security for that amount.

Walker was interested in the same bond to the extent of $1,600, that being the amount due to him after the satisfaction of the debt for which it was held by Wood as collateral; and Chew was interested in the bond to the extent of $3,500, for that was the amount which he had obligated himself to pay to Walker. It is apparent, therefore, that Wood, Walker, and Chew were the real parties in interest.

Now, by the Code of Civil Procedure of N. Y., this principle, that all parties in interest must be before the court to perfect an adjudication, is affirmed in express terms.

The Code enacts: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in § 113." Code, ed. 1853, § 111, p. 81.

If Walker, then, was a party in interest under § 111 of the Code, the action should have been prosecuted in his name.

In a note to § 111, in Voorhees' Code of Procedure, ed. 1853, pp. 81, 82, the annotator says: "The present Code has adopted, with slight modifications, the rule in relation to parties which formerly obtained in courts of equity and, with the exception in section 113, the suit must be prosecuted in the name of the party in interest, and the rule which prevailed in equity may be very safely applied to cases under the Code."

Again: "It seems impossible, in viewing the analogy of the rule respecting parties, contained in this title (title III., Parties to Civil Actions) to the rules on the same subject in the late court of chancery, to resist the inference that it was the intention of the framers of the Code to introduce the rules in equity practice respecting parties."

If this view is a correct one, and the term "real party in interest" has in courts of common law the same signification which it had in equity, the case at bar is at an end. The plaintiff in error has no standing here, for it is an undoubted rule in New York, that upon the foreclosure of a mortgage the assignor who has assigned a mortgage, as collateral security, is a necessary party, and this, too, although the assignment is absolute in its terms, and expresses the receipt of a full consideration.

Johnson v. *Hart*, 3 Johns. Cas. 332; *Whitney* v. *McKinney*, 7 Johns. Ch. 145; *Kittle* v. *Van Dyck*, 1 Sandf. Ch. 76; 1 Dan. Ch. Pr. (marg.) 304, 305, 307.

The rule in England is the same.

Palmer v. *Carlisle*, 1 Sim. & S. 423; *Wetherell* v. *Collins*, 3 Madd. 255; *Hobart* v. *Abbot*, 2 P. Wms. 642; *Norrish* v. *Marshall*, 5 Madd. 475; Coop. Eq. Pl. 34; *Cathcart* v. *Lewis*, 1 Ves. Jr. 463; Calv. Part. 11; *Palk* v. *Clinton*, 12 Ves. 48; *Lowe* v. *Morgan*, 1 Brown (C. C.) 368; *Lewis* v. *Nangle*, 2 Ves. 431; *Clerkson* v. *Bowyer*, 2 Vern. 67.

That this is the proper construction of the section in question has been clearly determined by the courts of New York.

Wallace v. *Eaton*, 5 How. Pr. 99; *Hollenbeck* v. *Van Valkenburgh*, 5 How. Pr. 281; *Cook* v. *Ins. Co.* 8 How. Pr. 514; *Lewando* v. *Dunham*, 1 Hilt. 114; *Secor* v. *Keller*, 4 Duer, 416; *Considerant* v. *Brisbane*, 22 N. Y. 389; *Bk.* v. *Sherwood*, 29 Barb. 383; *Boynton* v. *Ins. Co.* 16 Barb. 254; *Richtmyer* v. *Richtmyer*, 50 Barb. 55; *Tr. of Auburn Theol. Sem.* v. *Kellogg*, 16 N. Y. 83.

It is evident that Wood does not come within the exception of § 113. He is not in any sense a "trustee of an express trust." By the assignment of the bond to him as collateral, Wood did not become a trustee for Walker. The right of Walker was not that of a *cestui que trust;* it was simply an equity, a right to redeem the bond by satisfying the debt for which it had been assigned as collateral.

Mr. Justice **Strong** delivered the opinion of the court:

This was a bill to foreclose a mortgage given by Robert Chew, the testator of the plaintiff in error, to secure the payment of his bond to Peter Walker for the sum of $3,500. The consideration of the bond was the sale of a farm in the state of New Jersey. Soon after the bond was given, Walker, the obligee, assigned it, together with the accompanying mortgage, to Stephen G. Wood, as collateral security for payment of $1,700; and afterwards, by another instrument of writing, declared that the assignee held them as collateral security for the payment of $200 more. Wood, having thus become the assignee, brought suit on the bond in the supreme court of New York in 1853, against Chew, the obligor, and joined Walker as a defendant, he having refused to join as plaintiff; but process was not served upon Walker, nor did he appear. After his death, which occurred before the trial, on affidavit of his administratrix that he had deceased, the court ordered that the action should be continued against her as administratrix, but it does not appear that the order was ever served upon her. Chew, however, pleaded fraud in the sale of the farm, and claimed to recoup the damages he had sustained in consequence of the fraud *and [*499 the case went to trial upon the issue tendered by this plea. On the trial, the jury found for

Wood the sum of $2,091.25, for which judgment was given, and which Chew immediately paid.

Pending the suit, however, Wood assigned the bond and mortgage to M. S. Braisted, and two days after the judgment, which had been recovered, was paid, Braisted and Walker's administratrix joined in assigning them to Brumagen, the defendant in error in this case. A bill was then filed in chancery in New Jersey, at the suit of Brumagen, seeking to foreclose the mortgage, and the plaintiff in error set up in defense the suit in the supreme court of New York, the judgment therein and the payment of the judgment, claiming that the debt which the mortgage was given to secure was thereby satisfied and, consequently, that the mortgage, which was only a security for the debt, has also been satisfied. But it was ruled by the chancellor that the judgment in the supreme court of New York was no defense to the bill beyond the amount actually recovered by Wood and paid to him; that inasmuch as neither Walker nor his administratrix were served with process in that suit nor appeared therein, the assignee was not concluded by the judgment, and the ruling of the chancellor was affirmed in the court of errors and appeals.

Confessedly the judgment must have the same effect given to it in the courts of New Jersey as **502***] it has in the state of *New York, by the laws of that state, and either of the parties to it has, under the Constitution of the United States, a right to insist that such shall be its operation.

The question, therefore, is, What was its effect in the state of New York?

If, by the assignment to him, Wood, the assignee of the bond and mortgage, was clothed with the legal interest therein, and if, when he sued, Walker, the assignor, was not a necessary party to the suit, it is plain the judgment in the suit determined finally the amount of the debt for which the bond was given, and neither Walker nor his administratrix, nor any subsequent assignee of either of them can maintain that the bond was not wholly extinguished in the judgment. They were all represented by Wood, and they can claim only through him. On the other hand, if Walker was a necessary party to the suit, neither he nor those claiming under him by subsequent right can be concluded by the judgment.

By the 111th section of the Code of Procedure in New York, it was enacted that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in § 113." The 113th section enacted thus: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust within the meaning of this section shall be construed to include a person with whom, or in whose name a contract is made for the benefit of another." Doubtless, the object of these provisions was to change the common-law rule that an action must be brought in the name of the party who has the legal right, and to substitute for it the rule in equity, but with considerable enlargement. This is manifest, not only in the language of the statute, but in the construction which has been given to it by the courts of New York.

Had there been nothing more than the requirement of the 111th section, that every action must be brought in the name of the real party in interest, it might be that the precise rule in *equity as to parties might have been in- [***503** tended. But this cannot be, in view of the other sections. Thus the 117th enacts that all persons having an interest in the subject-matter may be joined as plaintiffs. The 118th enacts that any person may be a defendant who has or claims an interest in the controversy adverse to the plaintiffs, or who is a necessary party to a complete determination and settlement of the questions involved therein. The 119th section enacts that those united in interest must be joined as plaintiffs or defendants, unless the consent of one who should have been joined as plaintiff cannot be obtained, when he may be made a defendant. The 113th section we have already quoted. That, as we have seen, enables a trustee of an express trust to sue in his own name without joining those who have a beneficial interest. It makes him the representative of the holders of mere equities. Who, then, is a trustee of an express trust within the meaning of the statute? It is plain that the law intended to class among such trustees others than those who, in equity, are regarded as technical trustees. It expressly declares that included among them shall be persons with whom, or in whose name, a contract is made for the benefit of another.

And the judicial decisions of New York have given a liberal interpretation to the description, "trustee of an express trust" in accordance with the apparent intention of the legislature. Thus, in *Cummings* v. *Morris*, 25 N. Y. 625, where notes had been assigned to the plaintiff upon his agreement to give to the assignor when the notes should be collected the amount thereof in stock, it was held that the assignee might sue alone, and this though the whole beneficial interest was in the assignor. In *Considerant* v. *Brisbane*, 22 N. Y. 389, where a promissory note had been given to the plaintiff, as executive agent of a firm, it was ruled that he might sue in his own name, because he was a trustee of an express trust. In *St. John* v. *The American Life Insurance Company*, 13 N. Y. 31, the plaintiff was the assignee of two policies of insurance under an agreement *that, if one of the [***504** policies was paid, he would pay to the wife of the assignor part of the proceeds thereof, and pay her all he recovered on the other policy. It was held that he could sue alone. *Lewis* v. *Graham*, 4 Abb. Pr. 106, was a case where an assignment of property had been made by a debtor in trust for certain creditors, and the assignee was empowered to pay them, returning the balance to the assignor; and it was held that the assignee might bring a suit in his own name, without joining the *cestui que trust*. In *Slocum* v. *Barry*, 34 How. Pr. 320, which was an action brought by persons appointed to receive subscriptions for the Troy University against one who had signed a general subscription agreement, it was ruled they were trustees of an express trust, and it was said "no formal or written agreement is necessary to create a trust in money or personal estate. Any declaration, however informal, which evinces the intention of the party with sufficient clearness, will have that effect." *Cummins* v. *Barkalow*, 4 Keyes, 514; *Reed* v. *Harris*, 7 Robt. 151; *Burbank* v. *Beach*, 15 Barb. 326; *Brown* v. *Cherry*, 38 How.

Pr. 352. A factor, or other mercantile agent, who contracts in his own name in behalf of his principal, is a trustee of an express trust within the meaning of the statute.

These and other cases which might be cited, show how liberally the term "trustee of an express trust" has been construed in order to preserve, measurably, the common-law rule, that he who has the legal right is the proper plaintiff.

If, now, we turn to the case in hand it will be found not easy to see why, if Wood was not the real party in interest when he sued upon the bond, he was not at least a trustee of an express trust. The assignment of Walker to him, though expressly stated to be for a collateral security, gave him the entire legal interest. It enabled him to employ the entire bond, if necessary, for the payment of the assignor's debt to him. Had the assignment been without reference to the purpose for which it was made, it is not doubted that the assignee would have been the real party **505***] in interest, and *as such entitled to sue without joining the assignor, and this though in fact made as a collateral security. The legal effect of the transfer cannot be different because the purpose of it was expressed. It is to be observed that Walker's assignment was not a part of the bond, making Wood and Walker joint-owners, as was the case in *Lewando* v. *Dunham*, 1 Hilt. 114, where the agreement was that the assignor should have half the judgment. Walker's rights were not concurrent with those of his assignee. They were subordinate. He had nothing to get until Wood's claim was entirely satisfied. By his assignment he substituted Wood in his place to demand and receive payment of the bond, and agreed to look to Wood for what remained after his notes were satisfied. Surely after the assignment he had no right to demand anything from Chew. How, then, had he any real interest in the bond? He had an interest in what Wood might collect by virtue of the bond, but that is a different thing from an interest in the bond itself. And Wood, by taking the assignment expressly as a collateral security, undertook to account to his assignor for the property assigned. He became the holder of the legal right under an express trust to hold the beneficial interest or the money collected primarily for himself, and secondarily for his assignor. If faithless to his trust, if he colluded with the obligor in the bond, he was responsible to his *cestui que trust*.

If, then, as we think, Wood by the assignment became the trustee of an express trust, neither Walker nor his personal representative was a necessary party to the suit which was brought upon the bond. They were represented by the trustee, and the judgment which he recovered settled finally against them, and all claiming under them as well as against Wood, the amount recoverable. Such, in our opinion, was the legal effect of the judgment in the state of New York. And the plaintiff in error has a constitutional right to have the same effect given to it in the state of New Jersey. The learned court, therefore, erred in decreeing a foreclosure of the **506***] *mortgage. The complainant's bill should have been dismissed.

The decree of the Court of Chancery is reversed, and the cause is remitted, with directions to proceed in accordance with this opinion.

JOHN WATSON *et al.*, *Appts.*, *v.* WILLIAM A. JONES *et al.*

(See S. C. 13 Wall. 679-738.)

Rights of religious corporation and of its members, subject to control of the courts—former adjudication, when conclusive — marshal's possession—possession by trustees of church —trust, to sustain religious doctrines—congregational churches—decisions of ecclesiastical bodies, how far binding.

1. Rights of property or of contract, of religious organizations, are under the protection of the law, and the actions of their members subject to its restraints.
2. When the pendency of a suit is set up to defeat another, the case must be the same, and founded on the same facts, and there must be the same parties, the same rights asserted and the same relief prayed for.
3. The marshal of the chancery court cannot be displaced by another court as to the mere actual possession of the property held by him.
4. The trustees and elders of the Presbyterian church hold possession of its property for the use of the persons who, by the constitution, usages and laws of the Presbyterian body, are entitled to that use.
5. Their possession is a fiduciary possession, and they may be dispossessed by the election of others in their places.
6. Individuals may dedicate property by way of trust to the purpose of sustaining and propagating definite religious doctrines, and it is the duty of the court to see that the property so dedicated is not diverted from such trust.
7. It is not in the power of the majority of a congregation to carry the property so confided to them to the support of a new and conflicting doctrine.
8. Where a church is of a strictly congregational or independent organization, and the property held by it has no trust attached to it, its rights to the use of the property must be determined by the ordinary principles which govern voluntary associations.
9. Where the local congregation is itself a member of a much larger and more important religious organization and is under its government and control and is bound by its orders and judgments, its decisions are final, and binding on legal tribunals.
10. Courts, having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline; their only judicial power arises from the conflicting claims of the parties to the church property and the use of it.

[No. 12.]

Argued Mar. 10, 1871. Decided Apr. 15, 1872.

APPEAL from the Circuit Court of the United States for the District of Kentucky.

The case is stated by the court.

Messrs. **Thomas W. Bullitt** and *J. S. Black*, for appellants:

It has been observed that questions of this nature are, in a measure, novel to the jurisprudence of this country.

A number of cases of church litigation are reported in New York and New England; but with few exceptions, they are inapplicable to the general questions arising herein, for the reason that in the latter they refer mostly to Congregational or Independent churches, while in the former they relate to incorporated religious societies, wherein the whole body of the congregation, whether members of the church or not, are members of the corporation; and disputed questions touching property or other rights, are

NOTE.—*Conclusiveness of decisions of ecclesiastical tribunals*—see note, 49 L. R. A. 384.

determined strictly on the principles applicable to corporations.

See *Petty* v. *Tooker*, 21 N. Y. 267; *Burrel* v. *Ass. Ref. Church*, 44 Barb. 282; *Robertson* v. *Bullions*, 9 Barb. 64.

Pennsylvania affords several cases, and Kentucky at least one (arising before this schism occurred) in which the general questions have been ably considered and adjudged.

See *Sutter* v. *First Ref. Dutch Church*, 42 Pa. 509; *Pres. Cong.* v. *Johnson*, 1 Watts & S. 37; *Com.* v. *Green*, 4 Whart. 603; *Gibson* v. *Armstrong*, 7 B. Mon. 481.

The case of *Shannon* v. *Frost*, 3 B. Mon. 256, specially relied on by the appellees, has already been declared, by the court and by the judge who rendered the opinion, to be inapplicable in this cause, by reason of the purely congregational character of the Baptist Church, in which it arose.

The great field for litigation of this nature has been Scotland, the native home of the Presbyterian faith and form of church government. See Innes' Law of Creeds in Scotland, especially the fifth and sixth chapters, relating to the "legal theory of nonestablished churches," and "questions of church property in relation to creeds."

Prior to about the year 1813, the courts do not seem to have settled upon any definite rule by which church controversies were to be adjudged.

The earlier decisions, accepting as a conclusive test of right the action of a majority of the local congregation, afforded an easy and simple rule, so long as applied to independent churches; but when it came to be applied to societies organized as a part of larger bodies, where the majorities in the local and general organizations might be different, it was found not to be based on just or practicable principles. About the year 1813, in a case bearing in some points a striking analogy to the present, both of these conceptions were brought out at different periods; and on appeal to the House of Lords, drew from Lord Eldon an announcement of the principle which was at once recognized, and has since been universally accepted, as the true governing rule in all cases of this nature.

The case is that of *Craigdallie* v. *Aikman*, 2 Bligh, 529; 1st Dow, 1.

This case, immediately followed and recognized by that of *Atty.-Gen.* v. *Pearson*, 3 Mer. 353, has been uniformly accepted and founded upon in all cases of this nature in England, Scotland, and America.

Without attempting a review of the cases, I conceive that this general principle may be considered as finally settled, *viz.*, that where property is conveyed for the use or benefit of a designated church or religious society (the deed containing no special limitations) such property, by operation of the law of trusts, is held for the use of such society, subject to the entire body or system of doctrines, rules, or principles, whether of faith, form, or order, held and recognized by the society at the time of the conveyance; that it binds such society to a permanency of religious faith and continuance of subsisting connections, or recognizes a right of change in doctrine, or a lawful severance of its connections, so far and no farther than it is bound to or released from such permanent or continuing state, by or in accordance with the fundamental laws of the organization.

I conceive it to be settled that wherever the use or control of property depends upon adherence to or a change from original doctrines, or upon a continuance or severance of connections with a particular judicatory, or upon an alleged title to office in the church, or upon any act, judgment, or proceeding of an ecclesiastical tribunal, in every case the exclusive standard by which the conflicting claims are to be judged, is the constitution of the church itself. These views, recognized in all cases, are brought out with peculiar force in the American cases of *Gibson* v. *Armstrong*, 7 B. Mon. 481, and *Sutter* v. *First Ref. Church*, 42 Pa. 509. See *Smith* v. *Nelson*, 18 Vt. 511; *Kniskern* v. *Lutheran Church*, 1 Sandf. Ch. 439; *Miller* v. *Gable*, 2 Den. 492.

Another question, more serious and difficult than the last, remained in determining the application of this rule of the law of trusts, *viz.*, in these matters of religious doctrine, discipline, and church order, who is to be the judge? Who has the right to say conclusively, in case of controversy, that one or the other party has departed from the doctrines of the church? Who shall determine upon the validity of an act or judgment of a church court; upon the status of a member or an officer; upon the legality or otherwise of a voluntary or enforced severance of a part from the body of the general organization?

This question was promptly raised upon the earliest application of the principle stated by Lord Eldon, and although decided with a frequency and uniformity rarely met with upon any important question, has been raised again and again, and is now relied upon by the appellee as the controlling question in this cause.

It has been and is now urged that these matters being of an ecclesiastical nature, or arising upon a construction of the law of the church, are subject to exclusive cognizance and jurisdiction by the ecclesiastical courts, whose judgments thereon must be accepted as conclusive by the civil courts; and upon this principle the circuit judge has avowedly acted. The position assumed does not stop with asserting that, if the decision of the question in controversy has been committed by the constitution of the church to a particular tribunal, or if the act or judgment in question has been performed by such tribunal in pursuance of a power vested in it by the constitution, in such case the act or judgment is conclusive on the civil court. Presented in this shape, I should not object to the proposition, and would proceed at once to show that in this controversy the constitution of the Presbyterian church has been violated in its most vital points by the general assembly and its adherents. But it does not stop here. It goes on to assert an exclusive right in the general assembly to determine conclusively the extent of its own powers and duties under the Constitution; to determine in every case, whether it has itself violated the Constitution or abandoned the principles of the faith. It asserts that the announcement of a particular doctrine or the imposition of a duty on the church, or the performance, rendition, or approval of an act or judgment of the general assembly, is itself a conclusive evidence, *probatio*

probata, that such doctrine or duty, act or judgment, has been imposed, rendered, or performed, in accordance with the constitution of the church, and that the church itself and the civil courts have no power to examine or question what has been so settled by the supreme tribunal of the church.

The solution of this question determines the relations of the church to the state in this country; determines whether the church, in relation to its civil interests, is organized under the authority of law or above it. If the principle of the decree herein is affirmed, it sweeps away all limitations imposed upon church courts by their fundamental laws, and renders it impossible that churches can be organized under rules or limitations which shall bind the judicatories of their own creation.

Hitherto the question has received but one solution. It devolves upon this court authoritatively to settle it.

See *Galbreath* v. *Smith*, 15 Shaw. & D. 808; *Cragie* v. *Marshall* (Jan., 1850), 12 Dunl., B. & M. 523; *Cooper* v. *Burns*, 22 Dunl., B. & M. 120; *McMillan* v. *General Assembly of the Pres. Church*, 22 Dunl., B. & M. 270, decided Dec. 23, 1859.

An examination of the cases will show these general principles to have been evolved and finally settled:

I. That the church (nonestablished) stands before the law, in relation to all civil interests acquired or claimed by it, precisely as every other voluntary society for moral, or scientific or other purposes, subject, in the same manner and extent, to the jurisdiction of civil authority.

II. That in so far as the law can regard them, the powers of the church judicatories are derived solely from the consent of the members of the church, as expressed in their fundamental law; that they are not courts and have no jurisdiction in the strict sense of the term; these terms necessarily implying the existence of a power conferred by and vested in functionaries of the state. They are not courts except of the parties own choosing.

III. That, in so far as the fundamental laws of the church confer powers upon its tribunals, the civil courts will recognize them and, where civil rights are involved, will give effect to their exercise without inquiring into the motives or grounds of action of the ecclesiastical tribunal; and will enforce with the same respect the action of the inferior tribunal acting within its sphere, as they will that of the supreme court of the church.

IV. That the jurisdiction of civil courts being confined to "civil actions," they may not take cognizance of purely spiritual or ecclesiastical questions, as such; just as they may not take cognizance of any moral or scientific questions, for the purpose of determining upon their abstract truth; but that in every case of controversy, where a right of property depends upon an adherence to religious doctrine or is affected by an act or judgment of an ecclesiastical tribunal, the civil court will examine into such doctrine as matter of fact, for the purpose of determining which party maintains the original principles of the society, and will examine into the act or judgment of the ecclesiastical court, for the purpose of determining whether it is in contravention of the fundamental law of the church or without authority from it; in which latter case, such act or judgment will be esteemed void and be disregarded. In these several cases the exclusive standard of judgment is the constitution of the church itself.

For a continuous history of this controversy, see *Earl of Kinnoull* v. *Pres. of Auchterarder* (Feb. 27, 1838), 16 Shaw & D. 661; McL. & Rob. 320; *Clark* v. *Sterling* (June 14, 1839), 1 Dunl., B. & M. 955, Dunl., B. & M. 330; *Presbytery of Strathbogie* (1839 and 1840), 2 Dunl., B. & M. 258, 585, 1047, 1380, 15 F. 605 (1478), Dunl., B. & M. 64, 330; *Edwards* v. *Cruikshank* (Dec., 1840), 3 Dunl., B. & M. 283; *Presbytery of Strathbogie* (May, 1842), and other cases occurring near the same period, in reference to the established church.

Also *Dunbar* v. *Skinner* (Mar. 3, 1849), 11 Dunl., B. & M. 945; *Long* v. *Bishop of Cape Town*, 1 Moo. P. C. (N. S.) 411; *Murray* v. *Burgess*, L. R. 1 P. C. 362; *Forbes* v. *Eden*, 38 Jur. 98. See also "Buchanan's Ten Years' Conflict," in the matter of voluntary churches.

It is a little remarkable that, just as this controversy was arising in Scotland, the three leading American cases, *viz.*, *Sutter* v. *Trustees, etc.*, 42 Pa. 509; *Com.* v. *Green*, 4 Whart. 603; and *Gibson* v. *Armstrong*, 7 B. Mon. 481, should have occurred, distinctly recognizing the same principles. See also *Smith* v. *Nelson*, 18 Vt. 511; *Den* v. *Bolton*, 7 Halst. 206.

If I have correctly stated the controlling principles of law touching this matter, it follows that the question of organic succession or of identity of the Walnut Street Church, depends not merely upon the fact that one or the other party to the controversy retains a majority of the local congregation, or a continued connection with the general assembly of the church; both of these facts are, undoubtedly, important, but they are not conclusive.

It may be conceded that the presumption of lawful succession is prima facie in favor of a majority of the congregation. It may be further conceded that the Walnut Street Church having been organized as a part of and in connection with the Presbyterian church in the United States of America, the presumption of identity is in favor of that portion of the local society which maintains its connection with that body.

These are, undoubtedly, reasonable and just presumptions; but all parties are subject to control of the fundamental law; the general assembly representing in one body all the churches of this denomination, as well as the local congregation; and the majority, while they may control consistently with the general law, cannot control in violation of it.

If, therefore, it shall appear that the majority have abandoned, while the minority adhere to the original principles of the society, more especially, if it shall appear that the minority, while thus adhering and on account of such adherence, have been unlawfully excluded, without their own act or assent, by the majority, or by the general assembly, from connection with the general body, the presumption is shifted and becomes conclusive in favor of the minority—thus maintaining the original purposes of the trust.

In other words, a maintenance of the prin-

ciples of the society is, in reference to the trust at least, the controlling test of succession and identity. The right of control by a majority or a submission to superior judicatories may be a part of those principles; and so far as they are so, an observation of these duties is an important and, perhaps, conclusive test of succession and identity. But a maintenance of the doctrinal standards and of other fundamental principles, whether of form or church order, may be a test no less clear and determinate. Certainly, if any judicatory of the church should openly renounce the Trinity or declare its adhesion to the Pope of Rome, by any majority whatever, it would lose its identity, for all purposes of control over property devoted to the maintenance of the Presbyterian faith.

If abandoning the spiritual doctrine of "Christ, alone, the head of the church," it should admit the power of "civil or military authorities" over the spiritual affairs of the church, it is difficult to see why this same result shall not follow.

Messrs. **B. H. Bristow** and **John M. Harlan,** for appellees:

Even though the jurisdiction of the court below, as to the parties and subject-matter of this action, be maintained, counsel for appellants will insist that the final decree was erroneous in declaring that the appellees were members of the Walnut Street Presbyterian Church; that Rev. John S. Hays was its pastor, and that the society to which they belonged constituted the beneficiaries of the church property for whose exclusive use it was to be held and managed.

The determination of these questions will chiefly, if not wholly, depend upon the effect to be given in the civil tribunal to the action taken by the various judicatories of the Presbyterian church in the United States of America, in reference to the signers of the "declaration and testimony" paper, and the divisions resulting therefrom.

We contend:

1. That the *ipso facto* order of the assembly, passed at its session in 1866—the order of the same judicatory in 1867, which indicated what synod, presbytery, church sessions, congregations, ministers and elders were in connection with the Presbyterian church in the United States of America, under the care of said assembly and all other orders of that judicatory cited in this case and which relate to divisions in the church growing out of the "declaration and testimony" movement — had reference to matters purely ecclesiastical in their nature, of which the assembly certainly had jurisdiction in some form.

The civil courts must accept as final the action or decision of an ecclesiastical court upon an ecclesiastical question, especially where such action or decision of the spiritual tribunal is sanctioned and acquiesced in by all the church judicatories. They should take "the ecclesiastical decisions out of which the civil right arises, as it finds them."

"For its own internal order, and for the mode in which it fulfils its functions," the church "is to be a law unto itself or have its law within itself."

A party founding a claim on the alleged invalidity, in view of the law of the church, of an act done by the accustomed organ of authority, should, at least, plant itself upon some opposing act or judgment of some recognized body in the church having authority to judge in the premises.

These principles are peculiarly applicable to the Presbyterian church in the United States, since, by the constitution of that church, inferior and superior judicatories are organized as a security against permanent wrong, the general assembly being the court of the "last resort" beyond which there is no appeal. Book of Discipline, chap. 7.

The parties to the covenant embodied in that constitution have agreed that the government of the church shall be exercised by the various judicatories designated in their system of union; and in their confession of faith, they declare "And as Jesus Christ hath appointed a regular government and discipline in His church, no law of any commonwealth should interfere with, let or hinder the due exercise thereof, among the voluntary members of any denomination of Christians, according to their profession and belief." Confession of Faith, chap. 23.

Any interposition by the civil courts to prevent the full operation of ecclesiastical action upon an ecclesiastical question, is not only in disregard of the covenants which Presbyterians have made with each other, but it is subjection of the church upon an ecclesiastical question to the judgment of a foreign tribunal. Such a theory would banish from the church the tribunal to whose judgment only, upon all spiritual matters, the parties to such covenant have agreed to submit. More than this, it would produce a practical union of church and state, dangerous just in proportion that the civil tribunals are unacquainted with the history, organization, and uses of the religious denomination which is to be affected by its action.

In support of these general principles we refer to the following authorities:

Shannon v. *Frost*, 3 B. Mon. 258; *Gibson* v. *Armstrong*, 7 B. Mon. 481; *Harper* v. *Straws*, 14 B. Mon. 56; *Harmon* v. *Dreher*, 1 Speer, Eq. 121; *McGinnis* v. *Watson*, 41 Pa. 1; *Den* v. *Bolton*, 7 Halst. 206; *Robertson* v. *Bullions*, 9 Barb. 78; *Ger. Ref. Church* v. *Seibert*, 3 Pa. St. 291; *Amer. Prim. Soc.* v. *Pilling*, 4 Zab. 658; *Johns. Isl. Church Case*, 2 Rich. Eq. 215; *Dieffendorf* v. *Church*, 20 Johns. 12.

We refer the court to a recent decision of the supreme court of Missouri, which bears directly upon the orders of the assembly made in 1866 and 1867. *Missouri, etc.*, v. *Farris*, 45 Mo. 183.

A minority, separating itself from the majority in a Presbyterian church and assuming at its own mere will a new and distinct organization, cannot claim the right of occupying the house of worship to the exclusion of the majority, who have preserved their position in the general organization, and who are recognized by the latter as the lawful church. The adhering members have, in point of fact and in view of the law, all the evidences which a civil court could require, of its being the true society entitled to the use of the property.

Gibson v. *Armstrong*, 7 B. Mon. 492; *Shannon* v. *Frost*, 3 B. Mon. 258; *Den* v. *Bolton*, 7 Halst. 206; *Amer. Prim. Soc.* v. *Pilling*, 4 Zab. 659; *Robertson* v. *Bullions*, 9 Barb. 64; *John's Isl. Church Case*, 2 Rich. Eq. 215; *Ferraria* v.

Vasconcelles, 23 Ill. 461; *Hadden* v. *Chorn*, 8 B. Mon. 70; *Kinskern* v. *Lutheran Church*, 1 Sandf. Ch. 440; *McGinnis* v. *Watson*, 41 Pa. 15, 14 B. Mon. 56.

Mr. Justice **Miller** delivered the opinion of the court:

This case belongs to a class, happily rare in our courts, in which one of the parties to a controversy, essentially ecclesiastical, resorts to the judicial tribunals of the state for the maintenance of rights which the church has refused to acknowledge, or found itself unable to protect. Much as such dissensions among the **714***] members of a religious society should *be regretted, a regret which is increased when passing from the control of the judicial and legislative bodies of the entire organization to which the society belongs, an appeal is made to the secular authority; the courts when so called on must perform their functions as in other cases.

Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints. Conscious as we may be of the excited feeling engendered by this controversy, and of the extent to which it has agitated the intelligent and pious body of Christians in whose bosom it originated, we enter upon its consideration with the satisfaction of knowing that the principles on which we are to decide so much of it as is proper for our decision, are those applicable alike to all of its class, and that our duty is the simple one of applying those principles to the facts before us.

It is a bill in chancery in the circuit court of the United States for the district of Kentucky, brought by William A. Jones, Mary J. Jones, and Ellenor Lee, citizens of Indiana, against John Watson and others named, citizens of Kentucky, and against the trustees of the Third or Walnut Street Presbyterian Church, in Louisville, a corporation created by an act of the legislature of that state. The trustees, McDougall, McPherson, and Ashcraft, are also sued as citizens of Kentucky. Plaintiffs allege in their bill that they are members in good and regular standing of said church, attending its religious exercises under the pastorship of the Rev. John S. Hays, and that the defendants, George Fulton and Henry Farley, who claim without right to be trustees of the church, supported and recognized as such by the defendants, John Watson and Joseph Gault, who also without right claim to be ruling elders, are threatening, preparing, and about to take unlawful possession of the **695***] *house of worship and grounds belonging to the church and to prevent Hays, who is the rightful pastor, from ministering therein, refusing to recognize him as pastor, and to recognize as ruling elder Thomas J. Hackney, who is the sole lawful ruling elder; and that when they obtain such possession they will oust said Hays and Hackney, and those who attend their ministrations, among whom are complainants.

And they further allege that Hackney, whose duty it is as elder, and McDougall, McPherson, and Ashcraft, whose duty as trustees it is to protect the rights thus threatened, by such a proceeding in the courts as will prevent the execution of the threats and designs of the other defendants, refuse to take any steps to that end.

They further allege that the Walnut Street Church, of which they are members, now forms, and has, ever since its organization in the year 1842, formed, a part of the Presbyterian Church of the United States known as the Old School, which is governed by a written constitution that includes the Confession of Faith, Form of Government, Book of Discipline, and Directory for Worship, and that the governing bodies of the general Church above the Walnut Street Church, are, in successive order, the presbytery of Louisville, the synod of Kentucky, and the general assembly of the Presbyterian church of the United States; that while the plaintiffs and about one hundred and fifteen members who worship with them, and Mr. Hays, the pastor, Hackney, the ruling elder, and the trustees, McDougall, McPherson, and Ashcraft, are now in full membership and relation with the lawful General Presbyterian Church aforesaid, the defendants named, with about thirty persons, formerly members of said church, worshipping under one Dr. Yandell as pastor, have seceded and withdrawn themselves from said Walnut Street Church, and from the General Presbyterian Church of the United States, and have voluntarily connected themselves with and are now members of another religious society, and that they have repudiated and do now repudiate and renounce the authority *and jurisdiction [***696** of the various judicatories of the Presbyterian Church of the United States, and acknowledge and recognize the authority of other church judicatories which are disconnected from the Presbyterian Church of the United States, and from the Walnut Street Church. And they allege that Watson and Gault have been, by order of the general assembly of said church, dropped from the roll of elders in said church, for having so withdrawn and renounced its jurisdiction, and the general assembly has declared the organization to which plaintiffs adhere, to be the true and only Walnut Street Presbyterian Church of Louisville.

They pray for an injunction and for general relief.

The defendants, Hackney, McDougall, McPherson, and Ashcraft, answer, admitting the allegations of the bill, and that, though requested, they had refused to prosecute legal proceedings in the matter.

The other defendants answer and deny almost every allegation in the bill. They claim to be the lawful officers of the Walnut Street Presbyterian Church, and that they and those whom they represent are the true members of the church. They deny having withdrawn from the local or the general church, and deny that the action of the general assembly cutting them off was within its constitutional authority. They say that the plaintiffs are not, and never have been, lawfully admitted to membership in the Walnut Street Church, and have no such interest in it as will sustain this suit, and they set up and rely upon a suit still pending in the chancery court of Louisville, which they say involves the same subject-matter, and is between the same parties in interest as the present suit. They allege that in that suit they have been declared to be the only true and lawful trustees and elders of the Walnut Street Church, and an

order has been made to place them in possession of the church property, which order remains unexecuted, and the property is still in possession of the marshal of that court as its receiver. These facts are relied on in bar of the present suit.

This statement of the proceedings is indispensable to an understanding of the points arising in the case. So far as an examination of the evidence may be necessary, it will be made, as it is required in the consideration of those points.

The first of these concerns the jurisdiction of the circuit court, which is denied; first, on the ground that the plaintiffs have no such interest in the subject of litigation as will enable them to maintain the suit, and, second, on matters arising out of the alleged proceedings in the suit in the chancery court of Louisville.

The allegation that the plaintiffs are not lawful members of the Walnut Street Church is based upon the assumption that their admission as members was by a pastor and elders who had no lawful authority to act as such. As the claim of those elders to be such is one of the matters which this bill is brought to establish, and the denial of which makes an issue to be tried, it is obvious that the objection to the interest of the plaintiffs must stand or fall with the decision on the merits, and cannot be decided as a preliminary question. Their right to have this question decided, if there is no other objection to the jurisdiction, cannot be doubted. Some attempt is made in the answer to question the good faith of their citizenship, but this seems to have been abandoned in the argument.

715*] *In regard to the suit in the chancery court of Louisville, which the defendants allege to be pending, there can be no doubt but that that court is one competent to entertain jurisdiction of all matters set up in the present suit. As to those matters, and to the parties, it is a court of concurrent jurisdiction with the circuit court of the United States, and as between those courts the rule is applicable that the one which has first obtained jurisdiction in a given case must retain it exclusively until it disposes of it by a final judgment or decree.

But when the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties or, at least, such as represent the same interest, there must be the same rights asserted, and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such that if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties.

In the case of *Barrows* v. *Kindred*, 4 Wall. 399, 18 L. ed. 383, which was an action of ejectment, the plaintiff showed a good title to the land, and the defendant relied on a former judgment in his favor, between the same parties for the same land; the statute of Illinois making a judgment in such an action as conclusive as in other personal actions, except by way of new trial. But this court held that as in the second suit the plaintiff introduced and relied upon a new and different title, acquired since the first trial, that judgment could be no bar, because that title had not been passed upon by the court in the first suit.

But the principles which should govern in regard to the identity of the matters in issue in the two suits to make the pendency of the one defeat the other are as fully discussed, in the case of *Buck* v. *Colbath*, 3 Wall. 334, 18 L. ed. 257, where that was the main question, as in any case we have been able to find. It was *an action of trespass, brought in a [*716 state court, against the marshal of the circuit court of the United States, for seizing property of the plaintiff, under a writ of attachment from the circuit court. And it was brought while the suit in the Federal court was still pending and while the marshal held the property subject to its judgment. So far as the *lis pendens* and possession of the property in one court, and a suit brought for the taking by its officer in another, are concerned, the analogy to the present case is very strong. In that case the court said: "It is not true that a court, having obtained jurisdiction of a subject-matter of suit and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and in some instances requiring the decision of the same question exactly. In examining into the exclusive character of the jurisdiction in such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits." And it might have been added, to the facts on which the claim for relief is founded. "A party," says the court by way of example, "having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his notes, and in another court of law in an action of ejectment for possession of the land. Here, in all the suits, the only question at issue may be the existence of the debt secured by the mortgage. But, as the relief sought is different, and the mode of proceeding different, the jurisdiction of neither court is affected by the proceedings in the other." This opinion contains a critical review of the cases in this court of *Hagan* v. *Lucas*, 10 Pet. 402; *Peck* v. *Jenness*, 7 How. 624; *Taylor* v. *Carryl*, 20 How. 594, 15 L. ed. 1031; and *Freeman* v. *Howe*, 24 How. 450, 16 L. ed. 749, cited and relied on by counsel for the appellants; and we are satisfied that it states the doctrine correctly.

The limits which necessity assigns to this opinion forbid *our giving, at length, the [*717 pleadings in the case in the Louisville chancery court. But we cannot better state what is, and what is not, the subject-matter of that suit or controversy, as thus presented and as shown throughout its course, than by adopting the language of the court of appeals of Kentucky, in its opinion delivered at the decision of that suit, in favor of the present appellants. "As suggested in argument," says the court, "and apparently conceded on both sides, this is not a case of division or schism in a church; nor is there any question as to which of two bodies should be recognized as the Third or Walnut Street Presbyterian Church. Neither is there any controversy as to the authority of Watson and Gault to act as ruling elders; but the sole

inquiry to which we are restricted in our opinion is, whether Avery, McNaughtan, and Leach are also ruling elders and, therefore, members of the session of the church."

The pleadings in the present suit show conclusively a different state of facts, different issues, and a different relief sought. This is a case of a division or schism in a church. It is a question as to which of two bodies shall be recognized as the Third or Walnut Street Presbyterian Church. There is a controversy as to the authority of Watson and Gault to act as ruling elders, that authority being denied in the bill of the complainants; and; so far from the claim of Avery, McNaughtan, and Leach to be ruling elders being the sole inquiry in this case, it is a very subordinate matter, and it depends upon facts and circumstances altogether different from those set up and relied on in the other suit, and which did not exist when it was brought. The issue here is no longer a mere question of eldership, but it is a separation of the original church members and officers into two distinct bodies, with distinct members and officers, each claiming to be the true Walnut Street Presbyterian Church, and denying the right of the other to any such claim. This brief statement of the issues in the two suits leaves no room for argument to show that the pendency of the first cannot be pleaded either in bar or in abatement of the second.

The supplementary petition filed by the plain-**718***] tiffs in that *case after the decree of the chancery court had been reversed on appeal, and which did contain very much the same matter found in the present bill, was, on motion of the plaintiff's counsel, and by order of the court, dismissed, without prejudice, before this suit was brought, and of course was not a *lis pendens* at that time.

It is contended, however, that the delivery to the trustees and elders of the body of which the plaintiffs are members, of the possession of the church building, cannot be granted in this suit, nor can the defendants be enjoined from taking possession as prayed in the bill, because the property is in the actual possession of the marshal of the Louisville chancery court as its receiver, and because there is an unexecuted decree of that court ordering the marshal to deliver the possession to defendants.

In this the counsel for the appellants are, in our opinion, sustained, both by the law and by the state of the record of the suit in that court.

The court, in the progress of that suit, made several orders concerning the use of the church, and finally placed it in the possession of the marshal as a receiver, and there is no order discharging his receivership; nor does it seem to us that there is any valid order finally disposing of the case, so that it can be said to be no longer in that court. For, though the chancery court did, on the 20th March, 1867, after the reversal of the case in the court of appeals, enter an order reversing its former decree and dismissing the bill, with costs, in favor of the defendants, the latter, on application to the appellate court, obtained another order dated June 26th. By this order, or mandate to the chancery court, it was directed to render a judgment in conformity to the opinion and mandate of the court, restoring possession, use and control of the church property to the parties entitled thereto, according to said opinion, and so far as they were deprived thereof by the marshal of the chancery court under its order.

In obedience to this mandate the chancery court, on the 18th September, three months after the commencement of *this suit, [*719 made an order that the marshal restore the possession, use and control of the church building to Henry Farley, George Fulton, B. F. Avery, or a majority of them, as trustees, and to John Watson, Joseph Gault, and T. J. Hackney, or a majority of them, as ruling elders, and to report how he had executed the order, and reserving the case for such further order as might be necessary to enforce full obedience.

It is argued here by counsel for the appellees that the case was, in effect, disposed of by the orders of the chancery court, and that nothing remained to be done which could have any practical operation on the rights of the parties.

But if the court of appeals, in reversing the decree of the chancellor in favor of the plaintiffs, was of opinion that the defendants should be restored to the position they occupied in regard to the possession and control of the property before that suit began, we have no doubt of their right to make such order as was necessary to effect that object; and as the proper mode of doing this was by directing the chancellor to make the necessary order, and have it enforced as chancery decrees are enforced in his court, we are of opinion that the order of the court of appeals, above recited, was in essence and effect, a decree in that cause for such restoration, and that the last order of the chancery court, made in accordance with it, is a valid, subsisting decree, which, though final, is unexecuted.

The decisions of this court in the cases of *Taylor* v. *Carryl*, 20 How. 594, 15 L. ed. 1031, and *Freeman* v. *Howe*, 24 How. 450, 16 L. ed. 749, and *Buck* v. *Colbath*, 3 Wall. 334, 18 L. ed. 257, are conclusive that the marshal of the chancery court cannot be displaced as to the mere actual possession of the property, because that might lead to a personal conflict between the officers of the two courts for that possession. And the act of Congress of March 2, 1793, 1 U. S. Statutes, 334, § 5, as construed in the cases of *Diggs* v. *Wolcott*, 4 Cranch, 179, and *Peck* v. *Jenness*, 7 How. 625, are equally conclusive against any injunction from the circuit court, forbidding the defendants *to [*720 take the possession which the unexecuted decree of the chancery court requires the marshal to deliver to them.

But, though the prayer of the bill in this suit does ask for an injunction to restrain Watson, Gault, Fulton, and Farley from taking possession, it also prays such other and further relief as the nature of the case requires, and especially that said defendants be restrained from interfering with Hays, as pastor, and plaintiffs in worshiping in said church. Under this prayer for general relief, if there was any decree which the circuit court could render for the protection of the right of the plaintiffs, and which did not enjoin the defendants from taking possession of the church property, and which did not disturb the possession of the marshal of the Louisville chancery, that court had a right to hear the case and grant that relief. This leads us to inquire what is the nature and character of the

possession to which those parties are to be restored.

One or two propositions which seem to admit of no controversy are proper to be noticed in this connection. 1. Both by the act of the Kentucky legislature creating the trustees of the Church a body corporate, and by the acknowledged rules of the Presbyterian Church, the trustees were the mere nominal title holders and custodians of the church property, and other trustees were, or could be elected by the congregation, to supply their places once in every two years. 2. That in the use of the property for all religious services or ecclesiastical purposes, the trustees were under the control of the church session. 3. That by the constitution of all Presbyterian churches, the session, which is the governing body in each, is composed of the ruling elders and pastor, and in all business of the session the majority of its members govern, the number of elders for each congregation being variable.

The trustees obviously hold possession for the use of the persons who by the constitution, usages and laws of the Presbyterian body, are entitled to that use. They are liable to removal by the congregation for whom they hold this trust, and others may be substituted in their 721*] places. They *have no personal ownership or right beyond this, and are subject in their official relations to the property, to the control of the session of the Church.

The possession of the elders, though accompanied with larger and more efficient powers of control, is still a fiduciary possession. It is as a session of the Church alone that they could exercise power. Except by an order of the session in regular meeting they have no right to make any order concerning the use of the building, and any action of the session is necessarily in the character of representatives of the church body by whose members it was elected.

If, then, this true body of the Church, the members of that congregation, having rights of user in the building, have, in a mode which is authorized by the canons of the general church in this country, elected and installed other elders, it does not seem to us inconsistent or at variance with the nature of the possession which we have described, and which the chancery court orders to be restored to the defendants, that they should be compelled to recognize these rights, and permit those who are the real beneficiaries of the trust held by them, to enjoy the uses, to protect which that trust was created. Undoubtedly if the order of the chancery court had been executed, and the marshal had delivered the key of the church to the defendants, and placed them in the same position they were in before that suit was commenced, they could in any court having jurisdiction and in a case properly made out, be compelled to respect the rights we have stated, and be controlled in their use of the possession by the court, so far as to secure those rights.

All that we have said in regard to the possession which the marshal is directed to deliver to the defendants is equally applicable to the possession held by him pending the execution of that order. His possession is a substitute for theirs, and the order under which he received that possession, which we have recited, shows this very clearly.

The decree which we are now reviewing seems to us to be carefully framed on this view of the matter. While the rights of the plaintiffs and those whom they sue for, are admitted *and established, the defendants are still [*722 recognized as entitled to the possession which we have described; and while they are not enjoined from receiving that possession from the marshal, and he is not restrained from obeying the chancery court by delivering it, and while there is no order made on the marshal at all to interfere with his possession, the defendants are required by the decree to respect the rights of the plaintiffs, and to so use the possession and control to which they may be restored as not to hinder or obstruct the true uses of the trust, which that possession is intended to protect.

We are next to inquire whether the decree thus rendered is based upon an equally just view of the law as applied to the facts of this controversy.

These, though making up a copious record of matter by no means pleasant reading to the sincere and thoughtful Christian philanthropist, may be stated with a reasonable brevity, so far as they bear upon the principles which must decide the case.

From the commencement of the late war of insurrection to its close, the General Assembly of the Presbyterian Church at its annual meetings expressed, in declaratory statements or resolutions, its sense of the obligation of all good citizens to support the Federal government in that struggle; and when, by the proclamation of President Lincoln, emancipation of the slaves of the states in insurrection was announced, that body also expressed views favorable to emancipation, and adverse to the institution of slavery. At its meeting in Pittsburg, in May, 1865, instructions were given to the Presbyteries, the Board of Missions, and to the sessions of the churches, that when any persons from the southern states should make application for employment as missionaries, or for admission as members or ministers of churches, inquiry should be made as to their sentiments in regard to loyalty to the government, and on the subject of slavery; and if it was found that they had been guilty of voluntarily aiding the War of the Rebellion, or held the doctrine announced by the large body of the churches in the insurrectionary states, which had organized a new general assembly, that "the system of negro slavery in the south is a divine institution, and that it is the peculiar mission of the southern church to conserve that institution" they should be required to repent and forsake these sins before they could be received.

In the month of September, thereafter, the Presbytery of Louisville, under whose immediate jurisdiction was the Walnut Street Church, adopted and published in pamphlet form, what is called "a declaration and testimony against the erroneous and heretical doctrines and practices which have obtained and been propagated in the Presbyterian Church of the United States during the last five years." This declaration denounced, in the severest terms, the action of the general assembly in the matters we have just mentioned, declared their intention to refuse to be governed by that action, and invited the co-operation of all the

members of the Presbyterian Church who shared these sentiments of the declaration. in a concerted resistance to what they called the usurpation of authority by the assembly.

It is useless to pursue a history of this controversy further with minuteness.

The general assembly of 1866 denounced the declaration and testimony, and declared that every Presbytery which refused to obey its order should be *ipso facto* dissolved and called to answer before the next general assembly, giving the Louisville Presbytery an opportunity for repentance and conformity. The Louisville Presbytery divided, and the adherence of the declaration and testimony sought and obtained admission in 1868, into "the Presbyterian Church of the Confederate States" of which we have already spoken, as having several years previously withdrawn from the General Assembly of the United States, and set up a new organization.

We cannot better state the results of these proceedings upon the relation of the church organization and members to each other and to this controversy, than in the brief of the language of the appellants' counsel in this court.

In January, 1866, the congregation of the Walnut Street Church became divided in the manner stated above, each claiming to constitute the Church, although the issue as to membership was not distinctly made in the chancery suit of *Avery* v. *Watson*. Both parties at this time recognized the same superior church judicatories.

On the 19th June, 1866, the Synod of Kentucky became divided, the opposing parties in each claiming to constitute respectively the true Presbytery and the true Synod; each meanwhile recognizing and claiming to adhere to the same general assembly. Of these contesting bodies, the appellants adhered to one; the appellees to another.

On the 1st of June, 1867, the Presbytery and Synod recognized by the appellants, were declared by the general assembly to be "in no sense the true and lawful Synod and Presbytery, in connection with and under the care and authority of the General Assembly of the Presbyterian Church in the United States of America;" and were permanently excluded from connection with or representation in the assembly; by the same resolution the Synod and Presbytery adhered to by appellees were declared to be the true and lawful Presbytery of Louisville, and Synod of Kentucky.

The Synod of Kentucky thus excluded by a resolution adopted the 28th June, 1867, declared "that, in its future action, it will be governed by this recognized sundering of all its relation to the aforesaid revolutionary body (the general assembly) by the acts of that body itself." The Presbytery took substantially the same action.

In this final severance of Presbytery and Synod from the general assembly, the appellants and appellees continued to adhere to both bodies at first recognized by them respectively.

In the earliest stages of this controversy it was found that a majority of the members of the Walnut Street Church concurred with the action of the general assembly, while Watson and Gault, as ruling elders, and Fulton and Farley as trustees, constituting in each case a majority of the session and of the trustees, with Mr. McElroy, the pastor, sympathized with the party of the declaration and testimony of the Louisville Presbytery. This led to a breach by each party to exclude the other from participation in the session of the church and the use of the property. This condition of affairs being brought before the Synod of Kentucky before any separation, that body appointed a commission to hold an election by the members of the Walnut Street Church, of three additional ruling elders. Watson and Gault refused to open the church for the meeting to hold this election, but the majority of the members of the congregation, meeting on the sidewalk in front of the church, organized and elected Avery, Leech, and McNaughton additional ruling elders, who, if lawful elders, constituted, with Mr. Hackney, a majority of the session. Gault, Watson, Farley, and Fulton refused to recognize them as such: and hence the suit in the chancery court of Louisville, which turned exclusively on that question.

The newly elected elders and the majority of the congregation have adhered to and been recognized by the general assembly, as the regular and lawful Walnut Street Church and officers; and Gault, Watson, Fulton, and Farley, and the minority of the members, have cast their fortunes with those who adhered to the declaration and testimony party.

The division and separation finally extended to the Presbytery of Louisville and the Synod of Kentucky. It is now complete and apparently irreconcilable, and we are called upon to declare the beneficial uses of the church property in this condition of total separation between the members of what was once a united and harmonious congregation of the Presbyterian Church.

The questions which have come before the civil courts concerning the rights to property held by ecclesiastical bodies, may, so far as we have been able to examine them, be profitably classified under three general heads, which of course do not include cases governed by considerations applicable to a church established and supported by law as the religion of the state.

1. The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument devoted to the teaching, support or spread of some specific form of religious doctrine or belief.

2. The second is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority.

3. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete in some supreme *judicatory over the [*723 whole membership of that general organization.

In regard to the first of these classes it seems hardly to admit of a rational doubt that an individual or an association of individuals may dedicate property by way of trust to the purpose of sustaining, supporting and propagating

definite religious doctrines or principles, providing that in doing so they violate no law of morality, and give to the instrument by which their purpose is evidenced, the formalities which the laws require. And it would seem also to be the obvious duty of the court, in a case properly made, to see that the property so dedicated is not diverted from the trust which is thus attached to its use. So long as there are persons qualified within the meaning of the original dedication, and who are also willing to teach the doctrines or principles prescribed in the act of dedication, and so long as there is anyone so interested in the execution of the trust as to have a standing in court, it must be that they can prevent the diversion of the property or fund to other and different uses. This is the general doctrine of courts of equity as to charities, and it seems equally applicable to ecclesiastical matters.

In such case, if the trust is confided to a religious congregation of the independent or congregational form of church government, it is not in the power of the majority of that congregation, however preponderant, by reason of a change of views on religious subjects, to carry the property so confided to them to the support of new and conflicting doctrine. A pious man building and dedicating a house of worship to the sole and exclusive use of those who believe in the doctrine of the Holy Trinity, and placing it under the control of a congregation which at the time holds the same belief, has a right to expect that the law will prevent that property from being used as a means of support and dissemination of the Unitarian doctrine, and as a place of Unitarian worship. Nor is the principle varied when the organization to which the trust is confided is of the second or associated form of church government. The protection 724*] which the law *throws around the trust is the same. And though the task may be a delicate one and a difficult one, it will be the duty of the court in such cases, when the doctrine to be taught or the form of worship to be used is definitely and clearly laid down, to inquire whether the party accused of violating the trust is holding or teaching a different doctrine, or using a form of worship which is so far variant as to defeat the declared objects of the trust. In the leading case on this subject, in the English courts, of the *Attorney General* v. *Pearson*, 3 Mer. 353, Lord Eldon said: "I agree with the defendants that the religious belief of the parties is irrelevant to the matters in dispute, except so far as the King's court is called upon to execute the trust." That was a case in which the trust deed declared the house which was erected under it, was for the worship and service of God. And though we may not be satisfied with the very artificial and elaborate argument by which the Chancellor arrives at the conclusion, that because any other view of the nature of the God-head than the Trinitarian view was heresy by the laws of England, and any one giving expression to the Unitarian view was liable to be severely punished for heresy by the secular courts, at the time the deed was made, that the trust was, therefore, for Trinitarian worship, we may still accept the statement that the court has the right to enforce a trust clearly defined on such a subject.

The case of *Miller* v. *Gable*, 2 Den. 492, appears to have been decided in the court of errors of New York on this principle, so far as any ground of decision can be gathered from the opinions of the majority of the court as reported.

The second class of cases which we have described has reference to the case of a church of a strictly congregational or independent organization, governed solely within itself, either by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government; and to property held by such a church, either by way of purchase or donation, with no other specific *trust attached to it in the hands of the [*725 church than that it is for the use of that congregation as a religious society.

In such cases, where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property. If there be within the congregation officers in whom are vested the powers of such control, then those who adhere to the acknowledged organism by which the body is governed are entitled to the use of the property. The minority in choosing to separate themselves into a distinct body, and refusing to recognize the authority of the governing body, can claim no rights in the property from the fact that they had once been members of the church or congregation. This ruling admits of no inquiry into the existing religious opinions of those who comprise the legal or regular organization; for, if such was permitted, a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church. There being no such trust imposed upon the property when purchased or given, the court will not imply one for the purpose of expelling from its use those who by regular succession and order constitute the church, because they may have changed in some respect their views of religious truth.

Of the cases in which this doctrine is applied no better representative can be found than that of *Shannon* v. *Frost*, 3 B. Mon. 253, where the principle is ably supported by the learned chief justice of the court of appeals of Kentucky.

The case of *Smith* v. *Nelson*, 18 Vt. 511, asserts this doctrine in a case where a legacy was left to the Associate Congression of Ryegate, the interest whereof was to be annually paid to their minister forever. In that case, though the Ryegate *congregation was one of a [*726 number of Presbyterian churches connected with the general Presbyterian body at large, the court held that the only inquiry was whether the society still exists, and whether they have a minister chosen and appointed by the majority and regularly ordained over the society, agreeably to the usage of that denomination. And though we may be of opinion that the doctrine of that case needs modification, so far as it discusses the relation of the Ryegate congregation to the other judicatories of the body to which it belongs, it certainly lays down the principle

correctly if that congregation was to be treated as an independent one.

But the third of these classes of cases is the one which is oftenest found in the courts, and which, with reference to the number and difficulty of the questions involved, and to other considerations, is every way the most important.

It is the case of property acquired in any of the usual modes for the general use of a religious congregation which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government.

The case before us is one of this class, growing out of a schism which has divided the congregation and its officers, and the presbytery and synod, and which appeals to the courts to determine the right to the use of the property so acquired. Here is no case of property devoted forever by the instrument which conveyed it, or by any specific declaration of its owner, to the support of any special religious dogmas, or any peculiar form of worship, but of property purchased for the use of a religious congregation, and so long as any existing religious congregation can be ascertained to be that congregation, or its regular and legitimate successor, it is entitled to the use of the property. In the case of an independent congregation we have pointed out how this identity, or succession, is to be ascertained, but in cases of this character we are bound to look at the fact that the local congregation is itself but a member of 727*] a much *larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments. There are in the Presbyterian system of ecclesiastical government, in regular succession, the Presbytery over the session or local church, the Synod over the Presbytery, and the general assembly over all. These are called, in the language of the church organs, "judicatories," and they entertain appeals from the decisions of those below, and prescribe corrective measures in other cases.

In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

We concede at the outset that the doctrine of the English courts is otherwise. In the case of *The Attorney General* v. *Pearson*, cited before, the proposition is laid down by Lord Eldon, and sustained by the peers, that it is the duty of the court in such cases to inquire and decide for itself, not only what was the nature and power of these church judicatories, but what is the true standard of faith in the church organization, and which of the contending parties before the court holds to this standard. And in the subsequent case of *Craigdallie* v. *Aikman*, 2 Bligh. 529, the same learned judge expresses in strong terms his chagrin that the court of sessions of Scotland, from which the case had been appealed, had failed to find on this latter subject, so that he could rest the case on religious belief, but had declared that in this matter there was no difference between the parties. And we can very well understand how the Lord Chancellor of England, who is, in his office, in a large sense, the head and representative of *the Es- [*728 tablished Church, who controls very largely the church patronage, and whose judicial decision may be, and not unfrequently is, invoked in cases of heresy and ecclesiastical contumacy, should feel, even in dealing with a dissenting church, but little delicacy in grapling with the most abstruse problems of theological controversy, or in construing the instruments which those churches have adopted as their rules of government, or inquiring into their customs and usages. The dissenting church in England is not a free church in the sense in which we apply the term in this country, and it was much less free in Lord Eldon's time than now. Laws then existed upon the statute book hampering the free exercise of religious belief and worship in many most oppressive forms, and although Protestant dissenters were less burdened than Catholics and Jews, there did not exist that full, entire and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles. And it is quite obvious, from an examination of the series of cases growing out of the organization of the Free Church of Scotland, found in Shaw's Reports of Cases in the court of sessions, that it was only under the pressure of Lord Eldon's ruling, established in the House of Lords, to which final appeal lay in such cases, that the doctrine was established in the court of sessions after no little struggle and resistance. The full history of the case of *Craigdallie* v. *Aikman*, in the Scottish court, which we cannot further pursue, and the able opinion of Lord Meadowbank in *Galbraith* v. *Smith*, 15 Shaw & D. Cas. 808, show this conclusively.

In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of *any religious doctrine, and to [*729 create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, sub-

ject only to such appeals as the organism itself provides for.

Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches) has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.

We have said that these views are supported by the preponderant weight of authority in this country, and for the reasons which we have given, we do not think the doctrines of the English chancery court on this subject should have with us the influence which we would cheerfully accord to it on others.

730*] *We have already cited the case of *Shannon* v. *Frost*, 3 B. Mon. 253, in which the appellate court of the state, where this controversy originated, sustains the proposition clearly and fully. "This court," says the Chief Justice, "having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline. Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it. We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church."

In the subsequent case of *Gibson* v. *Armstrong*, 7 B. Mon. 481, which arose out of the general division of the Methodist Episcopal Church, we understand the same principles to be laid down as governing that case, and in the case of *Watson* v. *Avery*, 2 Bush, 332, the case relied on by the appellants as a bar, and considered in the former part of this opinion, the doctrine of *Shannon* v. *Frost* is in general terms conceded, while a distinction is attempted which we shall consider hereafter.

One of the most careful and well-considered judgments on the subject is that of the court of appeals of South Carolina, delivered by Chancellor Johnson in the case of *Harmon* v. *Dreher*, 1 Speer's Eq. 87. The case turned upon certain rights in the use of the church property claimed by the minister notwithstanding his expulsion from the synod as one of its members. "He stands," says the Chancellor, "convicted of the offenses alleged against him, by the sentence of the spiritual body of which he was a voluntary member, and whose proceedings he had bound himself to abide. It belongs not to the civil power to enter into or review the proceedings of a spiritual court. The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. The judgments, therefore, of *religious associations, [*731 bearing on their own members, are not examinable here, and I am not to inquire whether the doctrines attributed to Mr. Dreher were held by him, or whether if held were anti-Lutheran; or whether his conduct was or was not in accordance with the duty he owed to the synod or to his denomination. . . . When a civil right depends upon an ecclesiastical matter, it is the civil court, and not the ecclesiastical which is to decide. But the civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions out of which the civil right arises, as it finds them." The principle is reaffirmed by the same court in the *John's Island Church Case*, 2 Rich. Eq. 215.

In *Den* v. *Bolton*, 7 Halst. 206, the supreme court of New Jersey asserts the same principles, and though founding its decision mainly on a statute, it is said to be true on general principles.

The supreme court of Illinois, in the case of *Ferraria* v. *Vasconcelles*, 23 Ill. 456, refers to the case of *Shannon* v. *Frost*, 3 B. Mon. 253, with approval, and adopts the language of the court that "the judicial eye cannot penetrate the veil of the church for the forbidden purpose of vindicating the alleged wrongs of excised members; when they became members they did so upon the condition of continuing or not as they and their churches might determine, and they thereby submit to the ecclesiastical power and cannot now invoke the supervisory power of the civil tribunals."

In the very important case of *Chase* v. *Cheny*, 58 Ill. 509, recently decided in the same court, Judge Lawrence, who dissented, says: "We understand the opinion as implying that in the administration of ecclesiastical discipline, and where no other right of property is involved than loss of the clerical office or salary incident to such discipline, a spiritual court is the exclusive judge of its own jurisdiction, and that its decision of that question is binding on the secular courts." And he dissents with Judge Shelden from the opinion because it so holds.

*In the case of *Watson* v. *Farris*, 45 [*732 Mo. 183, which was a case growing out of the schism in the Presbyterian Church in Missouri in regard to this same declaration and testimony and the action of the general assembly, that court held that whether a case was regularly or irregularly before the assembly was a question which the assembly had the right to determine for itself, and no civil court could reverse, modify, or impair its action in a matter of merely ecclesiastical concern.

We cannot better close this review of the authorities than in the language of the supreme court of Pennsylvania, in the case of *The German Ref. Ch.* v. *Seibert*, 3 Pa. St. 291: "The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offense against the word of God and the discipline of the Church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve them-

selves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals."

In the subsequent case of *McGinnis* v. *Watson*, 41 Pa. 21, this principle is again applied and supported by a more elaborate argument.

The court of appeals of Kentucky, in the case of *Watson* v. *Avery*, 2 Bush, 332, before referred to, while admitting the general principle here laid down, maintains that when a decision of an ecclesiastical tribunal is set up in the civil courts, it is always open to inquiry whether the tribunal acted within its jurisdiction, and if it did not, its decision could not be conclusive.

There is, perhaps, no word in legal terminology so frequently used as the word "jurisdiction," so capable of use in a general and vague sense, and which is used so often by men learned in the law without a due regard to precision in its application. As regards its use in **733*]** the matters we have *been discussing, it may very well be conceded that if the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else. Or if it should at the instance of one of its members entertain jurisdiction as between him and another member as to their individual right to property, real or personal, the right in no sense depending on ecclesiastical questions, its decision would be utterly disregarded by any civil court where it might be set up. And it might be said in a certain general sense very justly, that it was because the general assembly had no jurisdiction of the case. Illustrations of this character could be multiplied in which the proposition of the Kentucky court would be strictly applicable.

But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character—a matter over which the civil courts exercise no jurisdiction—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them—becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and, in a sense often used in the courts, all of those may be said to be questions of jurisdiction. But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, would open the way to all the **734*]** evils which we *have depicted as attendant upon the doctrine of Lord Eldon, and would in effect transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions.

And this is precisely what the court of appeals of Kentucky did in the case of *Watson* v. *Avery*, *supra*. Under cover of inquiries into the jurisdiction of the synod and presbytery over the congregation, and of the general assembly over all, it went into an elaborate examination of the principles of Presbyterian Church government, and ended by overruling the decision of the highest judicatory of that church in the United States, both on the jurisdiction and the merits; and, substituting its own judgment for that of the ecclesiastical court, decides that ruling elders, declared to be such by that tribunal, are not such, and must not be recognized by the congregation, though four fifths of its members believe in the judgment of the assembly and desired to conform to its decree.

But we need pursue this subject no further. Whatever may have been the case before the Kentucky court, the appellants in the case presented to us have separated themselves wholly from the church organization to which they belonged when this controversy commenced. They now deny its authority, denounce its action and refuse to abide by its judgments. They have first erected themselves into a new organization, and have since joined themselves to another totally different, if not hostile, to the one to which they belonged when the difficulty first began. Under any of the decisions which we have examined, the appellants, in their present position, have no right to the property, or to the use of it, which is the subject of this suit.

The novelty of the questions presented to this court for the first time, their intrinsic importance and far reaching influence, and the knowledge that schism in which the case originated has divided the Presbyterian churches throughout Kentucky and Missouri, have seemed to us to justify the careful and laborious examination and discussion which we *have made of [***735** the principles which should govern the case. For the same reasons we have held it under advisement for a year; not uninfluenced by the hope that since the civil commotion, which evidently lay at the foundation of the trouble, has passed away, that charity, which is so large an element in the faith of both parties, and which, by one of the apostles of that religion, is said to be the greatest of all the Christian virtues, would have brought about a reconciliation. But we have been disappointed. It is not for us to determine or apportion the moral responsibility which attaches to the parties for this result. We can only pronounce the judgment of the law as applicable to the case presented to us, and *that requires us to affirm the decree of the Circuit Court as it stands.*

The Chief Justice did not sit on the argument of this case, and took no part in its decision.

Mr. Justice **Clifford**, dissenting:

I dissent from the opinion and decree of the court in this case, and inasmuch as the case presents an important question of jurisdiction, I deem it proper to state in a few words the grounds of my dissent.

Before this suit was commenced, a suit in re-

spect to the same subject-matter and substantially between the same parties had been instituted in the chancery court of Louisville, by parties representing the same interests as those prosecuted in this case by the appellees, and they obtained a final decree in their favor against the respondents therein, representing the same interests as those defended by the present appellants. Whereupon the respondents in that suit appealed to the court of appeals of that state, where the decree of the chancery court was in all things reversed and the cause remanded for proper corrective proceedings respecting the possession, control and use **736***]of the property *in controversy, and for final judgment in conformity with the opinion of the appellate court. *Watson* v. *Avery*, 2 Bush, 332.

On the 21st of February, 1868, the present appellants filed in the chancery court the mandate of the court of appeals, together with a copy of the opinion of the appellate court, and moved that an order issue for the restitution of the property and for judgment in conformity with the opinion of the court. Pending the consideration of that motion, the defeated party filed an original bill in equity against the then appellants, praying that they be restrained from all further prosecution of their motion for restitution and from all proceedings, by action, suit or otherwise, to obtain possession or control of the property in controversy, and the chancellor, instead of executing the mandate of the appellate court, granted the injunction prayed by the losing party in the original case. Feeling aggrieved by that proceeding the then appellants applied to the court of appeals for a rule to compel the chancellor to carry the mandate of the appellate court into effect, and upon that hearing the court of appeals decided that the chancellor had exceeded his jurisdiction in granting the injunction prior to the entry of their mandate, and rendering a final decree in conformity therewith, and peremptorily required him to render a judgment of restitution of the property to the appellants, in so far as they had been deprived thereof by his previous orders. *Watson* v. *Avery*, 3 Bush, 635.

Those orders of the appellate court were not executed, but the unsuccessful party immediately dismissed their bill of complaint to enjoin the appellants from executing the decree of the court of appeals, and on the twenty-first of the same month filed in the circuit court of the United States the bill of complaint in this case, before the second mandate of the appellate court, commanding the chancellor to execute the first mandate, was filed in the subordinate court.

Beyond all question, jurisdiction was assumed by the circuit court in this case by virtue of the fact that the parties are citizens of different states, in which case the judiciary act provides that the circuit courts shall have orig- **737***] inal cognizance *concurrent with the several states. Indeed, jurisdiction in the case is claimed solely upon the ground that the circuit court of the United States possesses concurrent and co-ordinate jurisdiction with the state court in such a controversy.

In view of these considerations, as more fully set forth in the record and in the opinions given in this case by the court of appeals, I am of the opinion that the circuit court had no jurisdiction to hear and determine the matter in controversy, as there were two courts of common law exercising the same jurisdiction between the same parties in respect to the same subject-matter, within the same territorial limits, and governed by the same laws.

Neither court had any peculiar jurisdiction over the property in question nor of any peculiar right or lien upon it claimed by either party. Originally the state court had the same power with the circuit court to hear and decide any and every question that might arise as to the rights of property of either party in the course of the litigation. State courts and circuit courts in such cases are courts of concurrent and co-ordinate jurisdiction, in respect to which the principle is that "whenever property has been seized by an officer of the court, or put in his custody by the process of the court, the property will be considered as in the custody of the court and under its control for the time being, and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises." *Buck* v. *Colbath*, 3 Wall. 341, 18 L. ed. 260. Decided cases asserting that principle and enforcing it are very numerous in the reported decisions of this court, and also in the reported decisions of other courts of the highest respectability. *Hagan* v. *Lucas*, 10 Pet. 400; *Taylor* v. *Carryl*, 20 How. 594, 15 L. ed. 1031; *Freeman* v. *Howe*, 24 How. 450, 16 L. ed. 749; *Payne* v. *Drewe*, 4 East, 523; *Peck* v. *Jenness*, 7 How. 612; *Evelyn* v. *Lewis*, 3 Hare, 472; *Noe* v. *Gibson*, 7 Paige. 513; *Russell* v. *East Ang. R. Co.* 3 Mc.N. & G. 104.

*Remarks to show that the suit in the [***738** state court was pending and undisposed of when the bill was filed in the circuit court are unnecessary, as the fact is admitted; and in view of that fact I am of the opinion that the circuit court had no jurisdiction of the case.

Being of the opinion that the case ought to be reversed and dismissed for the want of jurisdiction, I do not think it necessary or proper to express any opinion upon the merits of the case. I am authorized to say that Mr. Justice **Davis** concurs in this dissent.

BALIE PEYTON, *Appt.*,
v.
G. HEINEKIN *et al.*

Deeds referred to in description are evidence in aid of the description—interest allowed by law at the place of performance of a contract if taken, is not usury—judicial sale may be upon credit—money paid for insurance a proper charge by a factor—where appeal is taken for delay, ten per cent damages allowed.

1. Where deeds are referred to as parts of the description in a deed of trust, they may be used in aid of the description, if it is defective.
2. Where commission merchants in the city of New York agreed to advance money to defendant, to be reimbursed with interest from the proceeds of flour sent to them by him, the advances to be

NOTE.—*Conflict of laws as to interest and usury*—see note, 62 L. R. A. 33.

made in New York and to be repaid there, that state was the place of performance, and it was legitimate to fix the rate of interest there allowed by law.

3. A sale under a deed of trust may be ordered to be upon credit.

4. Charge for money paid by the commission merchants for insurance was correct. It is the usage, if not the duty, of factors, to insure their principal's goods.

5. Where it is obvious that an appeal was taken only for delay, the judgment will be affirmed with interest and ten per cent damages.

[No. 127.]

Argued Mar. 5, 1872. Decided Apr. 15, 1872.

APPEAL from the Circuit Court of the United States for the Middle District of Tennessee.

This action was commenced in the court below, by the appellees, alleging that the appellant was indebted to them under the following contract: "For the consideration of five dollars to me in hand paid, and the other considerations hereinafter mentioned I have bargained, sold, and hereby transfer and convey to William E. Milton, as trustee, the following described real estate, with all the houses, improvements, machinery, and fixtures on the same, consisting of a steam and water flouring mill, and houses for the miller, lying in Sumner county, Tennessee, on West station, Camp creek, on the Nashville & Gallatin turnpike, about four and one half miles west of the town of Gallatin, consisting of three and three fourths acres of ground on which the millhouse stands; the boundaries of which are set forth in the deed from R. A. Chapman to me, and registered at Gallatin, August 15, 1861, and one acre on which the miller's house stands conveyed to me by John F. Cage and registered at Gallatin about the same time. The considerations and purposes of this conveyance are as follows: G. Heinekin & Palmore, commission merchants of the city and state of New York, from time to time as required, agree to advance in cash $10,000 or more if mutually agreed upon, for the purpose of purchasing wheat to be ground at my said mill, and I am desirous of securing them in the payment of said advances; the wheat so purchased to be ground and the flour to be shipped to the said firm in New York, according to the directions of the said trustee, as fast as practicable, by the car load or otherwise, and to account to me for the net proceeds thereof. It is further agreed that the said firm of G. Heinekin & Palmore shall have the exclusive sale of all the flour ground at my mill, the produce of wheat purchased with their advances, except such sales as I may make at retail at the mill. It is further agreed that G. Heinekin and Palmore are to receive the legal interest of the state of New York for advances, and 2½ per cent commission on sales. It is further agreed that the money arising from the sales of the flour, less the interest and commissions, etc., is to be paid over and applied to my credit, from time to time, as sales take place. If I shall comply with the terms and conditions above mentioned, and pay to the said G. Heinekin & Palmore the principal and interest on the advances made by them as aforesaid, when called on so to do, then this obligation to be void, but on default thereof, Wm. E. Milton, the trustee aforesaid, shall advertise and sell the property above mentioned, for cash, upon giving twenty days' notice, at the courthouse door in the town of Gallatin, and after deducting the expenses of his trust, the balance is to be paid to the said G. Heinekin & Palmore, or a sufficiency to discharge all my liability to them. The said trustee is empowered to make to the purchaser of said property a deed, with convenant of warranty as full as I myself could do.

Signed, sealed, and delivered at Gallatin, July 11, 1868.

Balie Peyton. (Seal.)
G. Heinekin & Palmore. (Seal.)
Per Wm. E. Milton, Agt."

The complainants, now appellees, alleged that there was due them $10,034.05, with interest from Dec. 1, 1868, at seven per cent. They further allege that Peyton had refused to pay the same, on the ground that the account was not correct. They, therefore, thought it "to be just to him and proper, to come into a court of equity and ask that an account be taken and that its exact amount be ascertained previous to the sale of said property, instead of giving twenty days' notice and selling as authorized by the contract."

The defendant answered, admitting the contract, but alleging that the amount of his indebtedness was less than stated by the complainant. The court referred it to a commissioner, to take and state the account between the parties. The commissioner reported the amount due Nov. 15, 1869, to be $7,743.43. He afterwards, however, filed another report, as a substitute for the former report, in which he found the amount to be $7,122.18.

Both parties filed numerous exceptions to the report. An exception of the complainants, allowed by the court, was:

"The commissioner allows a discount of $40 on the draft for $4,000, wrongfully."

This draft was drawn on the complainants by their agent in Tennessee, payable at thirty days in New York. It was discounted, and the defendant realized $3,960. It was paid by the complainants at maturity, and they claimed they were entitled to credit for the full sum from the date of payment. The second and third exceptions of the defendant, disallowed by the court, were as follows:

"Second. The commissioner has allowed complainants $98.48 inland insurance, on the flour shipped to New York. There is no proof that it was ever paid and if it was, it was wholly unnecessary, as the common carrier insurance was sufficient.

Third. Complainants are allowed fire insurance to the amount of $37.33. That, also, was unnecessary, for the reason stated above."

The final decree of the court below contained the following:

It is now, therefore, ordered, adjudged and decreed by the court, that the complainants, G. Heinekin & Palmore, recover of and from the defendant the sum of $6,462.26, with interest from Feb. 11, 1870; and unless the same is paid to the said complainants by July 1, 1870, the clerk of this court is ordered to sell at public sale the real estate mentioned in the bill and former decree of this court, being three and three fourths acres of land in Sumner county, state of Tennessee, and situated on the Gallatin

turnpike road, about four and one half miles west of the town of Gallatin, with all the houses, improvements, and fixtures thereon, and also the one acre of ground on which the miller's house stands, after he had advertised the same, according to law and the practice of this court, for twenty days. And, upon the application of complainants, he is ordered to sell said property upon a credit of six, twelve and eighteen months, free from the equity of redemption or right of repurchase, taking three notes therefor in equal amounts, each with good personal security, and reserving a lien, until the same are paid, upon said property; and when collected, he will pay over the money to the said G. Heinekin & Palmore, or their solicitors, or so much thereof as may be necessary to satisfy this decree, including the costs, it being the intention of the court to charge the defendant with the payment of the costs."

The defendant thereupon appealed to this court.

Messrs. **Henry Cooper,** *Balie Peyton,* in person, and *C. Cushing* for the appellant.

Mr. **Conway Robinson** for the appellees.

Mr. Justice **Strong** delivered the opinion of the court:

There is no merit in any of the exceptions which have been taken to this decree. The contract, which was a deed of trust to secure the repayment of future advances, defined with sufficient certainty the property conveyed, and there could have been no difficulty in identifying it even without reference to the deeds of the grantor. These deeds were, however, referred to as parts of the description, and they may, therefore, be called in aid of the description, if it could be held defective. But no such defense was set up in the court below. It was not there pretended that the contract was void, either for uncertainty of description, nor for any other reason.

Nor is there any validity in the objection that the contract was usurious. The complainants were commission merchants in the city of New York, who agreed to advance money to the defendant, from time to time. To reimburse them for such advances, the defendant undertook to send flour to them in New York, which they agreed to sell and after deducting commissions and legal interest according to the New York rate, to credit him with the balance. Thus the advances were to be made in New York, and they were to be repaid there. That state was the place of performance, and hence it was legitimate to fix the rate of interest there allowed by law.

There is no error in the decree directing a sale. It is sufficiently specific, and the defendant cannot complain that the sale was ordered to be upon credit, when it might have been decreed to be for cash.

The exceptions to the report of the master require only slight notice. They are very trivial. The credit of $40 discount on the draft of August 24 was properly disallowed. The draft was paid by the complainants in full when it fell due, and the defendant is charged with interest only from the time of payment.

The charge of money paid by the complainants for insurance was correct. They were factors, and it was their duty to protect the flour with the same care as that which a prudent man would extend to his own. It is a recognized usage, if not the duty, of factors, to insure their principal's goods. Sm. Mer. Law, 124, 125.

The calculation of interest by the master was only too favorable for the defendant.

This disposes of the case. It is very obvious to us that this appeal was taken only for the purpose of delay.

It is therefore, affirmed, with interest and ten per cent damages.

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*UNITED STATES, *Appt.*, [*254
v.
AMHERST H. WILDER.

(See S. C. 13 Wall. 254-257.)

Statute of limitations—payment, when no acknowledgment.

1. The statute of limitations is entitled to the same respect as other statutes, and should not be explained away.
2. A payment in full of an admitted contract cannot be converted into an acknowledgment of one which was denied.

[No. 154.]

Submitted Mar. 26, 1872. Decided Apr. 22, 1872.

APPEAL from the Court of Claims.

The case is stated by the court.

Mr. **C. H. Hill,** *Asst. Atty. Gen.,* for appellant:

The findings of the court of claims, in respect to the payment made in Oct., 1863, may be slightly ambiguous; but, from the opinion of the court of claims in this case, it shows that the payment was made by the quartermaster's department, under the assumption that the old contract was still in force, and did not recognize the new contract.

Wilder v. *U. S.* 5 Ct. of Cl. 462, 466.

Such is the real meaning of the findings.

It may well be questioned whether any officer of the United States is authorized by making payment in behalf of the United States, to acknowledge that a debt is due so as to take it out of the statute of limitations of Mar. 3, 1863.

But, however that may be, it is perfectly apparent that the payment in this case did not acknowledge that the amount for which the suit was brought was due from the United States, and that, consequently, no promise to pay the residue claimed can be implied from the payment previously made, and, therefore, according to all the authorities the case is not taken out of the statute.

Clementson v. *Williams,* 8 Cranch, 72; *Wetzell* v. *Bussard,* 11 Wheat. 310; *Bell* v. *Morrison,* 1 Pet. 352; *Moore* v. *Bk.* 6 Pet. 86; *Tippets* v. *Heane,* 4 Tyrw. 772; *Waugh* v. *Cope,* 6 Mees. & W. 824.

Messrs. **Sanborn** and *King,* for appellee:

Payment of a part of a claim raises, by implication of law, a new promise to pay the balance due, and the statute of limitations commences to run anew from the time of such payment; and the fact that the debtor thereafter refused to pay the balance of the claim which was admitted at the time of such payment, can-

not affect this implied promise. Pars. Cont. 73, 79, inclusive, and authorities cited.

Under the rules of the court of claims when this action was brought, the claimant was compelled to show that application for the allowance of his claim had been made to the proper executive department, and without success, and its decision thereon.

The statute of limitations runs against the remedy only; hence it does not run while there is no remedy in court.

A different construction under this rule would place it in the power of an executive department to bar all claims cognizable by the court of claims, by simply refusing to act for six years.

Webster v. *Cooper*, 14 How. 488; *Richardson* v. *Curtis*, 3 Blatchf. 385.

The statute of limitations is no longer treated as a statute of presumption but a statute of repose. The memory of man is uncertain. The good order and quiet of communities is of paramount importance, and the statute of limitations at the same time guards against the weakness and uncertainty of the memory, and induces more order and quiet in political communities, and more vigilance on the part of creditors and claimants, and will be considered with favor and construed with ordinary liberality by the courts. But where the debtor has, within six years, paid a portion of the claim, or made a new promise to pay, the statute will commence to run anew from such payment or promise.

In the case at bar, payment of a part of the appellee's claim was made within six years from the time the action was brought, and promises made by the defendant's agent respecting the unpaid balance; and hence, the claim is not barred by the statute. There has not been six years of repose.

Spring v. *Gray*, 5 Mas. 523; 3 Pars. Cont. 66; Ang. Lim. 14, 15.

Mr. Justice **Davis** delivered the opinion of the court:

On the 23d of May, 1861, the firm of Burbank & Co. contracted with Major McKinstry, a United States quartermaster, to furnish transportation for all public stores from St. Paul, Minn. to Fort Abercrombie, Dakota territory, at the rate of $2.90 per hundred pounds. The contract specified no period of duration, but the parties acted under and in pursuance of its terms, until the 18th of July, 1863. On that day Captain Carling, an assistant quartermaster in charge of the department at St. Paul, being obliged to send forward quartermaster and commissary stores to Fort Abercrombie in a military exigency, notified Burbank & Co. to receive and transport them under the contract referred to; but Burbank & Co. declined to receive and transport the goods under that contract, and refused to acknowledge its force and validity. Carling, being unable to obtain transportation from other parties, thereupon entered into a verbal agreement with them that they should transport such supplies and should receive for such services whatever price the same might be reasonably worth; which they did. Carling fixed the value thereof at $4.50 per hundred pounds, but the quartermaster's department refused to allow or pay to Burbank & Co. any greater price than $2.90 per one hundred pounds, for the alleged reason that the obligations of the original contract had not been terminated by reasonable notice, and that the services could justly and legally be deemed to have been rendered thereunder, and at the agreed rate of compensation.

The services were performed and completed on the 31st of July, 1863.

*On the 1st of October, 1863, Burbank [*255 & Co. were paid by the quartermaster $6,393.72 being a payment at the rate of $2.90 per hundred pounds, and leaving unpaid $3,516.21; which "the defendants then and there refused to pay, and still remains unpaid."

The petition was filed in the court of claims on the 26th of August, 1869, being more than six years from the time the services were performed, and less than six years from the time of payment.

Upon these facts the court of claims decided:

1. That the claimants had a good and valid cause of action upon the parol agreement.

2. That the claimants are not barred from maintaining this suit upon the facts set forth in the second finding, under and within the true intent of the meaning of the act of March 3, 1863, re-organizing the court of claims, "and which declares that every claim against the United States shall be forever barred, unless the petition setting forth the statement of the claim be filed in the court . . . within six years after the claim first accrued." 12 Stat. at L. 765.

The United States appeal, and allege as error that the cause was barred by the statute of limitations, and that the court of claims should have so held.

We think the court of claims erred in deciding that the claimant was not barred by the provision in the act reorganizing that court. The claim accrued on the 31st of July, 1863, because the services were rendered at that time. The petition was not filed until six years afterwards. The claim was, therefore, barred by the statute, unless, in some way, taken out of it. It is insisted that this has been done by a payment of a portion of the demand within the six years, and this presents the only question for consideration.

This court has not adopted the rule of decision made at *one time in England [*256 (*Trueman* v. *Fenton*, Cowp. 548; *Quantock* v. *England*, 5 Burr. 2628; *Yea* v. *Fouraker*, 2 Burr. 1099) and to some extent in this country, under which, by a constructive equity, judicial refinements came near to abolish the statute altogether. On the contrary, following the decisions of the English courts (*Dickson* v. *Thompson*, 2 Show. 126; *Andrews* v. *Brown*, Prec. Ch. 385; *Williams* v. *Gun*, Fort. 177; *Bland* v. *Haselrig*, 2 Vent. 152; and *Benyon* v. *Evelyn*, A. D. 1664, Sr. Orlando Bridgman's Judgments, all referred to in Ang. Lim. pp. 18, 212, 5th ed. 1869) made more immediately after the passage of the statute of James I., we have sought to give to it full effect. In 1814, Marshall, Ch. J. delivering the judgment of this court, declared (*Clementson* v. *Williams*, 8 Cranch, 72) that the statute of limitations was entitled to the same respect as other statutes,

and should not be explained away. The same doctrine has been asserted in subsequent decisions. *Bell* v. *Morrison*, 1 Pet. 351; *McCluny* v. *Silliman*, 3 Pet. 270.

It results from these cases that a promise to pay cannot be inferred from the mere fact of payment of part of a debt, there being nothing to raise a presumption that it was a payment on account of this debt. The principle on which part payment takes a case out of the statute is, that the party paying intended by it to acknowledge and admit the greater debt to be due. If it was not in the mind of the debtor to do this, then the statute, having begun to run, will not be stopped by reason of such payment. It is too plain for controversy that the payment in question was not intended as an acknowledgment of the demand sued for. Instead of being applicable to an admitted debt, it was in denial of the right to further payment. The sum paid was the exact amount due under the written agreement, and was in discharge of the obligation imposed by it. That agreement was acknowledged, while the verbal arrangement made by the assistant quartermaster was repudiated. It is difficult to see how a payment in full of an admitted contract can be converted into an acknowledgment of one which was denied.

257*] *The case of the claimant is, in some of its aspects, worthy of consideration, but as it was not filed in the court of claims until barred by the statute, we are not at liberty to discuss its merits.

The judgment of the Court of Claims is reversed, and the cause is remanded to that court, with directions to dismiss the petition.

THADDEUS WILLIAMS, *Plff. in Err.*,
v.
ANNA T. E. KIRTLAND.

(See S. C. 13 Wall. 306-311.)

Minnesota tax deed not conclusive evidence of title—proof of performance of the requirements of law—state construction of state law binding on Federal courts.

*1. A tax deed executed by a county auditor under a statute of Minnesota of 1866, declaring that where the lands sold for taxes were not redeemed within the time allowed by law, such deeds should be prima facie evidence of a good and valid title in the grantee, his heirs and assigns, did not dispense with the performance of all the requirements prescribed by law for the sale of the lands. It only shifted the burden of proof of such performance from the party claiming under the deed, to the party attacking it.

2. The construction of a state law upon a question affecting the titles to real property in the state by its highest court, is binding upon the Federal court.

[No. 161.]

Argued Apr. 9, 1872. Decided Apr. 22, 1872.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

*Headnotes by Mr. Justice FIELD.

NOTE.—*Lex loci rei sitæ governs titles to lands by deed or devise*—see note to Clark v. Graham, 5 L. ed. U. S. 334; note to Elmendorf v. Taylor, 6 L. ed. U. S. 289; note to Darbey v. Mayer, 6 L. ed. U. S. 367; and note to Jackson v. Chew, 6 L. ed. U. S. 583.

The defendant in error, claiming under a tax title, brought ejectment in the court below, to obtain possession of certain premises situated in the city of St. Paul and state of Minnesota.

On the trial, the tax deed was introduced in evidence against objection, to establish the plaintiff's title, and was held to have that effect by the court below. A bill of exceptions was tendered and allowed.

A second trial was had, the same deed offered, the same ruling made, with like results.

On this trial, however, the defendant offered to prove that the tax deed was invalid by reasons of defects in the proceedings of the taxing officers. The court below rejected this evidence, on the ground that, by the act of 1862 of the legislature of Minnesota, such deed could not be attacked except in an action brought for that purpose and commenced within the time limited by that statute.

Judgment was, therefore, rendered for the plaintiff. a second bill of exceptions made and settled, and the case is brought here for review by writ of error.

The case further appears in the opinion.

Messrs. John B. Brisbin and **E. C. Palmer**, for plaintiff in error:

It was not shown that the premises in controversy were lands which have been sold for the taxes of 1859 and previous years, prior to March 11, 1862 (act 1862, p. 35, § 1); nor that said premises remained unredeemed on the first day of Nov. 1862. Act 1862, § 2.

The plaintiff below did not show that the land sold had not been redeemed when the tax deed was executed and delivered. It is only a deed "so made;" that is to say, when the land has not been redeemed, which is declared prima facie evidence of title.

Gen. Stat. of Minn. ch. 11, §§ 39, 40; Laws of 1860, ch. 2, §§ 29, 30; *Greve* v. *Coffin*, 14 Minn. 345.

The tax deed issued under the act of 1862 could only vest in the grantee therein an absolute title, in cases where the tax returned "delinquent" had not been actually paid. Therefore, the plaintiff below was bound to show that the tax had not been paid, before the tax deed could support the declaration. This was not done, and said deed was incompetent for any purpose. Act 1862, § 5; *Greve* v. *Coffin*, 14 Minn. 345.

The court erred in not permitting the defendant below to show that the provisions of law relating to notice of tax sales had not been complied with.

1. The action was commenced within one year after the tax deed was recorded, and rested for support solely upon that deed. *Hazell* v. *Shelby*, 11 Ill. 9; *Bedell* v. *Jenney*, 4 Gilm. 207.

2. The limitation clause in § 7 of the act of 1862, as applied to actions of ejectment, is unconstitutional and void. *Baker* v. *Kelly*, 11 Minn. 480.

Messrs. **Ira D. Warren**, *Lorenzo Allis*, and *Gilfillan Williams* for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

This was an action of ejectment, for the possession of certain real property situated in the city of St. Paul, in the state of Minnesota. The plaintiffs claimed the premises under a deed

executed by the auditor of Ramsey county of that state, upon a sale for unpaid taxes.

The statute of Minnesota of March 11, 1862, under which the sale was made, provided that certain lands sold for taxes of the year 1859, and of previous years, and the lands upon which delinquent taxes were due on the passage of the act, to any city or state, might be redeemed by payment of the amount of the taxes, with interest and costs, on or before November 1, 1862; that if any such lands remained unredeemed, or such delinquent taxes on land remained upaid at the time, the lands should become forfeited to the state, and that thereupon it should be the duty of the county auditor to advertise the property for sale, stating that such lands would be sold as forfeited to the state under the provisions of the act, and the time and place of sale, which time should be the second Monday in January, 1863.

The statute also contained provisions requiring publication of notices of the sale, prescribing the manner in which the sale should be conducted, for the issue of certificates of sale to the purchaser, and upon the return of the certificate, for the execution and delivery to him or his assignee of a deed in fee simple for the premises, which should recite the sale and the fact that the property was unredeemed. And the statute declared that the deed thus executed should vest in the grantee an absolute title, both at law and in equity, except where the tax returned delinquent was actually paid.

We agree with counsel that this last provision only declared the effect of a deed such as the statute contemplated, and did not dispense with proof of compliance with the preliminary requirements of the act. The officer, in making the sale and executing the deed, acted under a special power, and, as in all such 309*] *cases, was bound to keep strictly within the limits of his authority. No attempt was made by the plaintiff to show the levy of any tax upon the property, or its nonpayment, or that any sale was ever had. He relied, to supply the want of such proof, upon a provision of the Statute of 1866, declaring that where lands sold for taxes were not redeemed within the time allowed by law, the deed executed by the county auditor should be prima facie evidence of a good and valid title in the grantee, his heirs and assigns. Gen. Stat. Minn. 1866, chap. 11, §§ 139, 140.

It is admitted that a deed executed under these circumstances would, if valid on its face, have dispensed, in the first instance, with proof of the previous proceedings, upon the performance of which a sale only could be made. But it is contended that it was essential to the admission of a tax deed, having of itself such effect as evidence, that it should appear that the lands sold for taxes had not been redeemed when the deed was executed and delivered. And it is stated that this has been expressly adjudged by the supreme court of Minnesota upon the construction of the provision of the statute of 1866 cited by the plaintiff. *Greve* v. *Coffin*, 14 Minn. 355. Such is undoubtedly the case and, had the objection been taken when the deed was offered, the deed would not have been admissible, in the absence of such proof, to establish a title in the plaintiff. But the plaintiff is precluded from availing himself of the objection here, as it was not urged in the court below, and is not covered by any of the several objections presented by him.

It may admit of much doubt, as also contended by counsel, whether the deed was not invalid on its face. The act of 1862 declares that notice of the sale should be given for the second Monday of January, 1863. The deed shows that the sale took place on the 11th of February following, and contains no recitals explaining the disregard of the day designated by the statute and the selection of a different day.

The act of 1862 also provides for sale of certain lands upon which the taxes of 1859 and of preceding years were *unpaid. The deed [*310 shows that the sale was made for delinquent taxes not only of these years, but also of the subsequent years of 1860 and 1861; and counsel have not called our attention to any statute of Minnesota which authorizes a sale for the taxes of these years added to the taxes of the previous years.

But it is not necessary to express any opinion upon these objections until we have the entire statutes of the state on the subject of these tax sales before us. There is one error in the ruling of the court below which will require a reversal of the judgment. Giving to the deed full effect as prima facie evidence of title, its validity was open to question by the defendant. The statute does not dispense with the performance of all the requirements of the law prescribed for the sale of the land. It only shifts the burden of proof of such compliance from the party claiming under the deed to the party attacking it. The deed itself, when admitted, creates under the statute a presumption that all essential preliminary steps in the assessment and levy of the tax and sale of the property have been complied with. This presumption the defendant desired to rebut. He offered to prove that the notice of the sale was insufficient, but the offer was rejected under the objection that the proof was incompetent and immaterial. In this the court below erred.

Some criticism was made upon the form of the offer, that it was not to prove any particular fact, but a conclusion of law. It would, undoubtedly, have been better for counsel to have stated the facts he desired to establish, but no objection was taken to the form of the offer; the objection was only to the competency and materiality of the proof; and it would be unjust to the defendant to deprive him in this court of the benefit of his offer on the grounds not presented in the court below. That court evidently considered the right of the defendant to question the validity of the deed as lost by the operation of the 7th section of the act of 1862, which declared: "That any person or persons having or claiming any right, title, or interest in or to any land or premises after a sale under the provisions of this act, adverse to the title or *claim of the purchaser at [*311 any tax sale, his heirs, or assigns, shall, within one year from the time of the recording of the tax deed for such premises, commence an action for the purpose of testing the validity of such sale, or be forever barred in the premises."

It is a sufficient answer to this view of the

operation of this statute, that the supreme court of Minnesota has adjudged that the statute does not apply to cases where the owner of the property defends against a tax deed in an action of ejectment; and if it were susceptible of such application that the statute itself would be in conflict with the Constitution of the state. *Baker* v. *Kelley*, 11 Minn. 480. This construction of a state law upon a question affecting the titles to real property in the state by its highest court, is binding upon the Federal courts.

The judgment reversed, and the cause remanded for a new trial; and it is so ordered.

WILLIAM WHITE, Sr., *Plff. in Err.*,
v.
JOHN R. HART and William D. Davis.

(See S. C. 13 Wall. 646–654.)

Georgia Constitution void as to contracts for slaves made previous to its adoption—reconstructed states never out of the Union—state Constitutions impairing contracts.

1. The clause of the Constitution of Ga., of 1868, that no court shall have jurisdiction to try or give judgment on or enforce any debt, the consideration of which was a slave or the hire thereof, is void as to debts contracted previous to its adoption, which were valid when contracted.
2. The Constitution of Ga. was not adopted under the dictation and coercion of Congress, and is not the act of Congress, rather than that of the state.
3. The reconstructed states have never been out of the Union.
4. A state can no more impair the obligation of a contract by adopting a Constitution than by passing a law.

[No. 11.]

Argued Mar. 7, 1871. Decided Apr. 22, 1872.

IN ERROR to the Supreme Court of Georgia. The case is stated by the court.

Messrs. **P. Phillips**, *Edwin N. Broyles*, *Dawson A. Walker*, and *Reuben Arnold*, for plaintiff in error:

It is not denied that the state has very ample control of the remedies which it affords to parties in its courts. But it cannot under the pretense of regulating the remedy, impair the right itself.

If the legislature of any state were to undertake to make a law preventing the legal remedy upon a contract, lawfully made and binding on the party to it, there is no question that such legislature would, by such act, exceed its legitimate powers.

Call v. *Hagger*, 8 Mass. 429; *Fletcher* v. *Peck*, 6 Cranch, 135; Cooley, Const. Lim. 362.

It would ill become this court to sanction a distinction between the right and the remedy, which would render the provision of the Constitution illusive and nugatory; mere words of form, affording no protection and producing no practical result.

Bronson v. *Kinzie*, 1 How. 317; *McCracken* v. *Hayward*, 2 How. 612.

That the sale of slaves constituted a valid contract prior to these constitutional changes, is not and cannot be denied.

Prigg v. *Pa.* 16 Pet. 540; *Jones* v. *Van Zandt*, 5 How. 231.

It is, therefore, submitted, that it is not competent for a state, either by law or constitutional provisions, to impair the obligation of a contract which was valid by the laws of the state when entered into.

Chicago v. *Sheldon*, 9 Wall. 55, 19 L. ed. 597; Puffendorf, Droit de la Nat. L. 1, c. 6, s. 6.

The legislature cannot declare what the law was, but what it shall be. *Ogden* v. *Blackledge*, 2 Cranch, 272.

There are no reasons applicable to ordinary legislation, which do not on this point apply equally well to Constitutions. Story, Const. § 430; Cooley, Const. Lim. 63.

But it has been urged that this provision of the state Constitution was imposed upon the state by Congress itself, in virtue of the power of conquest, and is to be sustained because the prohibition as to impairing the obligations of contracts is not a limit to the powers of Congress, but to those of the state only. It is Congress, therefore, it is said, that has impaired the obligation of the contract.

Shorter v. *Cobb*, 39 Ga. 303; *Hardeman* v. *Downer*, 39 Ga. 425.

By the act of Mar. 2, 1867, it was provided that military rule should cease when the people of any of the states lately in rebellion should form a constitution in conformity with that of the United States, and it shall have been ratified by a majority of the qualified electors voting, and approved by Congress; and when the state legislature, elected under said Constitution, ratified the 14th Amendment, and the said article became a part of the Constitution of the United States, the state was to be entitled to representation in Congress. 14 Stat. at L. 429.

The supplemental act of Mar. 23, 1867, provided still further for a registration of voters and the adoption by the people through convention of a state Constitution, and declares that when ratified by a majority of the voters, a copy of the said Constitution should be transmitted to Congress through the Executive, and if it should appear that the election had been conducted fairly and that it truly represents the voice of the majority of the qualified electors, and that it is in conformity to the provisions of the act of Mar. 2, 1867, and is approved by Congress; then the state to be declared entitled to representation. 15 Stat. at L. 4.

By the act of June 5, 1868, it is declared that the several states therein named having framed Constitutions of state governments which are republican, they shall be entitled and admitted to representation as states of the Union, when they shall have ratified the 14th Amendment.

Under these authorities the people of Georgia met in convention and adopted the Constitution Mar. 11, 1868, and this was submitted to a popular vote and ratified.

Like other constitutions it opens with a declaration that "we, the people of Georgia, in order to form a more perfect government, do ordain and establish," etc.

On the face of the instrument there is an express declaration that it was the free will of the people of the state.

The reconstruction acts do not regard Georgia as a state out of the Union, but a state within the Union, without a legal state government.

It is very evident that the idea of rights acquired by the United States by virtue of con-

quest, has no foundation in the national legislation. It is certainly denounced by the decisions of this court. *Texas* v. *White*, 7 Wall. 700, 19 L. ed. 227.

The question propounded by the Chief Justice in the case cited is: "Did Texas, in consequence of these acts, cease to be a state? Or, if not, did the state cease to be a member of the Union?"

In replying to these questions, he says: "Not only, therefore, can there be no loss of separate and independent autonomy to the states through their union under the Constitution, but it may be said, not unreasonably, that the preservation of the states and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union, and the maintenance of the national government. The Constitution in all its provisions looks to an indestructible Union composed of indestructible states.

"It certainly follows that the state did not cease to be a state, nor her citizens to be citizens of the United States. If this were otherwise, the state must have become foreign and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and have become a war for conquest and subjugation."

These acts of Congress were passed by virtue of that clause of the Constitution which guarantees to the states a republican form of government.

Republican government can only rest upon the voluntary action of the people.

All that Congress required, all that it could require, was that before these states should be entitled to renew their representation, their Constitutions should be in harmony with that of the United States.

The national will having been expressed constitutionally for the extinction of slavery, Congress declared that it would admit to representation no state which did not by its action conform to this declaration. How far this was an exercise of force invalidating the adoption of the amendment is not now in question.

It is sufficient to say that the legislation of the state which annuls these contracts, or what is the same thing, prohibits all remedy thereon in their courts, was never required by any action of the national government, nor by any constitutional provision.

(No counsel appeared for defendants in error.)

Mr. Justice **Swayne** delivered the opinion of the court:

This case was brought before us by a writ of error to the supreme court of the state of Georgia.

The suit was instituted by the plaintiff in error on the 10th of January, 1866, in the superior court of Chattooga county. He declared upon a promissory note made to him by the defendants in error for $1,230, dated February 9, 1859, and payable on the 1st of March, A. D., 1860. The defendant pleaded in abatement that "the consideration of the note was a slave," and that "by the present Constitution of Georgia made and adopted since the last pleadings in this case, the court is prohibited to take and exercise jurisdiction or render judgment therein." To this plea the plaintiff demurred. The court overruled the demurrer and gave judgment for the defendants. The plaintiff excepted and removed the case to the supreme court of the state, where the judgment was affirmed, and the plaintiff thereupon prosecuted this writ of error. The *Constitution of Georgia [*648 of 1868, which is still in force, contains (art. 5, § 17, paragraph 7) the following clause:

"Provided, that no court or officer shall have, nor shall the general assembly give, jurisdiction to try, or give judgment on, or enforce any debt the consideration of which was a slave or the hire thereof."

From the close of the Rebellion until Georgia was restored to her normal relations and functions in the Union, she was governed under the laws of the United States known as the reconstruction acts. Under these laws her present Constitution was framed, adopted, and submitted to Congress. Among the terms of her rehabilitation prescribed by the acts referred to it was made a fundamental condition that certain designated parts of the Constitution so submitted should "be null and void, and that the general assembly of the state" should, "by a solemn act, declare the assent of the state" to the required modification. 15 Stat. 73; act of June 25, 1868. The Constitution was modified accordingly. When submitted it contained the proviso here under consideration. No objection was made to the proviso, and it has since remained a part of the instrument. With her Constitution thus modified, Congress enacted "that the state of Georgia, having complied with the reconstruction acts, and the Fourteenth and Fifteenth Amendments to the Constitution of the United States having been ratified in good faith by a legal legislature of said state, it is hereby declared that the state of Georgia is entitled to representation in the Congress of the United States." Act of June 15, 1870, 16 Stat. 363, 364. Her representatives and senators were thereupon admitted to seats in Congress. This act removed the last of the disabilities and penalties which were visited upon her for her share of the guilt of the Rebellion. The condonation by the national government thus became complete.

The judgment we are called upon to review is sought to be maintained upon the following grounds:

*(1) That when the Constitution of [*649 1868 was adopted Georgia was not a state of the Union; that she had sundered her connection as such, and was a conquered territory wholly at the mercy of the conqueror; and that hence the inhibition of the states by the Constitution of the United States to pass any law impairing the obligation of contracts had no application to her.

(2) That her Constitution does not affect the contract, but only denies jurisdiction to her courts to enforce it.

(3) That her Constitution was adopted under the dictation and coercion of Congress, and is the act of Congress, rather than of the state; and that, though a state cannot pass a law impairing the validity of contracts, Congress can, and that, for this reason also, the inhibition in the Constitution of the United States has no effect in this case.

The third of these propositions is clearly unsound, and requires only a few remarks. Con-

gress authorized the state to frame a new Constitution, and she elected to proceed within the scope of the authority conferred. The result was submitted to Congress as a voluntary and valid offering, and was so received and so recognized in the subsequent action of that body. The state is estopped to assail it upon such an assumption. Upon the same grounds she might deny the validity of her ratification of the constitutional amendments. The action of Congress upon the subject cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it. *Luther* v. *Borden*, 7 How. 43, 47, 57; *Gelston* v. *Hoyt*, 3 Wheat. 324; *Williams* v. *The Suffolk Ins. Co.* 13 Pet. 420; *Rose* v. *Himley*, 4 Cranch, 272; *United States* v. *Palmer*, 3 Wheat. 634. We may add, that if Congress had expressly dictated and expressly approved the proviso in question, such dictation and approval would be without effect. Congress has no power to supersede the national Constitution.

The subject presented by the first proposition has been considered under some of its aspects **650*]** several times by this *court. We need do little more upon this occasion than to reaffirm the views heretofore expressed, and add such further remarks as are called for by the exigencies of the case before us.

The national Constitution was, as its preamble recites, ordained and established by the people of the United States. It created not a confederacy of states, but a government of individuals. It assumed that the government and the Union which it created, and the states which were incorporated into the Union, would be indestructible and perpetual; and as far as human means could accomplish such a work, it intended to make them so. The government of the nation and the government of the states are each alike absolute and independent of each other in their respective spheres of action; but the former is as much a part of the government of the people of each state, and as much entitled to their allegiance and obedience as their own local state governments—"the Constitution of the United States and the laws made in pursuance thereof," being in all cases where they apply, the supreme law of the land. For all the purposes of the national government, the people of the United States are an integral, and not a composite mass, and their unity and identity, in this view of the subject, are not affected by their segregation by state lines for the purposes of state government and local administration. Considered in this connection, the states are organisms for the performance of their appropriate functions in the vital system of the larger polity, of which, in this aspect of the subject, they form a part, and which would perish if they were all stricken from existence or ceased to perform their alloted work. The doctrine of secession is a doctrine of treason, and practical secession is practical treason, seeking to give itself triumph by revolutionary violence. The late Rebellion was without any element of right or sanction of law. The duration and magnitude of the War did not change its character. In some respects it was not unlike the insurrection of a county or other municipal subdivision of territory against the state to which it belongs. In such cases the state has inherently *the right to use all the means [***651** necessary to put down the resistance to its authority, and restore peace, order, and obedience to law. If need be, it has the right also to call on the government of the Union for the requisite aid to that end. Whatever precautionary or penal measures the state may take when the insurrection is suppressed, the proposition would be a strange one to maintain, that while it lasted, the county was not a part of the state, and hence was absolved from the duties, liabilities, and restrictions which would have been incumbent upon it if it had remained in its normal condition and relations. The power exercised in putting down the late Rebellion is given expressly by the Constitution to Congress. That body made the laws and the President executed them. The granted power carried with it not only the right to use the requisite means, but it reached further and carried with it also authority to guard against the renewal of the conflict, and to remedy the evils arising from it in so far as that could be effected by appropriate legislation. *Stewart* v. *Kahn*, *ante*, 170. At no time were the rebellious states out of the pale of the Union. Their rights under the Constitution were suspended, but not destroyed. Their constitutional duties and obligations were unaffected and remained the same. A citizen is still a citizen, though guilty of crime and visited with punishment. His political rights may be put in abeyance or forfeited. The result depends upon the rule, as defined in the law, of the sovereign against whom he has offended. If he lose his rights he escapes none of his disabilities and liabilities which before subsisted. Certainly he can have no new rights or immunities arising from his crime. These analogies of the county and the citizen are not inapplicable, by way of illustration, to the condition of the rebel states during their rebellion. The legislation of Congress shows that these were the views entertained by that department of the government.

In the several acts admitting new states, the same formula substantially is used in all cases. It is, that the state named *"shall be, [***652** and is hereby declared to be one of the United States of America, and is hereby admitted into the Union, upon an equal footing with the original states, in all respects whatsoever." Act of June 15, 1836, 5 Stat. 50. In the several reconstruction acts, the language used in this connection is, that the state in question "shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom." Act of March 2, 1867, 14 Stat. 429; act of March 23, 1867, 15 Stat. 4. "Shall be entitled and admitted to representation in Congress as a state of the Union, when," etc. Act of June 25, 1868, 15 Stat. 73. And, lastly, in the final act as to Georgia, "It is hereby declared that the state of Georgia is entitled to representation in the Congress of the United States." Act of July 15, 1870, 16 Stat. 364.

The different language employed in the two classes of cases evinces clearly that, in the judgment of Congress, the reconstructed states had not been out of the Union, and that to bring them back into full communion with the loyal states, nothing was necessary but to permit them to restore their representation in Congress. Without reference to this element of

the case, we should have come to the same conclusion. But the fact is one of great weight in the consideration of the subject. And we think it is conclusive upon the judicial department of the government. *Luther* v. *Borden*, 7 How. 57.

Georgia, after her rebellion and before her representation was restored, had no more power to grant a title of nobility, to pass a bill of attainder, an *ex post facto* law, or law impairing the obligation of contracts, or to do anything else prohibited to her by the Constitution of the United States, than she had before her rebellion began, or after her restoration to her normal position in the Union. It is well settled by the adjudications of this court, that a state can no more impair the obligation of a contract by adopting a constitution than by passing a law. In the eye of the constitutional inhibition they are substantially the same thing. **653*]** The second proposition remains to be considered. When the note was executed and until the Constitution of 1868 was adopted, the courts of the state had unquestionable jurisdiction to entertain a suit brought to enforce its collection, and if that jurisdiction ceased, it was by reason of the provision of the Constitution of the state here under consideration.

The question presented by this proposition was fully considered by this court in *Van Hoffman* v. *Quincy*, 4 Wall. 552, 18 L. ed. 409. The city had sold its bonds under acts of the legislature of Illinois, which authorized their issue and required the assessment and collection of a special tax to meet the interest; and it was declared that the amount so raised should be applied to that object "and to no other purpose whatsoever." The legislature subsequently passed an act which prohibited any tax beyond the amount therein specified to be imposed. This tax yielded a sum barely sufficient to meet the municipal wants of the city — leaving nothing to be applied to the interest upon the bonds. This court held the prohibition, so far as it affected the special tax, to be void, and by a writ of mandamus ordered that tax to be collected and applied, as if the subsequent act had not been passed. It was said: "The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. . . . Nothing can be more material to the obligation than the means of enforcement." Without the remedy, the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against invasion. The obligation of a contract "is the law which binds the parties to perform their agreement." It was said further that the state may modify the remedy, but not so as to impair substantial rights; and that **654*]** *whenever this result "is produced, the act is within the prohibition of the Constitution, and to that extent void." When the contract here in question was entered into, ample remedies existed. All were taken away by the proviso in the new Constitution. Not a vestige was left. Every means of enforcement was denied, and this denial if valid involved the annihilation of the contract. But it is not valid. The proviso which seeks to work this result, is, so far as all pre-existing contracts are concerned, itself a nullity. It is to them as ineffectual as if it had no existence. Upon the question as thus presented, several eminent state courts have expressed the same views. Cooley, Const. Lim. 289.

As the case is disclosed in the record we entertain no doubt of the original validity of the note, nor of its validity when the decision before us was made. But as that question was not raised in this case, we deem it unnecessary to remark further upon the subject.

The judgment of the Supreme Court of Georgia is reversed, and the case will be remanded to that court, with directions to proceed in conformity to this opinion.

Dissenting, Mr. Chief Justice **Chase.**

THOMAS R. WELCH, Administrator of Chester Ashley, Deceased, and Joshua M. Craig, as Administrator of Silas Craig, Deceased, *Appts.*,

v.

ELIZABETH J. BARNARD *et al.*, Heirs of Thomas Barnard, Deceased.

Claim for rents and profits denied.

Where a decree required an amount to be taken by a master of the rents and profits of lands, which had accrued previous to a sale by the claimants, and the master reported that the lands had been sold by them long before the decree and before any rent was proved to have accrued, the claim for rents and profits was properly denied.

[No. 141.]

Submitted Mar. 22, 1872. Decided Apr. 22, 1872.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas.

The case is stated by the court.

See also *Barnard* v. *Ashley*, 18 How. 43, 15 L. ed. 285.

Messrs. **Watkins & Rose**, for appellants:

1. The status of Barnard's heirs, as parties to this suit and upon this record, is irrevocably fixed by the adjudication of this court, affirming the decree of the court below and remanding the cause, with specific directions, for further proceedings.

2. There must have been some period of time, while these lands were in the possession of Barnard, after Craig and Ashley acquired title to them, and before they sold them, that Barnard or his representatives would be liable to account to Craig and Ashley, or their representatives, for the use and occupation, under the original decree, as affirmed by this court. But any such inquiry or relief is denied by the decree of 1870, here appealed from.

3. The decree here appealed from nullifies the original decree, which this court affirmed and directed to be carried into execution. The master was directed to take an account of the rents and profits, and at the same time to inquire and ascertain what lands had been sold and conveyed by Craig and Ashley, and to exclude from the account the rents and profits of

any such lands accruing after the date of such sale and conveyance.

Mr. **George Taylor**, for appellees:

We submit that the report of the master in chancery showed that no rents accrued to Ashley during the possession of the lands by Barnard, but that all rents and profits accrued after the lands had been sold, and that the circuit court was right in refusing to confirm the master's report.

The mere supposition, as stated in the second point of appellant's brief, that there must have been some time during the occupancy of Barnard in which rents accrued, and for which his heirs are liable, is found against them by the court, and there is nothing in the record to justify the interference of this honorable court.

Mr. Justice **Field** delivered the opinion of the court:

In 1837, one Thomas Barnard, a citizen of the state of Mississippi, filed a bill in the circuit court of the United States for the eastern district of Arkansas, against Chester Ashley, Silas Craig, and others, to obtain a decree for the cancelation of certain patents issued to them, and to quiet his title to certain real property in Arkansas, of which he claimed to be the owner and occupant.

In 1853, by a decree of the court rendered in that suit and in a cross suit commenced by the defendants, the title to the property was adjudged to be in Silas Craig, and the heirs and executrix of Chester Ashley, he having died pending the suits; and the complainants were decreed to surrender possession of the premises, or such parts thereof as were occupied by them, and to pay the value of the rents and profits of such parts as were possessed and used by Barnard or his heirs, he also having died pending the suits, after the conveyance of the property by the governor of the territory to Craig and Ashley, until such parts were sold by them to other persons. And it was ordered that it be referred to a master in chancery, to take and state an account of such rents and profits, and to ascertain what portions, if any, of the property had been sold by Craig and Ashley to other persons; and the master was directed to exclude from the account the rents and profits of the portions thus sold, from the time of their sale.

This decree was affirmed by this court at the December term, 1855, and the case was remanded for further proceedings to be had respecting the rents and profits.

Upon filing the mandate in the circuit court, a reference was had to a master to examine and state an account of the rents and profits as directed by the decree.

No report was made by him, or, if made, was ever acted upon: and in consequence of the death of some of the parties, and proceedings taken to revive the suit, nothing appears to have been done with respect to the account ordered until 1867. The suits being then revived, a new master was appointed to take the account; and in 1868 he made his report, finding that the rents and profits of the property whilst possessed and enjoyed by the complainants, with interest, amounted, on the 16th of April of that year, to over $18,000.

He also reported that, as appeared by the answer and cross bill of the defendants, Craig and Ashley, the lands, of which he had taken an account of the rents and profits, had been sold by them long anterior to the decree, and before any rent was proved to have accrued; and that no other evidence of sale was presented to him. As the decree only required an account to be taken of the rents and profits which had accrued previous to a sale by Craig and Ashley, the circuit court refused to confirm the report, and denied to the parties their claim for rents and profits; and in so ruling, in our judgment, ruled rightly.

Decree affirmed.

G. JULES GERMAIN, *Plff. in Err.*,
v.
JAMES MASON *et al.*

Writ of error dismissed for want of proper teste.

Where the writ of error bears the teste of the clerk of the supreme court of the territory of Montana, and not the teste of the Chief Justice of this court, it will be dismissed.

[No. 290.]

Argued Apr. 5, 1872. Decided Apr. 22, 1872.

IN ERROR to the Supreme Court of the Territory of Montana.

Motion to dismiss.

The case sufficiently appears in the opinion.

Messrs. A. M. Woodfolk, **F. A. Dick**, and *Geo. G. Wright* for plaintiff in error.

Messrs. J. Hubley Ashton and **Nathaniel Wilson** for defendants in error.

Mr. Chief Justice **Chase** delivered the opinion of the court:

The writ of error in this case, as in the case of *Wells* v. *McGregor*, *ante*, 538, decided at this term, bears the teste of the clerk of the supreme court of the territory of Montana, and not the teste of the Chief Justice of this court.

It must, therefore, be dismissed.

HENRY T. OSBORN, *Plff. in Err.*,
v.
YOUNG A. G. NICHOLSON *et al.*

(See S. C. 13 Wall. 654-664.)

Arkansas Constitution void, as to contracts, for sale of slaves made previous to its adoption —defense to action for price of slaves.

1. The Constitution of Arkansas of 1868, which annuls all contracts for the purchase or sale of slaves, and declares that no court of the state should take cognizance of any suit founded on such a contract, is invalid as to all prior transactions.
2. It is no defense to an action for the price of a slave, sold when slavery existed, that the seller warranted him to be a slave for life and that such warranty was broken by the subsequent constitutional abolishment of slavery.

[No. 42.]

Argued Nov. 8, 1871. Decided Apr. 22, 1872.

IN ERROR to the Circuit Court of the United States for the District of Arkansas.

The case is stated by the court.

Messrs. **P. Phillips** and **A. H. Garland**, for plaintiff in error:

The first error in the opinion which is the foundation of these judgments is, that the right of property which existed in the service of a slave was the creature of statute law. The history of the institution shows how erroneous

this is. It is true that laws exist regulating the relations of master and slave, but nowhere does the proprietary right have its foundation in statute. An assertion so palpably erroneous needs no extended refutation. In the language of Lord Stowell, we assert that slavery never was the creature of law, but of that custom which operates with the force of law.

Another palpable error is the statement that the Constitution did not recognize property in slaves, but in the single instance in which it provides for the rendition of fugitive slaves.

A still stronger recognition is to be found in the provision for the importation of slaves. The stipulation allowing the importation, necessarily carried with it protection in the act of importation, and protection after that act had been consummated.

As showing the prevailing sentiment at the time, we refer to the debates on this subject. 5 Elliott, Deb. 477.

Property in slaves was thus not only recognized in the Constitution, but guaranteed by it; and with the exception of property in inventions, it is the only species of property expressly recognized.

Can contracts for the transfer of such property in states where slavery existed be held to be so inherently vicious as to be incapable of enforcement in courts of justice? Could such a plea have been made, in any of the courts of the United States, prior to the 13th Amendment? Would not these contracts have stood upon the same ground as notes given for any other species of property?

There can be but one answer to these questions.

We have shown the constitutional protection to this property and, as bearing on this subject, we briefly refer to the action of the legislative, executive, and judicial departments in the same direction.

The constitutional guaranty only extended to slaves escaping from one state to another. But the political department in its first act, of 1793, and its second, of 1850, influenced by the spirit of this provision, applied the right of the owner to repossess his slave when he escaped into a territory. Its words are "persons escaping from the service of their master." See also 2 Stat. at L. 116, 194, 757; 12 Stat. at L. 376, 591.

How Congress viewed the whole subject, we may see in the proposal for an Amendment of the Constitution, adopted by Congress as late as March 2, 1861. 12 Stat. at L. 251.

February 24, 1864, Congress provided for the enrollment of colored troops. Bounties had been provided for by former acts, and these were, of course, paid to the soldier who enlisted; but by the provisions of this act, when the colored soldier was a "slave of a loyal master" the bounty was to be paid, not to the soldier, but to his master." 13 Stat. at L. 11.

These provisions were enforced after the war was ended, and after the adoption of the 13th Amendment, by the 2d section of the act of July 28, 1866.

The treaty-making power has been used in the same direction, and property in the service of slaves has always been under its protection.

How has the subject been treated by the Executive? We need only to refer to the action of President Lincoln during the period of the late Civil War, when the idea of emancipation first fell within the range of probability. May 19, 1862, he issued his proclamation revoking the order of General Hunter, which had freed the slaves within his military command. He called the attention of the people of the south to the resolution adopted by Congress for the gradual abolishment of slavery on the principle of compensation by the United States. "This proposal (says he) makes common cause for a common object, casting no reproaches upon any. It acts not the Pharisee." 12 Stat. at L. 1265.

Again, September 22, 1862, he proclaims that he will still urge pecuniary compensation for the gradual abolishment of slavery; but that January 1 following, he will proclaim emancipation in all the states and parts of states that shall then be found in rebellion, and that he will recommend Congress payment "for all losses by acts of the United States, including the loss of slaves," to those who should be loyal. 12 Stat. at L. 1267.

There are many cases in which this right of property has been recognized and enforced by the judicial department itself.

The Antelope, 10 Wheat. 120; *United States* v. *La June Eugenie*, 2 Mason, 445; *Prigg* v. *Pa.* 16 Pet. 611; *Jones* v. *Vanzandt*, 5 How. 231.

After all this, it is not permissible to offer argument to show that a note, given in 1856 on the sale of a slave, is a contract protected by the Constitution and laws, the obligation of which cannot be violated by any act of the state. We admit in this argument that the 13th and 14th Amendments have been properly adopted, and are to be enforced by this court; and the question now to be considered is: Do they invalidate the note in question and bar a recovery in the courts of the United States?

The first of these Amendments merely declares that slavery shall not exist within the United States, and authorizes Congress to enforce this provision by appropriate legislation.

The judgment of the court below denies a recovery on two grounds: First, because it would be contrary to the spirit of this provision; second, because it would be against public policy.

The first objection, which contains a concession that the contract is not invalidated by the literal construction, rests on the inquiry whether the court is bound to embrace some subject-matter not contained in the Amendment, but necessarily growing out of it, and so to be regarded as within its provisions.

If we construe all the provisions of the Constitution together, we find that, by the 5th Amendment, no person can be deprived of his property but by due process of law, nor can private property be taken for public use without due compensation. Couple with this the 13th Amendment, which merely declares that slavery shall not exist, and how can it be said that the spirit of the latter demands a violation of the former Amendment?

That a promissory note constitutes property will not be denied; and until some express provision, by constitutional amendment, takes this property from the owner, no strained construction, derived from the supposed spirit of this Amendment, will be indulged in. A solemn guaranty in the fundamental law cannot be thus frittered away.

What necessary connection is there between the declaration made in 1865, which changed the provisions of the Constitution by abolishing slavery from that date, and the annulment of contracts made years previously and which were valid before that change?

If the annulment of these contracts was at all necessary to carry out the spirit of this Amendment, then Congress, by its 2d section, was expressly authorized to enforce this article by appropriate legislation. Not the courts, but Congress was intrusted with this power. Whenever Congress shall pass such an act, then the question would be presented to the court whether such legislation was appropriate. It is sufficient now to say, that Congress has not acted on the subject.

That the Amendment looked to legislative action, if deemed necessary to go beyond its express declaration, is seen in the enactment of the 2d section; and in this connection, the attention of the court is called to the case of *Groves* v. *Slaughter*, 15 Pet. 449.

It is further said that the enforcement of these contracts would likewise violate the spirit of the 14th Amendment. But a brief reference to its provisions will afford a complete answer to the assertion.

The fourth section declares that "neither the United States nor any state shall assume any debt or obligation incurred in aid of the insurrection or Rebellion against the United States, or any claim for the loss or emancipation of any slave."

Now, it is seen that claims arising out of the emancipation, was, in the legislative mind, the subject to be dealt with, and the limit of action is confined to the declaration that no such claim shall be paid by the United States or by a state.

Here was the appropriate place for the declaration (if fit to be made) that past contracts for slaves thus emancipated shall be void and of no effect.

Silence, as to this, is to be held as conclusive evidence that it was intended to be excluded.

It is insisted it would violate public policy, to enforce these contracts.

But can it ever be against public policy to enforce a contract which was protected by the laws when executed? This we presume is the first instance in which such a doctrine has been announced by a judicial tribunal.

If these contracts are made void by the Amendment, that ends the question. If these Amendments do not refer to them, but leave them as they stood before their adoption, by what right has a court of the United States to assume the authority to declare they are against public policy?

Davis v. *Bank of Eng.* 2 Bing. 393; *Richardson* v. *Mellish*, 2 Bing. 229.

Giving to the 13th Amendment its full scope, it can operate alone on executory contracts. In such contracts, when a new law intervenes which makes it unlawful or impossible, they are annuled. The unlawfulness exists in such cases when the contract is to be performed; thus, if the contract now sued were for the delivery of slaves at a time subsequent to the adoption of the Amendment.

But here the contract of sale was perfected in 1856. The defendant is called upon to pay his note for the purchase money. What is unlawful in his doing so? We invite the attention of the court to the case of *Bradford* v. *Jenkins*, 41 Miss. 328, where this doctrine is very clearly stated.

Messrs. **Watkins** and **Rose**, for defendants in error:

During the long period of slavery in the ancient world, although the subjection of the slave was more complete than any known since, the slave was never considered in any respect as a chattel. He was regarded merely as a person under the dominion of the father of the family, with which he was incorporated, whose power over his own children, during the entire period of his life and their lives, was quite as unlimited and despotic.

Maine's Ancient Law, chap. V.

On the revival of slavery in modern times, the despotic feature of parental power having in a great measure disappeared, it had ceased to be commensurate with that exercised by the master over his slave. A new analogy of slavery with property was discovered and another classification of the law adopted. As slaves might be sold, they were treated as chattels. However, the character of the institution was in no respect changed, except that the power of the master was diminished, and the slave was less a chattel than he was under the Roman law.

Obviously, to say that the slave was not a person, but a mere thing, would in common parlance be considered a gross solecism. But if the laws have given to this condition a technical attribute, it is not to be disregarded, though it be but a fiction. It is to be observed, however, of the law, that where it resorts to fictions that are at variance with common reason or experience, it is usually for some single and peculiar purpose, and the fiction is abandoned as soon as the necessary object is accomplished.

The slave for some purposes was regarded as property, but for most purposes as a person. The Federal constitutional provision as to the return of fugitives from labor recognized the status of slavery, but described the slave as a person held to service. Slaves were entitled to representation in Congress, in the ratio of three fifths to one free person; which was a recognition of slaves as persons, and was never considered as a property basis. In the state laws, for most purposes, they were treated as persons capable of committing crime, protected against excessive wrong and susceptible of emancipation. The police and patrol laws were made in the same conception.

It is from the same standpoint that the present state Constitution deals with the subject, the idea of property being wholly eliminated. The question is whether, in treating slaves solely as human beings, constituting a part of the social organism, the power of the state is limited by the prior connection of the doctrine of property with the status which it effects to destroy. If the state may not deal with the institution as being what it was for nearly every practical purpose, a social and political classification of the people into two orders, the one free and the other slaves, then it is hard to see how slavery could ever be legitimately ended.

The organization and the arrangement of the internal structure of society is, doubtless, the most fundamental and indispensable of all the

functions of sovereignty. It was on this basis that slavery itself rested; that it was a domestic institution throughout, and subject to none but domestic laws. No doctrine that the obligation of contracts could not be impaired ever curtailed the sway of slavery.

The term "contract," within the meaning of the Federal Constitution, does not include any rights or interest growing out of public policy. Sedg. Const. Law, 633.

Judge Story says: "That the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions adopted for internal government is admitted, and it has never been so construed." 2 Const. § 1392.

The case of *Butler* v. *Pennsylvania*, cited by the court below, sufficiently shows that any change in the general structure of society is not prohibited by the Federal Constitution, though individual loss may be the result.

In *Goszler* v. *Georgetown*, 6 Wheat. 597, it was held that the principle in question did not apply to a change in an ordinance made by the city council, which the public good required, although a contract made by the corporation might be affected thereby.

Dartmouth College v. *Woodward*, 4 Wheat. 627.

It is admitted that if slaves could be considered as nothing but property, the prohibition of the Federal Constitution might prevail; but that the state may properly regard them as persons and has done so, and may legislate for their best interests as such, and for the general advantage of all other members of the community, although in such reorganization some contract should, with many other rights, be lost, is a necessary corollary from the very power to emancipate.

There is no inhibition in the Federal Constitution against the passage of retrospective laws by the several states. There are very many cases where a contract is declared to be void by statute, before and at the time the contract is made. A law may be afterwards passed, however, which will not only repeal such a statute, but which shall also annul it, leaving the contract as much unaffected by it as if it had never existed. This is a direct legislative alteration of the rights and pecuniary standing of the parties, to the extent of the interest which the contract involves, by making with a mere breath, that thing a contract which before was no contract, because of the want of the essential element of legality. We cite three cases, as illustrating a principle not unfamiliar.

Baugher v. *Nelson*, 9 Gill, 299; *Curtis* v. *Leavitt*, 17 Barb. 311; *Watson* v. *Mercer*, 8 Pet. 108.

In one such case the supreme court of Massachusetts said: The truth is there is no such thing as a vested right to do a wrong; and the legislature which, in its acts not expressly authorized by the Constitution, limits itself to correcting mistakes and to providing remedies for the furtherance of justice, cannot be charged with violating its duty or exceeding its authority.

Foster v. *Bank*, 16 Mass. 245.

The right of personal liberty is a natural right, antecedent to all laws. The laws which restrict that right, being repealed, emancipation is the result. If the legislature may pass retroactive laws to protect the frailest right that exists, in the essence of an illegal contract, may it not do so to protect a fundamental right more to be cherished than any that grow out of any contract? But it may be said that these retrospective statutes are never allowed to affect the rights of third persons. But here there are no third persons. The slave, the buyer, and the seller are all principal parties, and these notes represent so much of the institution of slavery, which is dead.

At this day, and the hour of it, we presume that it will hardly be seriously denied that African slavery was a creature of the statutes of the several states and colonies.

If slavery were a common-law institution, it is strange that it has no place in the old tracts and abridgements. The same argument that would make slavery a common-law institution, would incorporate the customs of the ancient Britons as described by Cæsar and Tacitus, and all the clandestine and unrecognized acts of any number of men in the city of London; making a compendium of all the follies and wrongs of humanity. No more competent or trustworthy witness has appeared than Lord Mansfield. If his decision has been criticised, few have stood their ground so well. It has received the expressed sanction of this court, which has said that "the state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws." *Prigg* v. *Pennsylvania*, 16 Pet. 611.

Slavery was not the creature of any one statute but of a variety of such, forming complex and voluminous codes. These have all been repealed by the 13th Amendment. The effect of such repeal was to destroy at once all remedies growing out of such statutes. The foundation being destroyed, the superstructure falls with it. *Sublato fundamento, cadit opus.* 1 Poth. Obl. 615.

The repeal in this case being made by the people of the United States in its character of absolute and unlimited sovereignty, the act cannot have any less force than an act of the British Parliament. When an act of Parliament is repealed, it must be considered the same as if it had never existed, unless exceptions are made in the repealing statute.

Surtees v. *Ellison*, 4 Man. & Ry. 586, 9 Barn. & C. 750; *Key* v. *Goodwin*, 4 Moo. & P. 341; Smith, Const. § 759; Dwarr. Stat. 676; *Butler* v. *Palmer*, 1 Hill, 324, and cases there cited.

The expressed or implied guaranties of vested rights, or of the inviolability of contracts, finds no place, however, in the proper construction of these Amendments, which are in themselves a repeal of all guaranties to the extent of their legitimate operation. If there were any seeming hardship in the case (and that is quite the other way) it is presumed to be compensated by the great objects which the Constitution keeps in view; which are "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." These Amendments except from the Constitution, as it previously stood, so much as may be in conflict with them. *Johnson* v. *Tompkins*, 1 Bald. 598.

Section 4 of the 14th Amendment is not

remedial, but declaratory of the existing law; and is designed to restrict all the departments of the government in questioning certain principles there announced. If it establishes the validity of the public debt of the United States, it is because the public debt is deemed of itself valid, as resting on such principles of public faith and justice that it ought not to be denied. By the same reasoning, other possible claims against the government, among others, "any claim for the loss or emancipation of any slave," is declared to be one which shall not be assumed by the United States nor any state, all such claims being held to be "illegal and void;" not that they were made illegal and void, but that in themselves they are so; for it cannot be contended that this section is the repudiation of any just demand. In matters of contract, that is, the rules of interpretation and the measures of right and justice, are nowise different where the government is a party, from those which apply where the transaction is between private individuals. If a principle, large enough and true enough to have been consecrated by adoption into the organic law, is to prevail, then the claims sued on here are equally illegal and void, there being no special grace or merit to rescue them.

Here, however, we are confronted by an adverse argument that says, that if it had been the intention of the 14th Amendment to declare these contracts insupportable, it would have been easy so to say. Such innuendoes are often to be met with in legal tracts, and usually they amount, at best, to a mere begging of the question. The statute can never contain such exact directions as shall meet the exigency of every case that may arise with an explicit answer.

See *Osborn* v. *Bk.* 9 Wheat. 865; *Gelpcke* v. *Dubuque*, 1 Wall. 220, 17 L. ed. 530; *U. S.* v. *Babbitt*, 1 Black. 61, 17 L. ed. 96; *McCulloch* v. *Maryland*, 4 Wheat. 406; *Bank* v. *Deveaux*, 5 Cranch, 87; *Martin* v. *Hunter*, 1 Wheat. 326; *Rhode Island* v. *Massachusetts*, 12 Pet. 657.

The contracts in these cases were legal at the time that they were made, but, by the 13th and 14th Amendments, they would be illegal if made now. The enforcement of such contracts is made impossible by the simple fact that they would be illegal if entered into now.

"If, from a change in the political relations and circumstances of this country with reference to any other, contracts which were fairly and lawfully made at the time have become incapable of being any longer carried into effect, without derogating from the clear public duty which a British subject owes to his sovereign and the state of which he is a member, the nonperformance of a contract in a state so circumstanced, is not only excusable, but a matter of peremptory duty; an obligation on the part of the subject."

Lord Ellenborough in *Atkinson* v. *Ritchie*, 10 East. 530; Abb. Ship. 596; *Brown* v. *Delano*, 12 Mass. 370; *Lorillard* v. *Palmer*, 15 Johns. 14; S. C. 16 Johns. 348; *Odlin* v. *Ins. Co.* 2 Wash. (C. C.) 312; *Scott* v. *Libby*, 2 Johns. 336.

In *Touteng* v. *Hubbard*, 3 Bos. & P. 296, the court said that "when the policy of the states intervenes and prevents the performance of the contract, the party will be excused."

See, also, *Barker* v. *Hodgson*, 3 Maule & S. 267; *Evans* v. *Hutton*, 4 Man. & Gr. (43 Eng. C. L.) 954.

The contract in this instance being made illegal by constitutional Amendments, the effect cannot be less than that of an act of Parliament under like conditions.

Mr. Justice **Swayne** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of Arkansas.

The plaintiff in error brought this suit on the 10th of February, 1869, in that court, and declared upon a promissory note made to him by the defendants in error for $1,300, dated March 26th, A. D. 1861, and payable on the 26th day of December following, with interest at the rate of ten per cent from date. The defendants pleaded that the instrument sued upon was given in consideration of the conveyance of a certain negro slave for life, and none other; and that at the time of the making of the instrument the plaintiff, by his authorized agent, executed to the defendant a bill of sale, as follows:

"March 20th, 1861.

For the consideration of $1.300 I hereby transfer all the right, title, and interest I have to a negro boy named Albert, aged about twenty-three years. I warrant said negro to be sound in body and mind, and a slave for life; and I also warrant the title to said boy clear and perfect."

And that the said negro soon thereafter, to wit, on the first day of January, 1862, was liberated by the United States government, the said slave being then alive, and that the plaintiff ought not, therefore, to recover. The plaintiff demurred. The court overruled the demurrer, and the plaintiff *electing to [*656 stand by it, the court gave judgment for the defendants. This writ of error has brought the case here for review.

The question presented for our determination is whether the court erred in overruling the demurrer; or, in other words, whether the facts pleaded were sufficient to bar the action.

We lay out of view *in limine* the Constitution of Arkansas of 1868, which annuls all contracts for the purchase or sale of slaves, and declares that no court of the state should take cognizance of any suit founded on such a contract, and that nothing should ever be collected upon any judgment or decree which had been, or should thereafter be, "rendered upon any such contract or obligation." It is sufficient to remark that as to all prior transactions the Constitution is in each of the particulars specified clearly in conflict with that clause of the Constitution of the United States which ordains that "no state shall . . . pass any law impairing the obligation of contracts." *Von Hoffman* v. *Quincy*, 4 Wall. 535, 18 L. ed. 403; *White* v. *Hart*, *ante*, 685, just decided. Nor do we deem it necessary to discuss the validity of the contract here in question when it was entered into. Being valid when and where it was made, it was so everywhere. With certain qualifications not necessary to be considered in this case, this is the rule of the law of nations. Judge Story says: "The rule is founded not merely on the convenience, but on the necessity of nations; for otherwise it would

be impracticable for them to carry on an extensive intercourse and commerce with each other." Story's Conflict of Laws (Redfield) § 242.

It may be safely asserted that this contract, when made, could have been enforced in the courts of every state of the Union, and in the courts of every civilized country elsewhere. In the celebrated case of *Somerset*, Lord Mansfield said: "A contract for the sale of a slave is **657***] good here; the *sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But here the person of the slave himself is immediately the object of inquiry, which makes a very material difference." 20 How. St. Tr. 79; *Madrazo* v. *Willes*, 3 Barn. & Ald. 353; *Santos* v. *Illidge*, 98 Eng. C. L. 861; *The Antelope*, 10 Wheat. 66; *Emerson* v. *Howland*, 1 Mas. C. C. R. 50; *Com.* v. *Aves*, 18 Pick. 215; *Groves* v. *Slaughter*, 15 Pet. 449; *Andrews* v. *Hensler*, 6 Wall. 254, 18 L. ed. 737.

Nor is there any question as to an implied warranty, of title or otherwise. There being an express warranty, that must be taken to contain the entire contract on the part of the seller. This warranty embraces four points: that the slave was sound in body; that he was sound in mind; that he was a slave for life, and that the seller's title was perfect.

It is not averred or claimed that the warranty was false when it was given, in either of these particulars. The title to the slave passed at that time, and if the warranty were true then, no breach could be wrought by any after event. Let it be supposed that, subsequently, a lesion of the brain of the slave occurred; and that permanent insanity ensued; or that, from subsequent disease, he became a cripple for life, or died; or that, by the subsequent exercise of the power of eminent domain, the State appropriated his ownership and possession to herself; can there be a doubt that neither of these things would have involved any liability on the part of the seller? He was not a perpetual assurer of soundness of mind, health of body, or continuity of title. A change of the ownership and possession of real estate by the process of eminent domain is not a violation of the covenant for quiet enjoyment. *Frost* v. *Earnest*, 4 Whart. 86; *Ellis* v. *Welch*, 6 Mass. 246. Nor is it such an eviction as will support an action for a breach of the covenant of general warranty. In *Dobbins* v. *Brown*, 12 Pa. 80; *Bailey* v. *Miltenburger*, 31 Id. 41, it was said by the court: "It will scarcely be thought that a covenant of warranty extends to the state in the exercise of its eminent domain. Like any **658***] *other covenant, it must be restrained to what was supposed to be the matter in view. No grantor who warrants the possession dreams that he covenants against the entry of the state to make a railroad or a canal, nor would it be a sound interpretation of the contract that would make him liable for it. An explicit covenant against all the world would bind him; but the law is not so unreasonable as to imply it."

In *Bailey* v. *Miltenberger*, 31 Pa. 41, it was said: "It has never been supposed that the vendor or vendee contemplated a warranty against the exercise of this power whenever the public good or convenience might require it."

These remarks are strikingly apposite to the point here under consideration. As regards the principle involved, we see nothing to distinguish those cases from the one before us. In all of them the property was lost to the owner by the paramount act of the state, which neither party anticipated, and in regard to which the contract was silent. Emancipation and the eminent domain work the same result as regards the title and possession of the owner. Both are put to an end. Why should the seller be liable in one case and not in the other? We can see no foundation, in reason or principle, for such a claim.

It was formerly held that there could be no warranty against a future event. It is now well settled that the law is otherwise. Benj. Sales, 463. The buyer might have guarded against his loss by a guaranty against the event which has caused it. We are asked, in effect, to interpolate such a stipulation and to enforce it, as if such were the agreement of the parties. This we have no power to do. Our duty is not to make contracts for the parties, but to administer them as we find them. Parties must take the consequences, both of what is stipulated and of what is admitted. We can neither detract from one nor supply the other. *Dermott* v. *Jones*, 2 Wall. 1, 17 L. ed. 762; *Revell* v. *Hussey*, 2 Ball & B. 287.

Where an article is on sale in the market, and there is no fraud on the part of the seller, and the buyer gets what he *intended [***659** to buy, he is liable for the purchase price, though the article turns out to be worthless. Thus, where certain railroad scrip had been openly sold in London for several months, but was subsequently repudiated by the directors of the company as having been signed and issued by the secretary without authority, it was held that the buyer could not set up as a defense a failure of consideration. *Lambert* v. *Heath*, 15 Mees. & W. 487; *Lawes* v. *Purser*, 6 Ell. & B. 930. These cases go further than it is necessary for us to go in order to sustain the liability of the defendants upon the contract here in question. There, as in this case, the buyer might have protected himself by a proper warranty, but had failed to do so.

But we think the exact point here under consideration was settled by the court of Queen's Bench in *Mittelholzer* v. *Fullarton*, 6 Ad. & E. (N. S.) 989. That case so far as it is necessary to state it was this: the contract was made at Burbice, in British Guiana. The plaintiff sold to the defendant the services of one hundred and fifty-three apprentice laborers who had been slaves, for £7,800, payable in six annual instalments of £1,300 each. The defendant paid four instalments. The apprentices were then declared free by the local governor and council. The defendant refused to pay the last two instalments. The suit was brought to recover them. The court held that the plaintiff was entitled to judgment, "though the legislature had determined the apprenticeship before they became due."

Lord Chief Justice Denman said: "My Brother Weightman asked during the argument, what would have been the result, if at the end of a year the services had been determined by the act of God, and to this no sufficient answer was given. . . . The plain-

tiff's right vested when the bargain was made. The subsequent interference of the colonial Legislature does not prevent his recovering what was then stipulated for."

Williams, Justice, said: "The whole question is, who shall bear the loss occasioned by a 660*] *vis major?* And that depends *much upon the question, who was the proprietor when that loss was occasioned? The property in the services of these laborers had been transferred to the defendant. Then the question is analogous to those which often arise in cases of loss by fire; as whether the goods were *in transitu* or the transit was ended. If the property had passed, and the residue of it was destroyed by a *vis major*, the loss must fall upon the proprietor of the thing, namely: of the services during the unexpired term." The other justices expressed themselves to the same effect, and the judgment was unanimously given.

If all the buildings upon leasehold premises be destroyed by fire, the lessee is, nevertheless, liable for the full amount of the rent during the residue of the term. *Baker* v. *Holtpzaffell*, 4 Taunt. 45. And if he has covenanted to repair, he must also rebuild. *Phillips* v. *Stevens*, 16 Mass. 238. So, if a fire occur after the contract of sale, but before the conveyance is executed, the loss must be borne by the buyer. Sug. Vend. 291.

All contracts are inherently subject to the paramount power of the sovereign, and the exercise of such power is never understood to involve their violation, and is not within that provision of the national Constitution which forbids a state to pass laws impairing their obligation. The power acts upon the property which is the subject of the contract, and not upon the contract itself. *West River Bridge Co.* v. *Dix*, 6 How. 532, 536.

Such, also, is the rule of the French law and such was the Roman law. The seller is not bound to warrant the buyer against acts of mere force, violence and casualties, nor against the act of the sovereign, 1 Domat. part 1, book 1, tit. 2, sec. 10, paragraph 4. "After the bargain is completed, the purchaser stands to all losses." Digest 2, 14, 77, Cooper's Justinian, 615. The case is one in which the maxim applies, *Res perit suo domino*. Meredith's Emerigon, 419; *Paine* v. *Meller*, 6 Ves. 349.

It has been earnestly insisted that contracts 661*] for the purchase *and sale of slaves are contrary to natural justice and right, and have no validity unless sustained by positive law; that the right to enforce them rests upon the same foundation, and that when the institution is abolished, all such contracts and the means of their enforcement, unless expressly saved, are thereby destroyed. Slavery was originally introduced into the American colonies by the mother country, and into some of them against their will and protestations. In most, if not all of them, it rested upon universally recognized custom, and there were no statutes legalizing its existence more than there were legalizing the tenure of any other species of personal property. Though contrary to the law of nature it was recognized by the law of nations. The atrocious traffic in human beings, torn from their country to be transported to hopeless bondage in other lands, known as the slave trade, was also sanctioned by the latter code. 1 Wild. Int. Law, 70; Dana's Wheat. 199; *The Antelope*, 10 Wheat. 67; *Le Louis*, 2 Dod. 210.

Where the traffic was carried on by the subjects of governments which had forbidden it, a different rule was applied. *The Amedie*, 1 Acton, 240; *The Diana*, 1 Dod. 95; *The Fortuna*, 1 Dod. 81. Humane and just sentiments upon the subject were of slow growth in the minds of publicists. 1 Phillmore's Law of Nations, 316. The institution has existed largely under the authority of the most enlightened nations of ancient and modern times. Wherever found, the rights of the owner have been regarded there as surrounded by the same sanctions and covered by the same protection as other property. *Le Louis*, 2 Dod. 250. The British government paid for the slaves carried off by its troops from this country, in the war of 1812, as they did for other private property in the same category. Lawrence's Wheat. 496. The Constitution of the United States guaranteed the return of persons "held to service or labor in one state under the laws thereof, escaping into another." "The object of this clause was to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves as property in every state in the Union, *into which they might escape." [*662 Historically it is known that without this provision, the Constitution would not have been adopted, and the Union could not have been formed. *Prigg* v. *Pennsylvania*, 16 Pet. 611.

But without considering at length the several assumptions of the proposition, it is a sufficient answer to say that when the 13th Amendment to the Constitution of the United States was adopted, the rights of the plaintiff in this action had become legally and completely vested. Rights acquired by a deed, will or contract of marriage, or other contract executed according to statutes subsequently repealed, subsist afterwards, as they were before, in all respects as if the statutes were still in full force. This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood tide of intolerable evils. It would be contrary to "the general principles of law and reason," and to one of the most vital ends of government. *Calder* v. *Bull*, 3 Dall. 388. The doctrines of the repeal of statutes and the destruction of vested rights by implication, are alike unfavored in the law. Neither is to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. Every doubt should be resolved against a construction so fraught with mischiefs. There is nothing in the language of the Amendment which in the slightest degree warrants the inference that those who framed or those who adopted it intended that such should be its effect. It is wholly silent upon the subject. The proposition, if carried out in this case, would, in effect, take away one man's property and give it to another. And the deprivation would be "without due process of law." This is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the states and the nation. *Taylor* v. *Porter*, 4 Hill, 146; *Wynchamer* v. *The People*, 13 N. Y. 394; *Wilkinson* v. *Leland*, 2 Pet. 658. What would be

the effect of an amendment of the national Constitution reaching so far—if such a thing 663*] *should occur—it is not necessary to consider, as no such question is presented in the case before us.

Many cases have been decided by the highest state courts where the same questions arose which we have been called upon to consider in this case. In very nearly all of them the contract was adjudged to be valid, and was enforced. They are too numerous to be named. The opinions in some of them are marked by great ability.

Whatever we may think of the institution of slavery viewed in the light of religion, morals, humanity, or a sound political economy—as the obligation here in question was valid when executed, sitting as a court of justice, we have no choice but to give it effect. We cannot regard it as differing in its legal efficacy from any other unexecuted contract to pay money made upon a sufficient consideration at the same time and place. Neither in the precedents and principles of the common law, nor in its associated system of equity jurisprudence, nor in the older system known as the civil law, is there anything to warrant the result contended for by the defendants in error. Neither the rights nor the interests of those of the colored race lately in bondage are affected by the conclusions we have reached. This opinion decides nothing as to the effect of President Lincoln's Emancipation Proclamation. We have had no occasion to consider that subject.

The judgment below is reversed, and the cause will be remanded to the Circuit Court, with directions to proceed in conformity to this opinion.

Dissenting Mr. Chief Justice Chase.

329*] *THE STEAMER PATAPSCO, her Tackle, etc., James A. Borland, *Claimant, Appt.,*

v.

JAMES BOYCE.

(See S. C. *"The Patapsco,"* 13 Wall. 329–335.)

Lien on vessel for supply of coal—entries in books explainable.

1. Where coal is furnished to a vessel in a foreign port to enable her to make her voyage, the inference is, that the credit was given to the vessel, unless it can be inferred that the master had funds or the owners had credit, and that the material man knew of this, or knew such facts as should have put him on inquiry.
2. If the credit was to the vessel there is a lien, and the burden of displacing it is on the claimant.
3. Entries in books are always explainable, and the truth of the transaction can be shown independent of them.

[No. 140.]

Argued Mar. 21, 1872. Decided May 6, 1872.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr. **C. Donohue** for appellant.

Messrs. **D. McMahon** and *O. Horwitz,* for appellee:

The libelant having proven a sale and delivery of necessaries, *viz.:* coal, on board of a steamship, used by it in its navigation, in a foreign port, ordered by the owner's agent, the presumption of law would be that the goods were purchased on the credit of the steamship itself, and the claimants must displace that presumption.

See, Judge Taney's remarks in *Thomas* v. *Osborn,* 19 How. 22, 15 L. ed. 534, citing *The Gen. Smith,* 4 Wheat. 443; *The Freeman* v. *Buckingham,* 18 How. 182, 15 L. ed. 341; *The St. Jago de Cuba,* 9 Wheat. 417.

Where the owners of a steamboat need coal for it, and have none on hand, but actually buy some at the lowest cash price in a foreign port, the presumption of law would be that they had no credit to buy it on their own responsibility otherwise than for cash. If the material man waives the preliminary, cash on delivery, the presumption of law is, that he does not do it on the exclusive credit of the buyer, but rather on the credit of the ship to which it was delivered in a foreign port. *The Sea Lark,* 1 Spr. 573.

The very late cases of *The Lulu,* 10 Wall. 192, 19 L. ed. 906; *The Kalorama,* 10 Wall. 204, 19 L. ed. 941; *The Custer,* 10 Wall. 215, 19 L. ed. 944; *The Grapeshot,* 9 Wall. 129, 19 L. ed. 651; *The Guy,* 9 Wall. 758, 19 L. ed. 710; are quite conclusive in favor of the right of the material man in this case.

Entries in books are always explainable. The proof of the transaction can be shown independently of the entry. In place of the orders of the goods for the Patapsco by name, and in place of the delivery on that steamer itself, and of the rendition of bills aggregating the different deliveries to the several steamers by name, and of the evidence proving a delivery on the faith of the implied hypothecation of the Patapsco, the mere entries in the journal and ledger, which are not the originals, ought not to weigh much on the subject of a personal credit. Even the taking of the company's notes would not create a presumption that the credit was personal, and would not displace a bona fide lien if the note were surrendered at the trial.

The Guy, supra; The Kalorama, supra.

Mr. Justice **Davis** delivered the opinion of the court:

Boyce, a coal dealer in Baltimore, filed a libel against the steamer Patapsco, in the district court of New York, to recover a demand for six separate supplies of coal furnished between the 3d of February and the 26th of March, 1866, to the steamer Patapsco. One Borland intervened as claimant. The question was, whether the coal had been furnished on the credit of the vessel, or on that of her owners only. The facts, as we assume them from the weight of evidence, itself somewhat inconsistent, were thus: The Commercial Steamboat Company, a corporation of Rhode Island, owned and chartered certain steamers, the Kingfisher, etc., and used them as a line of steamers from New York to Baltimore. The Patapsco was chartered by the company to run on the line, and registered at New York in the

NOTE.—*Lien for repairs and necessaries for vessel, and for supplies, salvage, and freight; proceedings in rem for*—see notes, 2 L. ed. U. S. 636; 4 L. ed. U. S. 609; 6 L. ed. U. S. 531; 15 C. C. A. 679; 21 C. C. A. 21.

individual name of one Bacon, president of the company; though the company controlled her. The company had an agent at Baltimore, and the course of dealing was as follows:

When the steamers would arrive at Baltimore, their engineers would inform this agent of the amount of coal they needed for their different vessels; whereupon the agent would fill up a printed calendar circular, directed to Boyce, requesting him to furnish "with in-**330***] voice" to that steamer by name * (in this case the Patapsco) so many tons of coal; saying nothing about charging anybody. Boyce would then fill up a printed order to his clerk, directing him to furnish the coal to the steamer named. On receipt of this latter order, the coal would be delivered on board the steamer. At the end of a month, a bill would be made of all deliverances to all the boats. The object of making out a general bill at the end of each month, it appears, was to avoid a multiplication of bills and for the sake of convenience.

The entries in the libelant's journal were thus—one example showing all:

Baltimore, March, 1866.

Commercial St'b't Co.:

80	Tons	Geo. C'k	St'r Kingfisher,	$7..	$560
25	"	"	Patapsco,	7..	175
80	"	"	Kingfisher,	7..	560
42	"	"	Patapsco,	7..	294
					$1,589

And in his ledger, they were thus:

Commercial St'b't Co.: Dr.

1866.				
Jany.	30th,	To	Coal Ac.	$ 2,896.36
"	"	"	Bituminous Ac. ..	2,963.60
Feb.	"	"	Coal Ac.	790.00
Feb.	"	"	Bituminous Ac. ...	2,416.10
March	"	"	Coal Ac.	1,550.
March	"	"	Bituminous Ac. ...	1,539.
April	"	"	Coal Ac.	1,462.50
"	"	"	Bituminous Ac. ...	65.
May	16,	"	Cash	39.10
				$13,761.66

Cr.

Feb.	5,	By	Cash.....	$ 3,000.
"	9,	"	"	1,000.
"	15,	"	"	1,849.96
March	30,	"	" Coal Ac.	73.50
May	5,	"	"	136.00
June	30,	"	"	3,008.41
"	"	"	" Balance	4,693.79
				$13,761.66

Dr.

To Balance $4,693.79

331*] *The form of entries of the libelant's day-book did not appear; the claimant waived the production of it and the bills rendered to the company were not produced.

The coal was sold at the lowest price, and it was necessary for the Patapsco to make her trips, and was used by her in making them. The agent of the steamship company stated that "the coal bought for the Patapsco was ordered for the steamer expressly, but on account of the Commercial Steamship Company, the same as all coal was ordered and bought for the several steamers constituting the line." "The owners or charterers (he added) were not known in the transaction, but the steamer was supposed to belong to the Commercial Steamboat Company, by the parties who furnished the coal."

During the whole time that this coal was furnished, the steamboat company was in an embarrassed state, and on the 3d of February, on which day the first item of the coal for which the steamer was libeled, was furnished, the steamship company executed six promissory notes of $7,500 each, $45,000 in all, to the Baltimore & Ohio Railroad Company; following them immediately and by the 6th, by mortgages on three of its steamers to secure payment. And it owed a balance of $25,800 to the Neptune Steamboat Company on the 1st of February, 1866, so much remaining due for money laid out, paid or advanced, in the preceding year.

On the 2d of April, 1866, nine days after the last item of coal furnished to the Patapsco, the registered owner, Bacon, executed a bill of sale of her to Borland, already mentioned as the claimant in the case, to secure to him a debt of $10,500, and on the 10th following the company failed entirely; the failure being followed by attachments to a very large amount, much of it like the $25,800 already mentioned, for money lent or debts due prior to the 3d of February, 1866; and the result being a general break up of the company, in which the creditors got but a small portion of the claims from the whole effects of the corporation.

It was in virtue of his bill of sale above mentioned that Borland contested the libelant's claim.

*The district court dismissed the li- [*332 bel; holding that there was no credit to the vessel. The circuit court, on appeal, held that there was, and reversed the decree. From this reversal Borland appealed to this court.

Whether the coal was furnished on the credit of the vessel, or of the owners, is the only point of inquiry in this case. The case itself is not without its embarrassments, for the evidence, in some of its aspects, is not consistent with either theory, but the weight of it, in our opinion, enables us to assert the lien against the ship.

It is undisputed that the Patapsco was in a foreign port, and that the coal was ordered for her, specifically by name, and delivered to the officers in charge of her. It is equally free from dispute that the supply of coal was necessary—indeed, indispensable—to enable her to make her voyage at all. In such a case the inference is, that the credit was given to the vessel, unless it can be inferred that the master had funds or the owners had credit, and that the material man knew of this, or knew such facts as should have put him on inquiry. *The Lulu*, 10 Wall. 192, 19 L. ed. 906. There is no reason to suppose that the master had funds or the owners of the line credit, nor that the libelant was guilty of laches. On the contrary it is in proof that the company which owned the line of steamships was, at the date of these transactions, hopelessly insolvent, and was borrowing large sums of money on a mortgage of its steamers, away from home, and in the very city where the libelant resided. It would be strange if the libelant *did not know [*334 this condition of things and, in the absence of proof on the subject, it is a reasonable inference

that he did. If he had this knowledge it would be a violent presumption to suppose that he relied on the credit of the company at all for the supplies which he furnished. The company running the steamers was a distant corporation, of no established name, and without personal liability in case the enterprise recently undertaken should prove a failure, and it is hard to believe that a large and intelligent coal merchant in Baltimore, in dealing with this corporation, intended to renounce his claim against the steamers in case he was not paid. It is very clear that there was no credit to the company at the time of sale, because the coal was sold for cash at the lowest market price. And when the libelant waived his privilege of cash on delivery, and put the coal on board the steamship, the presumption of law would be that he thereby gave credit to the steamship, and not to the owners thereof, inasmuch as the supplies were furnished in a foreign port.

If the credit was to the vessel there is a lien, and the burden of displacing it is on the claimant. He must show, affirmatively, that the credit was given to the company to the exclusion of a credit to the vessel. This he seeks to do by the form of charge in the libelant's journal and ledger. If it be conceded that these entries tend to support this position, they are far from being conclusive evidence on the subject. Entries in books are always explainable, and the truth of the transaction can be shown independent of them. The form of charge in any book of original entries does not appear, as the day book was not called for by the claimants, nor are the "invoices" which the libelant was directed to furnish with the coal produced. But, from the form of entry in the journal itself (where the amount furnished to each vessel is set opposite to its name), we are led to the conclusion that the day-book entries which are thus journalized were debited to each steamer by name. If this be so, the journal entries are not inconsistent with the idea of the credit being given on the security of the ship. More espe-
335*] *cially is this apparent when it is proven that the reason why monthly accounts were made out to the steamboat company in bulk was for the sake of convenience, and to save a useless accumulation of bills. There is nothing besides this journal entry to indicate that the coal was furnished on the personal credit of the company; and, as the other facts in the case are in favor of a charge direct to the steamship, we do not think the legal inference of credit to the ship is removed.

The lien of material men for supplies in a foreign port is of so high a character that, in the case of *The St. Jago de Cuba*, 9 Wheat. 409, it was protected, along with that of seamen's wages, against a forfeiture which had accrued to the United States, and the recent decisions in this court have had the effect to place this lien on a more substantial footing than some previous cases seem to have left it. *The Grapeshot*, 9 Wall. 129, 19 L. ed. 651; *The Lulu*, 10 Wall. 192, 19 L. ed. 906; *The Kalorama*, 10 Wall. 204, 19 L. ed. 941.

On the whole, while we concede that the case is not free from difficulty, we are not disposed to disturb the decree of the circuit court in any particular.

Decree affirmed.

*REUBEN S. CARPENTIER, *Plff. in Err.*, [*480
v.
Z. MONTGOMERY *et al.*

(See S. C. 13 Wall. 480–497.)

Survey, when necessary to identify Mexican lands—defective boundary—effect of confirmation—equitable rights.

*1. Where a Spanish or Mexican grant of lands in California does not identify the precise tract of land granted, either by description or by reference, the title is an imperfect one, needing the further action of the United States government to make it perfect.

2. Such is the case where one side of the tract is undefined, or one of the exterior boundary lines cannot be located. An authoritative survey is required to demonstrate the particular tract of land granted.

3. A confirmation of a Spanish or Mexican grant of land in California segregates the land from the public domain and invests the confirmee with the legal title. It entitles him to a patent for the land as soon as the requisite survey has been made. No other title not clothed with equal solemnities can be set up against the confirmee or his assigns, in an action of ejectment.

4. But the equitable rights of third persons under the same title are not cut off. They will be sustained in a court of equity as against the confirmee and his assigns, who are chargeable with knowledge of the said equity.

5. The position of a confirmee is analogous to that of a patentee under a pre-emption right. Equity will hold him as a trustee for those who have equitable rights in the land, to the extent of their interests.

6. Equitable interests must be sought, not in an action of ejectment, but in an equitable proceeding where they can be properly investigated, with a due regard to the rights of others which may have intervened, such as those of bona fide purchasers, etc., ignorant of the equities existing between the original parties.

[No. 159.]

Argued Apr. 4, 5, 8, 1872. Decided May 6, 1872.

IN ERROR to the Circuit Court of the United States for the District of California.

The case is stated by the court.

Messrs. **M. Blair, F. A. Dick** and *H. W. Carpentier* for plaintiff in error.

Mr. **S. O. Houghton** for defendants in error.

Mr. Justice **Bradley** delivered the opinion of the court:

This was an action brought by the plaintiff in the circuit court of the United States for the district of California against a large number of defendants, to recover certain lands alleged to be in their possession, lying on the east side of the bay of San Francisco and described in the petition. Answers were put in by the defendants, severally claiming distinct portions of the land.

On the trial the plaintiff deraigned title under the children of Maria Teodora Peralta, a deceased daughter of Luis Peralta, and proved mesne conveyances from them to the extent of an undivided five and a half ninths of one ninth of the land in question. But whether the children of Maria Teodora Peralta were entitled to any estate in the lands upon which the plaintiff could sustain an action of ejectment against the defendants, was the question.

*Headnotes by Mr. Justice BRADLEY.

*481] *Luis Peralta, the father of Maria Teodora, died in August, 1851, in possession of the rancho called San Antonio, of which the premises in question were a part, leaving four sons, four daughters, and several grandchildren by a deceased daughter, the said Maria Teodora.

The four sons presented their petition for the confirmation of the claim to the entire rancho, to the board of commissioners organized under the act of Congress of March 3, 1851, founding their claim on certain documents supposed to demonstrate their father's right to the rancho, and upon an alleged devise thereof to them. Upon this petition the rancho was confirmed to the said sons in divided parcels, the portion embracing the premises in question being confirmed to Domingo and Vincente Peralta, by final decree of this court in December term, 1856.

See, 19 How. 343, 15 L. ed. 678.

No final approved survey, however, took place under the confirmation. The defendant holds under the confirmees.

The plaintiff insists that Luis Peralta's title was a perfect title under the Spanish and Mexican Laws and was protected by the treaty of Guadalupe Hidalgo; and that the confirmation of it on the application of the sons could not add to its strength and could not take away the right of the daughters as co-heirs of their father; and whether so or not, the confirmation of the title inures to the benefit of those already entitled under the original grant, their heirs and assigns; and as no devise from Luis to his sons was exhibited on the trial of this cause, the plaintiff contends that he was entitled to recover under the hereditary right of Maria Teodora's children.

The defendants on the contrary, deny that the title of Luis Peralta was a perfect title; and even if it was, they contend that the claim of the daughters cannot avail in an action of ejectment against the award of the commissioners in favor of the sons of Luis which gave them the legal title.

These were the principal points discussed on the argument of the cause.

To show that Luis Peralta's title was a perfect one, the plaintiff produced in evidence the documents on which it was founded. They are set out in the bill of exceptions, and are the same that were before this court in the case of *U. S.* v. *Peralta*, 19 How. 343, 15 L. ed. 678, when the claim was confirmed. In that case the court intimated an opinion that the title was perfect for at least a part of the rancho (embracing a part of the premises now in question) but the point was not material in the case, because the claimants were equally entitled to a confirmation, whether their father's title was perfect or imperfect, legal or equi-
489*] table; so that the intimation was *nothing but an *obiter dictum* of the judge who delivered the opinion. The title, in some of its aspects, again came before the supreme court of California, in 1864, in the case of *Minturn* v. *Brower*, 24 Cal. 644, but, as both parties in that case deemed it their interest to concede the title to be a perfect one, the observations of the court on the subject cannot be regarded as precluding further examination. Such examination, exhaustive in its character, was given in 1870 by the same court on this identical title, and on the very point in question, in the case of *Banks* v. *Moreno*, 39 Cal. 233; and the court, with all the documents before it which have been proven in this case, decided that the title was imperfect. If this were a case depending merely on the local land laws of California, we should be bound by that decision. But as the appellant, in case the title is adjudged a perfect one, invokes the guaranty stipulations of the treaty of Guadalupe Hidálgo in his favor, independent of any action of the commissioners, the question ceases to be a mere local one and devolves upon this court the duty of deciding it on its merits. An examination, however, of the reasoning of the supreme court of California, in the case last cited, satisfies us of its soundness. The point of the decision is that the rancho of San Antonio never had any clearly defined boundary on the east. In this we concur with that court. The new claim now made to extend that boundary beyond the crest of the mountain, and to take in the eastern slope on the pretense that the Leandro creek is the boundary to its ultimate source, is itself conclusive to show the uncertainty with which it has always been invested.

Luis Peralta's occupation of the rancho goes back to 1820. In that year he presented to Governor De Sola his petition for a grant, describing the tract as follows: "At the distance of eight leagues from the mission of San José, in a northerly or northwesterly course, along the coast, there is a creek named by the reverend fathers of the aforesaid mission, San Leandro; and from this to a little hill, adjoining the sea *beach in the same direction and along [*490 the coast—there may be four or five leagues, more or less, or about—which place and land he asks and solicits may be granted to him that he may establish a rancho." Here, certainly, is nothing definite. Supposing the creek, San Leandro, as the point of beginning, and the little hill four or five leagues beyond, as fixed and ascertained points; and supposing the shore of the bay on the west to be meant for the boundary on that side, there is no hint of a boundary on the east. Nor is the quantity specified. Had that been done, perhaps it might have enabled a surveyor to fix a boundary by relation. This is the first and original document on which the title is based—the foundation of all the rest.

Upon this petition, the governor, by an order of August 3, 1820, directs Captain Arguello to appoint an officer to put Sergeant Luis Peralta in possession of the lands petitioned for, and to "place landmarks on the four points of the compass, that it may be known at all times the extent of said lands which have been granted to him." Lieutenant Martinez being detailed for this service, on the 16th of August, 1820, reports his action as follows: "The boundaries which separate his land were marked to him, to wit: the deep creek called San Leandro, and at a distance from this (say about five leagues) there are two small mountains (cerritos). The first is close to the beach; next to it follows that of San Antonio, serving as boundaries, the rivulet which issues from the mountain ranges, and runs along the foot of said small mountain of San Antonio, dividing or separating the land; and at the entrance of the little gulch there is a rock elevating itself in the form of a

monument, and looking towards the north. On both boundaries were fixed firm landmarks. . . . I put in possession of the said land the above named Luis Peralta." Here we have, again, the two extremities of the tract along the bay, the creek San Leandro, at one end, and the rivulet that runs by the cerritos, at the other; and nothing more.

Next; we have a complaint of the fathers of the San Francisco mission, that Peralta has 491*] been put in possession of a *portion of their land at the north end of the tract; the result of which is that Peralta is limited, on the north, to the Temescal creek, or Willow Grove creek, about a league and a half south of the cerritos. This occurred in September, 1820.

On the 18th of October an entry was made in the public records to the effect, that "This day was issued in favor of Sergeant Luis Peralta, by the governor of this province, the certifying document for the land which has been granted to him, as appears in this folio by the writ of possession, which the lieutenant of his company, Don Ignacio Martinez, gave him agreeably to an order issued by the government." We also have the certifying document itself of the same date, which adds nothing to the definiteness of the description.

Now, the grant on which the appellant's counsel relies as conferring perfect title is not the certifying document above referred to, but the previous act of directing possession to be given to Peralta, and the actual delivery of possession to him. It is perfectly manifest that Peralta could not have been put into manual possession of several leagues of land. He could only have been put into possession of a certain part or parts in the name of all; and the exterior boundaries of the tract must have been indicated by language or monuments. But we have no evidence of any description of boundaries, or monuments to designate them, except the bay on one side, and the extreme limits of the tract along the bay. The interior line between those limits is entirely wanting in all the documents thus far presented. The title relied on, therefore, is necessarily imperfect, and requires some authoritative survey to distinguish what was intended to be granted from what remained in the public domain.

If we examine the remaining documents we shall not derive any material aid to help us out of the difficulty.

In October, 1820, Peralta addressed a remonstrance to the governor against the curtailing of his tract on the north. The only expressions which this paper contains going to show what the tract was which Peralta supposed was granted to him, are the following: "The rev- 492*] erend father says to the *honorable governor that I do not need the land, and that I occupy a great extent; but I would represent that five leagues does not seem to me much in a narrow tract, as you know it is, from the beach to the mountain range, and that not all of it is good, as my lieutenant is aware, for great portions contain hills, creeks, and ravines, not fit for the purpose." This would seem to indicate that the rancho extended from the bay to the foot of the mountain.

In 1823, whilst the revolution was in progress Peralta's captain, Arguello, had become governor of California, and Peralta renewed his application to have the curtailment of his rancho annulled. He speaks of the tract which he originally applied for, as follows: "Which tract of land, though it appears to be large is not so, for two reasons: 1. Because it is situate on the coast, and the space between the beach and the top of the mountain is too narrow." This would indicate the top of the mountain as his supposed boundary. The governor promptly made an order that the part which had been taken from him should be restored, and Lieutenant Martinez put him in possession accordingly; but nothing yet appears in the lieutenant's return or elsewhere to identify or fix the eastern boundary of the rancho, much less to fix it beyond the eastern slope of the mountain, as since claimed by the parties.

In 1827 some new regulations made it necessary for every proprietor to make a return of all lands occupied by him, with the titles annexed; and, in December of that year, Peralta made a return accordingly, describing his rancho as follows: "Along the coast of the mission of San José, in a northwesterly course, there is a deep creek called San Leandro, forming the dividing boundary of said mission of San José; thence to a small round mountain called San Antonio, the dividing boundary with my neighbor, Francisco Castro; which space is a little over four leagues long and, as it is the narrowest portion of the coast, it at most contains half a league in breadth from the mountain to the sea."

In 1844 Ignacio Peralta, on behalf of his father, whose title papers he says were mislaid, petitioned the then governor, *Michel- [*493 torena, to order the issue of a new title, extending to the top of the range, and accompanies his petition, with a diseño or rough map of the property. The governor ordered a grant to issue, as requested, extending to the top of the hill range, but not to prohibit the inhabitants of the Contra Costa from cutting wood for their own use. This order was not signed by the governor, and seems never to have been carried into execution. And this is the last of the documents on which the plaintiff, the now appellant, relied for a perfect title. Leaving out the proceedings of 1844, which are admitted to be imperfect, no human being can tell, from the language of the various documents, what was the eastern boundary of the rancho. It certainly would seem not to embrace the eastern slope of the hills, as is now claimed; but what it did embrace or where it did run is not ascertainable from any of the documents which have been adduced; and no parol testimony can aid this defect as regards the question now under consideration. Parol testimony was very properly adduced before the commissioners for the purpose of showing where equity required that the line should be run, in order to separate the rancho from the public domain. But it cannot make that title perfect which was not perfect before.

The supreme court of California, in *Banks* v. *Moreno*, 39 Cal. 239, 240, well observed: "The precise point under discussion is, whether or not the title of Peralta, as exhibited by the plaintiff, was a perfect title conveying the fee, and which invested him with absolute dominion

over a specific parcel of land without any further action on the part of the United States; or whether, at the time of the cession of California, something remained to be done by the government which was necessary to invest Peralta with a complete legal title to the specific tract.

In every complete grant conveying a perfect title, it is essential that the thing granted be sufficiently described to enable it to be identified.

494*] In grants of real estate it is not *always necessary to describe it by metes and bounds, or by a reference to actual or artificial monuments, nor by courses and distances. If the tract granted have a well known name, and the boundaries of the tract known by that name are notorious and well defined, a grant of the tract by its name would, doubtless, convey the title to the whole. In like manner, a grant describing the tract by reference to the known occupation of the grantor or another—or to another instrument containing a sufficient description of the premises—would be sufficient. In short, any description will suffice which identifies the land granted with such certainty that the specific parcel intended to be granted can be ascertained either by the calls of the instrument, as applied to the land, or by aid of the descriptive portions of the grant. But it is equally certain that, to constitute a complete and perfect grant to a specific parcel of land, it must, in some method, appear on the face of the instrument, or by the aid of its descriptive portions—not only that a specific parcel was intended to be granted, but it must also be so described that the particular tract intended to be granted can be identified with reasonable certainty. It would be a contradiction in terms to say that a specific tract was granted if there was nothing in the grant by which it could be ascertained with reasonable certainty what particular parcel was intended to be conveyed."

We entirely concur in these views and, therefore, hold that the title of Peralta was an imperfect title, and necessarily required confirmation in order to vest a full legal estate in private parties.

But it is claimed that the confirmation of the title inured to the benefit of the parties really interested, both at law and in equity, and not merely to the benefit of the confirmees. This is undoubtedly true so far as the segregation of the lands from the public domain and the extinguishment of the government title or claim of title is concerned; but as it respects the legal estate, the confirmation inures to the confirmees alone. The 8th and 9th sections of the act require the claimant to show not only the original **495***] title, but his own title *by deraignment therefrom. Having established these, the object of the inquest is attained. It satisfactorily appears that the land does not belong to the government, and the claimant appears to be the person prima facie entitled to the legal title. Hence the 13th section goes on to declare that for all claims finally confirmed a patent shall issue to the claimant upon his presenting to the General Land Office an authentic certificate of such confirmation and a plat or survey of the said land duly certified and approved by the surveyor general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed and to furnish plats of the same.

This language is utterly irreconcilable with the hypothesis that the legal estate devolves, upon the confirmation, to any other parties than the confirmees. The patent is to be given to them, and the legal title cannot be separated from the patent.

It is true that the 15th section of the act declares that the decree of confirmation shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons. But this was intended to save the rights of third persons not parties to the proceedings, who might have Spanish or Mexican claims independent of or superior to that presented by the claimant; or the equitable rights of other parties having rightful claims under the title confirmed. The former class still present their claims without prejudice within the time limited by the statute. The latter class, those equitably entitled to rights in the land under the title confirmed, were not to be cut off. Their equities were reserved. But they must seek them by a proceeding appropriate to their nature and condition. The legal title is vested in the confirmees, or will be when the requisite conditions are performed. It is not in these equitable claimants. They cannot maintain an action of ejectment against the confirmees, or those claiming under them; but must go into equity, where their rights can be properly investigated with a due regard to the rights of others. Had the daughters as well as the sons of Luis *Peralta gone before the commissioners, [**496** it is possible that they would have participated in the legal advantages of the confirmation. It may now be inequitable on the part of the sons to withhold from them a due share of their father's estate. But other rights may have grown up in the meantime; rights of bona fide purchasers and others ignorant of the equities existing between the original parties, which it would be unjust to disturb. These questions can be much better examined in an equitable proceeding than they can be in this action, in which, indeed, they are entirely inadmissible.

This view of the relative position of the parties is supported by the weight of authority. The case of *Wilson* v. *Castro*, 31 Cal. 420, is directly in point to show the form of proceeding proper for those who claim against the confirmee. In that case the claim was confirmed to the widow, who really had no interest. The brother and sister of the owner, as his heirs at law, brought a suit in equity against the widow, and obtained a decree declaring her to be seised, as trustee, for their use. In *Estrada* v. *Murphy*, 19 Cal. 272, the court says: "A court of equity will control the legal title in his (the confirmee's) hands, so as to protect the just rights of others. But in ejectment the legal title must prevail;" and it decided the case accordingly against the plaintiff in ejectment. In *Banks* v. *Moreno*, 39 Cal. 233, the same conclusion was reached. In that case, as in this, the plaintiff claimed under the daughters of Luis Peralta; the defendant under the sons; and it was held that the action did not lie. The same view was taken by this

wards, except in the case of minors and persons laboring under some legal disability.

It is evident from this brief statement of the character of the proceedings and of the evidence permitted in these actions for delinquent taxes, that the provision in question is of the utmost importance to nonresident or absent taxpayers, and that in many cases it affords the only security they have against a confiscation of their property under the forms of law.

It is plain to us, upon a consideration of the different statutes of California upon this subject, that whilst the legislature of that state intended to prevent by the strictest proceedings the possibility of any property escaping its proportional burden of taxation, it also intended by the provision in question to guard against a wanton sacrifice of the property of the taxpayer.

In the present case, real property situated 513*] near the second *city in size of California, and the capitol of the state, extending one half a mile along the river Sacramento, and running back one mile, was sold, according to the recitals of the deed, in one body, for less than one twentieth of its assessed value. It is hardly credible that a less portion than the whole of this large tract would not have been readily accepted and the judgment and costs, amounting to only $155.40, been paid, had any opportunity to take less than the entire tract been afforded to purchasers. Be this, however, as it may, it was incumbent upon the officer to afford such opportunity, and not to offer the whole tract at once to the highest bidder.

By the laws of Georgia, of 1790 and 1791, the collector of taxes in that state was authorized to sell the land of the delinquent only on the deficiency of personal estate, and then only so much thereof as would pay the amount of the taxes due, with costs. In *Stead's Executors* v. *Course*, 4 Cranch, 403, which came before this court, it appeared that a sale was made under these laws of an entire tract of four hundred and fifty acres, without specifying the amount of taxes actually due for which the land was liable; and the court said, Mr. Chief Justice Marshall delivering its opinion, that the sale ought to have been of so much of the land as would satisfy the tax in arrear; and if the whole tract was sold when a smaller part would have been sufficient, the collector exceeded his authority; and a plea founded upon the supposed validity of the title conferred by the sale could not be sustained.

By a law of New Hampshire, in force in 1843, it was provided that so much of the delinquent taxpayer's estate should be sold as would pay the taxes and incidental charges. In *Ainsworth* v. *Dean*, 1 Fost. 400, which came before the supreme court of that state, it appeared that a fifty-acre lot was offered and sold in one body, and the court held the sale to be void, observing that no regard appeared to have been paid to the provision mentioned in the statute, and that no reason was given why the law was 514*] not complied with, "if, *indeed, any reason could be considered as sufficient." A similar decision was made by the supreme court of Maine upon a similar clause in one of the statutes of that state. *Loomis* v. *Pingree*, 43 Me. 311. And numerous analogous adjudications will be found in the reports. Blackw. Tax Titles, xv. p. 286. They all proceed on the principle stated by the supreme court of Michigan, that "what the law requires to be done for the protection of the taxpayer is mandatory, and cannot be regarded as directory merely." *Clark* v. *Crane*, 5 Mich. 154.

But it is contended that, inasmuch as the sale in the present case was had under a decree of a court, the same presumptions must be indulged to sustain the action of the sheriff that would be entertained to uphold ordinary sales made by him under execution; and that he is not to be held to the same strictness in his proceedings that he would be if he had acted without the decree, solely under the statute. And several cases are cited from the reports of the supreme court of California, showing that all reasonable presumptions are indulged in support of sales on execution, and that such sales are not rendered invalid by reason of a want of conformity to statutory provisions as to the time, notice and, in some particulars, manner of the sale. *San Francisco* v. *Pixley*, 21 Cal. 58; *Blood* v. *Light*, 38 Cal. 649; *Hunt* v. *Loucks*, 38 Cal. 375.

But the obvious answer to this position is, that here there is no room for presumptions. The officer recites in his deed the manner in which he sold the property, and from the recitals it appears that the sale was made in conformity with directions which the statute, applicable to the case, in effect declares shall not govern sales upon judgments for delinquent taxes. Presumptions are not indulged to sustain irregular proceedings of this character, when the irregularity is manifest. Presumptions are indulged to supply the place of that which is not apparent, not to give a new character to that which is seen to be defective. The courses prescribed for the officer in the conduct of sales upon ordinary *judgments under [*515 the act of 1851, and upon judgments for delinquent taxes under the act of 1861, are entirely unlike, and usually lead to different results. The general authority of the officer in judicial sales under the act of 1851, in the exercise of which he has a large discretion, is limited and defined when applied to sales under judgments for delinquent taxes, by the provision declaring that the sheriff in selling the property assessed "shall only sell the smallest quantity that any purchaser will take, and pay the judgment and all costs"—language which imports a negative upon a sale in any other way. The fact that in some cases no purchaser at the sale may, perhaps, be willing to take less than the whole property and pay that amount, does not dispense with the duty of the officer to comply with the law.

It is also contended that the recitals in the deed were not required and, therefore, do not vitiate the deed, but the cases cited fail to support the position as broadly as here stated. They only show that a defective or erroneous recital of the execution, under which a sheriff has acted, will not vitiate his deed if the execution be sufficiently identified. Every deed executed under a power must refer to the power. As an independent instrument of the holder of the power it would not convey the interest intended. The deed of a sheriff forms no exception to the rule. But it is not essential that the execution, or judgment under which he acted, should be set out in full, or that his proceedings on the

sale should be detailed at length. It is sufficient if they be referred to with convenient certainty, and any misdescription not actually misleading the grantee would, undoubtedly, be considered immaterial. But if the manner in which the power is exercised is recited, it being a proper matter for recital, then the recital is evidence, not against strangers, but against the grantee and parties claiming under him. Thus, if a sheriff should refer in his deed to an execution issued to him, and recite that, in obedience to it and the statute in such case provided, he had sold the property to the highest bidder, it would be presumed that he had done his duty in the premises, given the proper advertisement **516***] and *made the sale at public auction in the proper manner. But if he should go further and recite that he had sold the property, not at public auction, but at a private sale, the deed would be void on its face, the sale by auction being essential to a valid execution of the authority of the sheriff. The vendee, by accepting the conveyance with this solemn declaration of the officer as to the manner in which his power was exercised, would be estopped from denying that the fact was as recited. *Robinson* v. *Hardcastle*, 2 T. R. 252; *Jackson* v. *Roberts*, 11 Wend. 427-435; *Den* v. *Morse*, 7 Halst. 331.

It is unnecessary to express an opinion whether in any case of a sale on a judgment for taxes under the special provision of the statute of California, any presumption can be indulged that the officer had complied with its directions when the fact does not affirmatively appear. It is sufficient that the recitals in his deed of what he did with respect to the sale under consideration show that these directions were disregarded by him in that case. It may also be added that the return of the officer corresponds with these recitals.

The objection to the bill of exceptions, that it does not purport to have been tendered and signed during the trial, is not tenable. It shows that the exceptions were taken at the trial, and that is sufficient. It is dated during the term and was, in fact, filed before the judgment on the verdict was entered.

The judgment must be reversed and the cause remanded for a new trial; and it is so ordered.

Mr. Justice **Miller**, dissenting:

I do not agree that when the state obtains a judgment on the taxes due her by regular proceedings in the courts, that the sale under that judgment is open to all the rigid rules which apply to tax sales made *ex parte* and without the aid of such judgment. The judgment in this case is not assailed by the court, and the sale under it is a judicial sale and entitled to all the presumptions which the law makes in favor of a purchaser at such a sale.

517*] *The law of California, while it required the sheriff to offer the smallest portion of the land which anyone would take and pay the judgment and costs, undoubtedly contemplated that if no one would take any less than the whole of the land and pay the judgment and costs, that then it should be sold to the highest bidder. If this were not so, the state could not collect the taxes in half the cases, because the right of redemption left no inducement to bidders for a smaller amount than the whole.

It is, therefore, a fair presumption from the recital in the deed, that although the sheriff sold the land to the highest bidder, it was because no one would take less than the whole and pay the taxes and costs. And the recital that is made, as well as that which is omitted, are neither of them necessary to the validity of a deed made in a judicial sale.

UNITED STATES, *Appt.*
v.
GEORGE H. MILLER.

(See S. C. *"Twenty per cent Cases,"* 13 Wall. 576-578.)

Foreman of carpenters entitled to additional compensation under resolution of Congress.

Foreman of carpenters on the Capitol extension is an employee in the civil service in the Department of the Interior, and entitled to the additional compensation given by the joint resolution of Congress.

[No. 204.]

Argued Apr. 23, 1872. Decided May 6, 1872.

APPEAL from the Court of Claims.

The case is stated by the court.

Messrs. Geo. H. Williams, Atty. Gen. **C. H. Hill**, *Asst. Atty. Gen.*, and *B. H. Bristow, Solicitor Gen.* for appellant.

Messrs. **Chipman** *& Hosmer* for appellee.

Mr. Justice **Clifford** delivered the opinion of the court:

Judgment for the claimant was rendered in this case by the court of claims, under the Joint Resolution of Congress *giving additional compensation to certain employees of the government in the civil service in this city. [**577** Preceding the entry of the judgment is a finding of the facts, which is also agreed to by the counsel of the parties, as follows: (1) That the claimant was appointed foreman of carpenters by the Secretary of the Interior, at a salary of $1,800, and that he was in the service of the United States, in connection with the Capitol extension, continuously for one year at that salary; (2) that he was paid monthly, as in the case of other salaried officers; that he received materials for the work upon the Capitol building, made up daily reports, had the charge of workmen, and performed such duties as were assigned him by the architect of the Capitol extension, and that he was paid out of the same appropriation as the architect, clerks, and others connected with that work.

Several defenses were set up by the appellants, as follows: (1) That he is not an appointee of the Secretary of the Interior, and that he was not an employee in the civil service; (2) that he does not show himself to have been an employee in the office of the Capitol extension; (3) that he was not an employee in any of the departments specified in the joint resolution.

Support to first proposition is supposed to be derived from the fact alleged in argument, which is not found by the court, that the claimant was employed in the first place at a compensation of $5 per day, exclusive of Sundays, and from the copy of a letter not introduced in evidence, addressed by the Secretary of the Interior to the disbursing agent of the Capitol extension, in which he gives authority to that

agent to pay the claimant from that date as time keeper, etc., on the Capitol extension, at the rate of $150 per month for the time he actually worked until further orders.

Two remarks will afford a sufficient reply to those suggestions: (1) That such evidence cannot be received in this court to contradict the finding of the court of claims; (2) suppose it could; it would constitute no defense to the 578*] claim, *as it only shows a mistake in the appellation given by the government to the employment. Enough appears in the letter to show that he was employed by authority of the Secretary of the Interior, and that his compensation was fixed as alleged, by the head of that department. Grant that the letter does not amount to a warrant of appointment, still, if it be admitted as evidence, it clearly shows that he was employed by the authority of the Secretary, which, instead of contradicting, actually fortifies, the finding of the court.

Sufficient has already been remarked in disposing of the first defense set up by the appellants, to show that the second cannot be sustained, as the claimant does show that he was employed in the public service on the Capitol extension. Employed as he was by the authority of the Secretary of the Interior, it is clear that he was an employee in the civil service in that department, as neither a commission nor a warrant of appointment is required to evidence such an employment.

Argument to show that the work designated by the words "Capitol extension" was under the supervision of the Secretary of the Interior is unnecessary, as the act of Congress of the 16th of April, 1862, provides that the supervision of the Capitol extension and the erection of the new dome be, and the same is hereby, transferred from the War Department to the Department of the Interior.

None of the errors assigned can be sustained and they are, accordingly, overruled. Judgment affirmed.

UNITED STATES, *Appt.*,
v.
CHARLES H. MANNING.

(See S. C. *"Twenty per cent Cases,"* 13 Wall. 578–580.)

Watchman or guard at jail in District of Columbia, entitled to additional pay under joint resolution of Congress.

1. A watchman or guard at the jail in Washington, is an employee in the bureau or division of the Interior Department.
2. Persons employed in a bureau or division of a department, are employees in the Department within the meaning of the Joint Resolution of Congress of Feb. 28, 1867, and entitled to the 20 per cent additional pay under said resolution.

[No. 207.]

Argued Apr. 23, 1872. Decided May 6, 1872.

APPEAL from the Court of Claims.

This was a claim for twenty per cent additional pay by the appellee, under the joint resolution of Feb. 28, 1867.

The case appears in the opinion.

Messrs. Geo. H. Williams, Atty. Gen., **C. H. Hill**, *Asst. Atty. Gen.*, and *B. H. Bristow, Solicitor Gen.*, for appellant.

Messrs. **L. P. Poland** and **J. Daniels** for appellee.

Mr. Justice **Clifford** delivered the opinion of the court:

Persons to act as watchmen or guards at the jails in this District are usually selected by the warden of the jail, subject to the approval of the head of the department, but their number and the amount of their compensation are fixed by the Secretary of the Interior, as they are paid out of the judiciary fund, over which he exercises control.

By the act of the 27th of February, 1801, the *custody of the jails was intrusted to [*579 the marshal of the district, and he was made accountable for the safe keeping of the prisoners. 2 Stat. at L. 106.

Congress, however, on the 29th of February, 1864, created the office of warden of the jail, and enacted that he should have all the power and should discharge all the duties previously exercised and discharged over the jail and the prisoners by the marshal. 13 Stat. at L. 12.

Supervisory power over the accounts of marshals is given by the act of Congress upon the subject to the Secretary of the Interior, and the express provision is that the warden shall annually, in the month of November, make a detailed report to the Secretary of the Interior, 13 Stat. at L. 12; 9 Stat. at L. 395.

Judgment was rendered for the claimant, and the court below made the following finding of facts: (1) That the claimant was employed as watchman or guard at the jail in this city for one year, at a salary of $1,200 per year, paid to him monthly by the disbursing officer of the Department of the Interior, and it is conceded by the appellants that the pay of such employees was fixed at that rate by the Secretary of that department. (2) That he made application to the First Comptroller of the Treasury for the additional compensation, which is the subject of controversy, and that his application was refused.

1. Objection is made in this case, as in those previously decided, that the claimant does not show that he was an employee in any one of the departments, or in any bureau or division thereof, or in any office named in the joint resolution. His appointment, it is said, is not authorized by statute, nor is his compensation prescribed by any appropriation act; and the argument is that, inasmuch as neither his employment nor his compensation is directly known to any act of Congress, he cannot be regarded as an employee in the civil service of the United States; but the court is entirely of a different opinion, as the office of warden is an *office cre- [*580 ated by law, and the appointee of the office is required to report to the Secretary of the Interior.

Guards at the jail are selected by the warden, but their compensation is fixed by the Secretary of the Interior, and they are paid by him, and it makes no difference whether the pay is charged to the appropriation for the department or to the judiciary fund, as the fact remains that the whole subject is under the supervision of the head of that department; whether their pay is charged to the one fund or to the other, the charge for their services must be approved by the warden, and must be included in his re-

port to the Secretary of the Interior, where the same is subject to a further revision. Evidently they are employees in a bureau or division of the Interior Department, as their compensation is fixed by the head of that department, and the officer by whom they are employed is required annually to make a detailed report to that department of all his official acts.

Persons employed in a bureau or division of a department are as much employees in the department, within the meaning of the joint resolution, as the messengers and others rendering service under the immediate supervision of the Secretary, or those specially named in the provision as entitled to its benefits. Unquestionably, guards of the jail are employees of the warden, and the office of warden of the jail is a bureau or division of the Department of the Interior.

Viewed in that light, as the case must be, it is clear that the claim is well founded, and we are all of the opinion that the judgment should be affirmed.

Judgment affirmed.

UNITED STATES, *Appt.*,
v.
THOMAS A. FITZPATRICK.

SAME, *Appt.*,
v.
GEORGE W. HALL.

SAME, *Appt.*,
v.
JOHN BOHN.

SAME, *Appt.*,
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THOMAS E. LYTLE.

SAME, *Appt.*,
v.
CHARLES F. HOLBROOK.

SAME, *Appt.*,
v.
LORENZO D. LARIEN.

SAME, *Appt.*,
v.
JOHN G. RICHARDS.

SAME, *Appt.*,
v.
WILLIAM A. NEWMAN.

(See S. C. "*Twenty per cent Cases,*" 13 Wall. 568-576.)

Resolution for additional pay, construction of — who are employees.

1. Under the joint resolution of Feb. 28, 1867, allowing additional pay to persons in the civil service, neither a commission nor a warrant of appointment is necessary to entitle an employee to its benefit, provided he was actually and properly employed in the Executive Mansion, or in any of the departments or in the office of the commissioner of public buildings.

2. Persons so employed are properly in the service, even though their particular employment may not be designated in an appropriation act.

3. Persons employed in a bureau or division of a department, are employees in the department.

[Nos. 208, 209, 210, 211, 212, 213, 214, 215.]

Argued Apr. 23, 1872. Decided May 6, 1872.

APPEALS from the Court of Claims.

The cases are stated in the opinion.

Messrs. Geo. H. Williams, Atty. Gen., **C. H. Hill**, *Asst. Atty. Gen.*, and *B. H. Bristow, Solicitor Gen.*, for appellant.

Messrs. **L. P. Poland** and *J. Daniels* for appellee.

Mr. Justice **Clifford** delivered the opinion of the court:

Twenty per cent additional pay is allowed by the joint resolution of the 28th of February, 1867, to certain persons or classes of persons therein described, who are employed in the civil service of the United States, in *this [*573 city, whose salaries, as fixed by law, do not exceed $3,500 per annum, to be paid out of any money in the Treasury not otherwise appropriated. 14 Stat. at L. 569.

Objection is made in several of the pending cases arising under that resolution that the claimant does not show himself to be an employee in the civil service of the United States, which, it is said, is the primary condition and the one required to be shown in every case before the party can lawfully claim the prescribed additional compensation, and the attempt is made by the appellants to restrict the meaning of the term "civil service" so as to exclude all persons from the benefits of the provision except such as have been appointed to office or hold appointments of some kind in that service. They contend that the words "in the civil service" were not employed merely to contradistinguish the service described from that of the military or naval service of the United States, but also to show that the persons entitled to the benefits of the enactment must be persons filling offices or holding appointments established by law.

Beyond doubt, those words were intended to contradistinguish the service described from that of the military or naval service, but the court is unable to concur in the proposition that they were also intended to restrict the operation of the resolution to persons in office in the civil service, or to persons holding appointments in that service as salaried officers.

Certain described persons and classes of persons are plainly entitled to the benefit of the provision, whether regarded as officers or as mere employees, and it is no valid argument against the proposition to show that there are or may be other employees or persons in the civil service here who are not within that description, as the terms of the enactment are special and do not extend to every employment in that service, but only to the described persons and classes of persons therein mentioned.

Civil officers, whose salaries, as fixed by law, do not exceed *$3,500 per annum, are [*574 clearly within the terms of the resolution, and so are temporary and other clerks, messengers, and watchmen, including enlisted men detailed as such, and employees, male and female, in the executive mansion, and in the State, Treasury, War, Navy, Interior, and Postoffice Departments, and the Department of Justice, or in

agent to pay the claimant from that date as time keeper, etc., on the Capitol extension, at the rate of $150 per month for the time he actually worked until further orders.

Two remarks will afford a sufficient reply to those suggestions: (1) That such evidence cannot be received in this court to contradict the finding of the court of claims; (2) suppose it could; it would constitute no defense to the 578*] claim, *as it only shows a mistake in the appellation given by the government to the employment. Enough appears in the letter to show that he was employed by authority of the Secretary of the Interior, and that his compensation was fixed as alleged, by the head of that department. Grant that the letter does not amount to a warrant of appointment, still, if it be admitted as evidence, it clearly shows that he was employed by the authority of the Secretary, which, instead of contradicting, actually fortifies, the finding of the court.

Sufficient has already been remarked in disposing of the first defense set up by the appellants, to show that the second cannot be sustained, as the claimant does show that he was employed in the public service on the Capitol extension. Employed as he was by the authority of the Secretary of the Interior, it is clear that he was an employee in the civil service in that department, as neither a commission nor a warrant of appointment is required to evidence such an employment.

Argument to show that the work designated by the words "Capitol extension" was under the supervision of the Secretary of the Interior is unnecessary, as the act of Congress of the 16th of April, 1862, provides that the supervision of the Capitol extension and the erection of the new dome be, and the same is hereby, transferred from the War Department to the Department of the Interior.

None of the errors assigned can be sustained and they are, accordingly, overruled. Judgment affirmed.

UNITED STATES, *Appt.*,
v.
CHARLES H. MANNING.

(See S. C. *"Twenty per cent Cases,"* 13 Wall. 578–580.)

Watchman or guard at jail in District of Columbia, entitled to additional pay under joint resolution of Congress.

1. A watchman or guard at the jail in Washington, is an employee in the bureau or division of the Interior Department.
2. Persons employed in a bureau or division of a department, are employees in the Department within the meaning of the Joint Resolution of Congress of Feb. 28, 1867, and entitled to the 20 per cent additional pay under said resolution.

[No. 207.]

Argued Apr. 23, 1872. Decided May 6, 1872.

APPEAL from the Court of Claims.

This was a claim for twenty per cent additional pay by the appellee, under the joint resolution of Feb. 28, 1867.

The case appears in the opinion.

Messrs. Geo. H. Williams, Atty. Gen., **C. H. Hill**, *Asst. Atty. Gen.*, and *B. H. Bristow, Solicitor Gen.*, for appellant.

Messrs. **L. P. Poland** and **J. Daniels** for appellee.

Mr. Justice **Clifford** delivered the opinion of the court:

Persons to act as watchmen or guards at the jails in this District are usually selected by the warden of the jail, subject to the approval of the head of the department, but their number and the amount of their compensation are fixed by the Secretary of the Interior, as they are paid out of the judiciary fund, over which he exercises control.

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Supervisory power over the accounts of marshals is given by the act of Congress upon the subject to the Secretary of the Interior, and the express provision is that the warden shall annually, in the month of November, make a detailed report to the Secretary of the Interior, 13 Stat. at L. 12; 9 Stat. at L. 395.

Judgment was rendered for the claimant, and the court below made the following finding of facts: (1) That the claimant was employed as watchman or guard at the jail in this city for one year, at a salary of $1,200 per year, paid to him monthly by the disbursing officer of the Department of the Interior, and it is conceded by the appellants that the pay of such employees was fixed at that rate by the Secretary of that department. (2) That he made application to the First Comptroller of the Treasury for the additional compensation, which is the subject of controversy, and that his application was refused.

1. Objection is made in this case, as in those previously decided, that the claimant does not show that he was an employee in any one of the departments, or in any bureau or division thereof, or in any office named in the joint resolution. His appointment, it is said, is not authorized by statute, nor is his compensation prescribed by any appropriation act; and the argument is that, inasmuch as neither his employment nor his compensation is directly known to any act of Congress, he cannot be regarded as an employee in the civil service of the United States; but the court is entirely of a different opinion, as the office of warden is an *office cre- [*580 ated by law, and the appointee of the office is required to report to the Secretary of the Interior.

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port to the Secretary of the Interior, where the same is subject to a further revision. Evidently they are employees in a bureau or division of the Interior Department, as their compensation is fixed by the head of that department, and the officer by whom they are employed is required annually to make a detailed report to that department of all his official acts.

Persons employed in a bureau or division of a department are as much employees in the department, within the meaning of the joint resolution, as the messengers and others rendering service under the immediate supervision of the Secretary, or those specially named in the provision as entitled to its benefits. Unquestionably, guards of the jail are employees of the warden, and the office of warden of the jail is a bureau or division of the Department of the Interior.

Viewed in that light, as the case must be, it is clear that the claim is well founded, and we are all of the opinion that the judgment should be affirmed.

Judgment affirmed.

UNITED STATES, *Appt.*,
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THOMAS A. FITZPATRICK.

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Resolution for additional pay, construction of — who are employees.

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2. Persons so employed are properly in the service, even though their particular employment may not be designated in an appropriation act.

3. Persons employed in a bureau or division of a department, are employees in the department.

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APPEALS from the Court of Claims.

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Messrs. Geo. H. Williams, Atty. Gen., **C. H. Hill**, *Asst. Atty. Gen.*, and *B. H. Bristow, Solicitor Gen.*, for appellant.

Messrs. **L. P. Poland** and *J. Daniels* for appellee.

Mr. Justice **Clifford** delivered the opinion of the court:

Twenty per cent additional pay is allowed by the joint resolution of the 28th of February, 1867, to certain persons or classes of persons therein described, who are employed in the civil service of the United States, in *this [*573 city, whose salaries, as fixed by law, do not exceed $3,500 per annum, to be paid out of any money in the Treasury not otherwise appropriated. 14 Stat. at L. 569.

Objection is made in several of the pending cases arising under that resolution that the claimant does not show himself to be an employee in the civil service of the United States, which, it is said, is the primary condition and the one required to be shown in every case before the party can lawfully claim the prescribed additional compensation, and the attempt is made by the appellants to restrict the meaning of the term "civil service" so as to exclude all persons from the benefits of the provision except such as have been appointed to office or hold appointments of some kind in that service. They contend that the words "in the civil service" were not employed merely to contradistinguish the service described from that of the military or naval service of the United States, but also to show that the persons entitled to the benefits of the enactment must be persons filling offices or holding appointments established by law.

Beyond doubt, those words were intended to contradistinguish the service described from that of the military or naval service, but the court is unable to concur in the proposition that they were also intended to restrict the operation of the resolution to persons in office in the civil service, or to persons holding appointments in that service as salaried officers.

Certain described persons and classes of persons are plainly entitled to the benefit of the provision, whether regarded as officers or as mere employees, and it is no valid argument against the proposition to show that there are or may be other employees or persons in the civil service here who are not within that description, as the terms of the enactment are special and do not extend to every employment in that service, but only to the described persons and classes of persons therein mentioned.

Civil officers, whose salaries, as fixed by law, do not exceed *$3,500 per annum, are [*574 clearly within the terms of the resolution, and so are temporary and other clerks, messengers, and watchmen, including enlisted men detailed as such, and employees, male and female, in the executive mansion, and in the State, Treasury, War, Navy, Interior, and Postoffice Departments, and the Department of Justice, or in

any bureau or division of such a department, including the Agricultural Bureau; and all civil officers, whether permanent or temporary, in the offices of the coast survey, naval observatory, navy yard, arsenal, Paymaster General, Commissary General of Prisoners, Bureau of Refugees, Freedmen, and Abandoned Lands, office of Quartermaster, Capitol and Treasury Extension, City Postoffice and Commissioner of Public Buildings, and the other officers and employees described in the same resolution.

By the finding of the court of claims it appears that Fitzpatrick was an employee in the office of the commissioner of public buildings, as keeper of the western gate of the Capitol; that Hall was an employee in the office of the commissioner of public buildings, in that part of the Capitol called the crypt; that Bohn was an employee in the office of the commissioner of public buildings, as a laborer on the public grounds; that Lytle was an employee in the office of the commissioner of public buildings, as watchman in the east grounds of the Capitol; that Holbrook was an employee in the office of the commissioner of public buildings, as watchman at the stables; that Richards was an employee in the office of the commissioner of public buildings, as watchman on the Capitol dome; and that Newman was an employee in the office of the commissioner of public buildings, as captain of the Capitol police. Employees in the office of the commissioner of public buildings being within the very words of the joint resolution, the court of claims in each of these cases rendered judgment for the claimant, and the United States appealed to this court.

Most of the defenses to the several claims have already been considered in the remarks preceding the statement of the case, but there 575*] are also certain special objections *which deserve some consideration, as, for example, it is insisted that the question whether the claimant was or was not an employee in the office of the commissioner is a question of law, and not a question of fact, and that being a question of law it may be re-examined in this court.

Whether the claimant was or was not employed by the commissioner of public buildings is certainly a question of fact; but the question as to what relation he sustained to that office may, perhaps, be a question of law, as assumed by the United States. What they contend is that the words of the act, "in the office of," have respect to another class of employees, that those words refer to the clerks and messenger and the like, but the court is of a different opinion, as clerks and messenger are specially mentioned in the same enactment, which shows that the words "employees in the office of" were intended to embrace a class of persons other and different from the persons having appointments as officers in the building assigned to the commissioner. Such an interpretation would be too restricted to comport with the general scope and object of the resolution, or with any of the canons of construction usually applied in ascertaining the meaning of a remedial law.

Offices may be and usually are divided into two classes — civil and military. Civil offices are also usually divided into three classes — political, judicial, and ministerial. Political offices are such as are not immediately connected with the administration of justice, or with the execution of the mandates of a superior, as the President or head of a department. Judicial offices are those which relate to the administration of justice, and which must be exercised by the persons appointed for that purpose and not by deputies. Ministerial offices are those which give the officer no power to judge of the matter to be done, and which require him to obey some superior, many of which are merely employments requiring neither a commission nor a warrant of appointment, as temporary clerks or messengers. *Mallory's Case*, 3 Nott & H. 257; *Kirby's Case*, 3 Nott & H. 265.

*Neither a commission nor a warrant [*576 of appointment is necessary to entitle an employee to the benefit of the provision under consideration provided he was actually and properly employed in the executive mansion, or in any of the departments, or in any bureau or division thereof, or in the office of the Capitol or Treasury extension, or in the office of the commissioner of public buildings, or in any other of the offices therein mentioned, if it appears that he is one of the persons or class of persons described in the joint resolution. Persons so employed are properly in the service if they were employed by the head of the department or of the bureau or any division of the department charged with that duty and authorized to make such contracts and fix the compensation of the person employed, even though the particular employment may not be designated in an appropriation act.

Many persons not employed as clerks or messengers of a department are in the public service by virtue of an employment by the head of the department or by the head of some bureau of the department authorized by law to make such contracts, and such persons are as much in the civil service within the meaning of the joint resolution as the clerks and messengers employed in the rooms of the department building. *United States* v. *Belew*, 2 Brock. 280; *Graham* v. *United States*, 1 Nott & H. 380; *Com.* v. *Sutherland*, 3 S. & R. 149.

Tested by these rules, it is clear that each of the eight claimants whose cases are under consideration were employees in the office of the commissioner of public buildings, and that the judgment of the court of claims in each case was correct.

The judgment in each case affirmed.

THE HOME INSURANCE CO., of the City of New York, *Plff. in Err.*,

v.

ELIAS R. BARTON.

(See S. C. 13 Wall. 603, 604.)

Decision on motion for new trial, not ground of error.

The granting or overruling of a motion for a new trial in the court below is not ground for error.

[No. 132.]

Argued Mar. 7, 1872. Decided May 6, 1872.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

The case is stated by the court.

Messrs. **M. H. Carpenter** and *J. O. Broadhead*, for plaintiff in error.

Messrs. **F. A. Dick** & *Blair*, for defendant in error.

Mr. Justice **Swayne** delivered the opinion of the court:

The defendant in error was the plaintiff, and the plaintiff in error was the defendant, in the court below.

The suit was brought by Barton upon a policy of insurance. Upon looking into the record we find that the case was tried by a jury; that evidence was adduced by both parties; that the court instructed the jury, and that they found a verdict for the plaintiff, upon which judgment was duly entered. All this was done without any exception being taken by the defendant. The assurers then moved the court to set aside the verdict and grant a new trial upon the following grounds:

That the verdict was against the evidence; that it was against the law and the instructions of the court; because the verdict was uncertain **604***] and insufficient. The court *overruled the motion. To this the assurers excepted, and in their bill of exceptions have set out all the evidence given in the case. The only point to which our attention has been called by their counsel in this court is, that, according to the evidence thus set out, the plaintiff was clearly not entitled to recover.

The granting or overruling of a motion for a new trial in the courts of the United States rests wholly in the discretion of the court to which the motion is addressed. This is so well settled that it is unnecessary to remark further upon the subject. *Henderson* v. *Moore*, 5 Cranch, 11; *Barr* v. *Gratz's Heirs*, 4 Wheat. 220; *Doswell* v. *De La Lanzo*, 20 How. 29, 15 L. ed. 824; *Schuchardt* v. *Allens*, 1 Wall. 371, 17 L. ed. 646.

The judgment of the Circuit Court is affirmed.

EDWARD WINSLOW PAIGE, Clara K. Paige, and Samuel W. Jackson, Executors of Alonzo C. Paige, Deceased, *Appts.*,

v.

DAVID BANKS, JR., *et al.*

(See S. C. 13 Wall. 608-616.)

Effect of agreement as to copyright—construction of by parties, evidence of intention.

1. An agreement to furnish, in manuscript, the reports of a court for publication, and that the publishers "shall have the copyright of said reports to them and their assigns forever," gave the publishers the benefit of the act of Feb. 1831, granting an additional extension of fourteen years, and vested in the publishers a full right of property thereto.

2. Acquiescence for ten years, by the parties, in a certain construction of a contract, is evidence of the intention of the parties in making it.

[No. 167.]

Argued Apr. 16, 1872. Decided May 6, 1872.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Messrs. William W. Campbell, R. D. Benedict, Jos. Bell, **Douglas Campbell,** and **C. N. Potter,** for appellants:

Were this a simple assignment of the copyright, that is, had Mr. Paige taken out the copyright in 1830, and assigned it to Gould & Banks, nothing would have passed but the first term.

This seems to be settled beyond controversy. *Pierpont* v. *Fowle*, 2 Wood. & M. 23; *Cowen* v. *Banks*, 24 How. Pr. 73.

At the time that Mr. Paige's contract was made, 1828, this last term was not provided for by the statute. The act of 1831 created it, and gives it specifically to the author, if living; to his family, if dead. Assignees are not mentioned in it, nor provided for.

Curtis, in his work on Copyright, page 235, questions whether the author by any assignment could dispose of this contingent interest, so as to deprive his widow and children of the right, in case of his death.

A similar provision in the patent law has been so construed by this court.

Wilson v. *Rousseau*, 4 How. 646; *Bloomer* v. *McQuewan*, 14 How. 539. See also *Hodge* v. *Railroad*, 6 Blatchf. 85.

The agreement in this case was only an assignment of the copyright and, therefore, conveyed only the original term.

The intention of the parties, to be collected from the whole agreement, was simply to convey the copyright, although it be admitted for the sake of the argument that the agreement contains provisions sufficient to create a license, if the copyright had not been specifically conveyed.

Clark v. *Price*, Wils. Cas. in Ch. pt. 2, 157.

If the agreement is regarded as conveying a license in addition to the copyright, it is neither harmonious nor consistent.

The construction contended for by the defendants is opposed to the maxim *"Verba generalia restringuntur ad habilitatem rei vel aptitudinem personæ,"* 2 Comyn, Cont. 533, n, 7; Story, Cont. § 641*a*; Chit. Cont. 10th Am. ed. 90, 91, in force in New York, by the law of which the agreement is to be construed as to everything except the copyright.

Van Hagen v. *Van Rensselaer*, 18 Johns. 423; *Elmendorf* v. *Lansing*, 5 Cow. 470.

The appellants urge their construction of this agreement with the more confidence, that an instrument of this same character has been construed by His Honor, Justice Nelson, sitting at circuit, in an action argued before him by several of the ablest counsel at the New York bar. *Cowen* v. *Banks*, 24 How. Pr. 73.

Messrs. Joseph Larocque, E. Ellery Anderson, and **Anderson & Mann,** for appellees:

This is not the ordinary case of an author who perfects his own copyright and then sells it. This is the case of an author who, for a stipulated gross sum, sells his book in manuscript for publication. The decisions, therefore, that have been made in cases arising on construction of agreements for sales of copyright have no application to the present case. See *Pierpont* v. *Fowle*, 2 Wood. & M. 23.

That an author has at common law an absolute title to the manuscript of his book before publication, is entirely settled. The effect of the statutes on his rights after publication, has been very much discussed; but the cases all concur in sustaining the title before publication. *Wheaton* v. *Peters*, 8 Pet. 657; *Pierpont* v. *Fowle*, 2 Wood. & M. 45.

The manuscript being then the author's personal property and being, as such property, subject to his absolute control and to his right of disposing of the same, the question presented by this case is: What is the legal effect of an agreement by an author to furnish and deliver his manuscript to a publisher for publication, at an agreed price per volume?

Waiving the consideration of the question whether, under such an agreement, the author would retain, concurrently with the publisher, the right to publish and sell his books, it seems to be a necessary sequence of this statement of the case, that the publisher has the right to publish and sell the book at all times.

This right is not dependent on nor derived from the author's copyright. It would exist equally if no copyright were ever taken out. The consideration they are to pay for this privilege is fixed, by the act of the parties themselves, at $1,000. For this sum they are to have the manuscript delivered to them for publication; not for one year nor for five years, but without limit as to time.

The contract must be construed according to the expressed intention of the parties. It does not say "for publication during the copyright;" but it simply says "for publication." It is impossible to fix a limitation to this privilege, without interpolating into the contract words of limitation that do not exist in it.

Is the right of the appellees to publish this book in any way restricted by the provision in the contract, that "they shall have the copyright of said reports to them and their heirs and assigns forever?"

This is not a provision inserted for the benefit of the author. There is no covenant that the publishers shall take out a copyright, either for their own benefit or for the benefit of the author. Had they chosen not to take out the copyright, they would have had, as against Mr. Paige, the perpetual right to print, publish, and sell the reports. How, then, can this clause of the agreement, inserted for the purpose of making it clear that the publishers were to be the proper parties to take out the copyright, have the effect of limiting or restricting their right, derived from the sale of the manuscript to them for publication? There is no copyright sold to them, or conveyed to them, or agreed to be sold or conveyed to them.

Regarding the sale of the manuscript for publication as a mere license to publish, it would pass to the appellees the right to publish and sell the book, even though the author had expressly reserved to himself the right to the copyright. This right being unlimited in time, would be as valid during the renewal of the copyright as during the original term.

Curt. Copyr. 222; *Rundell* v. *Murray*, Jacobs, 311.

The following cases are referred to as illustrating the nature of an author's title to the manuscript of his book before publication, and the manner in which his rights may be affected by assignment or license to publish:

Little v. *Gould*, 2 Blatchf. 165; *Little* v. *Hall*, 18 How. 165, 15 L. ed. 328; *Pulte* v. *Derby*, 5 McLean, 328; *Palmer* v. *DeWitt*, N. Y. Times, Mar. 13, 1872. See 7 Rob. (N. Y. Sup. Ct.) 530.

All the cases agree that if the intention to pass the entire interest of the author appears in the transfer, the assignee will acquire the right to the original term and to all renewals.

Carnan v. *Bowles*, 2 Bro. (C. C.) 80; 1 Hawk. Pl. C. 477, n. 7, 6th Dublin ed.

In any event, the acquiescence of the author for ten years (and until his death) after his alleged right accrued in the publication and sale of his work, must be held to be an abandonment of his property in this work, if any he had.

Rundell v. *Murray*, Jacobs, 311; *Bartiette* v. *Crittenden*, 4 McLean, 300, 4 Burr. 2345; *Platt* v. *Button*, 19 Ves. 447; *Folsom* v. *Marsh*, 2 Story, 100; Curt. Copyr. 222.

Mr. Justice **Davis** delivered the opinion of the court:

This is an appeal from the decree of the circuit court for the southern district of New York, dismissing the bill filed by the appellants against the appellees, to enjoin them from the publication and sale of the first volume of Paige's Chancery Reports, and for an account. The whole controversy turns upon the true interpretation of the agreement made on the 7th October, 1828, between Alonzo C. Paige and Gould & Banks, by which it is stipulated that "during the term of five years from the 28th April last, if the said Alonzo shall so long remain reporter of the court of chancery, he shall and will furnish the said Gould & Banks, in manuscript, the reports of said court for publication, and that the said Gould & Banks shall have the copyright of the said reports to them and their heirs and assigns forever; and the said William Gould and David Banks covenant and agree to and with the said Alonzo, that they will publish said reports in royal octavo volumes of between six and seven hundred pages, on paper and type suitable for such a work; that they will deliver to said Alonzo twelve copies free of expense; and they will sell said reports to the members of the Bar of New York, at a sum not exceeding $6 per volume, bound in calf, for each volume they shall so sell within one year next subsequent to the publication of such volume; and the said Gould & Banks agree to pay the said Alonzo $1,000 per volume for every volume they shall publish, and at the same rate for less than a volume, within six months after the publication of each volume. It is understood that the said Alonzo C. Paige is to read and correct the proof sheets of said report, as the same are furnished to him."

Independent of any statutory provision, the right of an author in and to his unpublished manuscripts is full and complete. It is his property and, like any other property, is subject to his disposal. He may assign a qualified interest in it, or make an absolute conveyance of the whole interest.

The question to be solved is: Do the terms of this agreement show the intent to part with the whole interest in the publication of this book, or with a partial and limited interest?

The agreement on the one side is "to furnish, in manuscript, the reports of said court for publication" with an additional clause that the publishers "shall have the copyright of said reports to them and their assigns forever." The cause or consideration of this agreement is a stipulation by the other side for a certain sum of

money, and the performance of certain duties in connection with the publication.

It is insisted by the appellants that a just interpretation confines the agreement to a mere assignment of the interest in such copyright, as is provided for in the act of 31st May, 1790 (1 Stat. at L. 124); that this was the law in force when the contract was entered into; that the fourteen years therein provided for, with the right to a prolongation of fourteen years more, is all that the publishers, at most, are entitled to, and that they are excluded necessarily from the benefit of the provisions conferred by the act of the 3d February, 1831 (4 Stat. at L. 436), granting to authors an additional extension of fourteen years.

In our view, this is too narrow a construction. The fair and just interpretation of the terms of the agreement indicate, unmistakably, that the **615*]** author of the manuscript, in *agreeing to deliver it for publication at a stipulated compensation, intended to vest in the publishers a full right of property thereto.

The manuscript is delivered under the terms of the agreement "for publication." No length of time is assigned to the exercise of this right, nor is the right to publish limited to any number of copies. The consideration is a fixed sum of $1,000. Whether one or one hundred thousand copies were published the author was entitled to receive, and the publishers bound to pay, this precise amount.

As between the parties to the agreement, the absolute interest was conveyed by the stipulation of Paige, that he would furnish the manuscript for publication. Paige could no longer do any act after such delivery for publication inconsistent with the absolute ownership of the publishers. But it was proper, for the protection of the publishers, that they should be in position to assert the remedies given by the law against intruders, and it is to this end it is added in the agreement, "and the said Gould & Banks shall have the copyright of said reports to them, their heirs, and assigns forever." It is not covenanted that the publishers should take out the copyright, nor is there any express agreement for an assignment to them by Paige, if he should take it out. Undoubtedly, the provision, that the publishers "should have the copyright," would authorize them to apply for it, and if Paige had taken it out in his own name it would have inured to their benefit. But, as between Paige and the publishers, the rights of the latter could not be estimated differently, whether they had or had not availed themselves of the provisions of the act.

We have been referred to the case of *Cowen v. Banks*, 24 How. Pr. 72, in which Mr. Justice Nelson, on a similar agreement, expressed the opinion that the construction now contended for by the appellants was the true one. No reason is assigned by the judge for his opinion, and the case was such that it was not necessary that this point should be maturely considered. It appeared in the case that the bill was filed by the executrix of Judge Cowen for an injunction and an account against the publishers. The hearing of the deposition of the judge given in the prior suit brought by the publishers against one Hastings, as a violator of the copyright, was read in evidence. In this deposition the judge testifies "that it was his intention, by the agreement, to convey his whole interest in the copyright of the work," and he adds: "I suppose the book to belong to my assignees, as soon as made, including all that was in it. I would not have taken the office of reporter with its salaries and duties, unless I was to have a proprietary right which I could use or dispose of." The practical construction by Judge Cowen of his own contract, in opposition to his interest, is cited in the decision to *which we are [***616** now referring, together with the fact that the judge died in 1844, three years after the expiration of the first term of the copyright. On this it is said, with some emphasis, "that he had all this time acquiesced in the claim of the assignee." The decree was that the contract be reformed accordingly.

In the case now before us the construction contended for by the appellants was, for the first time, urged by letter of Mr. Paige, 13th January, 1858, addressed to the appellees, who replied on 3d February, following, asserting their absolute right of ownership, with an unlimited license to publish and sell. The parties lived together after this in the same state until 31st March, 1868, when Paige died, a period of ten years, during which no further notice was ever taken of this subject, and no attempt by Paige, by act or protest, to interfere with the exercise of the right of the appellees to publish and sell. It is difficult to account for this long acquiescence upon any assumption that Paige, after the receipt of the reply to the publishers, had faith in the construction now urged. If this agreement needed any extraneous aid to indicate the intention of the parties, this acquiescence would certainly be persuasive of the view we have taken of it.

Decree affirmed.

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*EDWARD PUGH, *Appt.*, [*633
v.
UNITED STATES.

(See S. C. 13 Wall. 633-635.)

Court of claims has no jurisdiction of a claim for property destroyed during the war — claim for rent.

The court of claims has no jurisdiction of a claim for the destruction of property during the war in one of the states engaged in the Rebellion, by the military forces of the United States, nor of a claim for rent of a plantation, where the leasing was an incident only to the unlawful appropriation and spoliation of the plantation.

[No. 146.]

Argued Mar. 26, 1872. Decided May 6, 1872.

APPEAL from the Court of Claims.

The case is stated by the court.

Mr. **Thomas J. Durant** for appellant.

Mr. C. H. Hill, Asst. Atty. Gen., for appellee.

Mr. Chief Justice **Chase** delivered the opinion of the court:

This is an appeal from the court of claims.

The substantial averments of the petition are these:

First. That the United States, during the period of the late Civil War, illegally, violently, and forcibly took possession of the petitioner's

plantation in the state of Louisiana, on the false pretext that it had been abandoned by the owner, and held it until January, 1866, during which time the United States and the agents placed in charge of the plantation, destroyed and carried away the property of the petitioner to the value of $42,508; and,

Second. That the United States, during the same period, rented the plantation to sundry persons who made large crops worth $15,000 or $30,000.

This petition was dismissed by the court of claims for want of jurisdiction.

635*] *The destruction of property complained of was during the War and in one of the states engaged in the Rebellion, and the presumption, in the absence of inconsistent allegations, is, that it was by the military forces of the United States. It is clear that a petition for compensation for injuries of this character could not be sustained in the court of claims, for the demand plainly grows "out of the destruction or appropriation of or damage to property by the army or navy engaged in the suppression of the Rebellion" and is excluded from the cognizance of that court by the express terms of the act of July 4, 1864. 13 Stat. at L. 381.

But it is insisted that the court had at least jurisdiction of the case made by the petition in respect to the leasing of the plantation, under the amendment to the captured and abandoned property act made by the 2d and 3d sections of the act of July 2, 1864. 13 Stat. at L. 375. These sections provide for leasing abandoned lands by the agents of the Treasury Department, and the payment of the net amounts of rents collected into the Treasury. But the petition in this case makes the leasing an incident only to the unlawful appropriation and spoliation of the plantation. It does not allege any leasing by the agents of the Treasury Department, or that any rents were collected by them or paid into the Treasury.

It is plain, therefore, that the petition does not state a case within the jurisdiction of the court of claims. If the petitioner has any claim upon the government he must seek relief from Congress.

The decree dismissing the petition must be affirmed.

END OF VOLUME 80.

XIII WALLACE.

13 Wall. 1-3, 20 L. 556, BETHELL v. MATHEWS.

Appeal and error.— Plaintiff in error cannot take advantage of rulings upon exceptions in his own favor even if erroneous, p. 2.

Followed in In re Gribbon, 55 Fed. 876, 14 U. S. App. 882, in an appeal by the customs collector from a decision on question of duty on manufactured articles, holding the importer not having appealed could only be heard in support of the decision, and if an error had been committed by the court below it was to the advantage of the collector and furnished him no ground of complaint.

Appeal and error.— A statement of facts signed by counsel cannot be noticed upon error, and is insufficient under act of 1865, authorizing trial of facts by Circuit Court, p. 3.

Cited in Insurance Co. v. Folsom, 18 Wall. 252, 21 L. 834, finding of Circuit Court, where trial by jury is waived, is not proper subject of review in Supreme Court.

13 Wall. 3-6, 20 L. 556, NORWICH TRANSPORTATION CO. v. FLINT.

Evidence.— In an action for personal injuries caused by riotous soldiers on board a ship, statements of a sergeant to his officers and their replies and conduct offered to show the manner in which the officers attended to their duty, held admissible as part of res gestæ, p. 6.

Cited in Hemmingway v. Chicago, etc., R. Co., 72 Wis. 51, 7 Am. St. Rep. 829, 37 N. W. 807, in action for damages caused by alighting from a train permitting evidence of conversation of a passenger with the plaintiff as res gestæ.

13 Wall. 6-13, 20 L. 476, YEAGER v. FARWELL.

Bills and notes.— Strictly speaking, there can only be waiver of demand and notice by indorser before note is due; but an indorser may so act towards payee after it is due as to render want of demand and notice immaterial, as, by promise to pay after knowledge of default of maker, pp. 12-13.

Cited and followed in White v. Keith, 97 Ala. 669, 12 So. 611, holding that waiver of protest and notice after dishonor will not bind the indorser unless a new and valid promise to pay is made by him; Martin v. Lennon, 19 Minn. 74, holding that a subsequent

promise to pay by an indorser, with knowledge that he was not liable on the bill or note for failure to give notice of dishonor, was binding on the ground that it amounted to a waiver; Lockwood v. Bock, 50 Minn. 144, 52 N. W. 391, holding it was settled law that no new consideration for a waiver made after maturity was necessary, it is in effect a waiver of a condition precedent to the liability of the indorser, which may be dispensed with by the indorser as well after as before maturity; Quaintance v. Goodrow, 16 Mont. 378, 41 Pac. 77, holding that an indorser who at time of indorsing told the payee to look to him and no one else for payment, and on the last grace day and after maturity promised to pay and asked for time, waived notice of demand and dishonor.

Distinguished in Sebree Deposit Bank v. Moreland, 96 Ky. 156, holding subsequent promise by indorser, made without adequate consideration, is void.

Bills and notes.— Where B., who negotiated a loan as agent of C., the lender, indorsed the note, and at its maturity wrote C. that borrower could not pay, but that he held himself responsible for payment and would see that this was done, held that B. was liable as indorser without demand and notice, pp. 12, 13.

See note to preceding syllabus.

Miscellaneous.— Allen v. Rundle, 50 Conn. 27, 47 Am. Rep. 606, written indorsement cannot be varied or modified by parol.

13 Wall. 14–17, 20 L. 478, WEBB v. SHARP.

Landlord and tenant.— Under statute of 1867, lien of landlord in District of Columbia, on chattels of his tenant subject to execution, commences with the tenancy, attaches the moment the chattel is placed on the premises and is superior to that of deed of trust or mortgage subsequently executed, p. 16.

Cited and applied in Beall v. White, 94 U. S. 383, 387, 24 L. 173, 175, asserting priority of landlord's lien on hotel furniture over a deed of trust; Wooten v. Gwin, 56 Miss. 427, holding that under act of 1872 a purchaser, without notice, of cotton on which a landlord had a lien for rent was not liable for an action for damage for tortious removal by landlord.

Distinguished in The Hempstead, etc., Assn. v. Cochran, 60 Tex. 624, holding that sections 3122a, 3122b of the revised statutes limited the landlord's lien to yearly rentings and did not take precedence of a mortgage.

Landlord and tenant.— Bona fide purchasers of chattels without notice are protected against landlord's lien, and goods sold in ordinary course of trade are discharged from lien, p. 16.

Cited and ruling applied in Fowler v. Rapley, 15 Wall. 336, 21 L. 37, holding that the lien when once it attaches continues to attach to the chattels into whosesoever hands they may come unless

displaced by removal or by sale in the ordinary course of business; Beall v. White, 94 U. S. 386, 24 L. 175, holding that the lien attached at commencement of tenancy but is displaced where goods are sold and removed from the premises, the purchaser taking a perfect title; Smith v. Shell Lake, etc., Co., 68 Wis. 94, 31 N. W. 696, holding that a laborer's logging lien cannot affect a bona fide purchaser who buys before the filing of the claim of lien and without notice, actual or constructive.

13 Wall. 17-25, 20 L. 527, BOYDEN v. UNITED STATES.

United States.— Receiver of public money is not a mere bailee, but when he binds himself by his official bond to perform duties of his office without exception, he makes himself an insurer by express contract, p. 22.

Cited and ruling applied in State v. Nevin, 19 Nev. 165, 8 Am. St. Rep. 875, 7 Pac. 652, holding that under a bond for faithful performance of official duties a county treasurer and his sureties were liable for moneys stolen; United States v. Watts, 1 N. Mex. 562, holding sureties of receiver of public-land-sale moneys liable for moneys lost by robbery, the receiver being killed in defending them; Tillinghast v. Merrill, 151 N. Y. 143, 56 Am. St. Rep. 616, 45 N. E. 377, 34 L. R. A. 682, holding that an action on official bond of town supervisor could not be defended because public school moneys in his hands had been lost by insolvency of bank of deposit, collecting authorities; Fairchild v. Hedges, 14 Wash. 120, 44 Pac. 126, 31 L. R. A. 852, holding county treasurer not absolved from duty to pay over funds by insolvency of bank of deposit; State v. Gramm, — Wyo. —, 52 Pac. 540, 543, 40 L. R. A. 698, 700, holding that an officer is not by virtue of his office an insurer, but may become so by the effect of his bond, but a State treasurer under a bond "to truly and justly account" is not liable for loss by insolvency of bank where State funds are deposited to a separate account according to an established custom and no negligence or fraud is charged; Roberts v. Board, — Wyo. —, 56 Pac. 919, to same effect as to funds deposited by a county treasurer in bank owned by one of his official sureties, held not liable. See note to 67 Am. Dec. 367, on ground of liability of public officers for money in their custody; note to 56 Am. Rep. 67, on strictness of rule of liability where bond is given; dissenting opinion in State v. Gramm, — Wyo. —, 52 Pac. 552, 40 L. R. A. 708, arguendo.

Distinguished in York County v. Watson, 15 S. C. 9, 40 Am. Rep. 678, holding that in State a county treasurer is only subject to the common-law obligation and is not liable for loss of funds by failure of the bank of deposit, the bank being solvent at time of deposit; State v. Copeland, 96 Tenn. 302, 54 Am. St. Rep. 843, 34 S. W. 428, 31 L. R. A. 845, holding that it is not in accord with public policy that a public officer should

be liable for public funds as an insurer, and he is not liable for money lost by failure of bank of deposit.

Officers.— Bonds of public officers bind obligors to pay the moneys in their hands when required by law even though the money may have been lost without fault on their part, p. 22.

Cited and ruling applied in State v. Houston, 78 Ala. 581, 56 Am. Rep. 60, holding tax collector liable for money collected and not paid over notwithstanding he had been robbed of it; District Township v. Morton, 37 Iowa, 553, holding the obligor of an official bond will not be relieved from his contract by showing any degree of diligence or care which falls short of absolute compliance witn the terms of the contract, collecting authorities, robbery no excuse; Board of Education v. Jewell, 44 Minn. 428, 20 Am. St. Rep. 587, 46 N. W. 915, holding that the great weight of authority is that where the statute imposing a duty to pay over contains no condition limiting the obligation, the obligation imposed on and assumed by the officer is absolute, collecting authorities, applying rule to a loss of funds by burglary.

Distinguished in People v. Faulkner, 107 N. Y. 483, 14 N. E. 417, holding surrogate and his sureties not liable for surplus moneys arising from a foreclosure sale paid to him for distribution.

United States.— Felonious taking, stealing and carrying away of public money in the hands of a receiver without any fault or negligence on his part does not discharge him or his sureties and cannot be set up as a defense to an action on his official bond, p. 24.

Cited and principle applied in note to Halliburton v. United States, 13 Wall. 65, holding a receiver liable for public moneys which the Confederate authorities had compelled him to pay over to them; United States v. Bosbyshell, 73 Fed. 618, 619, affirmed in Bosbyshell v. United States, 77 Fed. 948, 39 U. S. App. 474, holding that the superintendent of the mint under a duty bond where the duty was to safely keep until legally withdrawn all moneys or bullion, etc., was bound to deliver to his successor and was liable on his bond for shortage; United States v. Bryan, 82 Fed. 293, holding postmaster liable for embezzlement by a clerk though appointed under the civil service rules and that only exception to rule was when the loss occurred through the act of God or of a public enemy, collecting authorities; United States v. Zabriskie, 87 Fed. 720, holding the melter and refiner of the mint at Carson City, Nev., liable for embezzlement of bullion by a subordinate; Bryan v. United States, 90 Fed. 474, 61 U. S. App. 262, holding a postmaster liable for money embezzled by the clerk in charge of the money-order department, though not appointed by him; Gartley v. People, 24 Colo. 157, 49 Pac. 272, holding that loss of county moneys by failure of the bank in which they were deposited did not constitute a defense to an action of county treasurer's bond; Clay Co. v. Simon-

son, 1 Dak. Ter. 417, 46 N. W. 596, holding that under bond of public officer he is not excused from handing over moneys collected by loss of same by accidental fire not caused by lightning, that not being "an irresistible superhuman cause;" State v. Powell, 67 Mo. 397, 29 Am. Rep. 514, holding that treasurer of school funds is liable for funds lost by insolvency of bank in which he had deposited them to his credit as trustee and treasurer; State v. Moore, 74 Mo. 417, 41 Am. Rep. 324, to same effect as to county funds deposited by treasurer in a bank which failed; Bush v. Johnson Co., 48 Neb. 10, 58 Am. St. Rep. 679, 66 N. W. 1025, 32 L. R. A. 227, to same effect where deposit in bank made by treasurer's predecessor who delivered certificate of deposit which was cancelled and a new certificate issued, the bank subsequently failing; Boggs v. State, 46 Tex. 13, holding sureties on tax collector's bond liable for collections made and stolen from the collector during his life; Wilson v. Wichita Co., 67 Tex. 649, 4 S. W. 68, holding that a county treasurer is not absolved from his duty to pay over all moneys to his successor because his deposits in bank were lost by the failure of the bank; Perley v. Muskegon Co., 32 Mich. 141, 20 Am. Rep. 643, holding county treasurer absolutely bound to account for moneys received, and failure of bank of deposit was no excuse.

Qualified in United States v. Thomas, 15 Wall. 340, 21 L. 93, if performance is rendered impossible by act of God or overruling necessity, or money is taken by public enemy without any fault or neglect of obligora, the obligation fails. Distinguished in United States v. Adams, 11 Sawy. 106, 24 Fed. 350, holding that a collector transporting money to a distant place under direction of the assistant secretary of the treasury was not acting officially and neither he nor his sureties were liable on his bond for the loss of the money in transit, except for want of ordinary care; City of Healdsburg v. Mulligan, 113 Cal. 214, 45 Pac. 339, holding that the obligation of a city treasurer was that which the common law imposes on a bailee for hire, that the statute defining his duties did not enlarge his responsibility, and that if violently robbed of city moneys it was a good defense to an action on his bond; Cumberland Co. v. Pennell, 69 Me. 369, 31 Am. Rep. 290, holding that if, without fault or negligence on his part, a county treasurer is robbed of money in his hands, he and his sureties are not responsible; Fudge v. Durn, 51 Mo. 267, holding an administrator is not a public officer, nor an insurer of deceased's property, nor liable for money lost by robbery.

Miscellaneous.— State v. Chadwick, 10 Or. 468, arguendo.

13 Wall. 25-29, 20 L. 530, UNITED STATES v. WORMER.

War.— Contractor having engaged to supply government with cavalry horses, instructions were afterwards issued by govern-

ment, providing regulations and inspection to prevent fraud, whereupon contractor threw up his contract and claimed damages; held, regulations reasonable and damages refused, pp. 28, 29.

Not cited.

13 Wall. 29-35, 20 L. 517, LOW v. AUSTIN.

Commerce.— When importer has so acted on thing imported that it is incorporated with mass of property in the country, it is subject to State's taxing power; but while remaining the property of importer in his warehouse, in original package, it cannot be taxed by State, p. 33.

Cited and followed in In re McAllister, 51 Fed. 283, holding that taking the lid from a tub of oleomargarine for purpose of showing to a customer, who purchased the whole package, did not destroy its character so as to subject it to State law prohibiting sales of that article; Blount v. Munroe, 60 Ga. 65, holding that logs in a port being shipped and awaiting shipment, belonging to a foreign subject, were exempt from State taxation. See notes to 27 Am. St. Rep. 553, and note to 62 Am. St. Rep. 473.

Commerce.— Right to import carries right of sale in bale or package imported, and States cannot license or tax goods so sold, p. 33.

Affirmed in Smith v. State, 54 Ark. 250, 15 S. W. 883, holding that an importer of whisky may sell it in the form and shape imported, without impediment from State license law.

Commerce.— While goods retain their character as imports, tax upon them in any shape is unconstitutional; question is not as to extent of tax or its equality, but of power of State to levy any tax, p. 34.

Approved in Blount v. Munroe, 60 Ga. 64, holding that whether the tax is specific or general, on imports or exports alone, or on all property, whether ad valorem or differentially, the tax is obnoxious to the prohibition.

Commerce.— Goods imported while they remain in importer's hands, in the form and shape in which they were brought into the country, can in no just sense be regarded as part of that mass of property in the State usually taxed for support of State government, p. 34.

Cited and applied in Clarke v. Clarke, 3 Woods, 411, F. C. 2,846, holding that logs in a port of Georgia, awaiting shipment to a foreign country, were "exports" and protected from State taxation, except for purposes of inspection; State v. Board of Assessors, 46 La. Ann. 146, 49 Am. St. Rep. 319, 15 So. 11, holding that at all times between the arrival of the goods and sale by the importer in unbroken packages they are not subject to State tax-

ation; May v. New Orleans, 51 La. Ann. 1067, 25 So. 960, upholding tax on imports taken from original boxes; People v. Barker, 155 N. Y. 332, 49 N. E. 941, holding that part of property of a firm assessed for personal property tax, consisting of tobacco kept for sale in original packages, was exempt, having paid duty under United States revenue laws; People v. Roberts, 158 N. Y. 166, 52 N. E. 1103, holding that imported goods, when the original packages were broken and placed on sale, were liable to State taxes; dissenting opinion in Leisy v. Hardin, 135 U. S. 151, 34 L. 147, 10 S. Ct. 699, majority holding Illinois law, prohibiting sale of intoxicating liquors, void as to sales in original packages.

Taxation.— Whenever taxation by a State is forbidden or would interfere with full exercise of a power vested in Federal government over same subject, it cannot be imposed, p. 35.

13 Wall. 35–38, 20 L. 479, UNITED STATES v. CLYDE.

Accord and satisfaction.— Acceptance of payment from the government on one basis of hiring of a vessel, and giving of a receipt in full, is clear evidence of agreement to take the payment in satisfaction of the claim and bars further demand, p. 37.

Followed in Sweeny v. United States, 17 Wall. 75, 21 L. 575, similar case.

13 Wall. 38–39, 20 L. 479, CLYDE v. UNITED STATES.

Court of Claims.— It is not competent for Court of Claims to impose a rule requiring that claim should first be presented to an executive department for allowance, p. 39.

Citing cases which affirm the ruling are: United States v. Kaufman, 96 U. S. 571, 24 L. 793, holding the Court of Claims had jurisdiction of a claim by a brewer for return of excess license properly allowed by the commissioner of internal revenue; United States v. Knox, 128 U. S. 234, 235, 32 L. 467, 468, 9 S. Ct. 64, 65, holding that the Court of Claims had jurisdiction of a claim by a commissioner of the Circuit Court of the United States for keeping and making entries in a docket, and that such claim did not need the approval or disapproval of the Circuit or District Court; United States v. Fitch, 70 Fed. 579, 580, 37 U. S. App. 103, to same effect as to claim by clerk of United States court to recover fees, such claim did not require a prior audit at the treasury department; United States v. Utz, 80 Fed. 851, 39 U. S. App. 630, as to a claim by contractors for cartage of imports while in charge of customs officers, brought in Circuit Court, holding presentation to executive department not necessary.

Qualified in United States v. Fletcher, 147 U. S. 667, 37 L. 323, 13 S. Ct. 435, holding that if claim were presented to the depart-

ment for allowance, and action on it was suspended for vouchers or other reasonable cause, courts should not assume jurisdiction till final action was taken.

13 Wall. 40–51, 20 L. 481, TOOF v. MARTIN.

Bankruptcy.— To prove fraudulent transfer assignee must show insolvency of transferrer at time of transfer; preferential object of the transfer; that transferee creditor had reasonable cause to believe transferrer insolvent at the time; that transfers were made in fraud of the act, pp. 46–47.

Cited and ruling applied in Catlin v. Hoffman, 2 Sawy. 488, F. C. 2,521, holding that a conveyance by an insolvent debtor to a creditor of property on which the creditor already had a lien to a greater amount than the value of the property would not be void because lacking both the intent to prefer and fraud; Harmanson v. Bain, 1 Hughes, 203, F. C. 6,072, defining the essentials for holding that notes should be void under section 35 of the act; In re Clemens, 8 N. B. R. 284, 5 Fed. Cas. 1015, holding that when a trader is in a condition of insolvency, creditors are not bound to wait until the ultimate winding up of his affairs determines whether he can pay in full or not; Merrill v. McLaughlin, 75 Me. 67, applying same requirements to State laws of 1878–1879; Rice v. Grafton Mills, 117 Mass. 232, holding the intent to prefer is essential and must be found by the jury.

Bankruptcy.— Insolvency, as applied to traders and merchants, means inability of party to pay his debts in money as they become due in ordinary course of business, p. 47.

Citing cases which affirm and apply the rule are: Dutcher v. Wright, 94 U. S. 557, 24 L. 131, where an assignment of collateral was obtained from a debtor under threat of legal proceedings and to prevent the securities coming to the possession of an assignee for creditors; Sedgwick v. Sheffield, 6 Ben. 29, F. C. 12,624, holding that the insolvents were merchants and traders within the sense of the rule (note the report does not say in what particular trade or business they were engaged); London v. First Nat. Bank, 2 Hughes, 430, F. C. 6,525, where a bank required a trader as a condition for a further loan to make small notes payable immediately; In re Schoenenberger, 15 N. B. R. 305, 21 Fed. Cas. 722, holding that one who was largely in debt and obliged to borrow on all sides to keep up his credit, and was unable to pay his notes as they fell due, was insolvent; In re Schoenberger, 21 Fed. Cas. 1335, holding that one for whose accommodation a note is given, who is unable to take it up at maturity, is insolvent within the legal definition (note this is evidently the same case as In re Schoenenberger, supra); Anchutz v. Hoerr, 1 Fed. 593, holding that a trader unable to pay his debts as they matured in money was insolvent; State v. Cadwell, 79 Iowa,

449, 44 N. W. 705, holding that same construction applied to the State law making it a crime for a banker to receive deposits, knowing himself to be insolvent; Clay v. Towle, 78 Me. 89, 2 Atl. 853, holding that a corporation unable to meet its maturing demands in the ordinary course of business at the time when it mortgaged its real estate was insolvent; Morey v. Milliken, 86 Me. 474, 30 Atl. 105, accepting the definition as the commercial use of the term, and that it applied to a commercial corporation, and meant inability to pay his debts in the ordinary course of business, as men in trade usually do, even though the inability was not so great as to compel him to stop business; Castleberg v. Wheeler, 68 Md. 277, 12 Atl. 6, holding that any transfer of a debtor then insolvent or contemplating insolvency, with a view to secure certain creditors, is in fraud of the insolvent law; Mish v. Main, 81 Md. 43, 31 Atl. 800, holding that the fact of insolvency could not be better established than by one who had direct information as to the prospect for non-payment of the company's negotiable paper, and this could be given by the notary; Daniels v. Palmer, 35 Minn. 349, 350, 29 N. W. 163, 164, holding that even as applied to traders, the definition must be construed more or less with reference to the habits and usages of the place where debtor resides, and of the particular branch of business in which he is engaged; Leedom v. The Ward, etc., Co., 38 Mo. App. 430, holding that inability of the company to meet its payments on its regular pay-day came within the legal definition of insolvency; Ring v. Vogel Paint, etc., Co., 44 Mo. App. 115, holding that when a merchant represented himself as solvent it meant present ability to meet current engagements; Dewey v. Trust Co., 56 Vt. 480, 48 Am. Rep. 806, holding that in a petition to appoint a receiver of a company alleged to be insolvent, where the record did not show that it was insolvent in fact, but only in the sense of being unable to meet its obligations in due course of business, there was no dissolution of the corporation; Martin v. South Salem Land Co., 94 Va. 52, 26 S. E. 598, holding that a corporation was insolvent, under both general and restricted definitions, against which executions had been issued and returned nulla bona, and a creditors' bill filed in which insolvency was alleged; Stadler v. First Nat. Bank, 22 Mont. 217, 56 Pac. 119, definition is also applicable to banks.

Distinguished in Sacry v. Lobree, 84 Cal. 46, 23 Pac. 1089, holding that under the State bankruptcy law a trader cannot be said to be insolvent because not possessed of money in hand to pay his debts as they become due, if he has other means from which they can be paid; Sabin v. Columbia Fuel Co., 25 Or. 28, 42 Am. St. Rep. 764, 34 Pac. 696, holding that so long as a corporation was a "going concern," it was not in state of insolvency, so as to prevent execution in good faith of mortgage to secure a debt.

Bankruptcy,— Bankruptcy act of 1867 does not define what shall constitute insolvency or evidence of insolvency in every case. The

general and popular meaning of the term is insufficiency of the entire property and assets of an individual to pay his debts; as to traders, the term is more restricted, p. 47.

Cited and ruling applied in Ecfort v. Greely, 6 N. B. R. 438, 8 Fed. Cas. 281, holding that a trader must be held insolvent when, owing large amounts, he was unable to meet two small demands and was disposing of his property in such manner as to defeat his creditors generally; In re Hauck, 17 N. B. R. 158, 11 Fed. Cas. 832, holding that insufficiency of assets when ultimately converted into money to pay all debts is not essential to constitute a state of insolvency, inability to convert assets into money to meet business engagements as they mature may be insolvency; Cohen v. Parish, 100 Ga. 338, 28 S. E. 123, holding if the property of a person whether real or personal, tangible or intangible, leviable or non-leviable, be in value more than sufficient to discharge all of his debts, such person can in no sense be termed an insolvent; Akers v. Rowan, 33 S. C. 470, 12 S. E. 171, 10 L. R. A. 715, and n., holding that the general and popular definition of insolvency was that properly applicable to the State "assignment" law, Gen Stat., 1882, chap. 72; Mitchell v. Mitchell, 42 S. C. 483, 20 S. E. 409, to same effect; Leon v. Welborne, 58 Tex. 161, holding that an answer was insufficient which failed to show that the debtor, a trader, was not in contemplation of insolvency in a suit attacking an assignment for benefit of creditors; Wolf v. McGugin, 37 W. Va. 557, 16 S. E. 798, holding that to render a person insolvent under statute of West Virginia he must be one whose whole property will not pay all his debts even though a trader.

Bankruptcy.— Transfer by debtor, while insolvent, of a large portion of his property to one creditor, without making provision for equal distribution among all, is a preference, and is conclusive evidence that a preference was intended, unless debtor can show that he was at the time ignorant of his insolvency, and had a reasonable expectation of his ability to pay. Burden of proof is on debtor, p. 48.

Reaffirmed, in In re Rome Planing Mill, 96 Fed. 814. Cited and principle applied in Wager v. Hall, 16 Wall. 602, 21 L. 506, holding that where a creditor, whose claim was overdue two years and who had pressed for payment without effect and who obtained a mortgage on nearly all of the debtor's real estate a few days before insolvency petition presented, the deed was prima facie evidence that a preference was intended; Catlin v. Hoffman, 2 Sawy. 492, F. C. 2,521, holding that a lien of a judgment acquired in contravention of the act was void though the judgment itself might be valid, and a deed made in consideration of the judgment would be void; Corbett v. Woodward, 5 Sawy. 413, F. C. 3,223, holding that where there was no doubt about the insolvency of a corpora-

tion executing a note and mortgage to a creditor and the money was applied on the creditor's claim, the reasonable inference was that it was made with a view to prefer the creditor and it would be void; In re Hapgood, 2 Low. 202, F. C. 6,044, holding that if the presumption of preference arising from payment by an insolvent to a creditor with knowledge was to be held conclusive, it must be a payment in full or of a larger proportion than other creditors would have, but a payment of a percentage not in excess of what other creditors would get is not a preference; Alderdice v. State Bank, 1 Hughes 56, 59, F. C. 154, holding a deed given to a creditor bank by a debtor to secure a large overdraft, obtained by collusion with the bank teller, was an undue preference; In re Forsyth, 7 N. B. R. 176, 9 Fed. Cas. 466, holding that where the evidence showed a debtor to have been insolvent at and after a certain date, payments made thereafter to a creditor constituted an undue preference and must be accounted for to the assignee in insolvency; In re Seeley, 19 N. B. R. 1, 21 Fed. Cas. 1010, arguendo, that a voluntary assignment to a trustee with a view to a voluntary petition in insolvency and intent to secure the property from attachment meanwhile, might be held fraudulent; Stobaugh v. Mills, 8 N. B. R. 364, 23 Fed. Cas. 111, holding that where no proof was offered by the debtor to show his solvency and it was evident that an assignment was made out of the ordinary course of the bankrupt's business it was a prima facie case of fraud under the act; Warren v. Delaware, etc., R. Co., 7 N. B. R. 455, 29 Fed. Cas. 272, holding that the suffering of judgments, executions and levies by the chief officers of a corporation, with knowledge that the corporation was insolvent, must be held to constitute undue preference; In re Nathan, 92 Fed. 598, holding that under the act of 1898, as well as under former acts, a sale or other disposition out of the usual course of business of all of a debtor's stock in trade to a person who knows the seller's insolvency is prima facie evidence that the sale was fraudulent; Riley v. Carter, 76 Md. 607, 35 Am. St. Rep. 456, 25 Atl. 672, 19 L. R. A. 498, and n., holding that creditors of an insolvent should be allowed to select the permanent trustee; Parsons v. Topliff, 119 Mass. 249, holding that if the plaintiff proved the transfer to defendant was not made in the usual and ordinary course of business, it would be prima facie evidence of fraud, but the burden of proof would not be changed; In re Howes, 38 Minn. 404, 38 N. W. 105, holding that a transfer by an insolvent of a large amount of property to pay one creditor in full could not well be otherwise than preferential in its nature.

Bankruptcy.—A preferred creditor will be charged with reasonable cause to believe his debtor insolvent, when such a state of facts is brought to creditor's notice in respect to affairs and pecuniary condition of bankrupt as would lead prudent business men to conclusion that debtor could not meet his obligations as they matured in ordinary course of business, p. 50.

Citing cases which apply the rule are: Buchanan v. Smith, 16 Wall. 308, 21 L. 287, holding that judgment creditors issuing executions on judgments obtained on long overdue demands against a debtor who had been repeatedly pressed and failed to pay must be held to have had reasonable cause of belief that debtor was insolvent; Wager v. Hall, 16 Wall. 601, 21 L. 506, holding that in the case at bar the preferred creditor had actual knowledge that the insolvent was unable to meet his obligations, but that actual knowledge was not necessary; Merchants' Nat. Bank v. Cook, 95 U. S. 346, 24 L. 414, holding that when a bank, immediately on receipt from a debtor of a clearing-house check, deposited as collateral, presented it for payment contrary to custom, they must be held to have had reasonable cause to believe the creditor insolvent; Burpee v. First Nat. Bank, 5 Biss. 409, F. C. 2,185, holding a mortgage void when the acts known to the mortgagee were sufficient to put them on inquiry and they were then chargeable with the knowledge which an investigation would have disclosed; Alderdice v. State Bank, 1 Hughes, 57, F. C. 154, saying the law does not require that the reasonable cause shall be perceived by the beneficiary of a deed of preference, but only that it shall exist; Singer v. Sloan, 11 Nat. Bank. Reg. 434, 22 Fed. Cas. 203, holding in a suit to set aside an assignment made shortly before bankruptcy, on the ground that the assignee had reasonable cause to believe the assignor was insolvent, that the amendment in the act of 1874 required actual knowledge to render the deed a fraud on creditors; Brooke v. Scoggins, 11 Nat. Bank. Reg. 264, 4 Fed. Cas. 234, in charging the jury, as the correct rule, but where jury found that a receipt of wheat by a creditor shortly before insolvency was without reasonable belief of his condition; Swan v. Robinson, 5 Fed. 293, holding that in considering the alleged invalidity of a transfer of stock the inquiry would be as to reasonable cause of belief and not actual knowledge that a fraud was intended under the bankruptcy act; Stanley v. Sutherland, 54 Ind. 350, holding that creditors could not, by proceedings in a State court, attach property alleged to have been fraudulently transferred by their debtor; Abbott v. Shepard, 142 Mass. 20, 21, 6 N. E. 829, holding that if certain propositions stated to a jury were properly established, an inference would of necessity arise that the defendants had reasonable cause to believe that the insolvent intended certain transfers of notes as undue preference; Bicknell v. Mellett, 160 Mass. 330, 35 N. E. 1130, holding that actual belief of the party was immaterial, the only matter for evidence was what facts were known; Goldsworthy v. Roger Williams Bank, 15 R. I. 589, 10 Atl. 633, holding it is not enough that a creditor has some cause to suspect insolvency, he must have a knowledge of such facts as to induce a reasonable belief that such is the debtor's condition; Wolf v. McGugin, 37

W. Va. 561, 16 S. E. 799, holding that if a party be insolvent and means of knowledge are at hand, ordinary prudence is required of a creditor taking security, and if he fail to investigate, he is chargeable with knowledge he might have acquired.

Bankruptcy.— Any transfer of an insolvent debtor's property, made with a view to secure the property or any part of it to one creditor, and thus prevent an equal distribution of it among all, is a transfer in fraud of bankruptcy act of 1867, p. 51.

Cited and ruling applied in In re Jacobs, 18 Nat. Bank. Reg. 48, 13 Fed. Cas. 273, holding large payments to relatives within sixty days of protest of debtor's commercial paper, fraudulent; Mundo v. Shepard, 166 Mass. 330, 44 N. E. 246, holding that where knowledge of a condition of insolvency and an expectation or fear of stopping payment existed, the fraudulent intent of an assignment to a creditor must be inferred.

Miscellaneous.— Harmanson v. Bain, 1 Hughes, 201, F. C. 6,072, incidentally.

13 Wall. 51–56, 20 L. 531, WHEELER v. HARRIS.

Appeal and error.— Decree of affirmance without taxation of costs, and without specifying sum for which it is rendered, is not a final decree, p. 53.

Approved in Norton v. Hood, 12 Fed. 766, holding that an appeal of the whole case will not be entertained when the decree is only final between some of the parties and leaves the rights of others undetermined.

13 Wall. 56–63, 20 L. 531, BEVANS v. UNITED STATES.

United States.— When a receiver of public moneys fails to deposit his collections as prescribed by treasury rules, he is in default on his bond, and if such moneys are subsequently seized by public enemy, he and his sureties are liable on their bond, p. 61.

Cited and principle applied in Halliburton v. United States, 13 Wall. 65, 20 L. 534, where payment was alleged to have been prevented by public enemies, holding that it was an unavailing defense, the receiver being at the time in default; State v. Houston, 78 Ala. 585, 56 Am. Rep. 64, holding that if a tax collector neglected to pay his collections into the treasury, as by law required, loss by robbery would be no defense; Chowning v. Stanfield, 49 Ark. 93, 4 S. W. 278, holding that an entryman of public lands could not be prejudiced by failure of the receiver to pay over the money received and for which under his bond he was liable; Gartley v. People, 24 Colo. 157, 49 Pac. 272, holding county treasurer and sureties on his official bond liable for money lost by failure of the bank of deposit, collecting and reviewing authorities; State v. Powell, 67 Mo. 398, 29 Am. Rep. 514, holding treasurer of school

funds liable for loss of money by failure of bank of deposit, the money not having been placed on special deposit. See note to 67 Am. Dec. 369.

United States.— Query, whether forcible taking of public money from possession of government officer by public enemy would work a discharge of the officer if he were entirely free from fault, although under bond to pay the money to the government, p. 61.

Cited in United States v. Thomas, 15 Wall. 350, 21 L. 93, holding that if the receiver is not a debtor or defaulter to the government and is prevented paying by overruling necessity, neither the obligor nor sureties are liable — as custodian of the money he is a bailee not a debtor; United States v. Bryan, 82 Fed. 293, with other authorities collected as holding that the felonious stealing of public moneys from a receiver without any fault or negligence on his part discharged him and his sureties and was a good defense in an action on his official bond (this is apparently a miscitation, as the principal case left the question undecided); Livingston v. Woods, 20 Mont. 98, 49 Pac. 440, holding that a city treasurer obliged by State law and city ordinance to keep the city funds on deposit is not liable for their loss by bank failure, if he used reasonable care in selecting bank; in general discussion in Perley v. Muskegon County, 32 Mich. 141, 20 Am. Rep. 643.

United States.— Receiver of public moneys under bond for faithful performance of duties is not an ordinary bailee of the money he receives; he is not only bound to highest degree of vigilance but to keep safely moneys which come to his hands, and pay it over promptly as required by law, p. 62.

Citing cases which apply the principle are: District v. Morton, 37 Iowa, 553, holding treasurer of school board and sureties liable on his official bond for loss by burglary of treasurer's house, and a receipt given by his successor in office by direction of the school directors was no discharge of the liability; Cumberland v. Pennell, 69 Me. 369, 31 Am. Rep. 289, holding that a bond for faithful discharge of official duties involved a reference to the common and statute law for a specification of the duties; United States v. Watts, 1 N. Mex. 562, holding that robbery does not constitute a defense to an action on bond of a receiver of public moneys; People v. Faulkner, 107 N. Y. 483, 14 N. E. 417, holding that the loss of a deposit of moneys arising from sales received by a surrogate by failure of bank did not render him or his sureties liable on the bond, the receipt of such moneys not being part of his official duty and no negligence being imputed; Tillinghast v. Merrill, 151 N. Y. 143, 56 Am. St. Rep. 616, 45 N. E. 377, 34 L. R. A. 682, holding that a supervisor of a town was liable to make good school moneys received by him but lost by insolvency of bank of deposit, collecting authorities; State v. Gramm, — Wyo. —, 52 Pac.

540, 552, 40 L. R. A. 698, 708, holding that an officer is a bailee under special obligations, but a State treasurer who, following an established custom, deposits the funds in a solvent bank on a separate account, is not liable for loss from insolvency of the bank. See note to 67 Am. Dec. 367.

Distinguished in York County v. Watson, 15 S. C. 9, 40 Am. Rep. 678, holding that in the absence of any State law imposing a higher obligation on receivers of public money than that of the common law, a county treasurer was not liable for county funds lost by failure of the bank of deposit; State v. Copeland, 96 Tenn. 303, 54 Am. St. Rep. 843, 34 S. W. 428, 31 L. R. A. 845, holding, after a careful review of authorities, that a public officer should not be held liable for public funds as an insurer, but responsible only for the exercise only of good faith, diligence, prudence, caution and disinterested effort to keep the fund.

Trial.— When there are no facts in dispute, it is not error to instruct jury to render a verdict in accordance with legal effect of evidence, p. 63.

Cited and followed in Walburn v. Babbitt, 16 Wall. 581, 21 L. 490, refusing to set aside a verdict when there were no disputed facts and no other result could be obtained on a new trial, holding the court could properly have instructed the jury to find as they did; Hendrick v. Lindsay, 93 U. S. 147, 23 L. 856, holding it correct practice in such case to instruct the jury in an absolute form what to find, the only question to be reviewed in such case was whether or not the court mistook the legal effect of the evidence; Phœnix Ins. Co. v. Doster, 106 U. S. 32, 27 L. 66, 1 S. Ct. 20, holding the evidence should never be withdrawn from the jury unless of such a conclusive character as to compel the court in the exercise of a sound discretion to set aside a verdict returned in opposition to it; Anderson Co. Commrs. v. Beal, 113 U. S. 241, 28 L. 971, 5 S. Ct. 440, holding, where the defendant did not ask to go to the jury on any question of fact, it was no error to instruct a verdict for plaintiff when it would have been the duty of the court to set aside one for the defendant; Robertson v. Edelhoff, 132 U. S. 626, 33 L. 481, 10 S. Ct. 190, approving the practice where there was no question of fact for the jury, and defendant did not ask to go to the jury, collecting authorities; United States v. Babcock, 3 Dill. 580, F. C. 14,486, refusing to take a case from the jury where there were facts not undisputed and the proper inferences to be drawn from the facts were not so clear and certain that the court could decide their effect as a matter of law; United States v. Watts, 1 N. Mex. 561, holding that instructions to jury could not be reviewed on appeal, unless the record contained the evidence — in its absence, the presumption of law is there was no conflicting evidence, and that the positive instructions were in accordance with legal effect of the evidence.

13 Wall. 63–65, 20 L. 533, HALLIBURTON v. UNITED STATES.

United States.— When a receiver of public moneys fails to deposit his collections as prescribed by treasury rules, he is in default on his bond, and if such moneys are subsequently seized by public enemy he and his sureties are liable, p. 65.

Affirmed in State v. Houston, 78 Ala. 585, 56 Am. Rep. 64, holding that if a tax collector failed to pay his collections into the treasury as required by law, loss by robbery would be no defense; Chowning v. Stanfield, 49 Ark. 93, 4 S. W. 278, holding that an entryman of public lands cannot be prejudiced by failure of the receiver to pay over the money received and for which, under his bond, he was liable; Perley v. County of Muskegon, 32 Mich. 141, 20 Am. Rep. 643, holding that the bond should be made the measure of official duty instead of an independent contract; United States v. Watts, 1 N. Mex. 562, holding that robbery does not constitute a defense to an action on the bond of a receiver of public moneys.

United States.— No set-off may be allowed in suit by United States unless it has been presented to accounting officers of treasury and by them disallowed, unless at the trial claimant was in possession of vouchers not before in their power to procure, p. 65.

Cited and followed in Railroad Co. v. United States, 101 U. S. 549, 25 L. 1069, rejecting a claim notwithstanding its apparent equity because not presented to the treasury and disallowed; United States v. Wade, 75 Fed. 267, holding that a claimant of set-off could only be heard in the suit on the ground that he has then vouchers which he could not before produce or procure; Yates v. United States, 90 Fed. 59, 61 U. S. App. 128, and United States v. Patterson, 91 Fed. 856, to same effect; United States v. Howland, 1 N. Mex. 552, disallowing set-off for rent, claimed by defaulting postmaster.

13 Wall. 66–68, 20 L. 484, RICE v. HOUSTON.

Courts.— Executors or administrators may sue in Circuit Court if they are citizens of a different State from party sued, on the ground that they are real parties in interest; it makes no difference that decedent was citizen of same State with defendant, p. 67.

Cited and principle applied in New Orleans v. Gaines, 138 U. S. 607, 34 L. 1106, 11 S. Ct. 431, holding that representatives may stand on their own citizenship in the Federal courts, but when a State or its governor is mere nominal party in a suit on a sheriff's or administrator's bond the rule does not apply; Davies v. Lathrop, 20 Blatchf. 404, 12 Fed. 358, holding the Federal court had jurisdiction of a suit by citizens of New York against receiver of railroad property appointed by same State, the receiver being a citizen of New Jersey; Goodnow v. Grayson, 5 McCrary, 20, 15 Fed. 4, Federal jurisdiction over administrators and executors depends on their citizenship, not on that of decedent, creditors, legatees or other

beneficiaries; Harper v. Norfolk, etc., R. Co., 36 Fed. 104, and Popp v. Cincinnati, etc., Ry., 96 Fed. 467, holding suit by administrator for damages for causing death of an intestate might be brought in Federal court where administrator and defendant were citizens of different States; Farlow v. Lea, 8 Fed. Cas. 1018, holding that a receiver having stated his non-citizenship can sue in the Federal court a defendant who is a citizen of same State as that of the company of which plaintiff is receiver; Goff v. Norfolk, etc., R. Co., 36 Fed. 301, to same effect, holding also that an administrator, appointed in place of one who, by reason of citizenship, could not have sued in Federal courts, was not thereby deprived of his right to sue there; Semmes v. Whitney, 50 Fed. 666, affirming jurisdiction of suit by an attorney against a non-resident administrator to recover fee for services performed notwithstanding State laws giving sole jurisdiction to the Probate Court; Wade v. Sewell, 56 Fed. 131, holding that in a suit to free real estate from the lien of a judgment, the title to which was in an administrator, jurisdiction was determined by his citizenship, not by that of the beneficiaries; Augusta v. Kimball, 91 Me. 608, 40 Atl. 668, 41 L. R. A. 477, holding that where property of a decedent was vested in non-resident trustees and removed from the State, it could not be directly taxed in State from which it was removed, although the trustees had qualified in last-mentioned State; Miller v. Sunde, 1 N. Dak. 4, 44 N. W. 302, holding that it is the personal citizenship of an administrator which determines the question of diverse citizenship on which the Federal jurisdiction depends.

Courts.— Administrator need not be citizen of same State as decedent, and one duly appointed may become citizen of another State and thereafter sue in Federal courts, p. 68.

Followed in Shirk v. La Fayette, 52 Fed. 858, holding that a trustee appointed by court of another State may maintain action in the Federal courts for damages to property in State of which he is trustee.

13 Wall. 68–72. 20 L. 513, CURTIS v. WHITNEY.

Constitutional law.— Statute is not void merely because it is retrospective, p. 70.

Affirmed in New Orleans v. New Orleans, etc., R. Co., 35 La. Ann. 682, holding that those laws only can be considered as retroactive and therefore unconstitutional which impair the obligations of contracts, or affect vested rights, or are in the nature of ex post facto laws, collecting numerous authorities; McLure v. Melton, 24 S. C. 570, 58 Am. Rep. 278, holding that a statute prescribing the order in which the debts of a decedent are to be paid does not affect rights under contracts of which the right of priority forms no part; dissenting opinion in Fitzpatrick v. Boylan, 57 N. Y. 443, 444, majority holding mechanic's lien law prospective only.

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Constitutional law.— Statute which affects value of a contract does not necessarily impair its obligation. So long as obligation of performance remains in force, legislation which may retroact on previous contracts and enhance cost and difficulty of performance or diminish value of such performance to other party, is constitutional, p. 71.

Cited and principle followed in Hamilton Gas Light Co. v. Hamilton City, 146 U. S. 268, 36 L. 968, 13 S. Ct. 93, holding that section 2486, revised statutes of Ohio, empowering municipalities to erect or purchase gas works, did not impair the obligation of the contract between the city and the company supplying gas; Griswold v. Bragg, 18 Blatchf. 208, 48 Fed. 522, 48 Conn. 582, holding statute of Connecticut forbidding entry of final judgment in ejectment before value of improvements made in good faith is ascertained and paid for, valid as merely abridging the right of immediate possession and enjoyment of the property recovered; Westerly Water-Works Co. v. Town of Westerly, 80 Fed. 623, holding that the laws of Rhode Island do not authorize a municipality to grant exclusive rights of laying water-pipes in a town so as to bar the right of the municipality to erect its own water-works; Price v. St. Louis, etc., Ins. Co., 3 Mo. App. 267, sustaining validity of section 41 of act of 1861, for the regulation of life insurance companies as applied to then existing companies; State v. Bank of Tennessee, 3 Baxt. 405, holding that act of 1865 repealing section 2807 of the code, giving a right of action against the State, affected only the remedy of creditors of the State and was constitutional; dissenting opinion in Bettman v. Cowley, 19 Wash. 223, 53 Pac. 59, 40 L. R. A. 822, majority holding act forbidding extension of judgments beyond six years from entry, void as to existing judgments; North Springs Water Co. v. Tacoma, — Wash. —, 58 Pac. 778, city is not estopped by its franchise to one water company to franchise another. See note to 10 Am. Dec. 135, on vested rights, and note to 12 Am. St. Rep. 174, on retrospective statutes.

Distinguished in Watkins v. Glenn, 55 Kan. 431, 40 Pac. 319, holding that an act extending the time for redeeming mortgages and imposing conditions on the appointment of a receiver and directing the application of the income, if intended to apply to prior mortgages, would be void as depriving the mortgagee of his rights. Note, this case was reversed on rehearing of Beverly v. Barnitz, 55 Kan. 491, 42 Pac. 728, 31 L. R. A. 82.

Constitutional law.— Statute which requires notice to be given to party in possession of property sold at a tax sale before deed is applied for, though retroactive, is not unconstitutional; right of legislature to frame rules by which right of redemption may be rendered effectual, cannot be questioned, p. 71.

Cited in the following, in which constitutionality of statutes is affirmed: Barrett v. Holmes, 102 U. S. 657, 26 L. 293, as to Iowa

statute of limitations as applied to bar of claims under tax deeds when possession is not sued for or taken within five years from deed; Vance v. Vance, 108 U. S. 518, 520, 27 L. 810, 811, 2 S. Ct. 857, 859, as to provision in Constitution of Louisiana requiring record of tacit mortgages; Fourth Nat. Bank v. Francklyn, 120 U. S. 755, 30 L. 828, 7 S. Ct. 761, as to statute of Rhode Island modifying the remedy and rules of evidence for enforcing the liability of stockholders for the debts of the corporation; Coulter v. Stafford. 56 Fed. 566, 15 U. S. App. 118, as to a statute of Washington of 1886 to same purport as that in principal case; Oullahan v. Sweeney, 79 Cal. 539, 12 Am. St. Rep. 173, 21 Pac. 961, to same effect similar statute; Beverly v. Barnitz, 55 Kan. 472, 474, 49 Am. St. Rep. 262, 264, 42 Pac. 727, 728, 3 L. R. A. 76, 77, holding that the mortgage redemption law of 1893 affected only the remedy in extending the period of redemption and was, therefore, not unconstitutional; State v. Gilliam, 18 Mont. 99, 44 Pac. 396, 31 L. R. A. 723, and n., holding section 1235 of the code of civil procedure, extending the time for redeeming mortgages, does not impair the obligation of the contract between prior mortgagor and mortgagee; Miles v. King, 5 S. C. 152, holding statute requiring recording of all mortgages, the records of which had been destroyed, or else to be null and void, was a constitutional and valid law; Herrick v. Niesz. 16 Wash. 78, 47 Pac. 415, as to statute requiring holders of tax certificates to give notice of application for deed. In the following cases statutes have been held unconstitutional as applied to prior contracts; Marx v. Harthorn, 12 Sawy. 377, 30 Fed. 587, as to statute of California of February 21, 1887, making a tax deed prima facie evidence of title instead of conclusive, because it opened a purchaser's title to proof of defects in the prior proceedings when he purchased on the faith of a statute which declared his deed conclusive evidence; State v. McPeak, 31 Neb. 143, 47 N. W. 692, as to statute of 1883 applicable to existing leases of school lands granted under law of 1879 and attempting to deprive the lessee of his right to select an appraiser by whom the rent was to be fixed periodically as provided by former statute.

Doubted in Miles v. King, 5 S. C. 155, separate opinion.

13 Wall. 72-91, 20 L. 485, JOHNSON v. TOWSLEY.

Courts.— Decision of State court against validity of title founded on patent from United States and on acts of Congress is within section 2 of judiciary act of 1867, and subject to review by Supreme Court, pp. 80-81.

Approved in Baldwin v. Stark, 107 U. S. 464, 27 L. 526, 2 S. Ct. 473, sustaining jurisdiction of an appeal from State court decision refusing to decree a patentee to be a trustee for one claiming a prior entry of pre-emption. See note to 12 Am. Dec. 566.

Public lands.— By act of 1836 the executive duties of survey and sale of public lands and issue of patents were made subject to supervision and control of commissioner of general land office under direction of president, p. 82.

Cited in Vantongeren v. Heffernan, 5 Dak. 199, 38 N. W. 61, arguendo, that the acts of the receiver in issuing a receipt were subject to review in the land office; Caldwell v. Bush, 6 Wyo. 353, 45 Pac. 489, holding that the commissioner of the land office had full power to cancel an entry of desert land after issue of final certificate in the case of fraud.

Public lands.— When law has confided to special tribunal authority to hear and determine certain matters arising in course of its duties, decision of that tribunal within scope of its authority is conclusive upon all others. The action of the land office in issuing a patent for public land is conclusive of the legal title, p. 83.

In the Federal courts the following affirm and rely upon this holding: French v. Fyan, 93 U. S. 171, 23 L. 813, holding that in an action of ejectment the validity of the land patent could not be contested before the jury or court — this could only be done in a proceeding in equity; Smelting Co. v. Kemp, 104 U. S. 645, 26 L. 878, holding that a patent in a court of law is conclusive as to all matters determinable by the land department when it has jurisdiction under the law to convey the land; Steel v. Smelting Co., 106 U. S. 451, 27 L. 228, 1 S. Ct. 392, holding that the judgment of the land department on the qualifications of the applicant, the acts he has performed to secure title, the nature of the land, and whether of the class open to sale, is unassailable except by direct proceedings for its annulment or limitation; Baldwin v. Stark, 107 U. S. 465, 27 L. 527, 2 S. Ct. 474, holding that State court could not re-examine the evidence on which the commissioner of the land office and secretary of the interior decided a claim and reverse the decision, and that jurisdiction could not be given by stipulation of the parties; Iron Silver Mining Co. v. Campbell, 135 U. S. 303, 34 L. 161, 10 S. Ct. 771, holding that questions of fact passed on by the land department are conclusively determined and only questions of law can be brought into court; Heath v. Wallace, 138 U. S. 585, 34 L. 1068, 11 S. Ct. 384, holding that the decision of the land department on the question of the actual physical character of certain lands could not be reviewed by the courts; Noble v. Union River Logging R. R., 147 U. S. 175, 37 L. 127, 13 S. Ct. 274, holding if a patent be issued for lands which the land department had authority to convey, it cannot be collaterally impeached and can only be avoided by proceedings taken for that purpose; United States v. California, etc., Land Co., 148 U. S. 44, 37 L. 360, 13 S. Ct. 463, as illustration of the principle that when jurisdiction is delegated to any officer or tribunal his or its determination is final; Astiazaran v. Santa Rita Min. Co., 148 U. S. 83, 37 L. 377, 13 S.

Ct. 458, holding that a determination by Congress of a claim to land in New Mexico, reported on by the surveyor-general for the territory, could not, while proceedings were pending before that tribunal, be considered by any other; Bishop of Nesqually v. Gibbon, 158 U. S. 166, 39 L. 936, 15 S. Ct. 784, holding that decision of the secretary of the interior on a claim to land occupied as a missionary station was final; Rector v. Gibbon, 2 McCrary, 286, 9 Fed. 18, holding that the language of the act appointing the commissioners for the Hot Springs reservation in Arkansas, providing that they should "finally determine" questions, meant a final determination in the absolute sense and that it could not be set aside for fraud, mistake or misconstruction of law; St. Louis, etc., Co. v. Green, 4 McCrary, 286, 13 Fed. 210, holding that a United States patent could not be collaterally attacked in an action of ejectment; Sharp v. Stephens, 6 Sawy. 51, F. C. 12,710, holding that in an action at law to recover possession of land, facts contradictory of a patent cannot be given in evidence; Bear v. Luse, 6 Sawy. 156, F. C. 1,179, holding no question of fact decided in the land department could be reviewed except for fraud or mistake other than error in judgment in estimating the value or effect of evidence, as on the fact of existence of a town site; United States v. Mullan, 7 Sawy. 475, 10 Fed. 792, holding that a bill will lie on behalf of the United States to vacate a patent on the ground of fraud or mistake or error in law; Pacific Coast M. & M. Co. v. Spargo, 8 Sawy. 647, 16 Fed. 349, holding that the determination of the land officers could not be attacked collaterally in an action against a patentee by one claiming a prior location of mines; Pengra v. Muns, 12 Sawy. 240, 29 Fed. 836, holding that the decision of the secretary of the interior in awarding land to a wagon-road grant included a ruling that it was not swamp which could not be impeached by oral evidence as to the character of the land; Aurora Hill M. Co. v. Eighty-five Min. Co., 12 Sawy. 363, 34 Fed. 520, holding the decision of the land office as to fact of one posting of notice of location of mining claim could not be attacked; United States v. Dalles M. R. Co., 14 Sawy. 394, 41 Fed. 497, holding the authority vested in the governor of Oregon, by act of Congress, to determine whether the Dalles military road was completed ren dered his decision conclusive in the absence of fraud; Glidden v. Union Pac. R. Co., 30 Fed. 661, holding the decision of the land department was conclusive only on questions of fact and did not finally determine the law; Pugsley v. Brown, 35 Fed. 690, holding in a bill to have a patentee declared a trustee, that if the secretary erred only in a matter of fact his decision was final and not subject to review; Sioux City, etc., R. Co. v. United States, 36 Fed. 612, holding that courts cannot control the officers of the department in the exercise of duties which are judicial or discretionary in their nature; United States v. Lee Hoy, 48 Fed. 828, and United States v. Chung See, 76 Fed. 954, 44 U. S. App. 751, both holding

that the decision of the collector of customs as to the right of a Chinese to land could not, in the absence of fraud, be questioned; Northern Pac. R. Co. v. Cannon, 54 Fed. 260, 7 U. S. App. 507, holding that on the question whether certain mineral lands were excluded from the railway grant the action of the land department in issuing a patent was determinative of the legal title and of the character of the lands if the company failed to contest it; Stimson Land Co. v. Rawson, 62 Fed. 430, stating the rule which should govern the secretary of the interior in refusing to issue a patent after entry and payment, that notice and opportunity to rebut new evidence must be given to the party in interest, and findings made of specific facts; The Burlington, 73 Fed. 262, holding that where by a Canadian statute the department of marine and fisheries was made a special tribunal to decide whether a wreck was or not an obstruction to navigation, its determination was conclusive; Garrard v. Silver Peak Mines, 82 Fed. 583, collecting and examining authorities as to the grounds on which courts would entertain an attack on a patent, and in an action at law admitting testimony showing that a patent was issued without authority and prohibited by statute of State; Brown v. Charles, 85 Fed. 174, holding that an order of the County Court in Virginia directing a plat and survey of a location to be recorded under code of Virginia could not be attacked collaterally in an action law; Sang Lung v. Jackson, 85 Fed. 507, holding that the decision of the board of general appraisers on classification of an import was not the subject of review by the courts on any allegation of mistake either of law or fact.

Cases relying upon the syllabus holding in the State courts are as follows: South, etc., R. Co. v. Gilliam, 85 Ala. 175, 4 So. 695, holding that the action of the land office in reopening a claim to a homestead land entry and a decision in favor of the claimant, as coming within 19 Stat. 35, § 3, was conclusive against collateral attack; Smith v. Hollis, 46 Ark. 24, holding the decision of the secretary of the interior rejecting a selection of swamp lands conclusive; Hosmer v. Wallace, 47 Cal. 471, holding that the commissioner of the land office and secretary of the interior had power to control the action of the register and receiver in permitting an entry and authority to set it aside for error; Cruz v. Martinez, 53 Cal. 243, holding that the patent to the city of Los Angeles vested the legal title in the city and it would be presumed the land office determined the due publication of the survey prior to its issue; Montgomery v. Donnelly, 57 Cal. 69, holding that in an action of ejectment by a plaintiff proving title under a United States patent defendant could not be allowed to prove compliance with the provisions of the homestead laws; Wright v. Roseberry, 63 Cal. 254, holding that where, as by section 4 of act of July 23, 1866, it was the duty of the commissioner of general land office to certify swamp lands to the State, ejectment could not be maintained to such lands

without showing such certification; Shanklin v. McNamara, 87 Cal. 378, 26 Pac. 346, holding that the decision in a contest between a claimant and the State that the lands were not swamp lands would bind the State; Wormouth v. Gardner, 112 Cal. 510, 44 Pac. 807, holding that errors of judgment as to the weight of evidence as well as inferences which officers of the land department may draw from the testimony are conclusive on the courts; Saunders v La Purisima Gold M. Co., 125 Cal. 166, 57 Pac. 659, holding that the grant by Congress of agricultural lands for school purposes was determinative of their character; Poire v. Wells, 6 Colo. 410, holding that a patent regular on its face cannot be attacked for fraud in an action of ejectment; Chever v. Horner, 11 Colo. 72, 7 Am. St. Rep. 220, 17 Pac. 497, holding a patent cannot be attacked collaterally for error as to questions of fact or law or fraud, if on any state of facts the patent might lawfully have been issued, resort must be had to a direct proceeding; Lee v. Justice Min. Co., 2 Colo. App. 121, 29 Pac. 1023, holding that the validity of a patentee's title could not be inquired into in an action of ejectment; Vantongeren v. Heffernan, 5 Dak. 224, 38 N. W. 74, holding that prior to the issuance of the patent a pre-emption claimant could not maintain an action to quiet title to the land; Johnson v. Drew, 34 Fla. 138, 43 Am. St. Rep. 177, 15 So. 782, patent purporting to have been issued by land office under authority of law, is prima facie evidence of right of land office to make grant, and conclusive until set aside by regular proceedings; Danforth v. Morrical, 84 Ill. 458, holding the decisions of the land officers as to aptness of time and sufficiency of proofs required to perfect title to a patent under the pre-emption laws conclusive in the absence of fraud, imposition or mistake shown by the party alleging it; Fuller v. Shedd, 161 Ill. 492, 52 Am. St. Rep. 397, 44 N. E. 296, 33 L. R. A. 161, sustaining conclusive of determination of land office of character of lands as swamp lands, unless directly attacked; Kansas Pac. R. Co. v. Dunmeyer, 24 Kan. 731, decision of land office on contested claim of homestead, if based on the construction of a statute or a question of law, might not be conclusive, but so far as it determined a fact it was, except in case of fraud; Tatro v. French, 33 Kan. 53, 5 Pac. 429, findings of facts as made by land officers in contested pre-emption case are considered final when relief is sought in the courts; Ard v. Pratt, 43 Kan. 423, 23 Pac. 648, to same effect as to a determination of non-compliance with the pre-emption law; M'Kinney v. Bode, 33 Minn. 453, 23 N. W. 853, holding a patent conclusive of the legal title; Winona, etc., Land Co. v. Ebilcisor, 52 Minn. 323, 54 N. W. 94, holding that a certification of land to a railroad company by secretary of interior had effect of a patent and was conclusive and only voidable at the suit of one who, having the right to do so, might take proper steps for the purpose; Silver Bow, etc., Co. v. Clark, 5 Mont. 424, 5 Pac. 581, holding that the presumptions as to the conclusiveness of a patent and the title

it conveys are confined to matters over which the land department has jurisdiction, if it exceeds jurisdiction this may be shown in an action at law; Talbott v. King, 6 Mont. 106, 9 Pac. 440, holding that as the only means by which a patent to mineral lands could be obtained were discovery and location, the fact that a patent had issued was conclusive proof of a discovery and location according to law; Colburn v. Northern P. R. Co., 13 Mont. 484, 34 Pac. 1018, holding decision of secretary of interior that certain land was not included in a railroad grant conclusive; Rose v. Richmond M. Co., 17 Nev. 64, 27 Pac. 1115, question whether an adverse claim has been prosecuted with reasonable diligence as required by statute, is for the courts; American Dock, etc., Co. v. Trustees of Public Schools, 39 N. J. Eq. 419, in action to eject a railroad company from riparian land, the deed under the great seal of the State was competent evidence of due performance of preliminary steps; Blakslee Mfg. Co. v. Blakslee Sons' Iron Works, 129 N. Y. 160, 29 N. E. 4, holding where evidence dehors the patent is requisite to establish its invalidity, it can be avoided only in a direct proceeding to review the action of the commissioners or by suit in equity; Parsons v. Venzke, 4 N. Dak. 460, 50 Am. St. Rep. 673, 61 N. W. 1038, holding decision of land commissioner to cancel an entry for fraud must be held final unless taken out of rule by exceptional features; Knapp v. Thomas, 39 Ohio St. 387, 48 Am. Rep. 467, holding patent cannot be impeached for fraud in ejectment or in any other collateral proceeding, but may be in equity in a direct proceeding for the purpose; Bridenbaugh v. King, 42 Ohio St. 412, holding deed from State governor passed legal title and was determinative of facts on which it rested; Woodruff v. Wallace, 3 Okl. 361, 378, 41 Pac. 359, 365, holding where land department has decided that claimant has no rights it is duty of courts to follow such decision unless the law has been misapplied; Sanford v. Sanford, 19 Or. 4, 13 Pac. 603, holding in ejectment, patent is conclusive; Ferry v. Street, 4 Utah, 537, 11 Pac. 576, holding finding of land department as to character of land, whether agricultural, mineral or town site, conclusively given by issue of patent; Keane v. Brygger, 3 Wash. 349, 28 Pac. 657, holding decision of secretary of interior final on question of right and bona fides of sale of lands granted for university purposes; Mendota Club v. Anderson, 101 Wis. 490, 78 N. W. 189, holding patent for swamp, mineral or homestead lands cannot be impeached in an action at law or collaterally. Cited in dissenting opinion in Northern Pac. R. Co. v. Barden, 46 Fed. 618, majority holding that to exclude mineral land from the grant to railroad it must have been "known mineral land;" Koehler v. Hill, 60 Iowa, 675, 15 N. W. 644, arguendo; South End M. Co. v. Tinney, 22 Nev. 43, 35 Pac. 97, majority holding grant of patent to mining ground after claim had been abandoned without notice given of intention, was a positive fraud on those who had

lawfully relocated and worked the mine after abandonment. See note to 20 Am. Dec. 273, on actions of land officers, when conclusive.

Cited in general discussion in Sioux City, etc., R. Co. v. United States, 34 Fed. 837, and Miller v. Tobin, 16 Or. 546, 549, 16 Pac. 164, 166, parol evidence could not be allowed to impeach a patent for swamp land.

Distinguished in M'Evoy v. Hyman, 25 Fed. 540, holding that the conclusive effect of a certificate of entry of a lode mining claim did not extend to a question of title as to which a suit was in progress when the entry was made; United States v. Lau Sun Ho, 85 Fed. 423, holding that the action of a customs collector permitting a Chinese to land was not in any sense judicial, not conclusive of nor even prima facie evidence of his right to remain in the country; Koehler v. Hill, 60 Iowa, 625, 15 N. W. 620, holding that where the Constitution of a State provided a method for its amendment any amendment to be valid must be adopted in strict conformity therewith, and the determination of the general assembly as to the regularity of the proceedings was not conclusive.

Equity courts have always had power, in a certain class of cases, to inquire into and correct mistakes, injustice and wrong in both judicial and executive action when it invades private rights, and to annul or modify final judgments of courts of law, and patents and other instruments issuing from the government, p. 84.

Cited and affirmed in Pelzer Mfg. Co. v. Hamburg-Bremen Fire Ins. Co., 71 Fed. 829, 833, holding the court had jurisdiction to reform a judgment based on a verdict of a jury which, by mistake, found upon one of two policies, intending to find on both; Platt v. Threadgill, 80 Fed. 195, where the court, ipso motu, held it had jurisdiction to grant relief to enjoin the enforcement of a judgment based on a verdict rendered by a jury guilty of misconduct, and defendant had lost all relief at law before the discovery was made of the grounds of relief; Forbes v. Driscoll, 4 Dak. 349, 351, 31 N. W. 640, 641, holding, that in acts strictly executive and partaking of a political character, the executive department is accountable only to the country, but when such acts affect private interests of individuals, they may be examined by a Court of Chancery; Brown v. Parker, 2 Okl. 266, 39 Pac. 569, holding that filing certificates, issued by the probate judge prior to entry of land, are unauthorized by law of Congress or rules of land office, and parties taking them must bear the consequences. See note to 20 Am. Dec. 274.

Public lands.— When register and receiver hear the application to enter land as a pre-emptor or otherwise, decide in favor of right, receive money, and issue certificate, this constitutes a vested right which can only be divested according to law, p. 85.

Cited and applied in Bogan v. Edinburgh, etc., Mortgage Co., 63 Fed. 194, 27 U. S. App. 346, holding the commissioner may re-

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Public lands.— Where, for any
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to issue a patent to a claimant as tr
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Schurz, 102 U. S. 396, 26 L. 172, ho
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decisions, and definite relief is deman
124 U. S. 405, 31 L. 430, 8 S. Ct. 520,
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Becker, 147 U. S. 57, 37 L. 77, 13 S. C
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claims against the holder; Turner v. S
1191, 14 S. Ct. 195, holding that a purch
of an outstanding title or incumbrance
for the benefit of all, and a bill will l
trust; In re Emblen, 161 U. S. 57, 40 L.
mandamus to review acts of secretary o

contest as to pre-emption after issue of patent, holding a bill in equity was the only method to attach the patent; Gildersleeve v. New Mexico M. Co., 161 U. S. 581, 40 L. 815, 16 S. Ct. 666, holding that equity would not interfere with a confirmation by Congress or conclusion of the land department, at the instance of one who had been guilty of great laches in not asserting his claim before the confirmation or grant; Leitensdorfer v. Campbell, 5 Dill. 426, F. C. 8,225, holding court will not restrain the issue of a patent, the complainant must wait for relief until the executive department has exhausted its power and its right to act, then the court will correct the result of such action when it invades private rights; Southern Pac. R. Co. v. Dull, 10 Sawy. 521, 22 Fed. 500, sustaining a bill against a patentee decreeing a trust in favor of plaintiff, the patent having been issued under mistake of law; American Mortgage Co. v. Hopper, 56 Fed. 70, affirmed in 64 Fed. 555, 29 U. S. App. 12, holding that the land office has power to cancel a certificate of payment issued on a fraudulent pre-emption entry; Scott v. Lockey Inv. Co., 60 Fed. 35, holding the decision of the land department that an entryman under additional soldier's homestead scrip bore the necessary character, was conclusive; Bogan v. Edinburgh, etc., Mortgage Co., 63 Fed. 195, 27 U. S. App. 346, holding it was the province and duty of the court to determine the legal question whether an entry of a pre-emption claim and payment made before declaration of intention to become a citizen, was void, and that his rights could not be forfeited by the land office commissioner; United States v. Winona, etc., R. Co., 67 Fed. 959, 32 U. S. App. 272, holding that a court of equity may, in a direct proceeding for that purpose, set aside a patent or certificate or declare the legal title under it to be held in trust for one having a better right where the action of the land department has resulted from fraud or mistake of fact or law; Diller v. Hawley, 81 Fed. 653, 48 U. S. App. 468, 469, holding the land department had jurisdiction to cancel an entry obtained through fraud; Sloan v. United States, 95 Fed. 194, holding courts will not take cognizance of a controversy of title to land so long as the title remains in the United States, but only after title has vested in a private party.

Citing cases in the State courts are: Thompson v. Ferry, — Ariz. —, 56 Pac. 743, holding bill would lie to declare a trust of land held by a patentee for benefit of co-tenants; Coleman v. Hill, 44 Ark. 455, holding that negligence on the part of the land agent in permitting a second entry on swamp land on which a patent issued would defeat the prior right of an entryman to whom a certificate had been issued; Bird v. Wilcox, 45 Cal. 689, holding that a patentee who obtains a patent by fraud over one who has taken the preliminary steps to enter it as a homestead, holds the title in trust for the homestead claimant; Aurrecoechea v. Sinclair, 60 Cal. 545, holding claimant of equitable relief from a patentee must show

not only equitable right, but must offer to do equity; Plummer v. Brown, 70 Cal. 546, 12 Pac. 465, holding that on land contest, if successful claimant acquires legal title affected with any fraud or trust, he will be regarded in equity as trustee of true owner; Buckley v. Howe, 86 Cal. 600, 25 Pac. 133, holding that a bill in equity to have a trust decreed of land by the patentee was a proper mode of attacking a patent; Mayor of Aspen v. Aspen T. & L. Co., 10 Colo. 201, 15 Pac. 799, holding that a patent for a town site must be construed according to the acts of Congress authorizing its issue, and when the trust was vested in the county judge, his successors and assigns, the intent of the grant would be enforced in equity; Bassick Min. Co. v. Davis, 11 Colo. 134, 17 Pac. 296, holding that when, through fraud, mistake or any recognized ground for equitable interference, the legal title of any portion of the public domain has been obtained by one when another was better entitled, equity will treat the holding as a trust and compel conveyance to the equitable owner; Lee v. Justice Min. Co., 2 Colo. App. 124, 29 Pac. 1024, sustaining a bill to declare a patentee a trustee for the equitable owner on proof that the patent had been issued on an invalid location; Forbes v. Driscoll, 4 Dak. 352, 353, 354, 31 N. W. 641, 642, holding, that while a contest is pending in the land office between pre-emptors, the courts cannot interfere to determine priority of rights; Vantongeren v. Heffernan, 5 Dak. 204, 209, 38 N. W. 64, 66, holding that courts have no jurisdiction to pass on conflicting claims prior to the issue of the patent; Bisson v. Curry, 35 Iowa, 78, holding that in an action for possession by a patentee, it was competent to show fraud in obtaining the patent and declaring the rightful title to be in the defendant; Brown v. Johnson, 14 Kan. 379, holding that in an action to establish a trust of land held by a patentee, it was error to withdraw the case from the jury, as the matter of right was open to judicial inquiry; Kansas Pac. R. Co. v. Missouri, K. & T. R. Co., 15 Kan. 25, holding, in a controversy between railway companies each claiming under a grant from Congress, where the facts were undisputed, the courts were free to apply the law to the facts and make a final disposition adjudging title; Janes v. Wilkinson, 2 Kan. App. 368, 42 Pac. 738, affirming rule, but holding that by no proceeding can a mere voidable title be set aside on behalf of one who does not show in himself a superior equitable or legal title; Boyce v. Danz. 29 Mich. 151, affirming rule, and holding right not barred by laches; Winona, etc., R. Co. v. St. Paul, etc., R. Co., 26 Minn. 182, 2 N. W. 491, decreeing transfer of legal title and an account of proceeds of portions sold of lands conveyed to a company by governor of State, which in equity belonged to another company, holding it was immaterial whether the error arose through fraud, ignorance, mistake of fact, or misconstruction of law; Corbett v. Wood, 32 Minn. 510, 21 N. W. 735, holding that after issue of a patent, a hostile claimant may come into

court and show fraud in its procurement, and that in equity he is entitled to the land; Sensenderfer v. Kemp, 83 Mo. 588, holding, that when the legal title has passed out of the United States, it was competent for the courts to compel a conveyance to the party who had the paramount equity; Widdicombe v. Childers, 84 Mo. 396, holding that location, entry and sale by a proper description passed the equitable title, and in an action of ejectment by a subsequent patentee of same land, the latter will be compelled to convey the legal title by deeds of general warranty; Boyd v. Mammoth Spring, etc., Co., 137 Mo. 494, 38 S. W. 967, holding that the beneficial owner who had furnished the purchase money for land patented in the name of the original locator whose entry was cancelled for fraud, was entitled to have the legal title of the patentee's heirs divested and decreed to him; Brundy v. Mayfield, 15 Mont. 211, 38 Pac. 1070, holding mining patent, fraudulently acquired, would be held in trust for the true owners and enforced in equity; South End M. Co. v. Tinney, 22 Nev. 31, 60, 35 Pac. 92, 104, refusing to disturb mining patent for fraud under circumstances; Grandin v. La Bar, 3 N. Dak. 448, 57 N. W. 241, holding that until legal title had passed out of United States, interior department was tribunal authorized by law to hear and determine all questions pertaining to rights of parties; Parsons v. Venzke, 4 N. Dak. 457, 50 Am. St. Rep. 671, 61 N. W. 1037, holding, when power of land commissioner to cancel an entry has been exercised under a mistake as to law, equity will correct the error; Sproat v. Durland, 2 Okl. 52, 35 Pac. 888, holding homestead law did not confer any inherent right of settlement on land already occupied; Miles v. Johnson, 18 Utah, 435, 56 Pac. 300, holding that an agreement by one of several settlers to take a patent for the joint benefit and convey after patent, is valid and enforceable; McCord v. Hill, — Wis. —, 80 N. W. 786, in suit to declare a trust, complaint failing to show United States has conveyed legal title is defective.

Cited also in dissenting opinion in Rector v. Gibbon, 111 U. S. 292, 28 L. 432, 4 S. Ct. 613, majority holding decision of commissioners under act of 1877, respecting Hot Springs reservation, was not that of a special tribunal and could be reviewed in Supreme Court; Rutledge v. Murphy, 51 Cal. 400, majority holding that when land office had correctly applied law to facts found concerning a contest about right of pre-emptioner to purchase land, court would not interfere to declare patentee a trustee for a prior claimant; Chapman v. Quinn, 56 Cal. 282, 284, 285, 287, 295, majority holding that one who had been prevented by register from filing declaratory statement and making proofs, was not in position to contest right of patentee; McHenry v. Nygaard, 72 Minn. 13, 74 N. W. 1109, majority holding that court had jurisdiction of a controversy as to land awarded by secretary of interior to homesteader, though no patent had issued; Meyendorf v. Frohner, 3

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29 Fed. 420, 40 U. S. App. 21
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interfere to prevent injustice or wrong when the land officers have misconstrued the law, or where fraud and misrepresentations have been practiced; Johnson v. Bridal Veil Lumber Co., 24 Or. 186, 33 Pac. 529, holding that when a homestead entryman made his final proof, and the local officers approved it and gave receipt for the purchase money, in the absence of fraud their action was conclusive on such questions and as to the character of the land; Galliher v. Cadwell, 3 Wash. Ter. 514, 18 Pac. 72, holding that if an application to purchase under act of 1880 was improperly rejected by the land department, the applicant would be entitled to relief in equity, unless other facts constituted a bar; Wiseman v. Eastman, — Wash. —, 57 Pac. 400, 401, affirming the right of the courts to review decisions of the land department on the ground of misconstruction of law, but holding the mistake must be clearly manifest and not founded on a possible finding of facts different from that put on them by the land department; Empey v. Plugert, 64 Wis. 612, 25 N. W. 563, courts will not disturb adjudication of land officers on homestead right, except in clear cases of fraud, mistake, perjury, or violation of law. Cited in dissenting opinion in United States v. Schurz, 102 U. S. 407, 26 L. 175, majority holding mandamus will lie to compel delivery of patent after decision in favor of patentee has been made and patent signed and recorded; Rutledge v. Murphy, 51 Cal. 399, majority holding, that if decision of land office correctly applies law to facts, courts will not review their findings; Chapman v. Quinn, 56 Cal. 279, 283, majority holding that the court would not interfere to allow relief to a preemptor who made his entry during a contest, but had paid no purchase money nor made any settlement as against the patentee. Cited in general discussion in Rutledge v. Murphy, 51 Cal. 391, as not in conflict with Warren v. Van Brunt, 19 Wall. 646, 22 L. 222. supra. See notes, 12 Am. Dec. 568, 20 Am. Dec. 275, and 63 Am. Dec. 91.

Distinguished in Rector v. Gibbon, 2 McCrary, 285, 9 Fed. 17. holding that the rule did not apply to the Hot Springs, Arkansas, commissioners, where the act provided that they should "finally determine" questions, and that their decision could not be reviewed; Manning v. San Jacinto Tin Co., 7 Sawy. 427, 9 Fed. 733, holding that a mining locator cannot attack a patent issued on a Mexican grant to a third party for fraud in making the location, the United States not being a party.

Public lands.— After surveys are made in any given locality, so that tracts can be identified by descriptions used in surveys, they are not subject to sale by private entry at land office until there has been public auction at which lands so surveyed are offered to highest bidder, p. 88.

Affirmed in Eldred v. Sexton, 19 Wall. 196, 22 L. 147, as the established practice of the land office and a leading feature in

the system of land sales; Norther — Pac
S. 629, 19 S. Ct. 794, holding that — nder
of public lands, unoffered land co — ld n
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Public lands.— Act of 1843, pro — ding
to pre-empt one tract of land sho — d no
tion on another, is limited to lan — sub

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L. 527, 2 S. Ct. 475, holding, — und
vised statutes, that when p — rty
of intention to claim benefit — of
one tract of land, he shall not — t a
declaration for another; Whitney — v. T
15 S. Ct. 800, arguendo, that neit — er b
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mens v. Cyphers, 56 Cal. 387, ho — ing
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Public lands.— Declaration of — e m
act of 1843 to be made within th — rty
may be made at any time while p — men
no other party has made a settl
meanwhile, p. 90. — erton

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733, arguendo, that there might b — here
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589, sustaining the right to a pat — e pr
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v. Taylor, 158 U. S. 96, 39 L. — idity
in filing had no effect on the — ary,
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of improving the land, cut d — Union
files his entry; United States v —

holding that no man could get a perfect title under the pre-emption laws without a settlement. After settlement the declaration may be filed even later than three months if no other rights have intervened; Hartman v. Warren, 76 Fed. 163, 40 U. S. App. 245, holding that in order to charge the owner of land with a trust, the claimant must have an equitable title which must have been initiated by settlement upon or improvement of the land before the foundation of the claim on which patent was issued; Pueblo v. Budd, 19 Colo. 590, 36 Pac. 602, holding the provision of the town site act, section 4, that a failure to file the required statement should bar the remedy only, does not work a forfeiture of a vested right so long as the occupant remains in possession; Nickals v. Winn, 17 Nev. 193, 30 Pac. 486, holding that a pre-emption right could not be acquired by an intrusion on land bona fide occupied and improved by another who had allowed the statutory time to pass for filing his declaration, pre-emption must be by settlement on unoccupied land; Jamestown, etc., R. Co. v. Jones, 7 N. Dak. 628, 76 N. W. 229, holding that a railroad company claiming a right of way under statute of 1875 cannot take advantage of the failure of a settler to proceed with diligence in the filing of the declaratory statement.

Distinguished in Northern Pac. R. Co. v. De Lacey, 174 U. S. 635, 19 S. Ct. 796, holding that after the declaration had been filed and the time for proving up and making payment had wholly expired the claim was no longer an existing one so as to prevent the transfer of title to the company under the act of Congress; Chicago, K. & W. R. Co. v. Abbott, 44 Kan. 178, 24 Pac. 56, holding that, in action by a landowner for wrongful taking possession of land for a railway, failure to record the report of condemnation commissioners within ten days did not invalidate the proceedings or prevent occupation of the land for the road.

Miscellaneous.— Kimball v. McIntyre, 3 Utah, 81, 1 Pac. 168; Pierce v. Frace, 2 Wash. 103, 26 Pac. 809, dissenting opinion, arguendo.

13 Wall. 91-92, 20 L. 489, SAMSON v. SMILEY.

Public lands.— Where secretary of interior, by erroneous construction of law, withheld patent from a pre-emptioner rightfully entitled, on ground that he had filed declaratory statement for another tract, equity will relieve. Johnson v. Towsley, 13 Wall. 72, affirmed on all points, p. 92.

Cited in Shanklin v. McNamara, 87 Cal. 378, 26 Pac. 346, holding that the decision in a contest between a claimant and the State, that the lands were not swamp lands, would bind the State; American Dock, etc., Co. v. Trustees of Public Schools, 39 N. J. Eq. 419, holding deed under great seal of State to a railroad company was competent evidence of due performance of the preliminary steps;

Bisson v. Curry, 35 Iowa, 79, holding c
of title, although equitable owner had
Winona, etc., R. Co. v. St. Paul, etc., I
491, decreeing transfer of legal title
of portions sold, which in equity bel
Craig v. Leitensdorfer, 123 U. S. 210, 31
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Distinguished in United States v. Fli
holding court had no power to adjudic
claim, as exclusive jurisdiction had
tribunal.

13 Wall. 92–104, 20 L. 534, GIBSON v.

Limitation of actions.—Statutes of li
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United States from legislative control; S
U. S. 135, 28 L. 954, 5 S. Ct. 399, holding
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the naval department could not be plea
of property unlawfully appropriated by
v. Nashville, etc., R. Co., 118 U. S. 125
holding that an action by United States o
and coupons purchased by the governme
barred by State statute of limitations; U
U. S. 266, 32 L. 969, 9 S. Ct. 486, holding th
to bring an action to redeem its propert
the time when by State law such actio
individual; Redfield v. Parks, 132 U. S. 2
holding adverse possession for statutory pe
the United States; United States v. Dalle
632, 35 L. 571, 11 S. Ct. 998, holding th
stale claim cannot be set up against the
M. Co. v. Ferris, 2 Sawy. 179, F. C. 14,37
remained in the United States no appropr
made which could be asserted as a presc
subsequent patentee; Shuffleton v. Nelson,

holding that the statute of limitations did not begin to run until the legal title passed from the United States by virtue of a settlement under the donation act, even though the adverse claimant had held possession for twenty years prior thereto; United States v. Rand, 4 Sawy. 273, F. C. 16,116, holding that the statute of limitations relating to marshals' bonds (R. S., § 786), does not apply to actions by the United States; United States v. Beebee, 4 McCrary, 13, 17 Fed. 38, holding that when the United States voluntarily became a party to a suit it became bound like other litigants to statutes of limitation; United States v. Southern Colorado, etc., Co., 5 McCrary, 573, 18 Fed. 279, holding that the government, although party to a suit, was never bound by the rule of laches nor by statutes of limitation, and distinguishing the last case of United States v. Beebee; United States v. Adams, 54 Fed. 116, holding the United States not chargeable with laches in delaying presentation of claim against the estate of a deceased marshal when suing the sureties on the bond; United States v. Winona, etc., R. Co., 67 Fed. 971, 32 U. S. App. 306, holding a suit by the United States to cancel a land certificate on the ground of error could not be defended by pleading laches in bringing suit; Nichols v. Council, 51 Ark. 33, 14 Am. St. Rep. 22, 9 S. W. 306, holding that a plea of adverse possession of a soldier's additional homestead before the grant of a patent could not be sustained; Gardiner v. Miller, 47 Cal. 574, holding the statutes of limitations of the several States are not binding on the rights of the United States and have no application to a title before issue of patent; Jatunn v. Smith, 95 Cal. 157, 30 Pac. 201, holding that a State could not prescribe the time within which the United States should assert its rights in order to preserve them and there could be no adverse possession as against the United States under State law; Catlett v. People, 151 Ill. 23, 37 N. E. 857, holding that by analogy the United States are not affected by the doctrine of estoppel; Churchill v. Seward, 78 Iowa, 474, 43 N. W. 272, holding that where land was entered by a wrong description and patent issued, and subsequently the patent was returned and cancelled and a new patent issued, the statute of limitations did not run in favor of one having possession under a tax title prior to the second patent; Wood v. Missouri, K. & T. R. Co., 11 Kan. 349, holding that an action to quiet title cannot be maintained so long as the fee remains in the government, no trespasser can ever obtain rights upon government land; McGannon v. Straightlege, 32 Kan. 525, 4 Pac. 1043, holding that statute of limitations could operate against an Indian title until it passed out of the Indian patentee by an approved conveyance; Langlois v. Crawford, 59 Mo. 468, as authorizing an instruction that prior to patent the statute of limitations would not apply; McIlhinney v. Ficke, 61 Mo. 331, holding that, although the State law allowed the holder of an entry to get possession by ejectment, and although the State statute of limitations ran from the date of

right of entry, court must follow the decision of principal case and hold that until the legal title passed out of the United States the statute had no effect as a bar; Miller v. Dunn, 62 Mo. 218, Smith v. Madison, 67 Mo. 705, Dunn v. Miller, 75 Mo. 272, and Buren v. Buren, 79 Mo. 542, to same effect; Chouteau v. Gibson, 76 Mo. 45, as conclusive on the court, being a further chapter in the litigation of the principal case; Hammond v. Johnston, 93 Mo. 222, 6 S. W. 92, and Smith v. McCorkle, 105 Mo. 142, 16 S. W. 604, holding that the statute of limitations leaves the right of entry upon the legal title subsequently acquired by the patent wholly unaffected by adverse possession and cannot operate as a transfer of the equitable right; Cummings v. Powell, 97 Mo. 537, 10 S. W. 823, holding the statute of limitations did not begin to run before the title passed out of the United States; Baird v. St. Louis Hospital Assn., 3 Mo. App. 437, holding that a title resting on a certificate of confirmation by the Louisiana land commissioners, unaccompanied by any survey, would not support a defense of the statute of limitations; Hammond v. Coleman, 4 Mo. App. 315, 316, 321, approving rule, but holding it presupposed an ascertained grantee and that it could not be invoked as a preliminary means of ascertaining who was the grantee; Gibson v. Chouteau, 7 Mo. App. 3, 13, holding that the Supreme Court having declared that the equities pleaded by defendant were a legitimate subject of inquiry, such judgment was conclusive on the State court; Mills v. Traver, 35 Neb. 296, 53 N. W. 68, holding that adverse possession did not begin to run against a homesteader until issue of the patent to him; H. & T. C. R. Co. v. Travis Co., 62 Tex. 17, holding that the rule applies only to the sovereign power and has no application to municipal corporations deriving their powers from the sovereign; therefore, statutes of limitations run against counties, cities, and towns; Brown v. Sneed, 77 Tex. 475, 14 S. W. 251, holding the State statute of limitations of four years in a suit on an official bond did not apply to the State.

Distinguished in Four Hundred and Twenty Min. Co. v. Bullion Min. Co., 3 Sawy. 658, F. C. 4,989, holding that the State statute of limitations relating to mining claims was part of the local law by which the rights of parties were to be ascertained as to the purchase of a lode from the United States; The St. Louis, etc., R. Co. v. McGee, 75 Mo. 525, holding that as the act of Congress of February 9, 1853, granting lands to the States of Arkansas and Missouri for railroad purposes, passed the whole title, both legal and equitable, the statute of limitations ran against the State and railroad company from the time the claimant by adverse possession entered into possession; Wilson v. Beckwith, 140 Mo. 384, 41 S. W. 991, same point and effect, and holding that the lands passed at once to the State unimpressed with any trust or lien in favor of the United States; Steele v. Boley, 6 Utah, 311, 312, 22 Pac. 312, holding where nothing remained to be done except delivery of

patent to pre-emptor, statute will run as against him in favor of one in adverse possession.

Public lands.— Congress has the absolute right to prescribe the times, conditions and mode of transferring public land and to designate the person to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise, p. 99.

Cited and principle applied in Van Brocklin v. State, 117 U. S. 167, 168, 29 L. 850, 851, 6 S. Ct. 679, holding that the lands of the United States acquired by purchase for delinquent taxes and afterwards sold are exempt from taxation by State while remaining the property of the United States; Sorrels v. Self, 43 Ark. 453, holding that a homestead under United States patent is not subject to debts contracted before issue; Lewton v. Hower, 18 Fla. 880, holding that revised statutes, section 2296, prohibiting seizure and sale of public land before issue of patent is constitutional, land acquired under the homestead law is granted for the benefit of the grantee not for that of antecedent creditors; Russell v. Lowth, 21 Minn. 170, 18 Am. Rep. 392, holding that the provision in the act enabling Minnesota to form a Constitution, and in the Constitution was an express constitutional inhibition of the power of the State legislature to pass any law subjecting land patented under homestead law to levy and sale for antecedent debts; Langlois v. Crawford, 59 Mo. 472, holding that the act of Congress of April 29, 1816. passed the title, both legal and equitable, to the persons confirmed by the act; State v. Central Pac. R. Co., 21 Nev. 254, 30 Pac. 687. affirming power of Congress to provide by the statute of July 10. 1886, for the liability of lands granted to State for railroad purposes, over which the United States still had a lien, to taxation; Chavez v. de Sanchez, 7 N. Mex. 89, 32 Pac. 146, holding that one wrongfully in possession of land claimed under a homestead patent was not entitled under State law to compensation for improvements made by him; Duncan v. Newcomer, 9 S. Dak. 378, 69 N. W. 581, holding that public land can be taxed only when a patent has issued or when the private proprietor has acquired a perfect equity; Wiseman v. Eastman, — Wash. —, 57 Pac. 401, holding power of compelling attendance of witnesses not having been granted to land department by Congress it must be held not to exist; Gile v. Hallock, 33 Wis. 528, sustaining constitutionality of section 4 of act of Congress, 12 Stat. 75, exempting homestead from debts contracted prior to issue of patent.

Distinguished in Kingman v. Holthaus, 59 Fed. 310, holding after title has passed from government, parties claiming under same grantee may make contracts between themselves respecting the property enforceable in the courts against each other.

Public lands.— State legislation cannot defeat or impair rights conferred by United States patent in advance of its issue, p. 100.

be invoked to put in operation the forfeiture clause of a policy which passed into the hands of a receiver appointed by creditors, proceedings for the appointment being commenced before the loss occurred; Evans v. Durango, etc., Co., 80 Fed. 439, 49 U. S. App. 332, holding the doctrine would not be applied where it appeared the rights of the patentee, acquired by the original entry, had been lost by lack of diligence and other rights had intervened; Shay v. McNamara, 54 Cal. 175, holding that the doctrine of relation could not be resorted to to transfer a title derived under a sheriff's deed to the date of the foreclosure sale so as to let in the lien of a subsequent judgment; Hawkins v. Harlan, 68 Cal. 238, 9 Pac. 109, holding that the rule that by relation an after-acquired title by a mortgagor inured to the benefit of the mortgagee would not be given effect to when it would work manifest injustice, as to give a mortgagee preference over a vendor's lien for unpaid purchase money; Grant v. Iowa, etc., Land Co., 54 Iowa, 677, 7 N. W. 115, holding that as lands in a floating grant to a railroad not earned and identified the title would not be held to relate back when identified to the grant if rights were defeated or liabilities created thereby; Reynolds v. County, 55 Iowa, 93, 7 N. W. 469, refusing to apply the doctrine in order to subject land to taxation at a time when the predecessor held neither title nor equity; Churchill v. Sowards, 76 Iowa, 474, 43 N. W. 272, refusing to apply rule so as to let in an adverse possession; Durham v. Hussman, 88 Iowa, 86, 55 N. W. 14, holding that until payment for public land was made no equitable title passed from the United States so as to render the land subject to taxation and validate by relation a sale for delinquent taxes prior to patent; Callahan v. Davis, 90 Mo. 83, 2 S. W. 217, holding that the patent when issued inured by relation to the transferee of the equitable title; Ellis v. Pomeroy, etc., Co., 1 Wash. 576, 21 Pac. 29, holding the doctrine of relation could not be invoked to divest the vested right of appropriation of a water-course on public lands, where the final proof of the patentee was not made until after the appropriation had matured; nor, Kromer v. Friday, 10 Wash. 642, 39 Pac. 234, 32 L. R. A. 692, and n., to defeat the claims of a widow where final proof was made before the marriage ceremony was performed but patent issued thereafter; Whitney v. Morrow, 34 Wis. 648, holding the doctrine of relation had no application to an action of waste where there was no privity of estate between the parties when the alleged waste was committed; Stahl v. Lynn, 86 Wis. 76, 56 N. W. 189, holding that a deed will not relate back to the contract for sale so as to prevent the vendor from maintaining an action against a trespasser for removing timber from the land after the contract, but before completion of the sale by payment and delivery of the deed; dissenting opinion in Baldwin v. Letson, 6 Kan. App. 21, 49 Pac. 623, majority holding Indians' deed prior to confirmation of their title passed nothing; dissenting opinion in United States v. Loughrey, 172 U. S. 225, 19 S. Ct. 160, arguendo.

Ejectment.— In Federal courts, action can only be sustained by plaintiff having legal title; and patent, when regular on its face, is conclusive evidence of that title. The same rule also applies in State courts, p. 102.

Cited and ruling affirmed in Kircher v. Murray, 60 Fed. 52, 23 U. S. App. 214, affirming S. C., 54 Fed. 626, holding that in Federal court an action of trespass to try title could only be sustained upon the possession by the plaintiff of the legal title; Montgomery v. Donnelly, 57 Cal. 69, holding that if a plaintiff in ejectment proved title in himself under a United States patent, it would override an attempted proof that defendant had complied with the homestead laws; McKinney v. Bode, 33 Minn. 453, 23 N. W. 853, holding that the patent, regular on its face, was conclusive evidence of the legal title; Knapp v. Thomas, 39 Ohio St. 387, 48 Am. Rep. 467, holding that a pardon granted by the governor of the State could not be impeached under State laws for fraud, except by a direct proceeding for that purpose; Bridenbaugh v. King, 42 Ohio St. 412, holding that a deed of State land under the hand of the governor of the State passed the legal title as against all the world. Note, this case cites the principal case correctly as to volume and page, but under the name of Shepley v. Cowan, reported in 91 U. S. 330, 23 L. 424, which practically deals with the same point that a patent cannot be attacked collaterally.

Public lands.— Patent passes government's title and is government conveyance. Where other parties possess equities superior to those of patentee, equity will enforce such equities by compelling transfer of legal title, enjoining its enforcement, or cancelling patent, p. 102.

Cited and applied in Baldwin v. Stark, 107 U. S. 465, 27 L. 527, 2 S. Ct. 474, holding that where in the land department fraud or imposition has been practiced on the party interested or on the officers, or where these have clearly mistaken the law, courts of equity may give relief; St. Paul, etc., R. Co. v. Winona, etc., R. Co., 112 U. S. 733, 28 L. 877, 5 S. Ct. 341, holding that an erroneous decision of the secretary of the interior could not deprive the defendant railroad of rights which became vested by its selection of lands which he had certified to another railroad; Stimson Land Co. v. Rawson, 62 Fed. 430, holding that until the execution and recording of a patent, the power of the land department to control proceedings to acquire a title to public land continues; Treadway v. Wilder, 12 Nev. 114, holding that after proof and payment the preempter has such an equity that even the government cannot deprive him of the land.

Ejectment.—When question is whether plaintiff or defendant has superior title from the United States, patent must prevail, p. 102.

Cited in Chavez v. de Sanchez, 7 N. Mex. 83, 32 Pac. 145, holding that collateral evidence to attack a patent in an action of ejectment could not be admitted.

Distinguished in Dolph v. Barney, 5 Or. 203, lands taken under the donation act vest by virtue of the act and make a title superior to a subsequent patent.

Ejectment.— When an equitable defense is set up, under a State law, to action of ejectment, answer or plea should contain all essential averments of a bill in equity, p. 103.

Cited and principle applied in McNee v. Donahue, 142 U. S. 589, 35 L. 1124, 12 S. Ct. 212, holding that where, as under law of California, an equitable and legal defense were allowed in an action for possession of land, the answer must contain the allegations of a bill in equity, and the equitable defense should, as a general rule, be disposed of before the legal remedy is considered; Davis v. Holbrook, 25 Colo. 495, 496, 55 Pac. 731, holding that in an action to recover possession of land, the answer alleging an equitable defense and proof in support, must be as full as if specific performance were sought as an affirmative relief; Rivers v. Rivers, 38 Fla. 70, 20 So. 809, striking out an equitable plea where the indefiniteness and uncertainty of its allegations made it impossible to tell whether the facts sought to be set up by it would constitute a legal or an equitable defense; Merrill v. Dearing, 47 Minn. 140, 49 N. W. 694, holding that legislation had not dispensed with the necessity of pleading the facts necessary to establish an equitable right; Kahn v. Old Telegraph M. Co., 2 Utah, 195, the issue made is triable by court without a jury.

Distinguished in Kansas Pac. R. Co. v. McBratney, 12 Kan. 12, holding that under code, section 747, in an action for recovery of real estate, it was not necessary for an equitable owner to state how his title was derived.

Adverse possession.— Neither in Federal nor State courts can mere occupation of premises for statutory period constitute a sufficient equity to control legal title subsequently conveyed by patent of United States, pp. 103, 104.

Cited and principle applied in Morrow v. Whitney, 95 U. S. 557, 24 L. 458, occupation of public lands can never be adverse to government so as to defeat or affect in any way title subsequently conferred by its grant or patent; Redfield v. Parks, 132 U. S. 249, 33 L. 331, 10 S. Ct. 86, so long as title remained in United States, statute of limitations could not operate; Turner v. Hall, 60 Mo. 275, as to necessity of considering actual occupancy in ascertaining character of an adverse possession; Altschul v. O'Neill, — Or. —, 58 Pac. 100, 101, occupant of public lands for ten years has no title as against government patentee.

13 Wall. 104–128, 20 L. 585, NORWICH CO. v. WRIGHT.

Shipping.— By maritime law, owner's liability for torts of master and seamen, whether by collisions or otherwise, is co-extensive with his interest in vessel and freight, and ceased by his abandonment of these to parties sustaining loss, pp. 117, 119.

Approved in Butler v. Boston S. S. Co., 130 U. S. 552, 32 L. 1023, 9 S. Ct. 617, holding that the law of limited liability applied to cases of personal injury and death as well as to cases of loss for injury to property; Thomassen v. Whitwell, 9 Ben. 409, 410, F. C. 13,929, holding that a collision on the high seas was governed by the general maritime law; Re Long Island, etc., Transportation Co., 5 Fed. 610, 611, holding the rule of the statute was same as that of the general maritime law; The Brantford City, 29 Fed. 885, holding that the law of the flag did not cover loss of cargo by negligence of ship in American courts, where the general maritime law was the guide; dissenting opinion in The Great Western, 118 U. S. 528, 530, 30 L. 149, 6 S. Ct. 1165, 1166, majority holding termination of voyage was time at which value of offending vessel was to be taken.

Shipping.— Act of 1851 exempts shipowners from loss or damage by fire to cargo, unless caused by their own neglect, and under section 3, in three classes of damage or wrongdoing happening without their privity and by fault or neglect of master or other persons on board, pp. 120, 121.

Affirmed in The Strathdon, 89 Fed. 378, holding shipowners not to blame for a fire loss not caused by their fault or neglect; Knowlton v. Providence, etc., S. S. Co., 53 N. Y. 83, holding act could not be applied to loss from fire arising through design or neglect of owner.

Shipping — Collision.— Under act of 1851 owner's liability is limited to value of his interest in vessel and freight; the limitation embraces not only loss or damage to goods on board, but any loss or damage by collision to other vessels and their cargoes, pp. 120, 121.

Cited and ruling applied in Butler v. Boston S. S. Co., 130 U. S. 550, 32 L. 1024, 9 S. Ct. 618, holding that the principal case had disposed of the contention that revised statutes, section 4283, did not apply to collisions; The Witch Queen, 3 Sawy. 204, F. C. 17.916, holding a materialman's lien covered articles on board not required for navigation, but for purposes of the voyage; In re Petition of Norwich, etc., Transportation Co., 17 Blatchf. 226, F. C. 10,362, holding the act adopted the rule of general maritime law; In re Long Island, etc., Transportation Co., 5 Fed. 618, holding act covered a case of damage on the waters of Long Island sound; Gokey v. Fort, 44 Fed. 366, holding that a decree limiting liability does not affect contracts for which owner is personally liable; Simp-

son v. Story, 145 Mass. 499, 1 Am. St. Rep. 481, 14 N. E. 642, holding the act did not apply to fishing vessels; Baird v. Daly, 57 N. Y. 250, 15 Am. Rep. 493, holding the act did not oust State court of jurisdiction of case of damage to stock in transportation across river through negligence of tug. See note, 45 Am. Dec. 57.

Shipping.— Liens for reparation of wrong done are superior to any prior liens for money borrowed, wages, pilotage, etc., but stand on an equality with each other if they arise from the same cause, p. 122.

Cited and principle applied in The John G. Stevens, 170 U. S. 125, 42 L. 974, 18 S. Ct. 549, holding that a suit by the owner of a tow against her tug for an injury to the tow by negligence is a suit ex delicto and not ex contractu and that the lien for such damages must be preferred to a previous lien for supplies; The Maria and Elizabeth, 12 Fed. 631, holding a decree for damages in case of collision overrides all prior liens, even for seamen's wages; The M. Vandercook, 24 Fed. 478, ordering payment of damages to another vessel and cargo before claim for repairs and supplies to vessel in fault; The John G. Stevens, 40 Fed. 336, holding that the lien for damages occasioned by negligent towage must be preferred to previous liens for supplies (see S. C., 170 U. S. 125, 42 L. 974, 18 S. Ct. 549, affirming this ruling); The Daisy Day, 40 Fed. 540, holding a claim for damages for negligent towage will have priority over those for supplies and repairs; The A. Heaton, 43 Fed. 595, holding lien for seamen's wages preferred to all claims except for salvage or for damages by collision owing to the fault of their ship; The F. H. Stanwood, 49 Fed. 579, 580, 581, 9 U. S. App. 15, where fund was insufficient to pay both collision damages, the latter preferred and seamen left to their personal remedy against owner; The Anaces, 93 Fed. 242, holding that there is a maritime lien for personal injuries resulting from negligence of ship's officers; The Escanaba, 96 Fed. 252, claim for tortious conversion by master is superior to prior lien for supplies; The Leonard Richards, 41 Fed. 820, holding "real value of a vessel," under the act, must be taken without regard to liens upon her at end of her voyage; obiter in The John G. Stevens, 170 U. S. 119, 42 L. 972, 18 S. Ct. 547, as to priority of liens for seamen's wages.

Distinguished in The Samuel I. Christian, 16 Fed. 797, holding wages of seamen on a tug entitled to priority over a claim by a tow for damages through tug's negligence; The Daisy Day, 40 Fed. 539, holding claims for seamen's wages are preferred to claims for negligence in towage, provided the claimant was free from fault. Qualified in The Young America, 30 Fed. 794, holding liens ex delicto inferior to those ex contractu, and liens for supplies to a tug furnished before accident were superior to lien for damages by stranding tow.

Collision.— In case of collision, lien for loss of ship and cargo is on an equality with lien for loss of cargo on vessel in fault, p. 122.

Shipping.— In proceeding to pro-rate and apportion damages against ship on which limitation of liability is claimed, court must have possession of proceeds or value of ship and freight. If the vessel were libelled and either sold or appraised and her value deposited in court, this sum, together with amount of freight (when proper to be added), would constitute the "res" or fund for distribution, p. 124.

Followed in The Benefactor, 103 U. S. 246, 26 L. 354, holding that American law limited the liability to the value of the ship and freight after the injury had occurred.

Criticised in The City of Norwich, 6 Ben. 332, F. C. 2,762, holding that possession of the ship or proceeds not necessary to give court jurisdiction.

Shipping.— Shipowner desiring limitation of liability must admit claims for damage which he sets up against libellants or ask the court to have them adjudicated and institute the necessary proceedings to ascertain co-existing claims, p. 124.

Cited and applied in Oregon R. & N. Co. v. Balfour, 90 Fed. 298, 61 U. S. App. 156, holding where two vessels of shipowner were in fault both must be surrendered and court may compel surrender.

Admiralty.— District Courts as courts of admiralty and maritime jurisdiction have jurisdiction, under act of 1851 limiting shipowner's liability, to apportion sum for which owner or owners of ship may be liable amongst parties entitled, p. 124.

Cited, affirmed and applied in Providence, etc., Co. v. Hill Mfg. Co., 109 U. S. 598, 599, 27 L. 1045, 1046, 3 S. Ct. 392, 393, holding the District Court, where the remains of the vessel libelled were situate, was the proper court to take cognizance of proceedings for limitation of liability; Ex parte Phœnix Ins. Co., 118 U. S. 624, 30 L. 280, 7 S. Ct. 31, holding that the jurisdiction of the District Court depended on its having jurisdiction in admiralty originally of the cause of action involved; In the Matter of Providence & New York S. S. Co., 6 Ben. 130, F. C. 11,451, holding a petition for limitation of liability belongs exclusively to District Court in admiralty; The Epsilon, 6 Ben. 380, F. C. 4,506, to same effect, and that jurisdiction depends on the nature of the relief sought; Copp v. Decastro, etc., Sugar Refining Co., 8 Ben. 324, F. C. 3,215, holding Federal courts in admiralty had equity jurisdiction to enjoin other suits; Thomassen v. Whitwell, 9 Ben. 461, F. C. 13,930, holding proceedings under act must be taken independently in District Court, not by an answer; Churchill v. The British America, 9 Ben. 520, F. C. 2,715, District Court may decree liability discharged on abandonment of vessel in case of collision on high seas; The John

Bramall, 10 Ben. 506, F. C. 7,334, holding proceedings under the act might be enforced as an equitable proceeding in admiralty in District Court; In re Long Island, etc., Transportation Co., 5 Fed. 630, holding, after transfer of ship to a trustee under the act, the remedy lay wholly with District Court in admiralty; In re Leonard, 14 Fed. 56, holding the District Court was the proper tribunal to determination of fund payable under an interlocutory decree on a subsequent petition to limit liability; The Mary Lord, 31 Fed. 417, holding proceedings under act must begin in District Court. Circuit Court has no original jurisdiction therein; Elwell v. Gelbel, 33 Fed. 71, to same point and effect, demurrer to jurisdiction of Circuit sustained; Goodrich Transportation Co. v. Gagnon, 36 Fed. 128, holding the act is confined to maritime losses for which relief can be given in admiralty and does not apply to loss of building on land by fire caused by steamer; Oregon R. & N. Co. v. Balfour, 90 Fed. 298, 61 U. S. App. 156, holding that a proceeding under the act was a suit in equity in admiralty to administer property and court must have possession and had power to exercise all remedies of a court in chancery.

Shipping.— In proceedings for limitation of liability, whether in rem or in personam, shipowner should file petition for apportionment of damages and pay into court or file stipulation for such sum as court may find to be amount of limited liability, or else surrender ship and freight by assignment to a trustee, p. 125.

Cited and approved in Providence, etc., Co. v. Hill Mfg. Co., 109 U. S. 590, 27 L. 1043, 3 S. Ct. 387, showing that rules for carrying out the course advised were issued in 13 Wall. xii, xiii, and commenting thereon; The City of Norwich, 118 U. S. 490, 30 L. 142, 6 S. Ct. 1155, holding, that where, before the decision in the principal case, the District Court had overruled an application for limitation of liability, the same court had jurisdiction thereafter to receive a new petition and order a new appraisement; In the Matter of Norwich & New York Transp. Co., 8 Ben. 315, F. C. 10,360, holding a stipulation should be for the value at time of seizure, but the amount is immaterial in proceedings under act; Thomassen v. Whitwell, 9 Ben. 462, F. C. 13,930, holding the petition should not form part of an answer, but be an independent proceeding; The John Bramall, 10 Ben. 504, F. C. 7,334, holding proceedings under the act might be taken where no other suits had been commenced; Dyer v. National Steam Nav. Co., 14 Blatchf. 487, F. C. 4,225, holding that by allowing final decree to go in District Court without taking proceedings under act, the right was waived; In re Long Island, etc., Transportation Co., 5 Fed. 625, holding that after transfer of the ship to a trustee, all suits for damage were to cease; The Maria and Elizabeth, 11 Fed. 521, holding the proper proceedings under act were those stated in admiralty rules 54, 55, 56 and 57; The Columbia, 73 Fed. 234, 44 U. S. App. 326, showing

that when proceedings took the form of a suit in equity, all claimants were forced into one suit, but each could set up his own case; Baird v. Daily, 57 N. Y. 251, 252, 15 Am. Rep. 495, holding that until proceedings were taken under the act, the jurisdiction of State courts in cases where there was a common-law remedy, remained. See note to 45 Am. Dec. 58.

Shipping.— Shipowner should file libel in admiralty with surrender of ship and freight or deposit of value in court, and either plead the fact in bar in State court or procure order from District Court restraining further prosecution of suit, p. 125.

Cited and ruling applied in The Tolchester, 42 Fed. 184, affirming power of District Court after proceedings begun to limit liability to enjoin suits for damages for loss of life, commenced in Maryland courts; Paxson v. Cunningham, 63 Fed. 134, 21 U. S. App. 466, holding that the right of a shipowner to file a libel in admiralty for limitation of liability, could not be restrained; In re Whitelaw, 71 Fed. 734, 735, denying motion to dissolve injunction restraining suits in State court after filing petition for limitation; Rounds v. Providence, etc., S. S. Co., 14 R. I. 348, holding the act applies to injuries to person as well as property, and the institution of proceedings was a bar to action in State court for personal injuries.

Distinguished in Hill Mfg. Co. v. Providence, etc., S. S. Co., 113 Mass. 501, 18 Am. Rep. 533, holding District Court cannot, under the act of 1851, restrain proceedings in State courts for damages by fire on ship owing to neglect of owners (overruled by Providence, etc., S. S. Co. v. Hill Mfg. Co., 109 U. S., see p. 595, 27 L. 1044, 3 S. Ct. 390); Dongan v. Champlain Transportation Co., 56 N. Y. 6, holding the act did not oust jurisdiction of State court in case of causing death by negligence of passenger on a boat within State when injury confined to one party; Baird v. Daly, 57 N. Y. 244, holding the act does not bar the right of recovery in State court where there is a common-law remedy.

Shipping.— It was intention of act of 1851, limiting shipowner's liability, to adopt rule of maritime law, so far as relates to torts, and if, in case of collision, offending vessel is wholly lost, liability of owner is gone; if not lost, liability ceases with surrender of ship and her freight or payment into court of their value after collision, p. 127.

Citing cases which apply the rule: The Benefactor, 103 U. S. 246, 26 L. 354, holding that the principle implied that the value of the ship at the time of surrender, if made in a reasonable time (with the addition of the pending freight), would furnish a proper criterion of the amount of liability; Butler v. Boston S. S. Co., 130 U. S. 555, 32 L. 1024, 9 S. Ct. 618, holding that the law of limited liability was co-extensive in its operation with the whole territorial domain of the maritime law of the United States; In re Garnett,

141 U. S. 12, 35 L. 633, 11 S. Ct. 842, to same effect; In the Matter of The Norwich & New York Transp. Co., 8 Ben. 314, 318, F. C. 10,360, both holding the value of the boat after collision was the limit of owner's liability; In the Matter of John G. Wright, 10 Ben. 15, F. C. 18,066, holding the measure of liability was the value of boat after collision and before repair; The Ontario, 2 Low. 49, F. C. 10,543, holding an assessment of value of a ship before collision, was wrong; Swift v. Brownell, 1 Holmes, 472, F. C. 13,695, to same effect (apparently same case); Lord v. Goodall, N. & P. S. S. Co., 4 Sawy. 300, F. C. 8,506, holding owner's liability for negligence of master or crew is within the act when he has exercised due care in their selection; Dyer v. National Steam Nav. Co., 14 Blatchf. 486, F. C. 4,225, holding that whatever was saved from the ship must be included in the surrender to entitle owner to benefit of act; In re Petition of Norwich, etc., Transportation Co., 17 Blatchf. 228, 236, F. C. 10,362, holding steamboat-owners not liable to value of vessel before collision, and need not pay into court the amount received for insurance; Thomassen v. Whitwell, 21 Blatchf. 54, 58, 61, 64, 12 Fed. 897, 898, 899, 900, 902, 903, 904, 905, to same point and effect; The Tolchester, 42 Fed. 183, holding jurisdiction depended on locality, not on nature of employment of ship, and District Court had jurisdiction over liability of a tug for a tort on navigable waters, usually employed on State waters. Cited in general discussion in The Scotland, 105 U. S. 28, 26 L. 1002, and In re Meyer, 74 Fed. 885.

Distinguished in The Chattahoochee, 173 U. S. 553, 19 S. Ct. 496, in case of mutual fault the vessels must bear the damage in equal parts.

Miscellaneous.— The following refer generally to principal cases in discussing limited liability of shipowners: In re Morrison, 147 U. S. 34, 37 L. 67, 13 S. Ct. 253, Re The Norwich & New York Transp. Co., 10 Ben. 194, F. C. 10,361, The Garden City, 26 Fed. 773, Miller v. O'Brien, 35 Fed. 783, The Katie, 40 Fed. 485, 493, 495, 7 L. R. A. 61, 66, and n., and The Annie Faxon, 66 Fed. 579. Cited also in The Columbia, 73 Fed. 228, 44 U. S. App. 326, erroneously; The E. A. Shores, Jr., 73 Fed. 348, on extent of Federal admiralty jurisdiction.

13 Wall. 128–150, 20 L. 519, UNITED STATES v. KLEIN.

War.— Proceeds of cotton which has come into possession of treasury as captured or abandoned property, may be recovered through Court of Claims by parties entitled, pp. 136–148.

Cited in Lamar v. Browne, 92 U. S. 194, 23 L. 653, as proving that cotton, though private property, was a legitimate subject of capture; Broadway v. Rhem, 71 N. C. 200, holding an action of trespass could not be maintained against a soldier for making capture of enemy property in the course of military duty.

War.— Effect of captured and abandoned property act of 1863 is not to absolutely divest property of original owner, even though disloyal, and by seizure, government constitutes itself a trustee for parties rightfully entitled to proceeds, pp. 138, 139.

Cited and principle applied in Haycraft v. United States, 22 Wall. 94, 22 L. 741, holding that an unpardoned rebel was not entitled to the benefit of the act; Lamar v. Browne, 92 U. S. 195, 23 L. 653, holding that capture for private gain was not permitted, all went to the government; dissenting opinion in Sprott v. United States, 20 Wall. 470, 22 L. 374, majority holding purchaser of cotton from government of Confederate States, could not, after its capture and sale by the United States, recover proceeds in Court of Claims.

A pardon, granted on conditions, blots out the offense on proof of compliance with the conditions; a person pardoned may sue for restoration of property within two years of suppression of Rebellion, p. 142.

Cited and rule applied in Armstrong v. United States, 13 Wall. 155, 20 L. 615, holding that the proclamation of December 25, 1868, granted pardon unconditionally, and on suit within two years Court of Claims was bound to give effect thereto; Haycraft v. United States, 22 Wall. 95, 96, 22 L. 742, holding that a rebel not pardoned until after two years from the suppression of the Rebellion was not entitled to sue for proceeds in Court of Claims; Knote v. United States, 95 U. S. 153, 24 L. 443, on effect of the general pardon and amnesty of 1868 not entitling the recipient to proceeds of sale of property previously confiscated and paid into treasury; Austin v. United States, 155 U. S. 427, 430, 39 L. 210, 211, 15 S. Ct. 171, 173, holding that the act of March 3, 1883, as to Austin's claims making the establishment of loyalty in fact a prerequisite to jurisdiction of the Court of Claims not in conflict with the innocence at law produced by a pardon; In re Monroe, 46 Fed. 57, holding that the effect of a pardon by a city mayor under city ordinance for breach of an ordinance destroys the offense and bars commitment by police judge; State v. Page, 60 Kan. 670, 57 Pac. 516, affirming constitutionality of statute establishing the State reformatory and authorizing the managers to grant paroles and discharges for good conduct before expiration of term; Jones v. Board of Registrars, 56 Miss. 768, 31 Am. Rep. 386, holding a pardon by president for embezzlement before end of term of sentence restores the right to be registered as voter in State; People v. Court of Sessions, 141 N. Y. 295, 36 N. E. 388, 23 L. R. A. 858, holding that statute authorizing court to suspend sentence during good behavior does not conflict with governor's right to grant reprieves and pardons; Knapp v. Thomas, 39 Ohio St. 391, 48 Am. Rep. 471, holding a governor's pardon on ground of danger to health cannot be impeached for fraud in the physician's certificate; Mitchell v. State, 42 Ohio St. 400, holding that effect of revised statutes, section 7303, constituting a presiding judge a committing magistrate

13 Wall, 158–162, 20 L. 490, SEMMES v. HARTFORD INS. CO.

Limitation of actions.— In computing time under statute, period of legal disability, created by war, must be excluded; where the law imposes both the limitation and the disability, the one period should be taken from the other, p. 160.

Cited and principle applied in Brown v. Hiatts, 15 Wall. 184, 21 L. 130, reversing S. C. in 1 Dill. 387, F. C. 2,011, excluding the duration of the Civil War from the time statute had run against the right of a mortgagee to sue on bond and mortgage; Ross v. Jones, 22 Wall. 587, 22 L. 733, rejecting a rejoinder to a plea of suspension of statute during the Civil War that the courts were not closed to legal process for the whole period; Cohen v. N. Y. Mutual Ins. Co., 50 N. Y. 623, 10 Am. Rep. 532, holding that when war prevented the transmission of the premiums the policy was not forfeited; also in note in Moore v. Smith, 29 S. C. 257, holding the statutory period after death of intestate, in which suits are forbidden against administrator, must be added to time prescribed in statute of limitations.

Distinguished in Tait v. New York L. Ins. Co., 1 Flipp. 333, F. C. 13,726, holding the performance of a condition precedent, viz., payment of premiums on policy, not excused by the Civil War; Bean v. Chapman, 62 Ala. 64, holding rule did not apply where sureties on a note residing in same country as payee could stop interest by payment, their liability remained though an enemy principal not liable; Galloway v. Standard Fire Ins. Co., 45 W. Va. 244, 31 S. E. 971, holding that a provision in a policy as to bringing suit within a certain time after loss, is absolutely waived by the company's action in delaying its refusal to pay until the time limit has expired.

Insurance.— Where compliance with a condition that suit on a policy must be brought within a defined period after loss, is rendered impossible by legal disability, such as that created by war, the disability removes consequences of non-compliance and presumptions arising, pp. 160, 162.

Cited and principle applied in Jackson v. Fidelity, etc., Co., 75 Fed. 365, 41 U. S. App. 552, holding that the suspension of a national bank and intervention of government officials relieved bank from obligation of suing on fidelity policy within twelve months after discovery of fraud; Blanks v. Hibernia Ins. Co., 36 La. Ann. 603, holding stipulations in policies limiting the time within which claims must be prosecuted bind the parties; Earnshaw v. Sun Mutual Aid Soc., 68 Md. 475, 6 Am. St. Rep. 465, 12 Atl. 887, holding that an injunction preventing beneficiaries receiving from society any portion of their certificate removed the contract obligation to bring suit for recovery within six months after death; Metropolitan Life Ins. Co. v. Dempsey, 72 Md. 295, 19 Atl. 643, holding an agreement by company's superintendent, having author-

loyalty of owner, ownership to be proved is that existing at time of capture. An administrator is an owner for purposes of statute, p. 153.

Affirmed in United States v. Gillis, 95 U. S. 417, 24 L. 506, holding an assignee of a claim for the proceeds of captured or abandoned goods is not an owner.

13 Wall. 154–156, 20 L. 614, ARMSTRONG v. UNITED STATES.

War.— Effect of unconditional pardon of 1868 relieves claimants of captured and abandoned property from proof of loyalty during Civil War, p. 155.

Cited and applied in Pargoud v. United States, 13 Wall. 157, 20 L. 646, holding it unnecessary to prove loyalty or personal pardon before Court of Claims; Carlisle v. United States, 16 Wall. 152, 21 L. 428, and Austin v. United States, 155 U. S. 425, 430, 39 L. 209, 211, 15 S. Ct. 170, 173, both to same effect.

Distinguished in Knote v. United States, 95 U. S. 153, 24 L. 443, holding that the pardon does not enable the recovery of proceeds of sale of property confiscated under the act of July 17, 1862.

Evidence.— Proclamation of pardon of 25th December, 1868, was a public act, of which all Federal courts are bound to take notice and to which they are bound to give effect, p. 156.

Cited and applied in Caha v. United States, 152 U. S. 222, 38 L. 419, 14 S. Ct. 517, holding rules and regulations of the interior department, in respect to contest before the land office, are matters of which courts of the United States take judicial notice; State v. Coosaw Min. Co., 45 Fed. 808, holding Federal court bound to take notice of State act, under which the plaintiffs claimed their powers to act in determining its jurisdiction; Wilkins v. United States, 96 Fed. 841, holding courts bound to notice regulations of treasury department.

13 Wall. 156–158, 20 L. 646, PARGOUD v. UNITED STATES.

War.— Unconditional pardon of 1868 relieves claimants of captured and abandoned property from proof of loyalty during Civil War, p. 158.

Cited and applied in Carlisle v. United States, 16 Wall. 152, 21 L. 429, holding it unnecessary to prove loyalty or personal pardon before Court of Claims; Austin v. United States, 155 U. S. 425, 430, 39 L. 209, 211, 15 S. Ct. 170, 173, to same effect

Distinguished in Knote v. United States, 95 U. S 153, 24 L. 443, holding that the pardon does not enable the recovery of proceeds of sale of property confiscated under the act of July 17, 1862.

and conspiracies in restraint of trade; Littleton v. Oliver Ditson Co., 62 Fed. 599, holding that a musical composition was not either a "book" or "lithograph," within section 3 of the international copyright act of 1891; Ex parte Siebenhauer, 14 Nev. 368, holding the word "solicitor," as used in act of reincorporation of Virginia City, authorizes taxation of a San Francisco merchant soliciting orders in Virginia City; Vermont L. & T. Co. v. Whithed, 2 N. Dak. 102, 49 N. W. 323, construing section 11 of the act of 1890 as not including transactions of building and loan associations with any parties other than their own stockholders; Atlantic & Pacific R. Co. v. Mingus, 7 N. Mex. 375, 376, 34 Pac. 597, holding the mortgage act of 1871, by declaring the right of the company to mortgage its property, did not intend to extend the time for completing the road.

Customs duties — Statutes.— Where act of 1861 allowed free import of all kinds of living animals; birds, singing and other, and land and water fowls, the duty imposed by act of 1866 on horses, mules, etc., "and other live animals" did not affect birds and fowls, pp. 164–165.

Cited and followed in Arthur v. Lahey, 96 U. S. 116, 24 L. 767, holding "thread laces" not dutiable as "silk laces" under act of 1864; Eureka Con. Min. Co. v. Richmond Min. Co., 4 Sawy. 317, F. C. 4,548, holding the acts of Congress of 1866 and 1872 were passed to protect locations of mines and lodes, as miners understood those terms.

Distinguished in Barber v. Schell, 107 U. S. 622, 27 L. 492, 2 S. Ct. 306, holding designations of articles qualified by "cotton" in act of 1846 are special descriptions of quality and material, not dutiable as "manufactures wholly of cotton."

Statutes.— When Congress in one act defines a word so as to limit its application, a subsequent act cannot enlarge the definition without language showing express intention, p. 165.

Citing cases which apply this principle are: Movius v. Arthur, 95 U. S. 147, 24 L. 421, holding previous duty on patent leather not altered by subsequent general tariff on "skins, dressed and finished, not herein otherwise provided for;" Arthur v. Morrison, 96 U. S. 111, 24 L. 765, holding "crape veils" not dutiable as "silk veils," term being specific in meaning; Arthur v. Lahey, 96 U. S. 113, 24 L. 766, holding "thread laces" not dutiable as "silk laces;" Arthur v. Stephani, 96 U. S. 127, 24 L. 772, holding "chocolate" not dutiable as "confectionery," articles specifically described in tariff not to be taxed under general description which may include them; United States v. Cent. Pac. R. Co., 118 U. S. 240, 30 L. 175, 6 S. Ct. 1040, holding the construction given by the court to act of July 1, 1862, must govern that of act of May 7, 1878, where same words were used as to application of compensation for services rendered for the government; Seeberger v. Cahn, 137 U. S. 98, 34 L. 600, 11 S. Ct. 29,

holding that goods technically known as "worsteds" not dutiable as "manufactures of wool;" Bogle v. Magone, 152 U. S. 626, 38 L. 575, 14 S. Ct. 720, under act of 1883, holding any article coming within two or more of the descriptions in the clause as to sauces must be assigned to the earlier one; United States v. Am. Bell Telephone Co., 159 U. S. 550, 40 L. 256, 16 S. Ct. 70, holding appellate jurisdiction of Supreme Court over judgment of Circuit Court of Appeals in suit to cancel a patent not narrowed by the act of March 3, 1891; Chung Yune v. Kelly, 8 Sawy. 420, 14 Fed. 643, a designation of an article eo nomine, must prevail over a general description, tapioca not dutiable as starch, though usable as such; Swayne v. Hager, 13 Sawy. 621, 37 Fed. 783, Chinese shoes not dutiable as ready-made clothing or wearing apparel, a definition adopted and acted upon for a long time, not to be regarded as changed by a subsequent act of Congress, unless intention to change is clear; Faxon v. Russell, 8 Fed. Cas. 1111, holding that an india-rubber webbing, falling within the description of articles in section 8 of the revenue act of 1862, was excluded from operation of section 10 of same act; Tong Duck Chung v. Kelly, 24 Fed. Cas. 47, holding that revised statutes, section 2504, does not affect sago, which is exempt under revised statutes, section 2505; Murphy v. United States, 68 Fed. 910, holding that "worsted dress goods" under act of 1894 are still distinguished from and not dutiable as "manufactures of wool," as under the earlier tariff acts; United States v. Gunther, 71 Fed. 500, 34 U. S. App. 447, holding that a single old picture, in carved frame, was not free from duty as part of a collection of antiquities; In re Southern Pac. Co., 82 Fed. 313, holding "creosote" not liable to duty as a "distilled oil," but is free as a "product of coal tar;" Wise v. Chew Hing Lung, 83 Fed. 165, 48 U. S. App. 522, holding that tapioca flour was under the act of 1890, liable to duty as starch, for which it was proved to be principally used; South Park Commrs. v. First Nat. Bank, 177 Ill. 241, 52 N. E. 367, determining the expression "corporate authorities of any such town" in act of June 17, 1895, as meaning the regular corporate authorities, not the park commissioners; Cortesy v. Territory, 6 N. Mex. 690, 30 Pac. 949, 19 L. R. A. 351, holding amendment of section 933 of penal code, imposing penalty on Sunday labor, included persons selling liquors, as provided by former act; Cortesy v. Territory, 7 N. Mex. 91, 32 Pac. 505, 19 L. R. A. 354, to same effect. Cited obiter in Arthur v. Lahey, 96 U. S. 115, 24 L. 767, on effect of Smythe v. Fiske, 23 Wall. 374, 23 L. 47, as not intended to overrule principal case; in general discussion in Maddock v. Magone, 152 U. S. 372, 38 L. 483, 14 S. Ct. 589.

13 Wall. 166–182, 20 L. 557, PUMPELLY v. GREEN BAY CO.

Pleading.— A plea that a river dam was not higher than a statute authorized, pleads a conclusion of law, and is bad. p. 175.

Cited and ruling applied in Hopper v. Covington, 118 U. S. 151, 30 L. 193, 6 S. Ct. 1027, holding averment that bonds were executed pursuant to laws of State, defective; Chicago, etc., R. Co. v. Sturgis, 44 Mich. 540, 7 N. W. 213, holding where the title to sue is statutory and depends on special construction of facts, the declaration must aver the existence of the facts; Arimond v. Green Bay, etc., Canal Co., 31 Wis. 331, following the rule of principal case against same company; also S. C., in 35 Wis. 47, to same effect; State v. City of Eau Claire, 40 Wis. 543, refusing to enjoin construction of a river dam, because the enabling act did not provide for compensating owners of overflowed lands, in the absence of an averment that any lands would be overflowed; dissenting opinion in Eisenbach v. Hatfield, 2 Wash. 265, 26 Pac. 547, 12 L. R. A. 645, and n., arguendo, on insufficiency of the answer in bar, in not stating the facts, point of of pleading not touched by majority.

Eminent domain.— The right to take private property for public use reaches back of all constitutional provisions, and the right to compensation for property so taken is incident to the exercise of that power; the powers exist as parts of one principle, p. 178.

Cited and principle applied in Monongahela Nav. Co. v. United States, 148 U. S. 324, 37 L. 467, 13 S. Ct. 625, holding the compensation to which company entitled for taking of a lock and dam must include value of the franchise to take tolls, as well as the actual property, and the court was not bound by the enabling act; Chicago, etc., R. Co. v. Chicago, 166 U. S. 238, 41 L. 985, 17 S. Ct. 585, holding that a judgment of State court, awarding $1 as compensation for opening a street across land used for railroad purposes, within city limits, could not be reviewed, as to amount; Chattanooga, etc., R. Co. v. Felton, 69 Fed. 278, holding a railway receiver had no right of eminent domain to forcibly construct a cross-over track across the road of another company to reach a private manufactory; Reardon v. San Francisco, 66 Cal. 502, 56 Am. Rep. 113, 6 Pac. 323, holding property-owner would be entitled to compensation, independent of statute, for damages caused by deposit of earth on it in grading a street, causing destruction of garden; Turnpike Road v. Baltimore, etc., R. Co., 81 Md. 256, 31 Atl. 855, holding that an electric railway company had power to take a road of the turnpike company and road and track of an existing horse-car line for construction of its road under its constitutional charter from the legislature; Opinion of the Justices, 66 N. H. 631, 33 Atl. 1077, holding the State's power of eminent domain extends to a railroad, but it cannot be purchased for less than its value, without owner's consent; McCullough v. Brown, 41 S. C. 237, 19 S. E. 469, 23 L. R. A. 418, holding that the "dispensary act" was not a statute of prohibition, but for raising revenue, and valid; dissenting opinion in Orr v. Quimby, 54 N. H. 646, arguendo.

Eminent domain.— Government cannot, by abstaining from absolute conversion of property, inflict irreparable and permanent injury on it without making compensation under a plea that it is not "taken" for the public use, p. 178.

Citing cases which affirm and apply this principle are: Head v. Amoskeag Mfg. Co., 113 U. S. 26, 28 L. 895, 5 S. Ct. 448, sustaining validity of State law authorizing riparian owners to construct mill-dams on paying compensation to owners of lands flooded thereby; Pennsylvania R. Co. v. Miller, 132 U. S. 83, 33 L. 272, 10 S. Ct. 37, S. C., sub nom. Pennsylvania R. R. v. Duncan, 129 Pa. St. 199, holding that there was no contract between State and company to prevent adoption of amendment to Constitution, making the company liable to consequential damages from construction of road; United States v. Alexander, 148 U. S. 187, 37 L. 416, 13 S. Ct. 529, holding the drainage and permanent destruction of a well by construction of a tunnel for an aqueduct, entitled owner to compensation (but this under 22 Stat. 168); Hollingsworth v. Parish of Tensas, 4 Woods, 288, 289, 17 Fed. 115, holding State has no such easement over riparian lands as to enable it to take the land for construction of a levee without making compensation; Douglass v. Leavenworth, 6 Kan. App. 99, 49 Pac. 677, holding individual may sue to abate public nuisance; Weaver v. Mississippi, etc., Co., 28 Minn. 539, holding the company liable for damage from diversion of course of stream, causing deposit of earth on riparian land and erosion of bank; Meyers v. City of St. Louis, 8 Mo. App. 275, holding that the building of a dyke in the river, by which its stream was diverted from a lot which derived its value from a water front, was an act entitling the owner to compensation; Trenton Water Co. v. Raff, 36 N. J. L. 343, holding legislature cannot authorize erection of a dam which, by causing a back water, permanently injures land without liability to make compensation; Robert v. Sadler, 104 N. Y. 232, 58 Am. Rep. 499, 10 N. E. 429, holding a city having accepted an easement for a public street, cannot remove more soil than is necessary to bring it to proper grade; Staton v. Norfolk, etc., R. Co., 111 N. C. 284, 16 S. E. 183, 17 L. R. A. 843, and n., holding legislative authority to construct a railroad did not entitle it to flood land without making compensation; had it purported to do so, it would be unconstitutional; Chattanooga v. Dowling, 101 Tenn. 345, 47 S. W. 700, a municipality in constructing a public sewer cannot suffer sewage to be discharged on private land through incompleteness of sewer without making compensation; G. C. & Santa Fe R. Co. v. Eddins, 60 Tex. 663, holding, where, by the construction of a steam railroad on a public street, special damage was caused to a lot owner, an action for damages will lie; Janesville v. Carpenter, 77 Wis. 301, 20 Am. St. Rep. 133, 46 N. W. 132, 8 L. R. A. 813, and n., holding a statute prohibiting a riparian owner from driving piles in river bed without providing for compensation, is unconstitu-

tional. See notes to 7 Am. Dec. 534, 20 Am. Rep. 631, 4 Am. St. Rep. 400, and 16 Am. St. Rep. 610.

Cited in dissenting opinions in Munn v. Illinois, 94 U. S. 144, 24 L. 90, majority holding that statute of Illinois, regulating public warehouses and the charges for warehousing and inspection of grain, is not in conflict with the Federal Constitution; Watuppa Reservoir Co. v. Fall River, 147 Mass. 561, 18 N. E. 474, 1 L. R. A. 470, and n., majority holding that the legislature, under act of 1847, could appropriate the waters of great ponds for domestic municipal or public uses without compensating riparian proprietors; State v. City of Hamilton, 47 Ohio St. 86, 23 N. E. 943, majority holding that a chartered gas company had no exclusive right to supply the city which would prevent the city erecting its own gas works without compensation; Western Union Tel. Co. v. Williams, 86 Va. 705, 19 Am. St. Rep. 915, 11 S. E. 109, 8 L. R. A. 433, and n., holding statute authorizing the erection of telegraph poles along a public road without providing for compensation to landowners, unconstitutional; Hodges v. Seaboard, etc., R. Co., 88 Va. 654, 14 S. E. 381, holding the occupation of a street by a railroad company imposes an additional servitude on abutting owners owning the fee of road, for which they must be compensated.

Distinguished in Price v. United States, 174 U. S. 377, 19 S. Ct. 767, holding an owner of property stolen by an Indian tribe, not entitled to compensation by United States for consequential damage to other property not stolen, unless so provided by act of Congress.

Eminent domain.— Where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it so as to effectually destroy or impair its usefulness, it is a "taking," within the meaning of the Constitution, pp. 178, 181.

The following citing cases affirm and apply this principle: Montana Co. v. St. Louis Mining, etc., Co., 152 U. S. 169, 38 L. 400, 14 S. Ct. 508, holding that entry on mining land by commissioners for purposes of survey by authority of statute is not a "taking" and the enabling statute is valid; Woodruff v. North Bloomfield G. M. Co. (The Mining Debris Case), 9 Sawy. 508, 18 Fed. 783, holding that the destruction of riparian farms by deposit of debris from hydraulic mining was special injury arising out of a public nuisance, for which owners were entitled to claim compensation; Hollingsworth v. Parish of Tensas, 4 Woods, 288, 17 Fed. 115, holding the construction of a levee, by which riparian property was permanently damaged, was a taking for which owner should be compensated; Rutz v. City of St. Louis, 3 McCrary, 265, 10 Fed. 341, holding that on proof of no damage arising from construction of a dike in Mississippi river the riparian owner was not entitled

to compensation; State v. Walruff, 26 Fed. 196, holding that the Kansas liquor law of 1881, by which the owner of an existing brewery was prohibited from making beer, constituted a "taking" of the property for public uses; Payne v. Kansas, etc., R. Co., 46 Fed. 556, holding that the use of a railway right of way for the approaches of a wagon and passenger bridge was an additional "taking;" King v. United States, 59 Fed. 12, holding that construction by government of a river dam by which riparian land had been covered with water and rendered unfit for cultivation was a "taking" for public purposes; Central Trust Co. v. Hennen, 90 Fed. 597, 61 U. S. App. 721, holding that a direct permanent injury to or obstruction of the right of egress and ingress by construction of a railroad over a private road is a "taking" requiring compensation; Memphis, etc., R. Co. v. Birmingham, etc., R. Co., 96 Ala. 577, 11 So. 643, 18 L. R. A. 167, holding the crossing of one railroad by another is a "taking" requiring compensation; Conniff v. San Francisco, 67 Cal. 47, 7 Pac. 44, holding the construction of an embankment in paving a street, closing a natural watercourse and permanently flooding adjoining property, was a "taking" of the property of another; Tyler v. Tehama Co., 109 Cal. 623, 42 Pac. 242, holding riparian proprietor entitled to compensation for damage caused by construction of a new county bridge, throwing the current of a stream against and washing away his property; Denver v. Bayer, 7 Colo. 120, 2 Pac. 10, the construction of an ordinary railroad is not an improvement of a street for public benefit, and an abutting owner is entitled to compensation for any special damage; Pensacola, etc., R. Co. v. State, 25 Fla. 326, 5 So. 840, 3 L. R. A. 667, and n., holding that enforcement of a schedule of freight and passenger rates insufficient to pay working expenses, amounted to a "taking" of the company's property; Rigney v. Chicago, 102 Ill. 72, holding city liable for damages to adjoining property by erecting a viaduct cutting off access to street except by a stairway, causing depreciation; Indianapolis, etc., Gravel Road Co. v. Belt R. Co., 110 Ind. 12, 10 N. E. 926, holding building of a railroad across a gravel road would be a "taking" within the Constitution; First National Bank v. Sarlls, 129 Ind. 211, 28 Am. St. Rep. 193, 28 N. E. 437, 13 L. R. A. 485, and n., holding a section of a fire ordinance, taking from property-owners the power of repairing wooden buildings, was unconstitutional; Hendershott v. City of Ottumwa, 46 Iowa, 660, 26 Am. Rep. 183, and Broadwell v. Kansas, 75 Mo. 218, 42 Am. Rep. 409, both holding a city cannot, in raising a street grade, deposit earth on private property without making compensation; Kemper v. Louisville, 14 Bush, 92, holding city liable for damage by raising grade of street so as to cause flooding of lots with water; Baltimore, etc., R. Co. v. Reaney, 42 Md. 133, holding that injury to property caused by lawful construction of a tunnel was a "tak-

ing" requiring compensation; Baltim
592, 39 Atl. 99, holding city liable for
farm land from erection of river dan
Mass. 518, 26 Am. St. Rep. 266, 28 N
holding city liable for encroachment o
ing property arising from natural cau
Mass. 82, 28 N. E. 1133, holding that
title, of land as a fee, in which vend
right of occupation, the exercise of t
of the fee constituted an eviction, givi
ranty; Grand Rapids Booming Co. v.
holding the flowing of riparian lands
without compensation is a violation
Port Huron, 35 Mich. 301, 24 Am. Rep
injuring house by cutting a sewer,
v. Allouez Min. Co., 38 Mich. 49, 31 A
chaser of land on which mill waste w
for speculation after mill was in ope
for the "taking" but not to injunc
Grand Rapids, 73 Mich. 535, 16 Am.
3 L. R. A. 253, and n., holding that gr
embankment in front of a lot thirty fe
was a "taking" which would be e
visors, 74 Mich. 562, 42 N. W. 78, 4 L.
ings of supervisors for discontinuanc
compensating owner of an adjoining f
etc., Boom Co., 28 Minn. 540, 11 N. W
logs and drift on land of riparian pro
in deflecting stream, was a taking;
R. Co., 112 Mo. 19, 20 S. W. 325, 17 L
damage to farm land by flooding, in
dam, did not constitute a taking; Meye
App. 274, holding the destruction of a
of a dike in the river constituted a tak
ery, 20 Mont. 189, 63 Am. St. Rep.
deposit of tailings from a placer mine
tion of land, was "a taking;" Eato
N. H. 521, 12 Am. Rep. 163, holdin
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Pennsylvania, etc., R. Co., 54 N. J. L
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land; Matter of Application of Peter
Rep. 640, holding statute prohibiting
tobacco in tenement-houses unconstit

N. Y. 478, 53 Am. Rep. 227, 3 N. E. 677, holding that the flooding of riparian land by the exercise of a paramount easement constituted a breach of a covenant for quiet enjoyment by the vendor of the land; Seifert v. City of Brooklyn, 101 N. Y. 145, 54 Am. Rep. 670, 4 N. E. 325, holding a municipal corporation cannot make public improvements involving appropriation of private property without making compensation; Garvey v. Long Island R. Co., 159 N. Y. 329, 70 Am. St. Rep. 552, 54 N. E. 58, holding the operation of a turntable in rear of and close to a house, causing a continuing trespass which must necessarily result in substantial damage, would be permanently enjoined and damages awarded; White v. Northwestern, etc., R. Co., 113 N. C. 620, 37 Am. St. Rep. 647, 18 S. E. 333, 22 L. R. A. 631, holding that a steam railroad cannot be laid in a public street without consent or compensation of abutting owners; Keating v. Cincinnati, 38 Ohio St. 148, 43 Am. Rep. 423, holding that where a cutting made in grading a street without due skill and care, caused a land slide, damaging land not adjoining the street, the city was liable for damages, both to the land and buildings; Inman v. Tripp, 11 R. I. 525, 23 Am. Rep. 523, holding a city liable for consequential damage from changing grade of street, causing surface water to flow into land and house of property-owner; The G. C. and Santa Fe R. Co. v. Eddins, 60 Tex. 662, and G. C. & S. F. R. Co. v. Fuller, 63 Tex. 470, both holding an abutting owner entitled to compensation for construction of railroad along public street when special damage shown; Hamilton Co. v. Garrett, 62 Tex. 606, holding an owner is entitled to compensation for value of land taken for a public road not merely to rent for the part appropriated; Winn v. Village of Rutland, 52 Vt. 495, holding the flooding of land with sewage so as to create a nuisance and permanently impair its usefulness, was a "taking" of the land; Smith v. City Council, 33 Gratt. 213, 36 Am. Rep. 791, holding that the improvement of a street so as to throw back water on an adjoining lot rendered city liable if by proper care the result could have been avoided; Hodges v. Seaboard, etc., R. Co., 88 Va. 670, concurring opinion, holding that the establishment of a railroad on a public street, imposing an additional servitude on the owners, is a "taking;" Stearns v. Richmond, 88 Va. 995, 998, 29 Am. St. Rep. 760, 762, 14 S. E. 848, 849, holding the damage from excavating a public street, causing land slides, was a taking of the land and buildings damaged; Parke v. City of Seattle, 5 Wash. 8, 34 Am. St. Rep. 844, 31 Pac. 312, 20 L. R. A. 70, to same effect; Johnson v. Parkersburg, 16 W. Va. 416, 422, 37 Am. Rep. 779, 785, holding that if a municipal corporation in changing grade of a street caused permanent damage to adjoining property without making compensation it violated the bill of rights; Jones v. United States, 48 Wis. 404, 412, 4 N. W. 519, 526, adopting rule in similar case relating to same river im-

grading a street properly carried out; Kehrer v. Richmond City, 81 Va. 748, holding property-owner not entitled to compensation for consequential damage from grading street on an embankment, such as necessity for a retaining wall, inconvenient access; Home Building Co. v. Roanoke, 91 Va. 61, 63, 20 S. E. 897, 27 L. R. A. 554, holding the construction of a bridge approach on a city street, leaving space on either side for convenience of adjoining owners, not a taking of private property; Mason v. Harpers Ferry Bridge Co., 17 W. Va. 419, holding that the construction of a bridge near a ferry did not constitute a taking of the ferry franchise unless it was an exclusive franchise, but holding that the ferry-owner was entitled to damages for the injury; Black River Imp. Co. v. La Crosse, etc., Co., 54 Wis. 685, 41 Am. Rep. 75, 11 N. W. 455, holding that riparian owners on navigable streams not entitled to compensation for diversion of water in the improvement of navigation.

Easement.— It requires twenty years to give title to an easement by prescription, p. 181.

Cited in Costigan v. Pennsylvania R. Co., 54 N. J. L. 241, 23 Atl. 813, holding railroad charter did not confer right for support of an embankment, which could only be acquired by prescription.

Eminent domain.— When United States sells land by treaty, or otherwise, and parts with fee by patent, without reservations, it retains no right to take that land for public use without just compensation, nor does it confer such right on the State in which it lies, p. 182.

Miscellaneous.— Cited incidentally in Orr v. Quimby, 54 N. H. 606, Black River Imp. Co. v. La Crosse, etc., Co., 54 Wis. 681, 41 Am. Rep. 72, 11 N. W. 453, Sweaney v. United States, 62 Wis. 399, 22 N. W. 609, and Green Bay, etc., Canal Co. v. Kankauna W. P. Co., 70 Wis. 654, 35 N. W. 536.

13 Wall. 183–185, 20 L. 615, STEINBACH v. INSURANCE CO.

Insurance.— When fire policy is made on stock of goods and "other articles in the line of business" of the insured, and required that fireworks, classed as extra hazardous, and imposing a higher premium, shall be specially written in it, the policy does not cover a loss from ignition of fireworks. Evidence to prove that fireworks are an article in the line of business of insured is inadmissible, p. 185.

Cited and approved in Cobb v. Insurance Co., 17 Kan. 503, holding that a special printed provision in a policy, prohibiting keeping of gunpowder, "unless by special consent in writing," imposed a condition precedent, and the keeping of gunpowder avoided the policy; Western Assurance Co. v. Rector, 85 Ky. 305, 3 S. W. 418, holding a policy on "general merchandise," when all the articles

v. Taylor, 125 U. S. 164, 31 L. 640, 8 S. Ct. 821, holding that where State Constitution prohibited taking or damaging of private property without compensation, damages may be recovered for substantial injury by a public improvement, whether direct or consequential; Gibson v. United States, 166 U. S. 276, 41 L. 1002, 17 S. Ct. 580, holding that temporary damage to riparian property by improving a navigable highway for public good was not a subject for compensation; Meyer v. Richmond, 172 U. S. 96, 19 S. Ct. 112, holding that the construction of a railroad on a public street by authority of a valid city ordinance did not entitle an abutting property-owner to consequential damage for obstruction of traffic; Mills v. United States, 46 Fed. 741, 742, 743, 12 L. R. A. 677, 678, 679, and n., holding that the erection of a dam across a navigable river which, by raising the level, prevented discharge of drainage from rice fields did not constitute a "taking;" High Bridge Lumber Co. v. United States, 69 Fed. 324, 326, 37 U. S. App. 234, holding no action for damages for consequential injuries from construction of public works will lie unless expressly conferred by statute, case of temporary flooding of lands by construction of dam; Green v. State, 73 Cal. 35, 37, 14 Pac. 613, 614, holding that consequential damage to a riparian proprietor by construction of a public canal, indirectly causing erosion of the land, did not constitute a "taking" of such property; De Baker v. Southern Cal. R. Co., 106 Cal. 285, 46 Am. St. Rep. 253, 39 Pac. 616, to same effect as to damage by river flood, consequent on construction of a levee in the bed. usually dry, of a river; Carson v. Hartford, 48 Conn. 88, holding an adjoining owner not entitled to compensation on abandonment of a contemplated street; Mayor, etc., of Cumberland v. Willison, 50 Md. 157, 33 Am. Rep. 314, holding the city not liable for slight damage by filling a millrace with street washings, done under direction of the mayor without authority; Pontiac v. Carter, 32 Mich. 170, holding that a property-owner is not entitled to compensation for damages to his property caused by changing grade of street; Whyte v. Kansas, 22 Mo. App. 414, holding that the passage of an ordinance for the widening of a street, which could be abandoned at any time before confirmation of the award, was not a "taking" of the property; Bertholf v. O'Reilly, 74 N. Y. 516, 30 Am. Rep. 329, holding a law giving a right of action against owner of building in which intoxicating liquor was sold (the civil damage act) not unconstitutional; Atwater v. Trustees, 124 N. Y. 610, 27 N. E. 387, holding erection of a coffer-dam, causing a temporary obstruction to flow of water, not a "taking;" Weisenberger v. Miller, 7 Ohio C. C. 178, holding that where the effect of a river dam was merely to cause slack water in a tributary which did not interfere with its ordinary use by riparian proprietors, there was no taking; Railroad v. Bingham, 87 Tenn. 532, 11 S. W. 708. 4 L. R. A. 627, and n., holding that an abutting owner is not entitled to compensation for depreciation of property caused by

Distinguished in Stroheim v. Deimel, 77 Fed. 804, 46 U. S. App. 639, holding that an order of discharge of a debtor-prisoner for failure to pay his board bill in advance, was final, and reviewable by writ of error.

Appeal and error.— Writ of error must bear teste of chief justice of the Supreme Court, pp. 169-190.

Followed in Germain v. Mason, 154 U. S. 588, 20 L. 689, 14 S. Ct. 1171, where teste of clerk of Supreme Court of Montana held insufficient.

13 Wall. 190-222, 20 L. 550, PENNSYLVANIA COLLEGE CASES.

Courts.— Whether an act is repugnant to State Constitution is not a question of Federal cognizance in a case brought by writ of error to State court, p. 212.

Cited and ruling applied in Railroad Co. v. Georgia, 98 U. S. 366, 25 L. 188, holding the decision of State court on validity of sections of State code not open to review in Supreme Court; First Nat. Bank v. Bennington, 16 Blatchf. 55, F. C. 4,807, following decision of State court, as to validity of statute of Vermont authorizing a bond issue.

Constitutional law.— Corporate franchises granted to, and accepted by, private corporations are in nature of legal estates and contracts within contract obligation clause of the Constitution, p. 212.

Cited in Cambios v. Philadelphia, etc., R. Co., 4 Fed. Cas. 1106, holding that all State laws, incorporating private institutions for public purposes, are legislative grants, and consequently contracts; The Black River Imp. Co. v. Holway, 87 Wis. 588, 59 N. W. 127, in general discussion showing object of the repealing clause in State Constitution.

Constitutional law.— Private charters are contracts because based for consideration on the liabilities and duties which corporators assume by acceptance; they cannot be resumed, diminished, or impaired without assent of corporators, unless right is reserved in charter or an antecedent general law, p. 214.

Cited and principle applied in Holyoke Co. v. Lyman, 15 Wall. 511, 522, 21 L. 137, 140, affirming power of legislature to compel a corporation authorized by charter to construct a dam across a river to alter it to allow passage of fish, under a right reserved in general law; Spring Valley W. W. v. San Francisco, 61 Cal. 5, holding the act of 1858, being the company's charter, was subject to the power of alteration given by the Constitution of 1849, and was not impaired by the constitutional amendment of 1879; Watson Seminary v. Pike County Court, 149 Mo. 68, 50 S. W. 882, 45 L. R. A. 679, holding that under general laws of 1845, an act of 1847, appropriat-

ing fines and penalties in a county to support a seminary, was subject to repeal. See note to 47 Am. Dec. 478, and 62 Am. St. Rep. 166.

Corporations.—When, by valid legislative act, two corporations are consolidated, they become merged in the one created, and neither of the originals is competent to sue for any cause of action subsequent in date to their acceptance of new act of incorporation, p. 215.

Cited in Kansas, etc., R. Co. v. Smith, 40 Kan. 193, 19 Pac. 637, holding that when the Kansas, Oklahoma and Texas R. Co. consolidated with other railway companies, it ceased to exist as a corporation.

Constitutional law.—The corporate franchises of private corporations may be altered, modified or amended by statute, in all cases where the power to pass such laws is reserved in the charter or in some antecedent general law, pp. 212-220.

Citing cases which apply this principle are: Miller v. State, 15 Wall. 488, 495, 21 L. 101, 103, sustaining an act changing the ratio of subscription to railroad stock carrying the right of appointing directors, the modifying power being found in a general antecedent statute; Railway Co. v. Philadelphia, 101 U. S. 540, 25 L. 915, holding the legislature had power under the Constitution to raise the license on street cars in Philadelphia; Greenwood v. Freight Co., 105 U. S. 18, 21, 26 L. 964, 965, holding that section 41, chapter 68, of the Massachusetts general statutes enabled the State to repeal all charters granted by it; Bryant v. Board of Education, 151 U. S. 657, 38 L. 304, 14 S. Ct. 472, sustaining act of Kentucky, empowering the trustees of a college to remove it to another site, power of amendment or repeal being found in the charter; Appeal Tax Court, etc., v. Baltimore Academy, etc., 50 Md. 447, affirming power of legislature to revoke the immunity from taxation of a chartered charitable institution, the power being in the charter; Thornton v. Marginal Freight Ry., 123 Mass. 34, holding the charter of the Marginal Freight R. Co. was subject to repeal, under power in antecedent general statute, and was legally repealed by act of 1872; Attorney-General v. Looker, 111 Mich. 507, 69 N. W. 932, sustaining the stockholders' minority law, as not infringing right of majority to elect directors, collecting authorities; Watson Seminary v. Pike County Court, 149 Mo. 67, 50 S. W. 882, 45 L. R. A. 679, holding that, under general law of 1845, an act of 1847, appropriating fines and penalties in a county to support a seminary, was subject to repeal; West Wisconsin, etc., R. Co. v. Board of Supervisors, 35 Wis. 271, holding the acts of 1871, repealing former statutes, exempting railway grants from taxation, valid, the repealing power being in the Constitution; Attorney-General v. Railroad Cos., 35 Wis. 575, affirming constitutionality of chapter 273, laws of 1874, limiting the tolls chargeable by railway companies on the railways within the State on transportation wholly within State, where the charter

gave an unlimited right of toll. See notes to 84 Am. Dec. 141, 142, and 62 Am. St. Rep. 172. Extended in Miller v. State, 15 Wall. 497, 21 L. 104, holding the modifying power might exist in the State Constitution.

Constitutional law.— Assent renders legislation, changing a corporate charter, valid, unless it changes the control of the institution, or diverts the fund of the donor to a use inconsistent with the purpose of original endowment, pp. 218–220.

Cited and principle applied in New York, etc., R. Co. v. Bristol. 151 U. S. 567, 38 L. 273, 14 S. Ct. 440, sustaining validity of Connecticut statute relating to railway-grade crossings, the railroad charter being subject to legislative power of amendment, specifically and under general law. See note to 53 Am. Dec. 473.

Constitutional law.— Contract by third person with corporation does not prevent or limit power of legislature to alter, modify, or amend the charter, under the reserve power, or with assent of corporation, p. 222.

13 Wall. 222–236, 20 L. 617, INSURANCE CO. v. WILKINSON.

Insurance.— If effects of an injury are lasting and remain when the insurance is applied for, or if the injury has affected, or might affect, the general health, or shorten life, non-disclosure, though not intentional or fraudulent, would prevent recovery, p. 230.

Cited and followed in Alabama Gold Ins. Co. v. Johnston, 80 Ala. 475, 2 So. 131, as to symptoms of diseases in childhood; Providence, etc., Assurance Society v. Reutlinger, 58 Ark. 535, 537, 25 S. W. 837, 838, holding answers as to physical condition should be interpreted as referring only to illness or injury affecting the risk; Bancroft v. Home Benefit Assn., 120 N. Y. 19, 23 N. E. 999, 8 L. R. A. 70, holding that a slight injury to the throat, received in fencing, was not a serious injury, to cause breach of warranty; Rand v. Life Assurance Society, 97 Tenn. 296, 37 S. W. 8, sustaining instructions on meaning of "serious illness" and "use of chloral" in application for policy; Knights of Pythias v. Cogbill, 99 Tenn. 37, 41 S. W. 343, holding that omission to mention a disease which did not contribute to death of insured did not render policy void. See also note to 59 Am. Rep. 820, on warranties by answers in insurance applications.

Insurance.— Fact that injury was serious at time does not, of itself, require its disclosure upon applying for life insurance, p. 230.

Cited in Weigle v. Cascade, etc., F. & M. Ins. Co., 12 Wash. 455, 41 Pac. 55, in discussion of the elements of concealment of material facts, avoiding a policy.

Insurance.— Question whether an injury was so serious as to require disclosure, when raised, is for jury, not the insurer, to decide, p. 230.

Cited in Bassell v. American Fire Ins. Co., 2 Hughes, 537, F. C. 1,094, holding a verdict that words of reference in body of a policy did not convey notice of conditions indorsed in small type bound the court.

Reformation of instruments.—Where written instrument fails to express intention of parties, as the result of accident, mistake, or fraud, it may be set aside or reformed in equity, and sometimes in an action at law, and parol evidence is admissible for that purpose, pp. 231, 232.

The citing cases applying this well-known rule are: Insurance Co. v. Mahone, 21 Wall. 155, 22 L. 594, admitting parol evidence to prove that an answer to an application question, written by the agent, was not that verbally made by the applicant, as to temperance; New Jersey, etc., Ins. Co. v. Baker, 94 U. S. 614, 24 L. 270, to same effect, as to questions of usual medical attendant and deaths in family; Snell v. Insurance Co., 98 U. S. 89, 25 L. 54, reforming contract of fire insurance made in name of owner's agent so as to cover all interests; American Basket Co. v. Farmville Ins. Co., 3 Hughes, 253, F. C. 290, saying policies must be construed liberally in respect to the insured and strictly as to the insurer; London & Lancashire F. I. Co. v. Storrs, 71 Fed. 125, 36 U. S. App. 327, on power of parties to contract of insurance to waive stipulations, as to appointment of umpire before appraisement; Glover v. National Fire Ins. Co., 85 Fed. 130, 42 U. S. App. 728, allowing parol evidence to show that a misdescription of occupancy of the premises was made by the agent with knowledge of the facts; McElroy v. British America, etc., Co., 94 Fed. 997, 998, allowing parol evidence to prove that a policy was issued with agent's knowledge of other insurance and incumbrance; Maxson v. Llewelyn, 122 Cal. 199 54 Pac. 734, sustaining a finding on evidence that a check for a first premium was obtained by agent's fraudulent representation of nature of policy to be issued on the application; Franklin Ins. Co. v. Humphrey, 65 Ind. 557, 32 Am. Rep. 85, rejecting evidence to prove custom to remove property to a place of safety during season of "running ice," which insured was not bound to observe; Insurance Co. v. Gray, 44 Kan. 735, 25 Pac. 109, holding evidence correctly admitted to show untruth of statements in an application by an illiterate, to which he had affixed his mark; Planters' Mutual Ins. Co. v. Deford, 38 Md. 402, admitting parol evidence to prove that agent was informed, at the time, of nature of the insurable interest, to rebut allegation of breach of warranty; Ben Franklin Ins. Co. v. Gillett, 54 Md. 218, directing reformation of policy and payment of loss where agent, by mistake and knowing the facts, omitted to describe property as leasehold; Kausal v. Minnesota, etc., Ins. Assn., 31 Minn. 23, 47 Am. Rep. 779, 16 N. W. 432, holding verbal testimony admissible to prove that application was filled up by company's agent, and that the facts were fully and correctly stated to

him; Rivara v. Queens Ins. Co., 62 Miss. 729, holding oral testimony admissible to show circumstances under which policy was issued and to effect an estoppel, as to any of its provisions; Insurance Co. v. Gibson, 72 Miss. 65, 17 So. 14, admitting parol evidence to show waiver of a stipulation that applicant's real interest must be set out in policy, where the applicant was lessee and the insurance was issued on the entire interest; Tracy v. Union Iron Works, 29 Mo. App. 363, majority holding that parol testimony was not allowable to prove a collateral agreement by lessor to construct a switch, not mentioned in, but forming part of, the consideration, for the acceptance of the lease; Pechner v. Phœnix Ins. Co., 65 N. Y. 207, holding parol evidence admissible to prove waiver by agent of condition as to additional insurance, and that the waiver might be by parol; Planters' Ins. Co. v. Sorrels, 1 Baxt. 355, 25 Am. Rep. 782, admitting parol evidence to prove full disclosure of insured's title to agent, who filled up the answers in application; American Central Ins. Co. v. McCrea, 8 Lea, 525, 41 Am. Rep. 652, affirming power of agent to waive by parol a condition as to other insurance, when duly notified; Dale v. Continental Ins. Co., 95 Tenn. 49, 31 S. W. 269, holding that a prohibition against waiver of conditions of a policy, except by the general manager, may be waived by parol; Home Ins., etc., Co. v. Lewis, 48 Tex. 630, holding that a mistake in the number of the block in which property was situated would be corrected unless the rules of insurer prohibited further insurance in the block to which property really belonged; Texas Banking & Ins. Co. v. Stone, 49 Tex. 14, restating rule of admissibility of parol evidence, to prove agents responsible for statements or omissions in application and estop insurer from setting up breach of warranty; Ring v. Windsor Co. M. F. I. Co., 51 Vt. 569, admitting parol evidence to estop insurer from proving false statement as to incumbrances, made by agent in the application; McLean v. Piedmont, etc., L. I. Co., 29 Gratt. 377, admitting parol evidence to show that conditions inserted in receipts given for back premiums were in violation of an agreement made with the company; Wytheville Ins. Co. v. Stultz, 87 Va. 638, 13 S. E. 80, holding that an oral application for a policy does not thereby become a warranty, and if false but honestly made, does not avoid the policy; Deitz v. Insurance Co., 31 W. Va. 857, 13 Am. St. Rep. 915, 8 S. E. 620, holding parol evidence admissible to prove that application was filled up by agent and that facts were fully and correctly stated to him.

Distinguished in Hubbard v. Mutual Reserve F. L. Assn., 80 Fed. 685, holding the insured cannot, by parol evidence, show that the statements in his application were not true. Denied in McCoy v. Metropolitan L. I. Co., 133 Mass. 85, holding the rule of principal case had not been adopted in State and that parol evidence could not be admitted to contradict statements in the application; Franklin F. Ins. Co. v. Martin, 40 N. J. L. 577, 579, 29 Am. Rep. 278, 279,

refusing to allow parol testimony to vary a contract of insurance and to raise an estoppel in pais which shall conclude the insurer from pleading forfeiture for breach of condition.

Estoppel.— Where one party has by his representations or conduct induced the other party to a transaction to give him an advantage, which it would be against equity and good conscience for him to assert, he is estopped to avail himself of it in a court of justice, p. 233.

Cited and principle affirmed in Metropolitan L. I. Co. v. Harper, 8 Hughes, 267, F. C. 9,505, holding that estoppel was the cause of the rule allowing parol evidence to prove that insurance agent's acts had operated as a fraud on the insured; Mutual, etc., L. I. Co. v. Robison, 58 Fed. 730, 19 U. S. App. 266, 22 L. R. A. 331, holding insurer estopped to deny truth of answers inserted by its medical examiner authorized to ask the questions and write the answers; Glover v. National Fire I. Co., 85 Fed. 131, 42 U. S. App. 728, holding agent's knowledge of real condition and situation of the risk, estopped the company from disputing the statement; Strauss v. Insurance Co., 9 Colo. App. 391, 48 Pac. 824, holding that if the agent knew of other insurance before issue of policy the company was estopped to plead breach of condition; Gillespie v. Schuman, 62 Ga. 252, habitual acceptance of premiums after due date estops company from setting up sickness of insured when last payment made to defeat policy; Standard Life, etc., Co. v. Davis, 59 Kan. 527, 53 Pac. 858, holding company estopped to allege breach of warranty when answers as to other insurance were incorrectly inserted in application for an accident policy on correct information given by insured; Maryland Fire Ins. Co. v. Gusdorf, 43 Md. 513, holding company estopped by act of its president waiving production of policy for indorsement of allowance of removal of property insured; Hartford Fire Ins. Co. v. Keating, 86 Md. 147, 63 Am. St. Rep. 505, 38 Atl. 31, issue by an agent of a policy with full knowledge that the interest of insured is not that of sole and absolute owner, estops company from setting up that defense; Westchester Fire Ins. Co. v. Earle, 33 Mich. 151, where an agent has so acted as to bind himself in the allowance of additional insurance the company is also bound; Cook v. Standard L. & A. Ins. Co., 84 Mich. 18, 47 N. W. 570, holding that an insured was estopped from relying on action of agent in extending accident policy to injuries while under influence of liquor, when policy expressly negatived the agent's power to alter the conditions; Parsons v. Knoxville F. I. Co., 132 Mo. 590, 31 S. W. 120, holding insurer estopped from claiming forfeiture of policy when agent omitted to indorse on it the fact, known to him, that insured did not own the land on which the property stood; Thomas v. Hartford Fire Ins. Co., 20 Mo. App. 157, holding the company estopped by acts of agent

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Insurance.— Powers of in
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tion, when the agent prepared the statement; Tubbs v. Dwelling-House Ins. Co., 84 Mich. 652, 48 N. W. 298, holding that the act of a soliciting agent in inserting in the application an incorrect amount of unpaid purchase money, without notice to the insured, did not constitute a breach of warranty; Breckinridge v. American Central Ins. Co., 87 Mo. 71, holding insurer bound to an assignment of the policy approved by its regular agent, no want of particular authority being communicated to the insured; Gentry v. Connecticut Mut. L. I. Co., 15 Mo. App. 225, in general discussion as to agent's powers, holding that authority to receive and forward applications and receive the first premium, authorized agent to bind the company by his receipt; Barnard v. National Fire Ins. Co., 38 Mo. App. 114, holding company's agent had power to waive a condition against assignment, and his acceptance of premium from assignee bound the company; Sprague v. Western Home Ins. Co., 49 Mo. App. 427, holding when policy contained a provision inhibiting agent's power to waive any conditions the policy became void on a breach as to occupancy occurring; McCollum v. Liverpool, L. & G. Ins. Co., 67 Mo. App. 81, holding a general agent had power by oral agreement to waive proof of loss; Fire Ins. Co. v. Building Assn., 43 N. J. L. 656, 657, holding the powers of an agent will be considered as general in the absence of express limitations in the policy or of notice to the assured of the existence of a restriction; Marvin v. Universal L. I. Co., 85 N. Y. 283, 39 Am. Rep. 659, where the policy expressly denied to any agent the power to waive conditions, and the assured had notice, held, an agent had no power to extend time for payment of premium; Kendrick v. Mutual Ben. L. Ins. Co., — S. C. —, 32 S. E. 729, holding that an instruction to an agent to require a health certificate when premium not paid for thirty days after due was not binding on insured; Planters' Mutual Ins. Co. v. Lyons, 38 Tex. 273, holding that assent of company's agent to additional insurance bound the company unless insured knew that agent had no authority to consent; Smith v. Niagara F. I. Co., 60 Vt. 691, 692, 6 Am. St. Rep. 147, 148, 15 Atl. 356, 1 L. R. A. 221, and n., holding that where a local agent, with limited authority, had no power to waive statement of losses, any waiver by him would be void, and a waiver by general agent, unless made in the prescribed manner, would also be void; Sheppard v. Peabody Ins. Co., 21 W. Va. 381, 382, holding the authority of a local agent to bind the company depended on his apparent powers, which the assured had a right to assume. See note to 65 Am. Dec. 557. Cited, arguendo, in French v. People, 6 Colo. App. 317, 40 Pac. 465.

Insurance company, establishing a local agency, must be held responsible to parties with whom they transact business for acts and declarations of agent within scope of his employment, p. 235.

The citing cases affirming and relying upon this holding are in part as follows: Baubie v. Ætna Ins. Co., 2 Dill. 159, F. C. 1,111,

holding that a local agent had power to bind the company by a parol contract to renew a policy during plaintiff's ownership; Brugger v. State Invest. Ins. Co., 5 Sawy. 310, F. C. 2,051, reforming a policy to include mill machinery omitted in error from application by agent expressly authorized to prepare applications; Sawyer v. Equitable Accident Ins. Co., 42 Fed. 32, 33, 34, holding agent had no authority after signature of an application to supply a blank as to income; Mutual, etc., Ins. Co. v. Robison, 54 Fed. 595, where the insured had no knowledge of any limitation of agents' powers, and fully communicated to the agents the facts with reference to questions, the issue of a policy waived all non-statements; Laclede, etc., Mfg. Co. v. Hartford, etc., Ins. Co., 60 Fed. 359, 19 U. S. App. 510, holding an agent had no authority to modify verbally an insurance on boilers so as to include two new boilers put in since date of policy; American Employers, etc., Co. v. Barr, 68 Fed. 876, 32 U. S. App. 444, holding an agent had apparent authority to make a binding contract of insurance without any further approval of risk by the company; Fireman's Fund Ins. Co. v. Norwood, 69 Fed. 74, 75, 78, 32 U. S. App. 490, holding the act of an agent with knowledge of intended insurance to a specified amount in taking and delivering policies conditioned against further insurance, except to a smaller sum, estopped the company; Supreme Lodge of K. of P. v. Withers, 89 Fed. 164, 59 U. S. App. 185, holding that the secretary of a section was, in fact, the agent of the board of control for receiving and transmitting dues, notwithstanding the provision in society's general laws; M'Elroy v. British America, etc., Co., 94 Fed. 1000, holding that the issue of a policy was a ratification of the acts of an insurance solicitor, not a regular agent of the company, and bound it to knowledge acquired by him; Piedmont & Arlington L. Ins. Co. v. Young, 58 Ala. 484, 29 Am. Rep. 773, holding that an insured intending to take a "participating" policy was entitled to recover on the misrepresentations of the agent that the policy issued was of that class; Commercial Fire Ins. Co. v. Allen, 80 Ala. 576, 1 So. 206, holding company bound to agent's knowledge of title of property insured; Syndicate Ins. Co. v. Catchings, 104 Ala. 189, 16 So. 50, holding insurer bound to a waiver of proof of loss by local agent without authority, but where the insured had no notice of the limitation of his power; Keith v. Herschberg Optical Co., 48 Ark. 146, 2 S. W. 779, holding principals liable for contract of travelling salesman not to sell a certain class of goods to any other merchant in a town; Jacoway v. Insurance Co., 49 Ark. 324, 5 S. W. 340, holding it was within scope of agent's apparent authority to receive a conditional application for insurance; Silverberg v. Phœnix Ins. Co., 67 Cal. 40, 7 Pac. 39, holding agents were authorized to waive a condition as to possession of the property insured; Farnum v. Phœnix Ins. Co., 83 Cal. 257, 17 Am. St. Rep. 242, 23 Pac. 872, holding company bound by term of credit allowed by agent; West Coast L. Co. v.

State Investment, etc., Co., 98 Cal. 509, 33 Pac. 260, holding agent had authority to waive surrender of a leasehold interest and condition as to occupancy; Knarston v. Manhattan Life Ins. Co., 124 Cal. 76, 56 Pac. 773, holding a general agent of an insurance company could waive the conditions of a policy and extend the time for payment of a premium; United States Accident Assn. v. Kittenring, 22 Colo. 263, 44 Pac. 597, company not estopped to prove restricted character of agent's authority when known to insured; Waterbury v. Dakota F. & M. Ins. Co., 6 Dak. 478, 43 N. W. 701, holding the agent's reply as to safety of a stovepipe bound the company though insured failed to carry out a representation that he would build a chimney; American Life Ins. Co. v. Green, 57 Ga. 472, acceptance of a premium by general agent after due date is a waiver of forfeiture, the insured being in good health at the time; Clay v. Phœnix Ins. Co., 97 Ga. 54, 25 S. E. 421, holding notice to company's agent of vacancy of property, notice to company; Clubb v. American Accident Co., 97 Ga. 511, 25 S E. 333, holding agent's misdescription of occupation of insured in application, without knowledge of insured, bound the company; Phœnix M. L. Ins. Co. v. Hinesley, 75 Ind. 10, holding notice to general agent of a foreign insurance company that premiums were paid by consent after due, and waiver, was notice to company; Lake Shore, etc., R. Co. v. Foster, 104 Ind. 313, 54 Am. Rep. 328, 4 N. E. 31, holding company liable for loss of baggage intrusted in good faith to baggageman to place on train; Commercial Union Ass. Co. v. State, 113 Ind. 336, 15 N. E. 521, holding agent of a foreign insurance company could bind the company by a parol contract of insurance; Slater v. Capital Ins. Co., 89 Iowa, 632, 635, 57 N. W. 423, 424, 23 L. R. A. 183, holding waiver of proof of loss by special adjusting agent binds the company when insured knew of no limitation of his authority; American Central Ins. Co. v. McLanathan, 11 Kan. 549, where failure to state insurer's interest in property held waived by agent and company bound; Life Ins. Co. v. Twining, 19 Kan. 381, holding acts of agent in inducing an insured to take a corrected policy by giving time for payment of premium binding on company when insured died after due date but before expiration of the extension; Western Home Ins. Co. v. Hogue, 41 Kan. 527, 21 Pac. 643, a general agent of a company having authority to renew policies binds the company by a renewal in an unauthorized manner, as by a renewal certificate.

Elsewhere the syllabus holding has been affirmed and relied upon by the following: Mississippi Valley Ins. Co. v. Neyland, 9 Bush, 436, holding a general agent who exceeds his powers may bind principal unless insured had notice of the limitation as by delivery of a binding receipt without payment of first installment; Phœnix Ins. Co. v. Spiers, 87 Ky. 296, 8 S. W. 457, where agent knew of an additional insurance his knowledge is imputable to

company, so that receipt of premiums waived forfeiture; Packard v. Fire Ins. Co., 77 Me. 150, holding the issue of a policy on an application prepared and submitted by one who is not in fact the company's agent, is a recognition of his agency, and his waiver of written assent to material alterations in the property binds the insurer; Mailhoit v. Metropolitan L. I. Co., 87 Me. 381, 47 Am. St. Rep. 340, 32 Atl. 991, holding waiver of medical examination by agent bound the company when policy was actually issued and premiums received; Schaeffer v. Farmers' M., etc., Co., 80 Md. 575. 45 Am. St. Rep. 368, 31 Atl. 319, holding notice to agent of use of an engine on premises was notice to the company; Hartford Fire Ins. Co. v. Keating, 86 Md. 146, 63 Am. St. Rep. 504, 38 Atl. 31, when a company supplies a person with policies in blank, with authority to issue, sign and deliver them and receive premiums, it constitutes him a general agent; Pechner v. Ins. Co., 65 N. Y. 209, holding that an agent authorized to issue policies and write contents thereon, may bind the company to a waiver of a condition; Merserau v. Phenix Mutual L. I. Co., 66 N. Y. 278, holding an insured having knowledge that an agent's authority was limited in receiving renewal premiums could not plead payment to agent without company's receipt in bar of forfeiture; Goodwin v. Massachusetts, etc., Ins. Co., 73 N. Y. 495, holding the act of an agent in waiving proof of loss within the specified time bound the company; Flynn v. Equitable L. I. Co., 78 N. Y. 577, 34 Am. Rep. 565, holding company estopped to deny truth of answers by the medical examiner; Weed v. London & L. F. I. Co., 116 N. Y. 117, 22 N. E. 232, holding a special agent, with limited authority, had no power to waive forfeiture for breach of condition as to defect of title; Forward v. Continental Ins. Co., 142 N. Y. 389, 37 N. E., 617, 25 L. R. A. 640, holding insuring company affected by knowledge of agent intrusted with the power of issuing policies that the insured was not sole owner at time of issue; McCraw v. Old North State Ins. Co., 78 N. C. 155, holding it error to omit to inform a jury that company was bound by acts of its agent within the line of his employment; Hornthal v. Western Ins. Co., 88 N. C. 75, holding that agent's knowledge of existing insurances and issue of policy was a waiver of prohibition of other insurance without consent; Follette v. Accident Assn., 107 N. C. 244, 247, 22 Am. St. Rep. 879, 882, 12 S. E. 372, 12 L. R. A. 317, where agent's actual knowledge of applicant's defective hearing, held constructive notice to principal and issue of policy deemed waiver of the objection; Horton v. Home Ins. Co., 122 N. C. 505, 65 Am. St. Rep. 722, 29 S. E. 946, holding that agent's knowledge of advertisement for sale of insured property by mortgagees was knowledge of the company, and when the insured was ignorant of the foreclosure and sale, the insurer remained bound; Kendrick v. Mutual Ben. L. Ins. Co., 124 N. C.

319, 70 Am. St. Rep. 595, 32 S. E. 729, holding that written instructions to agents that if premium was more than thirty days overdue there must be a health certificate, was evidence that credit was allowable; Hardwick v. State Ins. Co., 20 Or. 560, 26 Pac. 844, holding company bound by a verbal contract of agent for surrender of existing policy and issue of new policy, the increased premium to be paid on issue, but insurance to take effect immediately; Stickley v. Mobile Ins. Co., 37 S. C. 69, 16 S. E. 284, sustaining a refusal of a non-suit in action on an oral contract of insurance made by an agent; American Central Ins. Co. v. McCrea, 8 Lea, 528, 41 Am. Rep. 654, holding that an agent under a power authorizing the countersigning and issue of policies and the doing of the customary acts and duties of insurance agents, could waive a condition as to other insurance; Continental Ins. Co. v. Kasey, 25 Gratt. 273, 18 Am. Rep. 684, where the insurer inspects the premises and subsequently issues policy the insured is not liable for a misdescription in the application and policy made by the agent; Mutual Fire Ins. Co. v. Ward, 95 Va. 238, 239, 28 S. E. 211, 212, holding that knowledge of other insurance acquired by an agent authorized to receive and accept proposals, fix premiums and receive payment is knowledge of the company whether communicated to company or not; Georgia Home Ins. Co. v. Goode, 95 Va. 758, 30 S. E. 369, holding that a false statement of no incumbrance in application made on advice of agent that it was too small to be noticed, estopped the company from claiming forfeiture; Coles v. Jefferson Ins. Co., 41 W. Va. 266, 23 S. E. 733, holding the extent of an agent's power may depend rather on what he is held out to the public to possess rather than on his actual powers; Woolpert v. Franklin Ins. Co., 42 W. Va. 662, 26 S. E. 526, affirming power of agent authorized to issue policies, to waive forfeitures and conditions in policy and consent to prior and subsequent insurance. See note to 93 Am. Dec. 324, and note to 42 Am. Rep. 622.

Cited in general discussion in De Lancey v. Ins. Co., 52 N. H. 590; arguendo, in Pelzer v. Sun Fire Office, 36 S. C. 270, 15 S. E. 583.

Distinguished in New York L. Ins. Co. v. Fletcher, 117 U. S. 531, 532, 29 L. 938, 939, 6 S. Ct. 843, holding an assured bound by his statements, when the application expressly stipulated that the company should not be bound by its agent's statements unless reduced to writing and forwarded with application; United States L. Ins. Co. v. Smith, 92 Fed. 508, where the facts as to rejection of prior applications were communicated to agent, who, without authority, supplied a false answer, the company was held not bound; Stamey v. Western Union Tel. Co., 92 Ga. 618, 44 Am. St. Rep. 99, 18 S. E. 1010, holding delivery of a message to company's messenger is not delivery to the company, until message presented and accepted at transmitting office; O'Brien v. Prescott Ins. Co., 134 N. Y. 31, 34, 31 N. E. 266, 267, holding that where the power of the agent was ex-

pressly limited by the policy an agent had no power to waive condition as to occupancy of building insured.

Insurance.— Where an agent misleads a customer as to what application should contain, or himself prepares application and obtains customer's signature, on assurance of its correctness, description of risk should be regarded as act of insurer, not of insured, pp. 235–236.

The citing cases affirming and applying this holding are, in part, as follows: New Jersey, etc., Ins. Co. v. Baker, 94 U. S. 614, 24 L. 270, holding that the application, being filled up by the agent, could not be set up to defeat its policy; Eames v. Home Ins. Co., 94 U. S. 630, 24 L. 301, where interest of insured was misdescribed in application for fire policy, written up by agent, though correctly communicated to him; Continental Ins. Co. v. Chamberlain, 132 U. S. 309, 33 L. 343, 10 S. Ct. 88, holding the act of district agent, in writing a negative answer as to other insurance and informing the applicant that insurance in a co-operative society did not need disclosure, estopped the company from denying liability; Sias v. Roger Williams Ins. Co., 8 Fed. 186, holding company bound by statement prepared by sub-agent verbally appointed by agent; Langdon v. Union Mutual L. I. Co., 14 Fed. 276, holding company estopped by act of sub-agent, stating wrong name of medical attendant, having correct information; Pacific Mut. L. I. Co. v. Snowden, 58 Fed. 346, 12 U. S. App. 704, where the insured fully stated his occupation and the agent classified the risk and fixed the premium, the insurer was bound; Standard Life, etc., Co. v. Fraser, 76 Fed. 708, 44 U. S. App. 694, holding there was no fraud in an application when the facts were truly stated to the agent, as to prior insurance, and answer made on his advice; New York L. I. Co. v. Russell, 77 Fed. 102, 103, 104, 40 U. S. App. 530, holding company bound, when facts of disease were communicated to agent, who filled up the application; Phœnix Ins. Co. v. Warttemberg, 79 Fed. 248, 48 U. S. App. 348, to same effect as to statement of other incumbrances; New York Life Ins. Co. v. M'Master, 87 Fed. 69, 57 U. S. App. 647, to same effect as to other insurance, insured being a member of co-operative society; Insurance Co. v. Brodie, 52 Ark. 14, 15, 11 S. W. 1016, 4 L. R. A. 459, 460, where false answers as to condition of property were knowingly inserted in application by agent, the company was bound; Wheaton v. Insurance Co., 76 Cal. 419, 420, 9 Am. St. Rep. 218, 18 Pac. 760, holding company bound by false answers of value, written by agent, made contrary to correct statement and without knowledge of insured; German Am. L. Assn. v. Farley, 102 Ga. 735, 29 S. E. 621, holding false statements as to rejection of risk by other companies, in an application prepared by agent who knew the truth, did not avoid policy when made without fraud: Mass. Mutual L. Ins. Co. v. Robinson, 98 Ill. 330, holding company estopped after receiving premiums to deny liability, when agent

prepared application, assured having made full statement of facts to agent; Royal Neighbors of America v. Boman, 177 Ill. 32, 69 Am. St. Rep. 205, 52 N. E. 266, to same effect where medical examiner inserted false answers to questions truthfully replied to by insured; Phœnix Ins. Co. v. Allen, 109 Ind. 277, 10 N. E. 87, agent inserting false description of location of personal property without knowledge or consent of insured, binds the company; Pickel v. Phœnix Ins. Co., 119 Ind. 297, 21 N. E. 900, and note to 12 Am. St. Rep. 403, agent making false statements of value without knowledge of, and contrary to, directions of applicant, estops the company; Indiana Ins. Co. v. Hartwell, 123 Ind. 192, 24 N. E. 105, holding an insurance broker is the agent of an insurance company for delivering policies and collecting premiums; Germania L. I. Co. v. Lunkenheimer, 127 Ind. 543, 26 N. E. 1084, where an applicant gives truthful answers, as to prior applications, but agent of company inserts false answers in the application, the company is estopped to contest policy; Bowlers v. Phœnix Ins. Co., 133 Ind. 117, 32 N. E. 823, 20 L. R. A. 404, and n., to same effect as to incumbrances on property; Sullivan v. Phœnix Ins. Co., 34 Kan. 174, 8 Pac. 115, holding company estopped from insisting on breach of warranty where insured has truthfully answered, and agent inserts false replies in statement as to heating apparatus; Continental Ins. Co. v. Pearce, 39 Kan. 402, 406, 7 Am. St. Rep. 562, 565, 18 Pac. 294, 296, to same point and effect; Western Assurance Co. v. Rector, 85 Ky. 303, 3 S. W. 417, agent misdescribing title as a fee simple, when insured stated he held a bond for title and lien, estops the company to allege misrepresentation; Mutual Benefit L. I. Co. v. Daviess, 87 Ky. 548, 9 S. W. 814, where agent informed insured that a physical trouble was immaterial, thereby causing a false answer to be made, the company was estopped from alleging fraud; Wright v. Northwestern, etc., Ins. Co., 91 Ky. 213, 15 S. W. 243, holding company bound when soliciting agent describes a railway employee as a "laborer," knowing the fact, though the company might have refused the risk; Young v. Insurance Co., 80 Me. 250, 13 Atl. 898, misstatement of date of accident in a proof made out by insurer's agent and signed by insured is no ground for disputing liability; Marston v. Kennebec M. L. Ins. Co., 89 Me. 272, 56 Am. St. Rep. 416, 36 Atl. 391, holding company estopped to deny statement as to refusal of risk by other companies, prepared by agent without fraud or collusion of the insured.

Elsewhere the syllabus holding has been relied upon as follows: Keystone Mutual, etc., Assn. v. Jones, 72 Md. 365, 20 Atl. 196, holding company bound by statement of age inserted by agent in case of an illiterate applicant; Kausal v. Minnesota, etc., Ins. Assn., 31 Minn. 21, 47 Am. Rep. 777, 16 N. W. 430, where an agent, fully informed as to title, made out a joint application by husband and wife for husband's house and personalty on wife's land; held, the company bound by the policy; Planters' Ins. Co. v. Myers, 55 Miss.

504, 30 Am. Rep. 526, holdin
by the agent on true inform
American Cent. Ins. Co., 150
pany bound to statement pre
ventory, the assured having st
agent replying it was immat
Ins. Co., 6 Mo. App. 128, holdi
ment from true answers given
reading, insurer held bound to
surance; McDonald v. Metropol
501, holding that where the age
and wrongly described it in sta
titled to retain the premiums pa
v. Home Life Ins. Co., 64 N. Y.
were given to the agent who fille
would be estopped to challenge
though changed or modified by th
N. Y. 363, holding that where ar
signed in blank, which he filled
which accepted risk and issued p
from claiming breach of warranty;
Co., 107 N. Y. 301, 14 N. E. 275, to
age of insured, a German understa
by agent; Johnson v. Dakota F. & I
N. W. 803, holding the decided weig
agent filling out an application, on
sured, was the agent of the compan
v. Eshelman, 30 Ohio St. 660, holding
cation was made by insured, but poli
lent application substituted by agent,
the policy; Union Ins. Co. v. McGook
an agent fills up an application from s
fully made, receives premium, and is
bound unless the insured is chargeable
exceeded his authority; Insurance Co.
589, 48 Am. Rep. 476, holding insuring co
statement as to heating apparatus in appl
ing agent, but ordering reform of applica
Co., 128 Pa. St. 565, 15 Am. St. Rep. 699
648, holding the law does not impose any
sured to read his policy, and the company
lent act of agent in filling up application;
West, 76 Va. 560, holding a false statemen
an application, induced by agent's opinion
money not yet due was not an incumbranc
company; Simmons v. Insurance Co., 8 W.
particulars of heating apparatus were filled
agent from his own knowledge, the insured

keep them in better order than at the time of insurance; Schwarzbach v. Ohio Valley P. Union, 25 W. Va. 663, holding that knowledge of dissipated habits of insured by agent who filled up the application with a false answer estopped a claim of forfeiture; Johnston v. Northwestern, etc., Ins. Co., 94 Wis. 121, 68 N. W. 869, holding question whether the insertion by agent of definite amount of incumbrance after insured's statement of uncertainty was a representation or warranty, should have been left to jury. See note to 77 Am. Dec. 724, 725, 726, 728, note to 82 Am. Dec. 723, and note to 26 Am. Rep. 370.

Distinguished in Maier v. Fidelity M. L. Assn., 78 Fed. 571, 47 U. S. App. 322, where untrue statements were inserted in an application, filled up by the agent at request of insured on incomplete information, and one of the conditions of the policy was that an untrue statement should avoid it, holding the company not bound; Alabama Gold L. I. Co. v. Garner, 77 Ala. 216, the writing of an application by agent, from a memorandum of the answers of assured, afterwards read to and signed by the assured, make it in fact the answers and representations of the assured; Sellers v. Commercial Fire Ins. Co., 105 Ala. 290, 16 So. 799, where it was shown that the broker who prepared the application was in fact agent of the applicant, holding the company not bound by misdescriptions of the property; Ryan v. World Life Ins. Co., 41 Conn. 170, 19 Am. Rep. 491, where an agent deliberately inserted false information on material points in the answers in an application signed without reading, the company were not bound; Commonwealth M. F. I. Co. v. Huntzinger, 98 Pa. St. 48, holding that statement by insured of wrong amount of existing insurance on property was in breach of warranty and avoided the policy.

Miscellaneous.— Cited incidentally in Mosley v. Vermont Mutual F. I. Co., 55 Vt. 148, Virginia Fire & M. Ins. Co. v. Saunders, 84 Va. 216, 4 S. E. 586, and Bettman v. Harness, 42 W. Va. 447, 26 S. E. 276, 36 L. R. A. 573.

13 Wall. 236-243, 20 L. 624, EX PARTE McNIEL.

Pilot regulations are regulations of commerce, and half pilotage is a necessary and usual part of every system; provisions relating thereto have obtained from an early period, and are to be found in the laws of most commercial States, pp. 238, 239.

Approved in Neal v. Steamship Alameda, 12 Sawy. 432, 31 Fed. 368, holding that provisions of California code, discriminating in pilot charges between ocean-going and coasting vessels, are unconstitutional; Williams v. The Lizzie Henderson, 29 Fed. Cas. 1373, as established law, holding a State law exempting State-owned vessels from pilotage, unless a pilot is actually employed, unconstitutional; The Chase, 14 Fed. 856, sustaining act of Florida of

1879, empowering local bo
several ports.

Pilots.— Libel for half p
vessel, is authorized by New

Cited and followed in Flan
as also the rule under Mass.
Fed. 795, holding that a Dela
age under State law; Neil v.
ing an Oregon pilot, who ha
river, is not entitled to full pilo
ship piloted out by a Washing

Not followed in The Bark Pr
11,430, holding State court cons

Commerce.— Powers of gover
longing exclusively to the States
ment; those exercisable concurr
those exercisable by States until
is the commerce power, p. 240.

Cited and relied upon in Railro
L. 714, holding statute of Iowa
panies annually to fix transportati
in stations, constitutional as a poli
Bank v. Dearing, 91 U. S. 34, 23 L.
to tax national banks is within the
93 U. S. 137, 23 L. 838, holding th
was not given to Federal courts, a
bring a suit in State courts to reco
ment; Inman S. S. Co. v. Tinker, 9
holding statute of New York of 18
constitutional, as violating the com
and Wardens, 94 U. S. 248, 24 L. 1
of 1869, requiring survey of vessel
leans, unconstitutional; Wilson v.
234, holding that foreign and interst
jurisdiction of Congress; Covington
154 U. S. 211, 38 L. 966, 14 S. Ct.
of 1890, regulating tolls over bridge
out concurrence of Congress or the
Gulf, etc., R. Co. v. Hefley, 158 U.
holding that the act of Texas of 18
to be, as regards interstate shipm
commerce acts; Glover v. Love, 68
had exclusive jurisdiction of all a
ruptcy for recovery of assets, unle
statutory amendment; Hade v. M
State courts had jurisdiction of a su

cedure; Whitney v. The Mary Gratwick, 2 Sawy. 343, F. C. 17,591, sustaining Federal jurisdiction of libel in rem, for wages, on ship engaged on interior waters of State given by State law; Holmes v. Oregon, etc., R. Co., 6 Sawy. 272, 5 Fed. 84, affirming Federal jurisdiction of suit for damages for death by marine tort given by Oregon law; Goldsmith v. Gilliland, 10 Sawy. 609, 22 Fed. 866, affirming jurisdiction of Federal courts of a bill to remove a cloud founded on section 500 of Oregon code of civil procedure; The Steamship Oregon, 14 Sawy. 463, 45 Fed. 76, holding Federal courts would have jurisdiction of a suit for damages causing death, from a maritime tort, when State law gave such right of action; The Canal-Boat Ann Ryan, 7 Ben. 25, F. C. 428, affirming Federal jurisdiction of a claim for double wharfage, under New York statute; The St. Joseph, 21 Fed. Cas. 178, affirming power of Admiralty Court to entertain a libel for tolls imposed by a State law; Williams v. Empire Transportation Co., 29 Fed. Cas. 1364, holding that, where a corporation of another State, doing business in home State, was by local law subject to process by service on agents, it was in jurisdiction of Federal court; Runkle v. Lamar Ins. Co., 2 Fed. 12, affirming Federal jurisdiction of a foreign insurance company which, under a State law, has consented to service of process on its agent in State; The Garland, 5 Fed. 927, holding an action, under Michigan statute, for damages by loss of life, was within admiralty jurisdiction; The J. F. Warner, 22 Fed. 345, sustaining jurisdiction of a libel in rem to enforce a lien under a contract of affreightment given by law of New York; Flash v. Wilkerson, 22 Fed. 691, holding Federal courts will administer a State law giving creditors an enlarged and purely statutory remedy, but according to their own practice; Buford v. Holley, 28 Fed. 682, 684, sustaining constitutionality of Alabama statute, giving a simple contract creditor the right to go into a court of equity without first obtaining a judgment, and holding Federal courts would follow its interpretation by State court; McDonald v. Priolean, 44 Fed. 770, affirming Federal jurisdiction of a libel for pilotage against consignee liable by State law; De La Vergne, etc., Co. v. Montgomery Brewing Co., 46 Fed. 830, holding Federal courts will enforce a statutory mechanic's lien in equity, when the remedy is more complete than at law; The H. E. Willard, 52 Fed. 389, holding that Federal courts in admiralty have no jurisdiction of a claim by a part owner of a vessel for supplies furnished by him before the taking of an account with the other part owners; Brisenden v. Chamberlain, 53 Fed. 309, holding that a suit under Lord Campbell's act is removable to Federal court by a non-resident defendant; Wyman v. Mathews, 53 Fed. 680, holding Circuit Court has jurisdiction of a suit in equity to enforce a trust and distribute a fund under section 4160, code of South Dakota; The City of Norwalk, 55 Fed. 106, 109, holding District Court had jurisdiction to recover damages for death by negligence arising under law of New York, collecting authorities, on Federal jurisdiction, where causes of action

arose under State laws; Prentice v. Duluth, etc., Co., 58 Fed. 442. 19 U. S. App. 100, holding that owners in severalty, under a common source of title of vacant and unoccupied lots, may bring suit to quiet title in Federal court, under Minnesota statute enabling such suit; Gilchrist v. Helena Hot Springs, etc., Co., 58 Fed. 711, 712, sustaining jurisdiction of a suit in equity to enforce a judgment lien on corporate property, when the State law provided no mode of enforcement; Bigelow v. Nickerson, 70 Fed. 119, 34 U. S. App. 261, 30 L. R. A. 340, holding a suit under statute of Wisconsin, giving right of action for negligence causing death, in a cause arising on Lake Michigan, in jurisdiction of Admiralty Court; Missouri, etc., Trust Co. v. Krumseig, 77 Fed. 43, 40 U. S. App. 620, in concurring opinion, holding that the Minnesota statute, reversing the rule of tender before seeking relief from a usurious contract, was binding on Federal courts; Atlantic Works v. Tug Glide, 157 Mass. 526, 528, 532, 34 Am. St. Rep. 307, 308, 309, 310, 33 N. E. 163, 164. affirming validity of statute, chapter 192, section 14, giving a lien for repairs to vessel in home port, and that Federal court had jurisdiction to enforce the lien; The Willapa, 25 Or. 77, 34 Pac. 691, holding that when maritime law does not give a lien, State law cannot confer jurisdiction in rem.

Courts.— A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, the case is there tried and decided on same principles and considerations as if brought in proper State tribunal, p. 243.

Approved in the following where Federal jurisdiction has attached: Davis v. Gray, 16 Wall. 222, 21 L. 453, a suit by receiver of a railroad to enjoin the regrant of parts of the railroad land grant by State officers, the State having declared the lands forfeited; Brine v. Insurance Co., 96 U. S. 635, 24 L. 861, holding that the right of redeeming property sold under foreclosure, enacted by State law, is obligatory on Federal courts in State; The Corsair, 145 U. S. 347, 36 L. 731, 12 S. Ct. 952, holding that unless local law gives a lien in cases subject to State legislation, there is none to enforce by proceedings in rem in admiralty, a libel in rem for damages from death by collision will not lie under Louisiana law; Darragh v. H. Wetter Mfg. Co., 78 Fed. 13, 14, 49 U. S. App. 11, 13, holding that rights created or provided by State law may be enforced in Federal courts, either at law or in equity or admiralty; dissenting opinion in Cates v. Allen, 149 U. S. 462, 37 L. 809, 13 S. Ct. 978, arguendo.

Miscellaneous.— The Schooner Kalmar, 10 Ben. 244, F. C. 7,601.

13 Wall. 244-251, 20 L. 539, BATH CO. v. AMY.

Mandamus.— Power to issue mandamus as original proceeding does not belong to Circuit Court; it is authorized only when ancillary to jurisdiction already acquired, pp. 249, 250.

Cited and principle affirmed in Graham v. Norton, 15 Wall. 429, 21 L. 178, holding neither District nor Circuit Court could issue mandamus to compel repayment of State taxes to an assignee in bankruptcy of several bankrupts; Heine v. Levee Commissioners, 19 Wall. 660, 22 L. 226, holding a bill in equity will not lie to compel levy of a tax to pay bonds unless a judgment at law has been previously obtained; Louisiana v. Jumel, 107 U. S. 727, 27 L. 454, 2 S. Ct. 141 (but see dissenting opinion in 107 U. S. 762, 763, 27 L. 466, 2 S. Ct. 170, 171), mandamus will not lie at suit of bondholders to compel State officials to perform a ministerial duty without a prior judgment; Rosenbaum v. Bauer, 120 U. S. 455, 30 L. 745, 7 S. Ct. 635 (affirming S. C., 11 Sawy. 621, 622, 28 Fed. 224), holding that the removal of causes act of 1875 does not enable the issue of an original writ to compel supervisors to levy a tax to pay bonds; United States v. Pearson, 24 Blatchf. 455, 32 Fed. 810, refusing mandamus to compel postmaster to transmit mail matter at a different rate of postage; In re Vintschger, 50 Fed. 461, mandamus refused to compel a customs collector to examine into facts and decide whether an entry should be refused or not; Gares v. Northwestern, etc., Assn., 55 Fed. 210, refusing mandamus to compel a corporation to hold a stockholders' meeting for election of directors; In re Forsyth, 78 Fed. 801, holding the district court cannot by mandamus compel clerk of the court to deliver to a receiver appointed by a State court a check drawn on the fund in court representing surplus proceeds of sale; Denton v. Baker, 79 Fed. 194, 48 U. S. App. 244, holding that mandamus will not issue to holder of a judgment against a national bank to compel the receiver in insolvency to file and allow the claim, the remedy is an action at law; United States v. Judges, 85 Fed. 179, 56 U. S. App. 35, holding Circuit Court of Appeals cannot issue writ to compel judges of Court of Appeals in the Indian Territory to admit to bail pending an appeal; Rosenbaum v. Bauer, 120 U. S. 455, 30 L. 745, 7 S. Ct. 635, holding jurisdiction not enlarged in cases of removal, by act of 1875; United States v. Union Pac. R. Co., 2 Dill. 530, 531, F. C. 16,599, dissenting opinion, arguendo, as to effect of acts of 1872 and 1875.

Distinguished in State v. Philips, 97 Mo. 346, 10 S. W. 861, 3 L. R. A. 481, and n., holding mandamus will lie from State Supreme Court to compel Court of Appeals to correct an erroneous and arbitrary exercise of its discretion.

Mandamus is one of the writs authorized to be issued by Circuit Courts under section 14 of judiciary act, and is not included in suits in civil nature, of which original jurisdiction is given by section 11, p. 248.

Cited and followed in Rosenbaum v. Board of Supervisors, 11 Sawy. 622, 28 Fed. 224, holding the writ is not a suit of a civil

nature within the meaning c
removable under it; State v.
holding a proceeding for an o.
in a State court is not a ci
1887 or 1888. Cited, arguend
Fed. 6.

Denied in Erwin v. Walsh, 2
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to allow an appeal. (For the r
Washington Imp. Co. v. Kansas

Mandamus.— Act of Congress
Federal courts, did not confer
tion to issue mandamus; that
Federal jurisdiction, p. 250.

Mandamus.— Circuit Court h
mandamus the levy of a tax to
bonds without a previous judgm
tempt to enforce payment by ordi

Cited and followed in Greene C
26 L. 101, to same effect as prin
County, 105 U. S. 243, 26 L. 1021,
bonds; Jordan v. Cass Co., 3 Dill
where the State enabling act hac
bodies politic on their bonds, suit
courts and enforced by mandamus
v. Town of Portsmouth, 2 Flipp. 106
sit was the proper remedy to enforce
and mandamus would not lie until
Kellogg, 2 Woods, 18, F. C. 8,688, re
to compel State officers to levy a ta
proper remedy was by mandamus a
v. Town of Edgefield, 32 Fed. 501, re
levy of tax when the judgment prev
want of jurisdiction; Stryker v. Board
U. S. App. 583, holding Colorado stat
authorize the issue of writ to a jud
county expenses to compel the levy of
Santa Cruz, 89 Fed. 623, 624, holding
of an action on a municipal bond, th
mandamus to compel levy of a tax w
Tulare Irr. Dist., 94 Fed. 3, 4, to sa
because mandamus was available in
court the plaintiff was not obliged to s
Herring v. Modesto Irr. Dist., 95 Fed. 7
Cited, arguendo, in Fuller v. Aylesworth
657.

Distinguished in People v. Getzendaner, 137 Ill. 261, 34 N. E. 303, holding State court could issue mandamus to compel levy of tax to pay a corporate debt when the debt and amount were admitted, as by demurrer on the application for the writ; State v. Mayor, 52 Wis. 428, 9 N. W. 608, holding that where there is a clear duty to levy a tax to pay a special debt or class of debts whose genuineness is not disputed, the levy may be enforced by mandamus in State court without a prior judgment at law.

13 Wall. 251-253, 20 L. 610, UNITED STATES v. AVERY.

Courts.— Supreme Court has no jurisdiction to decide a division of opinion in Circuit Court on a motion to quash an indictment on the ground of no jurisdiction to try the offense, p. 253.

Followed in United States v. Canda, 154 U. S. 674, 26 L. 1070, 14 S. Ct. 1211, and United States v. Hamilton, 109 U. S. 63, 27 L. 857, 3 S. Ct. 9, on same point.

13 Wall. 254-257, 20 L. 681, UNITED STATES v. WILDER.

Limitation of actions.— Statutes of limitation are entitled to same respect as other statutes, they should not be explained away, p. 256.

Affirmed in Merrill v. Town of Monticello, 66 Fed. 166, holding that the bar of statute may be raised by demurrer and is available both in suits in equity and actions at law.

Limitation of actions.— Payment by a debtor of part of a claim which he admits and denies the balance, cannot be taken by creditor as on account to prevent running of statute of limitations, p. 256.

Cited and ruling applied in Kallenbach v. Dickinson, 100 Ill. 441, 39 Am. Rep. 66, holding a partial payment by a joint debtor, without knowledge of or ratification by the other, will not operate to bind the latter so as to take the debt out of statute of limitations; Cowhick v. Shingle, 5 Wyo. 100, 63 Am. St. Rep. 27, 37 Pac. 693, to same point and effect.

Limitation of actions.— Effect of part payment as taking debt out of statute of limitations depends on debtor's intention; unless he intends to admit greater debt, payment of part will not stop running of statute, p. 256.

Cited and principle applied in Kirk v. Williams, 24 Fed. 447, holding if other circumstances show a part payment could only have been made, on a distinct acknowledgment of whole debt, a promise might be implied stopping running of statute; Adams v. Tucker, 6 Colo. App. 400, 40 Pac. 786, holding it is settled law that a partial payment made on a debt will be sufficient to renew the entire debt; Christian v. State, 7 Ind. App. 424, 34 N. E. 827, to same effect where the payment is voluntary and made as part payment; Leach

v. Asher, 20 Mo. App. 659,
part payment must be mad
one authorized to make a n
71 Ala. 400, when a paymer
applied by the creditor, with
a debt on which the statute
running of the statute; Brov
Rep. 568, holding that an ap
posited as collateral, on a debt
by creditor without notice to
will stay the statute; Lang v
to same effect, and holding if
showing debtor did not intend
the statute bar; Stubblefield v
638, payments on account of p
on a joint note of himself and
not stay statute as against wife

13 Wall. 257-263, 20 L. 635, KLI

Courts.— Where record on erro
whether judgment was based o
question or on independent groun
sustain judgment, Supreme Cour
but if insufficient it will be presun
raising Federal question, p. 263.

Cited and principle applied in E
Co., 14 Wall. 26, 20 L. 851, dismissi
silent, the opinion showed it was
a Federal question; Johnson v. Ris
S. Ct. 113. dismissing writ where
ground on which State court had
of the defenses called for the cons
State law sufficient to determine th
ham, etc., Co., 163 U. S. 69, 41 L. 74,
where an examination of the opinion
it might have been based on construc
statute of limitations, raising no Feder

Courts.— On error to State court, wh
ment might have been based on a law
stitutional question or upon some othe
it appears that in fact it was based o
the Supreme Court will not take juris

Cited and ruling applied in Citizens' I
tion, 98 U. S. 141, 25 L. 115, dismissing
that no Federal question was involved
the case was decided; New Orleans Wat
Sugar, etc., Co., 125 U. S. 29, 38, 31 L. 6

dismissing writ, where record showed a case, alleging that the obligation of a contract had been impaired, to have been decided on the ground, independent of any statute, that the contract did not give the right claimed; De Saussure v. Gaillard, 127 U. S. 234, 32 L. 132, 6 S. Ct. 1062, dismissing writ, record showing that though the State court passed upon a Federal question, the decision of that question was not necessary to the judgment; Blount v. Walker, 134 U. S. 614, 33 L. 1038, 10 S. Ct. 608, dismissing writ where record showed that the decision that a will was properly admitted to probate in North Carolina, but was not executed according to law of South Carolina did not involve any question of "faith and credit;" Eustis v. Bolles, 150 U. S. 366, 370, 37 L. 1112, 1113, 14 S. Ct. 132, 134, dismissing writ where State court decided as to the right of a creditor of an insolvent debtor under the State insolvent law to challenge the constitutionality of the law, but such decision was not necessary to the judgment; dissenting opinion in Meyer v. Richmond, 172 U. S. 100, 19 S. Ct. 113, majority holding the writ would lie to a decision of State court denying a motion to set aside a judgment on ground of invalidity of State statute.

13 Wall. 264–268, 20 L. 568, WILMINGTON R. R. v. REID.

Constitutional law.— Charter of incorporation granted by a State creates a contract between State and corporators which State cannot violate, p. 266.

Cited and principle applied in Pacific R. Co. v. Maguire, 20 Wall. 48, 22 L. 286, holding that statute of State of Missouri, of 1852, exempting the railroad property from taxation until completion and declaration of a dividend, created a contract; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 665, 29 L. 522, 6 S. Ct. 260, holding that State may grant an exclusive franchise for a public utility, and that such grant creates an inviolable contract; Pearsall v. Great Northern R. Co., 161 U. S. 662, 40 L. 844, 16 S. Ct. 709, reversing S. C., 73 Fed. 936, holding the State could, by subsequent legislation, provide that the power of consolidation with other roads in the charter of Minneapolis & St. Cloud Railroad Company should not extend to purchase, lease or consolidation with parallel or competing lines; Tucker v. Russell, 82 Fed. 265, holding statute of North Carolina of 1897, altering the voting power of stockholders of a charter corporation, was void; Oliver v. Memphis, etc., R. Co., 30 Ark. 131, holding attempted taxation of the company's property void, and enjoining a sale to prevent irreparable damage; Gonzales v. Sullivan, 16 Fla. 812, holding the companies which had accepted the provisions of the State internal improvement act of 1855 became parties to a contract with the State, which included the exemption from taxation conferred by the act, which could not be subsequently divested; Western & Atlantic R. Co. v. State, 54 Ga. 431, holding that under sections 1 and 11 of

act of 1870, relating to the company, it is only liable to taxation to the extent limited by the act; State v. Western & Atlantic R. Co., 66 Ga. 567, to same point and effect; State v. Maine Central R. Co., 66 Me. 494, holding when two corporations, both exempt from taxation on conditions, are incorporated into a new corporation without such conditions, the exemption ceases; Rockland Water Co. v. Camden, etc., Water Co., 80 Me. 561, 15 Atl. 787, 1 L. R. A. 393, holding the charters of the companies did not confer any exclusive rights of water supply, so that the grant of the later charter did not violate any contract with the first chartered company; Mechanics' Bank v. Kansas, 73 Mo. 558, enjoining the sale and collection of city taxes where the bank charter provided for an annual payment to State in lieu of taxes, State and municipal; North. Pac. R. Co. v. Carland, 5 Mont. 178, 3 Pac. 150, holding the contract of the government with the railway company rendered its property free from all taxation by States; Cheraw, etc., R. Co. v. Commissioners, 88 N. C. 524, holding that variations in the route of a chartered railway company did not destroy the exemption right; Worth v. Wilmington, etc., R. Co., 69 N. C. 296, 300, 45 Am. Rep. 683, 686, holding that a charter exempting the property of a company and the shares therein prohibits taxation of its gross receipts or capital stock; West Wisconsin R. Co. v. Board, 35 Wis. 266, holding that if when a charter is granted, an existing law or the Constitution reserves power of amendment or withdrawal of charter, a subsequent amendment or withdrawal is not a violation of contract; Attorney-General v. Chicago, etc., R. Co., 35 Wis. 569, reaffirming rule that railroad charters are contracts which subsequent legislation cannot alter, so that where a charter fixes the tolls the legislature cannot change them. Cited, arguendo, in Pearsall v. Great Northern R. Co., 161 U. S. 662, 40 L. 844, 16 S. Ct. 709; in general discussion in Laurel Fork, etc., R. Co. v. West Va. Transportation Co., 25 W. Va. 357; dissenting opinion, arguendo, in Low v. Blackford, 87 Fed. 405.

Distinguished in Grand Lodge v. New Orleans, 166 U. S. 146, 41 L. 952, 17 S. Ct. 524, holding the State act of 1855, exempting the Grand Lodge hall from State and parish taxation during occupancy, was not a contract and was subject to repeal.

Taxation.— When a corporation claims exemption from taxation it must show that power to tax has been clearly relinquished by the State; reasonable doubt must be resolved in favor of State, p. 266.

Cited and principle applied in Mobile, etc., R. Co. v. Kennerly, 74 Ala. 571, holding the clear intent of the railroad act of 1860 was to exempt the corporation, to the extent specified, from all other municipal taxation than that expressly authorized; County Commissioners v. Annapolis, etc., R. Co., 47 Md. 612, holding that the investing of president and directors of a company with all the rights and powers necessary to the construction of a road, given

by another statute, did not convey an immunity from taxation; Manistee, etc., Co. v. Commissioner, 118 Mich. 351, 76 N. W. 634, holding State law exempting railroads from general taxation for a specified time is a gratuity and not a contract and may be repealed.

Taxation.— In absence of constitutional restraint State may grant a corporate charter exempting its property from taxation, p. 267.

Cited and principle affirmed in Salt Co. v. East Saginaw, 13 Wall. 376, 20 L. 613, holding, however, that a law exempting from taxation all corporations and individuals manufacturing salt in State, and a bounty on the product, is not a contract and may be repealed; Tomlinson v. Jessup, 15 Wall. 458, 21 L. 206, sustaining an exemption from taxation in act of 1855, amending a railroad charter; Erie R. Co. v. Pennsylvania, 21 Wall. 498, 22 L. 598, holding the Pennsylvania statute of 1868, taxing railroad gross receipts, did not violate the contracts by which a foreign corporation was authorized to build through State and in which there was no engagement not to tax the road; Morgan v. Louisiana, 93 U. S. 223, 23 L. 862, holding that an exemption from taxation does not attach to the property so as to follow it into the hands of third persons. See note to 2 Dill. 187, F. C. 3,937, on immunity from taxation following the lands; East Tennessee, etc., R. Co. v. Pickerd, 24 Fed. 615, affirming validity of exemptions from taxation in charter of Cincinnati, etc., Railroad Company, and holding the exemption passed with the property; Oliver v. Memphis, etc., R. Co., 30 Ark. 130, affirming validity of the act of 1853 incorporating the company and exempting its property from taxation for twenty years; Wilmington, etc., R. Co. v. Alsbrook, 110 N. C. 144, 145, 152, 157, 14 S. E. 652, 655, 656, holding the decision in principal case as to exemption does not extend to any branch roads which the company was authorized to construct or acquire; Knoxville, etc., R. Co. v. Hicks, 9 Baxt. 446, affirming power of State legislature to grant charters of incorporation, with exemption from taxation. See 72 Am. Dec. 684, note.

Questioned in dissenting opinion in Wilmington, etc., R. Co. v. Alsbrook, 110 N. C. 167.

Taxation.— Exemption of "property" of a corporation from taxation includes all real and personal estate required by it for successful prosecution of its business, and its franchise, p. 268.

Cited and applied in Pacific R. Co. v. Maguire, 20 Wall. 44, 22 L. 286, holding that under a contract not to tax the "Pacific Railroad" a tax on the gross receipts for transportation of freight and passengers is void; Farrington v. Tennessee, 95 U. S. 687, 688, 24 L. 560, holding that a law imposing a tax on each share of bank capital stock subscribed prohibited subsequent taxation of the shares in hands of shareholders; Calhoun v. Memphis, etc., R. Co.,

2 Flipp. 448, F. C. 2,309, holding a general mortgage of a railroad did not include after-acquired lands unless used as an actual part of the road; Floyd v. Blanding, 54 Cal. 46, holding there was no contract between the State and grantees under the water lot act of 1851 that the water front line, as defined by the act, should never be changed; Spring Valley W. W. v. Schottler, 62 Cal. 110, 111, affirming power of State to tax corporate franchises; Nichols v. New Haven, etc., Co., 42 Conn. 125, holding if the stock of a railroad is exempt from taxation, so must be the franchise also; Porter v. Rockford, etc., R. Co., 76 Ill. 574, holding franchise of a railroad company is property taxable according to its value; State v. Philadelphia, etc., R. Co., 45 Md. 383, holding the exemption in act of 1831 of the roads, "with all their works, improvements and profits and machinery," etc., included gross receipts, which the legislature could not subsequently tax; Hancock v. Singer Mfg. Co., 62 N. J. L. 336, 41 Atl. 850, holding that the corporation tax act of 1884 and amendments imposing a license or franchise tax was inoperative as to the company; Worth v. Petersburg, etc., Co., 89 N. C. 306, holding that a tax imposed directly by the legislature depending on the amount of business done by a corporation, without reference to the value of its property, is a franchise tax, and void as to an exempted corporation; Bank of Commerce v. McGowan, 6 Lea, 706, showing that as to property beyond the legitimate wants of a corporation for its corporate purposes, the exemption does not apply; State v. Anderson, 90 Wis. 561, 63 N. W. 743, holding franchises of a street railway company are taxable as personal property; Duluth, etc., R. Co. v. Douglas Co., 103 Wis. 81, 79 N. W. 36, holding that a railroad exemption does not extend to property acquired in contemplation of future needs.

Railroads.— Franchise of a railroad corporation is privilege of running railroad and taking fare and freight, p. 268.

Cited and principle applied in Pearsall v. Great Northern R. Co., 73 Fed. 944, holding a franchise to consolidate with another corporation is property which cannot be taken for public use without compensation; State v. Philadelphia, etc., R. Co., 45 Md. 388, holding an exemption of franchise from taxation covered gross receipts; Richmond, etc., R. Co. v. Brogden, 74 N. C. 712, holding the exemption in the charter of the company, extending only to real estate, does not affect the franchise, which should be assessed separately; Worth v. Petersburg, etc., R. Co., 89 N. C. 307, holding that a tax by the legislature depending on the amount of business of a corporation, without reference to the value of its property, is a privilege tax on a franchise; Commercial Electric, etc., Co. v. Judson Co., — Wash. —, 56 Pac. 832, holding that under the revenue law of 1897 the company's franchise was assessable and liable to taxation; dissenting opinion in State v. Morgan, 28 La. Ann. 493, major-

ity holding that corporate franchises granted not subject to seizure and sale by creditors, nor to alienation; State v. Baltimore, etc., R. Co., 48 Md. 82, 84, majority holding that gross receipts earned in State under franchises granted after the charter and without any expression of immunity from taxation are liable to taxation.

Constitutional law.— When a State, in granting a railroad corporate charter, exempts its corporate property from taxation, any subsequent legislation laying a tax on franchise and rolling stock impairs obligation of contract and is void, p. 268.

Cited and ruling applied in Humphrey v. Pegues, 16 Wall. 249, 21 L. 328, holding that a statute granting to an existing corporation all the privileges granted by the charter of another corporation, which by an amendment was exempted from taxation, could not be repealed; Farrington v. Tennessee, 95 U. S. 689, 24 L. 561, holding that a law imposing a tax on each share of bank capital stock subscribed prohibited subsequent taxation of the shares in hands of shareholders; Hewitt v. New York, etc., R. Co., 12 Blatchf. 467, F. C. 6,443, holding New York statute of 1866, exempting the company's property from taxation for ten years, constituted a contract which, but for the reservation of an amending power in the State Constitution, could not be repealed; Winona, etc., R. Co. v. County of Deuel, 3 Dak. 13, 12 N. W. 564, holding that an exemption of railroad lands from taxation by statute of Minnesota continued after the creation of Territory of Dakota out of State and applied to the railroad lands in the territory; Atlantic, etc., R. Co. v. Allen, 15 Fla. 662, 663, holding that section 16 of act incorporating the Pensacola, etc., Railroad Company, limiting the rate of taxation on the road, was a valid contract with the State and covered a branch road; Grand Gulf, etc., R. Co. v. Buck, 53 Miss. 247, holding the charter of the company containing an exemption from taxation of all property for ten years prohibited the imposition of a privilege tax during that period; State v. Walsh, 31 Neb. 477, 48 N. W. 265, holding the act of 1875, exempting from taxation works of internal improvement in a precinct which had issued bonds in aid of their construction, unconstitutional; State Board v. Morris, etc., R. Co., 49 N. J. L. 217, 7 Atl. 837, holding that the charter of the company in the act of 1865 created an absolute contract of immunity from taxation, which attached to the company's property in the hands of its lessee; Richmond, etc., R. Co. v. Board, 74 N. C. 509, under the charter of North Carolina Railroad Company exempting its property from taxation until its dividends exceed 6 per cent., county authorities cannot tax the property until the dividends reach the limit.

Distinguished in Wilmington, etc., R. Co. v. Alsbrook, 146 U. S. 301, 302, 36 L. 981, 13 S. Ct. 78, 79, holding that the decision in principal case did not cover a branch line constructed by another company under a different charter.

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Taxation.— When a corporation cla
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tion in suit by alien against Louisiana commercial co-partnership; Kerp v. Michigan, etc., R. Co., 14 Fed. Cas. 383, holding that it is sufficient if a bill sets forth facts from which citizenship of the parties may be presumed or legally inferred; Petrocokino v. Stuart, 19 Fed. Cas. 385, holding that a foreign corporation is to be considered an alien for purposes of Federal jurisdiction; Burger v. Grand Rapids, etc., R. Co., 22 Fed. 562, holding that a consolidated corporation, by acts of the several States, operating a single line is a citizen of each State and cannot be sued in Federal court by a citizen of either; Vincent v. Lincoln Co., 30 Fed. 752, holding a county is liable to be sued in Federal courts; Elston v. Piggott, 94 Ind. 23, holding that the title of a foreign corporation cannot be questioned for failure of its agent to comply with State law as to filing a power of attorney; Florence Sewing Machine Co. v. Grover & Baker, etc., Co., 110 Mass. 79, holding that under act of 1867 a suit in which one of several defendants was of same State with plaintiff could not be removed to Federal court, the cause of action not being separable; Baltimore, etc., R. Co. v. Cary, 28 Ohio St. 212, affirming right of company as a Maryland corporation, as lessee of a domestic corporation, to remove suit for damages to buildings in Ohio to Federal court; Durham v. Southern L. I. Co., 46 Tex. 186, holding that the filing of application for removal and bond instantly suspends the jurisdiction of State court; Larson v. The Aultman, etc., Co., 86 Wis. 284, 39 Am. St. Rep. 894, 56 N. W. 916, holding that a foreign corporation is, under section 4231 of the revised statutes, a person out of the State. See note, 33 Am. Dec. 401. Cited generally in Angier v. The East Tennessee, etc., R. Co., 74 Ga. 641.

Courts.— A corporation, chartered by two or more States, is not, if sued in one of them, a citizen of any other State, p. 283.

Cited and affirmed in Muller v. Dows, 94 U. S. 447, 24 L. 208, affirming jurisdiction of Federal court of Iowa, of foreclosure of entire road of two railways, incorporated in Iowa and Missouri, and consolidated; Clark v. Barnard, 108 U. S. 452, 27 L. 786, 2 S. Ct. 887, holding that the powers and status of the Boston, H. & E. Railroad Company as a corporation of Rhode Island, were to be determined exclusively by laws of the same State; Pennsylvania R. Co. v. St. Louis, etc., R. Co., 118 U. S. 298, 30 L. 88, 6 S. Ct. 1097, holding that an Indiana railroad company, authorized by laws of Illinois to extend its road into that State, does not become a citizen of Illinois for purposes of suit; St. Louis, etc., R. Co. v. Indianapolis, etc., R. Co., 9 Biss. 151, 154, F. C. 12,237, holding that one of two consolidated corporations might sue in Federal court of State of its creation, the other corporation as a citizen of another State; Copeland v. Memphis, etc., R. Co., 3 Woods, 666, F. C. 3,209, holding that when two States unite to create the same body corporate, it is a citizen of each of the States by whose legislature it

is created; Horne v. Boston, etc., R. Co., 18 Fed. 51, remanding to State court a suit by a citizen of New Hampshire against a domestic corporation, afterwards consolidated with companies of Maine and Massachusetts; Burger v. Grand Rapids, etc., R. Co., 22 Fed. 563, holding that a consolidated corporation is a citizen of each State of incorporation, and cannot be sued in Federal court by a citizen of either; Union Trust Co. v. Rochester, etc., R. Co., 29 Fed. 609, affirming jurisdiction of a suit between a corporation of New York and a consolidated corporation under laws of Pennsylvania and New York; Page v. Fall River, etc., R. Co., 31 Fed. 261, affirming jurisdiction of Federal court in Rhode Island, of suit between citizen of Massachusetts and a corporation created by laws of Massachusetts and Rhode Island; Fill v. Delaware, etc., R. Co., 37 Fed. 66, setting aside service of process on a corporation of Pennsylvania, in a suit instituted by an alien, in Federal courts of New York, where was defendant's principal office; Central Trust Co. v. St. Louis, etc., R. Co., 41 Fed. 552, holding that after consolidation of corporations of Arkansas and Missouri, the consolidated company was in each State a corporation of that State; Paul v. Baltimore, etc., R. Co., 44 Fed. 514, remanding suit by a citizen of Indiana against a consolidation of companies created in Ohio and Indiana; Fitzgerald v. Missouri Pac. R. Co., 45 Fed. 815, remanding action by a resident of Nebraska against a consolidation of three companies chartered in Missouri, Kansas and Nebraska, collecting authorities; James v. St. Louis, etc., R. Co., 46 Fed. 49, holding, when State legislation adopts a foreign corporation, it becomes a citizen of both States; Stephens v. St. Louis, etc., R. Co., 47 Fed. 532, 14 L. R. A. 187, and n., holding that the company, chartered in Missouri and adopted in Arkansas, might remove to Federal court of Arkansas a suit by a citizen of that State (note this case appears to be directly in conflict with Paul v. Baltimore R. Co., 44 Fed. 514, and Fitzgerald v. Railroad Co., 45 Fed. 815, vide supra); Phinizy v. Augusta, etc., R. Co., 56 Fed. 276, holding the citizenship of a corporation is not determined by its place of business, but by its act of incorporation; Central Trust Co. v. Chattanooga, etc., R. Co., 68 Fed. 694, holding that a receiver in equity, exempt by State law from garnishment, may be garnisheed in Federal court on a proper petition by non-resident citizens; Missouri Pac. R. Co. v. Meeh, 69 Fed. 756, 757, 32 U. S. App. 691, 30 L. R. A. 253, saying two States may incorporate the same corporation, but it will still be two corporations distinct in each State; Louisville Trust Co. v. Louisville, etc., R. Co., 75 Fed. 447, 43 U. S. App. 550, holding that an existing corporation, incorporated by another State, was not affected by its subsequent consolidation with another corporation in a third State; Baldwin v. Chicago, etc., R. Co., 86 Fed. 167, denying jurisdiction of suit in Michigan, by citizen of Michigan, against a consolidated corporation of three companies of Illinois, Wisconsin and Michigan; Dun-

can v. St. Louis, etc., R. Co., 49 La. Ann. 1703, 22 So. 925, holding the separate identity of each company as a corporation and citizen of the creating State is not lost by consolidation; Chicago, etc., R. Co. v. Auditor-General, 53 Mich. 91, 92, 18 N. W. 592, holding that a consolidated company was taxable only for its road in the State of creation; Holland v. Mobile, etc., R. Co., 16 Lea, 418, holding the company chartered also in Alabama, liable to garnishment for wages due an employee, employed and residing in Alabama; Rece v. Newport News, etc., R. Co., 32 W. Va. 171, 9 S. E. 214, 3 L. R. A. 575, and n., holding that a State cannot, by a mere legislative declaration, convert a foreign into a domestic corporation.

Cited, arguendo, in Louisville, etc., R. Co. v. Louisville Trust Co., 174 U. S. 562, 19 S. Ct. 821, Hall v. Bank of Virginia, 14 W. Va. 625, 626, 627, and Baltimore, etc., R. Co. v. Pittsburgh, etc., R. Co., 17 W. Va. 876, 877. Cited in dissenting opinion in St. Louis, etc., R. Co. v. James, 161 U. S. 568, 40 L. 810, 16 S. Ct. 630, majority holding that a State law cannot enable a foreign corporation to be sued in Federal court there by a citizen of the State of origin; Baltimore, etc., R. Co. v. Cary, 28 Ohio St. 222, 223, 230, majority holding that a Maryland corporation, sued in Ohio, as lessee of an Ohio corporation, by a citizen of Ohio, was entitled to remove suit to Federal court.

Courts.— A State law, authorizing a foreign railroad company to operate in State, does not create a new corporation, nor alter its citizenship, but renders it subject to suit in the State. For the purposes of Federal jurisdiction, it remains a citizen of State of creation, and no proof of citizenship elsewhere will be permitted, p. 285.

Cited and ruling applied in Ex parte Schollenberger, 96 U. S. 376, 24 L. 854, sustaining jurisdiction of Pennsylvania Circuit Court over foreign insurance company, doing business in State; Nashua, etc., R. Co. v. Boston, etc., R. Co., 136 U. S. 378, 34 L. 369, 10 S. Ct. 1009, holding the Nashua company, consolidated with a corporation of Massachusetts, entitled to sue in Circuit Court there, a citizen of that State; Martin v. Baltimore & Ohio R. Co., 151 U. S. 684, 38 L. 315, 14 S. Ct. 537, holding that a State license to act in Virginia, did not prevent company from removing suit to Federal courts as a citizen of Maryland (see note to 10 Biss. 126, on suits between corporations of different States); Williams v. Missouri, etc., R. Co., 3 Dill. 272, F. C. 17,728, holding that a corporation created in Kansas had a right to sue in Federal court in Missouri; see note to 3 Dill. 274, F. C. 17,728, on effect on Federal jurisdiction of charters granted by different States to same corporation; Blackburn v. Selma, etc., R. Co., 2 Flipp. 536, F. C. 1,467, holding that whether a foreign corporation is only licensed or made a corporation of State, it remains, for the purposes of jurisdiction, a foreign cor-

poration in the State of adoption; Ehrman v. Teutonia Ins. Co., 1 McCrary, 129, 1 Fed. 477, holding that as to a foreign company doing business in Arkansas, service on its auditor in State is sufficient; Mock v. Virginia Fire, etc., Ins. Co., 4 Hughes, 115, 120, 10 Fed. 703, 706, sustaining service of process on a general agent of an insurance company, chartered and resident in another State; Wilmer v. Atlanta, etc., Air Line R. Co., 2 Woods, 455, F. C. 17,776, holding that where railway corporations of different States consolidate and mortgage their property, the Federal courts in either State may direct sale of entire property; Missouri, etc., R. Co. v. Texas, etc., R. Co., 4 Woods, 365, 10 Fed. 501, discussing difference between State legislation creating a corporation already incorporated in another State and legislation recognizing an existing corporation of another State; Williams v. Empire Transp. Co., 29 Fed. Cas. 1364, affirming jurisdiction of Federal courts in a suit for infringing patent against a corporation of another State doing business in and amenable to process of State; Runkle v. Lamar Ins. Co., 2 Fed. 12, affirming jurisdiction in Federal court of Ohio of a suit by resident citizen against a corporation of New York; Uphoff v. Chicago, etc., R. Co., 5 Fed. 547, holding, if the effect of State legislation is to adopt a corporation of another State, it becomes, for the purposes of suit, a corporation of the adopting State; Consolidated Store-Service Co. v. Lamson, etc., Co., 41 Fed. 835, affirming jurisdiction of Federal court of a suit against a foreign corporation doing business in State; Myers v. Murray, Nelson & Co., 43 Fed. 697, 11 L. R. A. 218, and n., holding a corporation, though carrying on business in several States, could only be sued in State of creation; Dinzy v. Illinois Cent. R. Co., 61 Fed. 51, holding Federal court has jurisdiction of a suit by a resident plaintiff against a foreign corporation doing business in State, and by statute subjected to jurisdiction of the State courts; Western, etc., R. Co. v. Robertson, 61 Fed. 599, 22 U. S. App. 187, holding that citizens of another State, as lessees of part of a road, constructed by a domestic corporation in such other State under license from its legislature, were, for jurisdictional purposes, citizens of same State as the domestic corporation; Sullivan v. Sullivan Timber Co., 108 Ala. 375, 15 So. 942, 25 L. R. A. 544, holding foreign corporation doing business in State, must be sued in the county where is its place of business; Farmers, etc., Ins. Co. v. Harrah, 47 Ind. 241, holding that a corporation created by a State is not a citizen within section 2, article 4 of the Federal Constitution; Reyer v. Odd Fellows' Accident Assn., 157 Mass. 372, 34 Am. St. Rep. 292, 32 N. E. 471, holding that, under Indiana State law, any foreign corporation doing business in State was liable to be sued in State courts; State Board of Assessors v. Morris, etc., R. Co., 49 N. J. L. 219, 7 Atl. 839, holding that the powers of a foreign corporation exercising its franchises in State, are limited by expressed terms of the grant.

Cited in dissenting opinion in Philadelphia Fire Assn. v. New York, 119 U. S. 123, 30 L. 348, 7 S. Ct. 115, majority holding a foreign insurance company, doing business in New York, was subject to the imposition of a special tax as a condition of doing business there. See notes to 66 Am. Dec. 121, on service on foreign corporation, to 79 Am. Dec. 427, on interstate corporations, and 96 Am. Dec. 341, on taxation of foreign corporations.

Distinguished in St. Louis, etc., R. Co. v. James, 161 U. S. 560, 40 L. 808, 16 S. Ct. 626, holding that a State law, providing that a foreign corporation doing business in State should become a corporation of that State, does not enable it to be sued in Federal courts there, by a citizen of the State of origin; Pacific R. R. v. Missouri, etc., R. Co., 5 McCrary, 378, 23 Fed. 568, holding that a corporation formed under laws of several States is presumed to be a citizen of each State, and cannot remove a suit by a citizen of either State, on the ground of diverse citizenship; Wilkinson v. Delaware, etc., R. Co., 22 Fed. 354, holding that legislation authorizing a foreign corporation to do business in State, does not render it a domestic corporation; Home Ins. Co. v. Davis, 29 Mich. 239, holding that when a foreign corporation submitted to being sued in State courts, it was precluded from removing suit to Federal court.

Courts.— Whenever a general rule as to property or personal rights or injuries to either is established by State legislation, its enforcement by Federal courts in a case between proper parties, is a matter of course, and the jurisdiction of the court is not subject to State limitation, p. 286.

Citing cases which affirm and apply the principle are: Insurance Co. v. Morse, 20 Wall. 453, 22 L. 369, holding act of Wisconsin, forbidding foreign insurance companies doing business in State to remove suits to Federal courts, void; Southern Pac. Co. v. Denton, 146 U. S. 209, 36 L. 945, 13 S. Ct. 46, holding the provisions in Texas practice act, as to appearance on behalf of a defendant to object to jurisdiction, had no application to actions in Federal courts; Mexican Central R. Co. v. Pinkney, 149 U. S. 206, 37 L. 704, 13 S. Ct. 684, to same effect; Holmes v. Oregon, etc., R. Co., 6 Sawy. 270, 5 Fed. 82, holding an action by an administrator to recover damages for death of his intestate, under Oregon code, is enforceable in Federal court; Merchants' Mfg. Co. v. Grand Trunk R. Co., 21 Blatchf. 110, 13 Fed. 358, sustaining jurisdiction of suit between foreign corporations on a cause of action arising in Canada, where the State law enabled service of process to be made on corporate officers in State; Warren v. Wisconsin Valley R. Co., 6 Biss. 429, F. C. 17,204, holding a proceeding to condemn land for a railway was removable to Federal court in a case between proper parties; Cunningham v. County of Ralls, 1 McCrary, 119, 11 Fed. 455, holding section 5359, revised statutes of Missouri, does not oust Federal jurisdiction of an action against a county by citizen of another

State; Pulliam v. Pulliam, 10 Fed. 30, holding that notwithstanding statute of Tennessee as to effect as prima facie evidence of executor's accounts, Federal court may require executor to account anew in a suit by a legatee; Logan v. Greenlaw, 12 Fed. 19, holding that a creditor's bill in a State court to settle an estate, cannot prevent a non-resident creditor from proceeding for similar purpose in Federal court; Allen v. Texas, etc., R. Co., 25 Fed. 515, holding that State law, providing that State courts should retain jurisdiction over a domestic corporation after consolidation with a foreign or Federal corporation, could not prevent a corporation, after consolidation, removing suit to Federal court; Mineral Range R. Co. v. Detroit, etc., Copper Co., 25 Fed. 520, affirming Federal jurisdiction of suit to condemn lands of a foreign corporation for railway purposes, notwithstanding State law; Union Trust Co. v. Rochester, etc., R. Co., 29 Fed. 610, holding that statute of New York, forbidding suit on a judgment, without previous order of the court, did not apply to suit in Federal court having jurisdiction of the parties; Hoover v. Crawford County, 39 Fed. 9, holding Arkansas statute of 1879 ineffective to prevent suit against a county in Federal court; East Tennessee, etc., R. Co. v. Atlanta, etc., R. Co., 49 Fed. 612, 15 L. R. A. 111, holding that where a Federal statute gives a plaintiff a right to select the district within which suit can be brought, the laws of the State regulating the venue cannot restrict the territorial jurisdiction of Federal courts; Barling v. Bank, 50 Fed. 261, 7 U. S. App. 194, holding California statute, prohibiting suits by banking corporations which had failed to comply with the law, did not prevent suit in Federal courts; The City of Norwalk, 55 Fed. 110, holding Federal court had jurisdiction in admiralty of a case under State law to recover damages for death caused by negligence; O'Connell v. Reed, 56 Fed. 534, 12 U. S. App. 369, where Federal court refused to follow Kansas decision on Kansas statute on misjoinder of causes of action; Minneapolis v. Reum, 56 Fed. 581, 12 U. S. App. 446, holding that Minnesota statute, enfranchising foreigners after declaration of intention, did not prevent their suing in Federal court; Edwards v. Hill, 59 Fed. 725, 19 U. S. App. 493, sustaining jurisdiction of foreclosure suit by non-resident, where mortgagor has made an assignment and consent of State court had not been obtained; The Willamette Valley, 62 Fed. 297, holding that a vessel operated by a State receiver was subject to a maritime lien for liabilities incurred in another State; Bigelow v. Nickerson, 70 Fed. 121, 122, 126, 34 U. S. App. 261, 30 L. R. A. 341, 344, holding provision of Wisconsin statute, section 4255, revised statutes, confining actions in case of death by negligence to State courts, void; Quimby v. Penn. Ins. Co., 58 N. H. 495, holding that State law making the acceptance of process in State a condition on foreign corporations doing business in State, could not deprive them of right of removal of suit to Federal

court. Cited in dissenting opinion in Johnson v. Brewers, etc., Co., 51 Wis. 580, 583, 9 N. W. 658, 660, majority holding that where removal was refused on account of irregularity in verification of petition and bond, the judgment was only voidable, and unless appealed, was binding.

Distinguished in Pulliam v. Pulliam, 10 Fed. 78, holding statute of Tennessee, limiting time for creditor's suits against decedent's estate, binding on Federal courts in equity; Van Doren v. Pennsylvania R. Co., 93 Fed. 264, holding action for damages causing death under Pennsylvania statute, could be prosecuted in Federal court, either in or out of State; Home Ins. Co. v. Davis, 29 Mich. 239, when foreign corporation submitted to being sued in State courts as a condition for doing business in State, it was precluded from removing suit to Federal court.

Death.— Right of action for death, against wrongdoer, under Wisconsin statute, exists only in virtue of the statute, and only in cases where the death was caused within the State, pp. 285, 286.

Cited as obiter in Rudiger v. Chicago, etc., R. Co., 94 Wis. 196, 68 N. W. 662, holding that under the State law an action was maintainable for a death occurring in another State caused by acts in the home State.

Courts.— In all cases where a general right is conferred by a State law, it can be enforced in any Federal court within the State having jurisdiction of the parties; hence right of action for death, granted by Wisconsin statute, may be removed to Federal court, although statute provided that it should be enforced only in State court, p. 286.

Cited and principle applied in The Steamship Oregon, 14 Sawy. 463, 45 Fed. 77, holding that a State law giving a right of action for injuries causing death might be enforced in Federal court; Davis v. James, 10 Biss. 54, 2 Fed. 620, affirming right of mortgagees to foreclose a guardian's mortgage in Federal court on ground of citizenship, notwithstanding State law limiting such actions to State court; Phelps v. O'Brien Co., 2 Dill. 519, F. C. 11,078, holding that the Iowa code limitations for actions on judgments, without leave of court, did not apply to Federal courts; Hartman v. Fishbeck, 18 Fed. 295, holding that statute of limitations for presentment of claims for allowance in probate matters did not bind a non-resident creditor suing the administrator in Federal court; Wyman v. Mathews, 53 Fed. 680, holding Federal court has jurisdiction of a suit in equity by foreign creditors to enforce a trust and distribute a fund created by statute of South Dakota; Prentice v. Duluth Storage, etc., Co., 58 Fed. 442, 19 U. S. App. 100, sustaining jurisdiction of a suit to quiet title by owners of lots in severalty; Pierstoff v. Jorges, 86 Wis. 139, 39 Am. St. Rep. 887, 56 N. W. 738, holding that a judgment in bastardy proceedings may be enforced by a creditor's bill.

Distinguished in The Manhasset, 18 Fed. 923, holding State law as to administrator's action for damages for injuries causing death does not apply to maritime tort.

Courts.— In some cases, from their character, the Federal judicial power is necessarily exclusive of all State authority, in others it may be made so at the option of Congress, or it may be exercised concurrently with that of the States, p. 288.

Cited in Gaines v. Fuentes, 92 U. S. 18, 23 L. 527, instancing cases of exclusive jurisdiction; Ellis v. Davis, 109 U. S. 497, 27 L. 1010, 3 S. Ct. 334, in matters of wills and probates Federal courts have no jurisdiction unless by reason of citizenship of the parties; United States v. Block One Hundred and Twenty-one, 3 Biss. 218, F. C. 14,610, affirming jurisdiction of Federal courts of a suit by secretary of the treasury to condemn land for public use.

Removal of causes.— Legislation for removal of causes has been uniformly recognized by Supreme Court as valid, and the manner and conditions upon which Federal judicial power shall be exercised are mere matters of legislative discretion, p. 288.

Cited and principle applied in Tennessee v. Davis, 100 U. S. 265, 25 L. 651, holding a criminal prosecution of a revenue officer was removable to Circuit Court; Virginia v. Rives, 100 U. S. 337, 25 L. 676, in separate concurring opinion, holding that a prosecution for murder was not removable to Federal court, where no jurisdiction had been conceded to the United States; Kern v. Huidekoper, 103 U. S. 492, 26 L. 357, holding no provision of State law could prevent removal of a case which fell within the terms of the removal act; Sharon v. Terry, 13 Sawy. 413, 36 Fed. 355, 1 L. R. A. 586, and n., denying right of State court to prevent the complete prosecution and determination of suit in Federal court whose jurisdiction has attached; see note to 3 Dill. 356, F. C. 8,802, on constitutionality of act of 1867; Filer v. Levy, 17 Fed. 612, refusing to remand a suit by an executor, a citizen of another State, against the resident liquidating partner to compel an accounting and to recover assets; Sutherland v. Jersey City R. Co., 22 Fed. 357, holding that the act (§ 639, R. S.) was not repealed by the subsequent act of March 3, 1875; Amsden v. Norwich Union, etc., Co., 44 Fed. 517, holding that a foreign corporation, subjected to condition of admitting service of process on local agent, may claim removal of action to Federal court; Elliott v. Shuler, 50 Fed. 456, holding that a special proceeding by an administrator for leave to sell intestate's real estate for payment of debts may be removed by non-resident defendants; In re Cilley, 58 Fed. 987, holding that only cases which could have been brought originally in the Federal courts could be removed; Board of Commissioners v. Hurd, 49 Ga. 467, 15 Am. Rep. 683, holding that under the act of 1867 a non-resident plaintiff may remove a case on motion; Burson v. National

Bank, 40 Ind. 182, 184, 13 Am. Rep. 294, to same effect, where plaintiff removed an action on a note after trial in State court where the jury failed to agree; Mahone v. Manchester, etc., R. Co., 111 Mass. 74, 15 Am. Rep. 11, affirming constitutionality of act and holding that the requirements of the act must be strictly complied with; Galpin v. Critchlow, 112 Mass. 339, holding an action could not be removed after trial on the merits, though the jury had disagreed; Clark v. Delaware, etc., Canal Co., 11 R. I. 37, holding a case could be removed after trial in State court and disagreement of jury. See notes to 7 Am. Rep. 507, and 12 Am. Rep. 548. Cited in general discussion in Gaines v. Fuentes, 92 U. S. 19, 23 L. 527; dissenting opinion in Johnson v. Brewers, etc., Ins. Co., 51 Wis. 583, 584, 9 N. W. 660, majority holding that if State court wrongly refuses a removal the judgment is only voidable, and unless reversed on appeal, is valid.

Removal of causes.— There is no constitutional objection to legislation authorizing and prescribing conditions for removal of a cause by a plaintiff when prejudice and local influence are such as are likely to prevent him obtaining justice, p. 290.

Citing cases which apply the principle are: Case of sewing-machine companies, 18 Wall. 580, 21 L. 920, holding a case could not be removed unless all of defendants were of different State from plaintiff; Burson v. National Bank, etc., 40 Ind. 182, holding a non-resident plaintiff could remove a cause to Federal court after trial in State court and failure of jury to agree; Mahone v. Manchester, etc., R. Co., 111 Mass. 75, refusing to order removal on petition and affidavit of a superintendent of a railroad, as not acts of the corporation. See note to 29 Am. St. Rep. 313.

Railroads.— One crossing a railroad is required to exercise that degree of prudence, care and caution incumbent on a person possessing ordinary reason and intelligence, under the special circumstances of the case, pp. 278, 290.

Cited in Tanner v. Louisville, etc., R. Co., 60 Ala. 637, contributory negligence is not always a defense; Kansas Pac. R. Co. v. Twombly, 3 Colo. 132, and Hoye v. Chicago, etc., R. Co., 67 Wis. 16, 29 N. W. 653, question of negligence is for the jury not for the court; dissenting opinion in Northern Pac. R. Co. v. Holmes, 8 Wash. Ter. 216, 218, 220, 14 Pac. 693, 694, 695, majority holding plaintiff was guilty of contributory negligence in not looking before crossing.

Railroads.— It is duty of those having management of train to cause engine bell to be rung a sufficient time before crossing a street, to warn passengers, and keep it ringing till crossing is passed, and to keep a proper and vigilant lookout in direction train is moving, pp. 277, 290.

Cited in Kansas Pac. R. Co. v. Pointer, 14 Kan. 56, where the company was held liable for gross negligence, although plaintiff was also negligent.

Trial.— Court may refuse to give extended series of instructions, if law arising upon the evidence is given with such fullness as to guide the jury correctly in its findings, p. 290.

Citing cases which make application of this principle are: New York, etc., R. Co. v. Estill, 147 U. S. 614, 37 L. 303, 13 S. Ct. 453, holding that objection should not be made to detached sentences in a charge, they must be read in connection with the whole charge; Coffin v. United States, 156 U. S. 456, 39 L. 492, 15 S. Ct. 404, as to the insufficiency of a charge on the question of presumption of innocence; Goddard v. Crefield Mills, 75 Fed. 821, 45 U. S. App. 84, holding where a charge was full on the whole case it was no error to refuse a particular instruction; McCoy v. State, 46 Ark. 153, reaffirming rule in a criminal case; State v. Pike. 65 Me. 116, collecting authorities, showing that it is sometimes the duty of the court to withhold requested instructions; Nelson v. Railway Co., 104 Mich. 587, 62 N. W. 995, where an excessive verdict for loss of a wife held ground for reversal and new trial; S. C., separate concurring opinion, p. 594, 62 N. W. 997, on correct instruction in case of estimating damages for loss of wife; Solen v. Virginia, etc., R. Co., 13 Nev. 138, holding a verdict should never be set aside for a charge which could not possibly have misled jury; Missouri, etc., R. Co. v. Vance, — Tex. Civ. App. —, 41 S. W. 170, sustaining instruction in husband's action for damages for personal injuries to wife, that value of her services need not be proved.

Death.— In suit for death of another, evidence that deceased was enceinte at time of accident, held unobjectionable in view of the clear and correct charge of the court, p. 291.

Cited in Gulf, etc., R. Co. v. Younger, — Tex. Civ. App. —, 40 S. W. 425, holding it is not necessary for a husband to prove the value of injured wife's services.

Miscellaneous.— South & North R. Co. v. Sullivan, 59 Ala. 280, as an illustration of a case of suit for damages for death of a married woman; White v. Holt, 20 W. Va. 811, as indicating the proper course to pursue when State court rejects petition for removal; Dimmey v. Railroad Co., 27 W. Va. 38, 42, 55 Am. Rep. 296, 300, as authority for sustaining an administrator's action for the killing of a married woman.

13 Wall. 291–297, 20 L. 562, MYERS v. CROFT.

Corporations.— It will be presumed that a grantee described as a land company is competent to take a conveyance of real estate, p. 295.

Cited and followed in Hagar v. Yolo Co., 47 Cal. 227, applying same presumption to "The Sacramento Valley Reclamation Company," described as owners of land in petition for formation of a reclamation district; Board, etc. v. Lafayette, etc., R. Co., 50 Ind. 107, in statement of appellee's argument on question of ultra vires by the court, collecting numerous authorities; Douthitt v. Stinson, 63 Mo. 278, holding a deed to "the board of directors" of an imaginary corporation void.

Vendor and purchaser.— Vendor of real estate cannot question capacity of a corporate grantee to take title, after it has paid the purchase money, p. 295.

Cited and approved in Fritts v. Palmer, 132 U. S. 293, 33 L. 321, 10 S. Ct. 96, holding that a grantee under a quitclaim deed could not question the title of a foreign corporation which had previously purchased the land from same grantor without complying with State law as to acquisition of real estate; South, etc., R. Co. v. Highland Ave., etc., R. Co., 119 Ala. 117, 24 So. 118, holding that if a corporation has acquired title and possession of real property its right cannot be questioned by a private citizen; Broadwell v. Merritt, 87 Mo. 102, holding neither a paid grantor nor his subsequent grantee can deny legality or incorporation of a corporation purchaser; Hyde v. Holland, 18 Or. 333, 22 Pac. 1105, a vendor of land before issue of patent is estopped to claim the title through the patent when issued; Green v. Niver, 43 S. C. 370, 21 S. E. 267, holding heirs of a government grantee as head of a family estopped to contest his conveyance after the ancestor's title had become absolute.

Public lands.— Section 12 of pre-emption act of 1841 prohibits assignment only of the right of pre-emption secured to settlers by the act; after entry made in good faith the pre-emptor may dispose of the land as owner before issue of patent, pp. 296, 297.

Cited and principle applied in Lamb v. Davenport, 18 Wall. 314, 21 L. 762, sustaining contracts for sale of settler's interest under the Oregon donation act made before passage of the act; Quinby v. Conlan, 104 U. S. 422, 26 L. 801, holding that purchasers from other settlers of their rights, founded on occupation, did not increase their equities as prior pre-emptors; St. Louis Mining Co. v. Montana M. Co., 171 U. S. 656, 19 S. Ct. 63, holding that a contract for sale of a located mining claim is valid before patent; Aiken v. Ferry, 6 Sawy. 87, F. C. 112, holding the right of pre-emption is not an interest in the land; Smith v. Ewing, 11 Sawy. 61, 23 Fed. 745, holding that when a certificate of purchase under the pre-emption law has been issued by the registrar, the land is salable; McClung v. Steen, 32 Fed. 374, sustaining validity of title under quitclaim deed executed immediately after issue of final receipt against another executed after issue of patent and before record

of first deed; United States v. Steenerson, 50 Fed. 507, 4 U. S. App. 332, holding that after cancellation by the land commissioner of a pre-emption entry, the right of the pre-emptor may be attacked collaterally; American Mortgage Co. v. Hopper, 56 Fed. 71, holding that an entry made for benefit of a third person might be cancelled; S. C., 64 Fed. 555, 558, 559, 29 U. S. App. 12, holding an entryman only secures a vested interest when he has lawfully entered upon and paid for the land and complied with the law; Diller v. Hawley, 81 Fed. 653, 48 U. S. App. 468, sustaining right of land department to cancel an entry for fraud; Gilkerson-Sloss Co. v. Forbes, 54 Ark. 149, 26 Am. St. Rep. 30, 15 S. W. 191, holding that one entitled to a patent as homesteader may mortgage the land; Thurston v. Alva, 45 Cal. 17, a certificate for pre-emption land renders the land salable; Stewart v. Powers, 98 Cal. 517, 33 Pac. 487, holding the restriction against alienation does not apply to a mortgage before final proof and payment; Merrill v. Clark, 103 Cal. 370, 371, 37 Pac. 239, a transfer after final proof and payment is valid, although by negligence or dishonesty of register no certificate of purchase has been issued; Godding v. Decker, 3 Colo. App. 204, 32 Pac. 834, holding that a receiver's receipt made a good title on which a contract could be based; Cooper v. Hunter, 8 Colo. App. 105, 44 Pac. 946, showing that the prohibition against assignment extended no further than the right of pre-emption; Jones v. Meyers, 2 Idaho, 798, 35 Am. St. Rep. 262, 26 Pac. 217, showing that the entry must be in good faith and a transferee takes no better title than his grantor had; Close v. Stuyvesant, 132 Ill. 616, 24 N. E. 870, 8 L. R. A. 166, and n., in Illinois certificates of entry are held to be evidence of legal title and invest holder with right of possession and transfer; Ogden v. Walters, 12 Kan. 296, affirming right of purchaser under pre-emption laws to sell or mortgage land before patent issues; Leonard v. Ross, 23 Kan. 300, land purchased under homestead law is liable for debts thereafter contracted and to execution before patent; Hardesty v. Service, 45 Kan. 617, 26 Pac. 30, holding that relinquishment of a right of homestead entry and withdrawal of a protest constitute a good consideration for a contract for payment of money; McCabe v. Caner, 68 Mich. 184, 35 N. W. 902, to same effect; Norris v. Heald, 12 Mont. 284, 285, 33 Am. St. Rep. 583, 584, 29 Pac. 1121, 1122, holding that a mortgage by a settler on land subject to entry under pre-emption laws before final proof and payment is valid; Gregory v. Kenyon, 34 Neb. 645, 52 N. W. 686, holding a deed of land made after entry under homestead law and proof and receipt is valid; United States v. Saucier, 5 N. Mex. 574, 25 Pac. 792, holding government cannot sue in trover for value of timber cut on public land after pre-emptor has paid the purchase money; Richards v. Snyder, etc., 11 Or. 509, 6 Pac. 191, holding a pre-emptor who has entered a claim may sell before patent issues; Carson v. Railsback, 3 Wash. Ter. 175, 13 Pac. 620,

when a deed is made and dated on same day the patent certificate was received by grantor the presumption is that it was made after such receipt; Boggan v. Reid, 1 Wash. 517, 20 Pac. 426, applying the same rule to homestead entries; Spiess v. Neuberg, 71 Wis. 285, 5 Am. St. Rep. 213, 37 N. W. 419, sustaining mortgages of a homestead entry. Cited, arguendo, in Vantonger v. Heffernan, 5 Dak. 206, 223, 38 N. W. 65, 74.

Distinguished in Fisher v. Wisner, 84 Iowa, 451, holding the exemption from taxation under act of Congress of March 3, 1845, ran from date of patent.

Public lands.— There is no presumption that Congress intended to render lands inalienable by the owner after entry and before issue of the patent, p. 297.

Cited and principle applied in Rose v. Nevada, etc., Co., 73 Cal. 388, 15 Pac. 20, holding the restrictive provisions of chapter 5 of act of Congress of 1872, April 4th, do not apply to additional homestead entries under revised statutes, section 2306.

13 Wall. 297-306, 20 L. 579, PENDLETON COUNTY v. AMY.

Bonds.— In action on railroad bonds payable to bearer plaintiff correctly averred himself to be the bearer, since if he was neither owner, holder, nor bearer, there was no promise to pay him; plea denying that he was bearer is good on demurrer, p. 303.

Followed in Lanning v. Lockett, 4 Woods, 458, 11 Fed. 816, in suit on promissory note a plea denying plaintiff's title is an issuable defense.

Pleading.— Argumentative plea may be stricken from the record on motion or condemned on special demurrer, but if it traverse a material averment of the declaration it is not open to a general demurrer, pp. 303, 304.

Municipal corporations.— Without legislative authority a municipal corporation may not subscribe to capital stock of a railroad nor issue bonds in payment; a purchaser is affected by the want of authority, p. 304.

Cited and relied on in Town of South Ottawa v. Perkins, 94 U. S. 262, 24 L. 156, holding municipality not estopped to deny validity of pretended act of legislature duly published among the printed statutes as a law; note to Davis v. Kendallville, 5 Biss. 286, F. C. 3,638, on void bonds; Lewis v. Shreveport, 3 Woods, 214, F. C. 8,331, denying validity of bonds issued by a municipality for which there was no authority in the charter; McPherson v. Foster, 43 Iowa, 70, 22 Am. Rep. 233, when bonds are issued without authority a holder cannot recover on the ground that he was an innocent purchaser; Lewis v. Commissioners, 12 Kan. 205, holding that without legisla-

tive sanction the assent of a majority of voters could not validate bonds issued in pursuance thereof.

County may be estopped by recitals in its bonds issued in aid of a railroad, of compliance with conditions or by fact of subsequent levy of taxes to pay interest, against asserting that the conditions were not fulfilled, p. 305.

Cited and principle applied in National Life Ins. Co. v. Board of Education, 62 Fed. 792, 27 U. S. App. 244, where recitals held to estop showing non-compliance with constitutional requirements of previous provision for an annual tax; Commissioners v. Shorter, 50 Ga. 508, sustaining validity of bonds signed by justices when not in regular session, but regular on their face; McPherson v. Foster, 43 Iowa, 69, 22 Am. Rep. 231, holding corporation not estopped to deny validity of acts done in exercise of a prohibited power; Lewis v. Commissioners, 12 Kan. 209, 219, holding that determination of jurisdictional fact of majority of voters, by competent authority, conclusive in action by a bona fide holder; Moore v. New Orleans, 32 La. Ann. 745, holding the city estopped to deny validity of "premium bonds" on the ground that the necessary taxation would raise the tax rate above the constitutional limit; Rose v. Mayor, etc., of Baltimore, 51 Md. 272, 34 Am. Rep. 310, where a sale was within power of mayor and council neither party could question its validity for neglect to observe some formality or regulation; Smith v. County of Clark, 54 Mo. 74, holding a corporation having power to issue bonds estopped to deny validity on the ground of non-compliance with conditions. (Note here again the principal case is miscited as estoppel founded on recitals.) See notes, 98 Am. Dec. 688, 51 Am. St. Rep. 835, on this point. Cited in general discussion in Hawkins v. Carroll Co., 50 Miss. 764; dissenting opinion in State v. Clinton, 28 La. Ann. 400, majority holding that municipal bonds issued in excess of constitutional limit were void.

Distinguished in Town of Lyons v. Chamberlain, 89 N. Y. 587, arguendo, rule did not apply where bonds were invalid as issued by strangers falsely simulating authority.

Municipal corporations.— Presumption runs in favor of an innocent purchaser that condition attached to exercise of power to issue railroad aid bonds, has been fulfilled, p. 305.

Cited and affirmed in Commissioners, etc. v. January, 94 U. S. 206, 24 L. 112, applying rule where a municipality took and retained certificate of stock issued and delivered bonds and paid interest for a time; Atchison, etc., R. Co. v. Fletcher, 35 Kan. 250, 10 Pac. 606, holding that company having power to receive bonds and negotiable paper may sell and guarantee same.

Distinguished in Green v. Dyersburg, 2 Flipp. 501, F. C. 5,756, holding that a bond for payment of money on condition, imports

a condition precedent, performance of which must be shown by holder.

Municipal corporations.— When a municipal corporation receives and retains stock certificate from a railroad company in exchange for bonds, it is estopped to assert against a purchaser of the bonds that they were issued in disregard of the conditions of issue, pp. 305, 306.

Cited and principle applied in Randolph v. Post, 93 U. S. 513, 23 L. 959, holding county estopped by delivery of bonds and receipt of stock to object the completion of the railroad was not performed in time; County of Leavenworth v. Barnes, 94 U. S. 73, 24 L. 64, or, under same conditions, to object that there was an irregularity in the organization of the company; Commissioners, etc. v. January, 94 U. S. 206, 24 L. 112, where taking and holding certificate of stock, issue and delivery of bonds, and payment of interest for a time, held to cure defect, if any, as to the order for an election; McKee v. Vernon Co., 3 Dill. 211, F. C. 8,851, holding municipality estopped by receipt of stock certificate and payment of interest to plead non est factum; Whiting v. Town of Potter, 18 Blatchf. 180, 2 Fed. 531, holding estoppel to question validity of coupons after acceptance and retainer of the stock and payment of interest; Irwin v. Town of Ontario, 18 Blatchf. 272, 3 Fed. 62, holding that in absence of any statement to the contrary, receipt and retention of stock would be presumed from the bond issue, completion of road and payment of interest for three years; Flynn v. Edwards, 36 Fed. 879, holding a judgment creditor who has sold and received and retained proceeds of sale, estopped after five years to question validity of the sale; Eakin v. St. Louis, etc., R. Co., 8 Fed. Cas. 235, holding that a lease by one corporation to another, not authorized by stockholders, had been ratified and confirmed by acquiescence and action thereunder; Singer v. St. Louis, etc., R. Co., 6 Mo. App. 433, to same point and effect; Louisville, etc., R. Co. v. State, 8 Heisk. 788, holding county bonds cannot be collaterally attacked in suit to enjoin collection of interest tax; State v. Anderson Co., 8 Baxt. 258, 259, holding, in suit to compel levy of interest tax, the county having authority to issue and having received the consideration, cannot impeach validity of bonds; Bennington v. Park, 50 Vt. 209, holding taxpayers who have stood by and seen municipality issue bonds, make contracts and levy taxes for payment, not entitled to relief against the bonds. See notes to 98 Am. Dec. 689, on estoppel by acquiescence, and 51 Am. St. Rep. 857, on estoppel.

Distinguished in Brown v. Bon Homme Co., 1 S. Dak. 233, 46 N. W. 178, holding a corporation is in no case estopped from setting up a total want of power to issue bonds.

Miscellaneous.— Iowa, etc., Co. v. Carroll Co., 39 Iowa, 166, incidentally.

13 Wall. 306–311, 20 L. 683, WILLIAMS v. KIRTLAND.

Taxation.— Statute making a tax deed prima facie evidence of title does not dispense with performance of all prescribed requirements for sale of the land, but burden of proving non-compliance is on the party attacking the deed, p. 310.

Cited and ruling applied in Wambole v. Foote, 2 Dak. 27, 2 N. W. 252, holding a treasurer's tax deed, showing sale to have been made on a day different from that fixed by the enabling ordinance, without any explanatory recitals, was void; Sams v. King, 18 Fla. 569, with other authorities, showing that courts had sustained legislation establishing such rule of evidence; City R. Co. v. Chesney, 30 Kan. 201, 1 Pac. 521, holding that a statutory affidavit of publication showing an insufficient publication overcame the presumption, prima facie established by the deed. See notes on this point. 17 Am. Dec. 509, 510, 100 Am. Dec. 238, and 4 Am. St. Rep. 188.

Courts.— Construction of State law, by its highest court, upon a question affecting title to real property in the State, binds Federal courts, p. 311.

Cited and principle affirmed and followed in Erie R. Co. v. Pennsylvania, 21 Wall. 497, 22 L. 598, adopting construction of Pennsylvania Supreme Court, that the Erie company was "doing business in the State;" Barnett v. Holmes, 102 U. S. 655, 26 L. 292, holding the Iowa decisions, construing the five years' statute of limitations as applying to one claiming under a tax deed, conclusive; McArthur v. Scott, 113 U. S. 391, 28 L. 1031, 5 S. Ct. 668, holding the Ohio decisions on effect of a decree setting aside a will, conclusive as to an Ohio will affecting land in same State; note to Galpin v. Page, 1 Sawy. 320, F. C. 5,205, holding the California decisions on the question of validity of judgments obtained on publication of summons on a collateral attack, conclusive on Federal courts; Meeks v. Vassault, 3 Sawy. 211, F. C. 9,393, holding Federal court bound by California decision as to application of section 190 of the probate act; Myers v. Reed, 9 Sawy. 137, 17 Fed. 404 (where case is cited under name of Canal Co. v. Clark, by mistake), accepting decision of Supreme Court of Oregon as the law of State on effect of grant of real property to a husband and wife.

Distinguished in Patapsco, etc., Co. v. Morrison, 2 Woods, 404, F. C. 10,792, holding rule does not apply to construction of contracts, nor to a construction of State statute by an inferior State court.

13 Wall. 311–328, 20 L. 581, CANAL CO. v. CLARK.

Trademarks.— Words or devices, though not the original invention of the user, and words in common use if, when adopted, not employed to designate the same or like products, are available and will be protected in equity, p. 322.

Cited and ruling applied in Columbia Mill Co. v. Alcorn, 150 U. S. 463, 37 L. 1146, 14 S. Ct. 152, holding the word "Columbia" could not be appropriated because previously used; Leidersdorf v. Flint, 8 Biss. 331, F. C. 8,219, holding trademark act of July 8, 1870, unconstitutional, and Circuit Court had no jurisdiction to enjoin use of trademark in suit between citizens of same State; Filkins v. Blackman, 13 Blatchf. 446, F. C. 4,786, holding "Dr. J. Blackman's Genuine Healing Balsam" was a valid trademark; Gray v. Taper-Sleeve Pulley Works, 16 Fed. 440, holding that a trade name invented by a manufacturer passed through a sheriff's sale of the business, and, being abandoned by the inventor, could be rightfully appropriated by purchaser; Pennsylvania Salt Mfg. Co. v. Myers, 79 Fed. 91, enjoining the use by a rival maker of the word "Saponifier," as a valid trademark of concentrated lye; Centaur Co. v. Heinsfurter, 84 Fed. 958, 56 U. S. App. 14, holding the name of "Castoria," by which a patented article has become known, cannot be protected as a trademark after the patent has expired; Grand Lodge v. Graham, 96 Iowa, 610, 65 N. W. 841, 31 L. R. A. 139, holding that the fact of incorporation does not give a right to exclusive use of corporate name when still used by an unincorporated society; Insurance Oil, etc., Co. v. Scott, 33 La. Ann. 952, 39 Am. Rep. 289, holding that prior use of available words, for a time sufficient to establish a recognized connection with the user, as the originator or seller, entitled to protection of equity; Robertson v. Berry & Co., 50 Md. 602, 33 Am. Rep. 334, enjoining publication of "T. G. Robertson's Hagerstown Almanack" in colorable imitation of "J. Gruber's Hagerstown Town and Country Almanack;" Waterman v. Shipman, 130 N. Y. 311, 29 N. E. 114, holding the word "Ideal" in the name "Waterman's Ideal Fountain Pen" constituted a valid trademark; dissenting opinion in Manufacturing Co. v. Trainer, 101 U. S. 60, 25 L. 996, majority holding that letters "A. C. A." used to denote quality of a ticking cannot be used as a trademark.

Trademark is designed to point out distinctively the origin or ownership or place of manufacture or sale of the article to which it is affixed; to give notice who was the producer, p. 322.

Cited and principle applied in McLean v. Fleming, 96 U. S. 254, 24 L. 632, and note to 23 Am. Rep. 29, holding trademark of "Dr. C. McLane's Liver Pills," infringed by use of "Dr. J. H. McLean's Universal Pills or Vegetable Liver Pills" and "Dr. McLean's Universal Pills;" Coleman v. Flavel, 12 Sawy. 224, 40 Fed. 856, enjoining the use of a label representing that a firm were sole agents of a salmon cannery after the termination of such agency; Smith v. Reynolds, 10 Blatchf. 105, F. C. 13,098, holding that the illustration of a crown was not valid for paints generally, when it was in use for a particular paint by another at time of registration; Estes v. Worthington, 24 Blatchf. 373, 31 Fed. 156, holding "Chat-

poration in the State of adoption; Ehrman v. Teutonia Ins. Co., 1 McCrary, 129, 1 Fed. 477, holding that as to a foreign company doing business in Arkansas, service on its auditor in State is sufficient; Mock v. Virginia Fire, etc., Ins. Co., 4 Hughes, 115, 120, 10 Fed. 703, 706, sustaining service of process on a general agent of an insurance company, chartered and resident in another State; Wilmer v. Atlanta, etc., Air Line R. Co., 2 Woods, 455, F. C. 17,776, holding that where railway corporations of different States consolidate and mortgage their property, the Federal courts in either State may direct sale of entire property; Missouri, etc., R. Co. v. Texas, etc., R. Co., 4 Woods, 365, 10 Fed. 501, discussing difference between State legislation creating a corporation already incorporated in another State and legislation recognizing an existing corporation of another State; Williams v. Empire Transp. Co., 29 Fed. Cas. 1364, affirming jurisdiction of Federal courts in a suit for infringing patent against a corporation of another State doing business in and amenable to process of State; Runkle v. Lamar Ins. Co., 2 Fed. 12, affirming jurisdiction in Federal court of Ohio of a suit by resident citizen against a corporation of New York; Uphoff v. Chicago, etc., R. Co., 5 Fed. 547, holding, if the effect of State legislation is to adopt a corporation of another State, it becomes, for the purposes of suit, a corporation of the adopting State; Consolidated Store-Service Co. v. Lamson, etc., Co., 41 Fed. 835, affirming jurisdiction of Federal court of a suit against a foreign corporation doing business in State; Myers v. Murray, Nelson & Co., 43 Fed. 697, 11 L. R. A. 218, and n., holding a corporation, though carrying on business in several States, could only be sued in State of creation; Dinzy v. Illinois Cent. R. Co., 61 Fed. 51, holding Federal court has jurisdiction of a suit by a resident plaintiff against a foreign corporation doing business in State, and by statute subjected to jurisdiction of the State courts; Western, etc., R. Co. v. Robertson, 61 Fed. 599, 22 U. S. App. 187, holding that citizens of another State, as lessees of part of a road, constructed by a domestic corporation in such other State under license from its legislature, were, for jurisdictional purposes, citizens of same State as the domestic corporation; Sullivan v. Sullivan Timber Co., 103 Ala. 375, 15 So. 942, 25 L. R. A. 544, holding foreign corporation doing business in State, must be sued in the county where is its place of business; Farmers, etc., Ins. Co. v. Harrah, 47 Ind. 241, holding that a corporation created by a State is not a citizen within section 2, article 4 of the Federal Constitution; Reyer v. Odd Fellows' Accident Assn., 157 Mass. 372, 34 Am. St. Rep. 292, 32 N. E. 471, holding that, under Indiana State law, any foreign corporation doing business in State was liable to be sued in State courts; State Board of Assessors v. Morris, etc., R. Co., 49 N. J. L. 219, 7 Atl. 839, holding that the powers of a foreign corporation exercising its franchises in State, are limited by expressed terms of the grant.

Cited in dissenting opinion in Philadelphia Fire Assn. v. New York, 119 U. S. 123, 30 L. 348, 7 S. Ct. 115, majority holding a foreign insurance company, doing business in New York, was subject to the imposition of a special tax as a condition of doing business there. See notes to 66 Am. Dec. 121, on service on foreign corporation, to 79 Am. Dec. 427, on interstate corporations, and 96 Am. Dec. 341, on taxation of foreign corporations.

Distinguished in St. Louis, etc., R. Co. v. James, 161 U. S. 560, 40 L. 808, 16 S. Ct. 626, holding that a State law, providing that a foreign corporation doing business in State should become a corporation of that State, does not enable it to be sued in Federal courts there, by a citizen of the State of origin; Pacific R. R. v. Missouri, etc., R. Co., 5 McCrary, 378, 23 Fed. 568, holding that a corporation formed under laws of several States is presumed to be a citizen of each State, and cannot remove a suit by a citizen of either State, on the ground of diverse citizenship; Wilkinson v. Delaware, etc., R. Co., 22 Fed. 354, holding that legislation authorizing a foreign corporation to do business in State, does not render it a domestic corporation; Home Ins. Co. v. Davis, 29 Mich. 239, holding that when a foreign corporation submitted to being sued in State courts, it was precluded from removing suit to Federal court.

Courts.— Whenever a general rule as to property or personal rights or injuries to either is established by State legislation, its enforcement by Federal courts in a case between proper parties, is a matter of course, and the jurisdiction of the court is not subject to State limitation, p. 286.

Citing cases which affirm and apply the principle are: Insurance Co. v. Morse, 20 Wall. 453, 22 L. 369, holding act of Wisconsin, forbidding foreign insurance companies doing business in State to remove suits to Federal courts, void; Southern Pac. Co. v. Denton, 146 U. S. 209, 36 L. 945, 13 S. Ct. 46, holding the provisions in Texas practice act, as to appearance on behalf of a defendant to object to jurisdiction, had no application to actions in Federal courts; Mexican Central R. Co. v. Pinkney, 149 U. S. 206, 37 L. 704, 13 S. Ct. 684, to same effect; Holmes v. Oregon, etc., R. Co., 6 Sawy. 270, 5 Fed. 82, holding an action by an administrator to recover damages for death of his intestate, under Oregon code, is enforceable in Federal court; Merchants' Mfg. Co. v. Grand Trunk R. Co., 21 Blatchf. 110, 13 Fed. 358, sustaining jurisdiction of suit between foreign corporations on a cause of action arising in Canada, where the State law enabled service of process to be made on corporate officers in State; Warren v. Wisconsin Valley R. Co., 6 Biss. 429, F. C. 17,204, holding a proceeding to condemn land for a railway was removable to Federal court in a case between proper parties; Cunningham v. County of Ralls, 1 McCrary, 119, 11 Fed. 455, holding section 5359, revised statutes of Missouri, does not oust Federal jurisdiction of an action against a county by citizen of another

State; Pulliam v. Pulliam, 10 Fed. 30, holding that notwithstanding statute of Tennessee as to effect as prima facie evidence of executor's accounts, Federal court may require executor to account anew in a suit by a legatee; Logan v. Greenlaw, 12 Fed. 19, holding that a creditor's bill in a State court to settle an estate, cannot prevent a non-resident creditor from proceeding for similar purpose in Federal court; Allen v. Texas, etc., R. Co., 25 Fed. 515, holding that State law, providing that State courts should retain jurisdiction over a domestic corporation after consolidation with a foreign or Federal corporation, could not prevent a corporation, after consolidation, removing suit to Federal court; Mineral Range R. Co. v. Detroit, etc., Copper Co., 25 Fed. 520, affirming Federal jurisdiction of suit to condemn lands of a foreign corporation for railway purposes, notwithstanding State law; Union Trust Co. v. Rochester, etc., R. Co., 29 Fed. 610, holding that statute of New York, forbidding suit on a judgment, without previous order of the court, did not apply to suit in Federal court having jurisdiction of the parties; Hoover v. Crawford County, 39 Fed. 9, holding Arkansas statute of 1879 ineffective to prevent suit against a county in Federal court; East Tennessee, etc., R. Co. v. Atlanta, etc., R. Co., 49 Fed. 612, 15 L. R. A. 111, holding that where a Federal statute gives a plaintiff a right to select the district within which suit can be brought, the laws of the State regulating the venue cannot restrict the territorial jurisdiction of Federal courts; Barling v. Bank, 50 Fed. 261, 7 U. S. App. 194, holding California statute, prohibiting suits by banking corporations which had failed to comply with the law, did not prevent suit in Federal courts; The City of Norwalk, 55 Fed. 110, holding Federal court had jurisdiction in admiralty of a case under State law to recover damages for death caused by negligence; O'Connell v. Reed, 56 Fed. 534, 12 U. S. App. 369, where Federal court refused to follow Kansas decision on Kansas statute on misjoinder of causes of action; Minneapolis v. Reum, 56 Fed. 581, 12 U. S. App. 446, holding that Minnesota statute, enfranchising foreigners after declaration of intention, did not prevent their suing in Federal court; Edwards v. Hill, 59 Fed. 725, 19 U. S. App. 493, sustaining jurisdiction of foreclosure suit by non-resident, where mortgagor has made an assignment and consent of State court had not been obtained; The Willamette Valley, 62 Fed. 297, holding that a vessel operated by a State receiver was subject to a maritime lien for liabilities incurred in another State; Bigelow v. Nickerson, 70 Fed. 121, 122, 126, 34 U. S. App. 261, 30 L. R. A. 341, 344, holding provision of Wisconsin statute, section 4255, revised statutes, confining actions in case of death by negligence to State courts, void; Quimby v. Penn. Ins. Co., 58 N. H. 495, holding that State law making the acceptance of process in State a condition on foreign corporations doing business in State, could not deprive them of right of removal of suit to Federal

court. Cited in dissenting opinion in Johnson v. Brewers, etc., Co., 51 Wis. 580, 583, 9 N. W. 658, 660, majority holding that where removal was refused on account of irregularity in verification of petition and bond, the judgment was only voidable, and unless appealed, was binding.

Distinguished in Pulliam v. Pulliam, 10 Fed. 78, holding statute of Tennessee, limiting time for creditor's suits against decedent's estate, binding on Federal courts in equity; Van Doren v. Pennsylvania R. Co., 93 Fed. 264, holding action for damages causing death under Pennsylvania statute, could be prosecuted in Federal court, either in or out of State; Home Ins. Co. v. Davis, 29 Mich. 239, when foreign corporation submitted to being sued in State courts as a condition for doing business in State, it was precluded from removing suit to Federal court.

Death.— Right of action for death, against wrongdoer, under Wisconsin statute, exists only in virtue of the statute, and only in cases where the death was caused within the State, pp. 285, 286.

Cited as obiter in Rudiger v. Chicago, etc., R. Co., 94 Wis. 196, 68 N. W. 662, holding that under the State law an action was maintainable for a death occurring in another State caused by acts in the home State.

Courts.— In all cases where a general right is conferred by a State law, it can be enforced in any Federal court within the State having jurisdiction of the parties; hence right of action for death, granted by Wisconsin statute, may be removed to Federal court, although statute provided that it should be enforced only in State court, p. 286.

Cited and principle applied in The Steamship Oregon, 14 Sawy. 463, 45 Fed. 77, holding that a State law giving a right of action for injuries causing death might be enforced in Federal court; Davis v. James, 10 Biss. 54, 2 Fed. 620, affirming right of mortgagees to foreclose a guardian's mortgage in Federal court on ground of citizenship, notwithstanding State law limiting such actions to State court; Phelps v. O'Brien Co., 2 Dill. 519, F. C. 11,078, holding that the Iowa code limitations for actions on judgments, without leave of court, did not apply to Federal courts; Hartman v. Fishbeck, 18 Fed. 295, holding that statute of limitations for presentment of claims for allowance in probate matters did not bind a non-resident creditor suing the administrator in Federal court; Wyman v. Mathews, 53 Fed. 680, holding Federal court has jurisdiction of a suit in equity by foreign creditors to enforce a trust and distribute a fund created by statute of South Dakota; Prentice v. Duluth Storage, etc., Co., 58 Fed. 442, 19 U. S. App. 100, sustaining jurisdiction of a suit to quiet title by owners of lots in severalty; Pierstoff v. Jorges, 86 Wis. 139, 39 Am. St. Rep. 887, 56 N. W. 738, holding that a judgment in bastardy proceedings may be enforced by a creditor's bill.

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41 L. R. A. 166, holding the nai
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Co. v. Gato, 25 Fla. 909, 23 Am.
827, enjoining the use of the name
maker's own name for cigars not
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West; Bolander v. Peterson, 136 Il
351, the words "Sweedish Snuff
competent as trademark; Elgin Bu
155 Ill. 133, 40 N. E. 618, holding
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latter of "Elgin Butter"; Metcalfe v
Rep. 289, 5 S. W. 778, enjoining the
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397, doubting if the words "East
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15 Am. Rep. 601, denying protection to n
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Dunbar v. Glenn, 42 Wis. 187, 24 Am. Re
"Bethseda," as applied to a natural mine
by the proprietor as a trademark as

for suspension, acted judicially; Grove v. Van Duyn, 44 N. J. L. 659, and note to 42 Am. Rep. 649, holding a magistrate not liable for unlawful imprisonment in a case colorably under his jurisdiction; Lange v. Benedict, 73 N. Y. 34, 29 Am. Rep. 93, holding that a sentence of imprisonment in excess of jurisdiction would not justify an action against a judge of a Superior Court, of general jurisdiction; Bannister v. Wakeman, 64 Vt. 208, 23 Atl. 586, 15 L. R. A. 204, holding a justice of the peace liable for damages by the unlawful issue of a mittimus in a criminal prosecution; Burch v. Hardwicke, 30 Gratt. 41, 32 Am. Rep. 649, holding that where the power of removal was vested in a board, the mayor was responsible in a civil action for damages for dismissing the chief of police; Johnston v. Moorman, 80 Va. 142, holding that a mayor of a city would not be liable to an action for false imprisonment ordered by him in his judicial capacity. See note to 6 Am. Rep. 513, and 12 Am. St. Rep. 919, on civil liabilities of grand jurors. Cited in dissenting opinion in Barthe v. Larguie, 42 La. Ann. 137, 7 So. 82, majority holding that one who was neither a party nor enjoined, has a right of action against the parties causing his imprisonment for contempt; Vaughn v. Congdon, 56 Vt. 129, majority holding justice of peace issuing a warrant of arrest on a complaint of a grand juror, which on its face was void, was liable for false imprisonment.

Judges of courts of superior or general authority are not civilly liable for acts done in exercise of their judicial functions, even when in excess of jurisdiction and alleged to have been done maliciously or corruptly, pp. 347-351.

Cited and principle applied in Spalding v. Vilas, 161 U. S. 493, 40 L. 784, 16 S. Ct. 635, holding an action would not lie against postmaster-general for issuing a circular calling attention to statute providing for adjustment of salary claims without intervention of an attorney; Cooke v. Bangs, 31 Fed. 643, holding a justice of peace not liable for committing for contempt for same offense after discharge on first commitment; Allec v. Reece, 39 Fed. 342, holding a justice of the peace not liable for arrest and imprisonment of a witness served with subpœna insufficient and directed to wrong officer; Philbrook v. Newman, 85 Fed. 144, holding that judges of Supreme Court of California could not be made liable for damages for disbarring an attorney; Turpen v. Booth, 56 Cal. 68, 38 Am. Rep. 51, holding that grand jurors cannot be held civilly responsible for finding an indictment; Pickett v. Wallace, 57 Cal. 557, holding justices of Supreme Court of California not liable in damages for adjudging contempt for offense in open court; Hughes v. McCoy, 11 Colo. 597, 19 Pac. 677, holding a judge could not be held civilly responsible for making an order reinstating a cause in vacation and without notice, as required by the code; Terry v. Wright, 9 Colo. App. 18, 47 Pac. 908, holding judge of County Court not liable to civil action for alleged illegal arrest and imprisonment for non-

delivery of mortgaged chattels, pursuant to order of court; Calhoun v. Little, 106 Ga. 339, 32 S. E. 88, 71 Am. St. Rep. 257, 43 L. R. A. 632, holding that judge of court of limited jurisdiction cannot be held civilly liable for judicial acts where court of general jurisdiction is exempt; State v. Wolever, 127 Ind. 312, 26 N. E. 763, holding mayor of city not liable for refusing change of venue in charge for violating city liquor ordinance; Jones v. Brown, 54 Iowa, 78, 37 Am. Rep. 187, 6 N. W. 142, holding that arbitrators cannot be made liable for an award made in exercise of their jurisdiction; Thompson v. Jackson, 93 Iowa, 382, 61 N. W. 1006, 27 L. R. A. 95, and n., denying liability of a justice of the peace for entering up a judgment in the absence of proper service of process; Maurice v. Worden, 54 Md. 256, 39 Am. Rep. 388, holding that an indorsement made by an official on a formal resignation of another officer sent to him for transmission to secretary of the navy, was not absolutely privileged, and malice might be shown; Maulsby v. Reifsnider, 69 Md. 166, 14 Atl. 512, in concurring opinion, court holding that the privilege of counsel for statements made in trial of cause is absolute; Patzack v. Gerichten, 10 Mo. App. 428, holding the rule did not apply to case of a justice who, having only jurisdiction to commit, inflicted a penal sentence for an offense; Lange v. Benedict, 73 N. Y. 25, 27, 29 Am. Rep. 86, 87, holding that judge of Federal District Court could not be made liable in damages for false imprisonment ordered judicially; Root v. Rose, 6 N. Dak. 582, 72 N. W. 1024, holding that judge of Superior Court is not civilly liable for ordering disbarment of an attorney; McCall v. Cohen, 16 S. C. 449, 42 Am. Rep. 644, holding a trial justice not liable for rendering a judgment void for want of proper service of the parties; Abrams v. Carlisle, 18 S. C. 246, holding a trial justice not liable for issue of execution; Johnston v. Moorman, 80 Va. 141, holding a mayor of a city not liable to action for false imprisonment ordered by him in his judicial capacity; Fansler v. Parsons, 6 W. Va. 488, 20 Am. Rep. 432, board of registration held not liable for striking name from list of registered voters. See notes to 6 Am. Dec. 304, on liability of judicial officers; 79 Am. Dec. 473, on distinction between judicial and ministerial acts; 23 Am. Rep. 692, on exemption from liability for judicial acts, and 22 Am. St. Rep. 425, on relief from judgment for contempt.

Judges.— Where, to the knowledge of the judge, there is no jurisdiction over the subject-matter, any authority exercised is usurped, for which no excuse is permissible; but where jurisdiction exists, the manner and extent of its exercise rests with the judge, free from personal liability, p. 352.

Cited and principle applied in Case of Lange, 13 Blatchf. 564, appx., F. C. 18,307, 8 Hun, 366, holding that where a judge was required to pass on a doubtful question, he could not be held personally responsible for a decision in good faith and without malice;

Cooke v. Bangs, 31 Fed. 644, holding justice of peace not liable to civil action for committing for contempt, for same offense, after discharge on first commitment; Allec v. Reece, 39 Fed. 344, exonerating a justice of the peace from liability for arrest of a witness in a criminal charge for failing to attend on an insufficient subpœna; Hofschulte v. Doe, 78 Fed. 439, holding a town marshal not liable to action for false imprisonment, when acting under an order of a court having jurisdiction; Busteed v. Parsons, 54 Ala. 402. 25 Am. Rep. 694, holding an action for damages for false imprisonment for violation of the act of Congress of May 31, 1870, would not lie against Federal district judge; Hughes v. McCoy, 11 Colo. 596, 19 Pac. 677, holding a judge not liable for reinstating a cause without notice to adverse party; Calhoun v. Little, 106 Ga. 341, 32 S. E. 88, 43 L. R. A. 633, holding, where the court has jurisdiction of subject-matter, and presiding officer erroneously decides it has jurisdiction of the person, he is not liable in civil action for damages; Smith v. Casner, 2 Kan. App. 596, 44 Pac. 754, holding a justice of the peace liable to a civil action for false imprisonment for committing a defeated complainant after execution of a valid bond on appeal; Mousseau's Will, 30 Minn. 205, 14 N. W. 889, holding, if a court act without authority, its judgments and orders are regarded as nullities; Root v. Rose, 6 N. Dak. 585, 72 N. W. 1025, holding that in proceedings to punish for contempt of court, before a superior judge, the judge must act judicially in determining his jurisdiction; McCall v. Cohen, 16 S. C. 451, 42 Am. Rep. 646, holding a judge not liable for an error of judgment as to jurisdiction of persons when the jurisdiction of subject-matter was clear; dissenting opinion in Vaughn v. Congdon, 56 Vt. 124, majority holding that a justice of the peace, issuing a warrant of arrest on a complaint void on its face, was liable for false imprisonment. See notes to 6 Am. Dec. 305, on liability of judges; 25 Am. Rep. 701, and 67 Am. St. Rep. 422, on liability of judicial officers.

Attorney and client.— Power to disbar attorneys is possessed by all courts which have the power to admit attorneys to practice, p. 354.

Cited and rule relied on in In re Boone, 83 Fed. 949, in considering the power of Federal courts to disbar for unprofessional conduct; United States v. Green, 85 Fed. 861, disbarring an attorney in Federal courts for filing scandalous and irrelevant briefs; People v. Green, 7 Colo. 242, 49 Am. Rep. 355, 3 Pac. 68, in disbarring an attorney for stopping a judge on the street and abusing him concerning judicial action; In re Walkley, — Colo. —, 56 Pac. 576, sustaining jurisdiction of court in a case of disbarment when notice of the proceedings had been sent by mail by clerk of court; Wilson v. Whitacre, 4 Ohio C. C. 18, holding that the admission of an attorney to practice law was a judicial act under statutory

power; In re Palmer, 15 Ohio C. C. 95, where the court refused to reinstate a disbarred attorney unless he was of good moral character; In re Samuel Davis, 93 Pa. St. 121, 39 Am. Rep. 731, holding a charge of embezzlement, made the ground for disbarment proceedings, could not be withdrawn or compromised so as to stay the proceedings. See notes to 95 Am. Dec. 345, on disbarment a judicial act, and 2 Am. St. Rep. 847, on what courts may disbar.

Attorney and client.— Except for matters occurring in open court, in judge's presence, power of court to disbar an attorney should never be exercised without notice to offending party of grounds of complaint against him and opportunity for explanation and defense, p. 354.

Cited and rule affirmed in Ex parte Robinson, 19 Wall. 513, 22 L. 208, holding that before judgment, the attorney should have notice; In re Boone, 83 Fed. 947, holding that the attorney was entitled to notice and to have the charges set out clearly and unambiguously; In re Orton, 54 Wis. 382, 11 N. W. 585, holding that the order to show cause should state the charges. See note to 95 Am. Dec. 334, 341, on this point.

Attorney and client.— Even for acts in open court, the attorney should ordinarily be heard before the order of disbarment is made, to afford opportunity for explanation, defense or apology, pp. 355, 357.

Attorney and client.— Disbarment should never be decreed where any punishment less severe, such as reprimand, temporary suspension, or fine, would accomplish the end desired, p. 355.

See note to 2 Am. St. Rep. 848, on disbarment, a discretionary power.

Attorney and client.— Obligations of attorneys extend to the maintenance at all times of the respect due to courts of justice and judicial officers, and include abstaining out of court from all insulting language and offensive conduct towards the judges personally for their judicial acts, p. 355.

Approved in In re Lambuth, 18 Wash. 480, 51 Pac. 1072, where, on disclaimer of intentional offense and disrespect in a petition for rehearing, the rule against an attorney was discharged; In re Brown, 3 Wyo. 125, 126, 4 Pac. 1088, ordering suspension of attorney's license for using vile language to judge and accusing him of being bribed. See notes to 95 Am. Dec. 336, on grounds for disbarment; 2 Am. St. Rep. 852, on same subject, and 45 Am. St. Rep. 84, on contempt of court.

Attorney and client.— Where an attorney has been disbarred for misconduct coram judice, the verity of the record cannot be impeached in any civil action against the judge, p. 356.

Cited in Scott v. Fishblate, 117 N. C. 275, 23 S. E. 436, 30 L. R. A. 696, 697, holding that power to punish for contempt in presence of court is final, and cannot be reviewed in any court. Apparently miscited in Matter of Eldridge, 82 N. Y. 166, discussing power of reviewing facts in disbarment cases.

Miscellaneous.— Blakeslee v. Carroll, 64 Conn. 233, 29 Atl. 475, 25 L. R. A. 108, not in point. See note to 2 Am. St. Rep. 861.

13 Wall. 358–363, 20 L. 606, GAY'S GOLD.

War.— Gold coin, in packages, carried from one person to another, and not used for travelling expenses, when intended for an insurrectionary district, was within the prohibition of the non-intercourse acts of 1861–1862, p. 362.

Cited in Cantu v. Bennett, 39 Tex. 307, holding that a contract for the transportation of corn from Mexico into Texas, was within the non-intercourse acts and void. See note to 1 Woods, 56, F. C. 15,194.

War.— Proclamation of amnesty of December 25, 1868, did not extend to one who was technically a loyal man, nor affect the release of his property confiscated under the non-intercourse laws, pp. 362, 363.

Cited in Semmes v. United States, 91 U. S. 27, 23 L. 195, holding that a pardon will not restore rights to property previously condemned and sold in the exercise of belligerent rights.

13 Wall. 363–366, 20 L. 653, ROBINSON v. UNITED STATES.

Customs and usages.— Extrinsic evidence of custom or usage is properly receivable to ascertain and explain meaning and intention of parties to a contract, written or verbal, p. 365.

Cited and principle applied in Tilley v. Cook County, 103 U. S. 162, 26 L. 377, refusing evidence to prove custom of architects in suit for percentage fees, there being no contract; Grace v. American, etc., Ins. Co., 109 U. S. 283, 27 L. 934, 3 S. Ct. 210, excluding evidence as to custom of insurance companies to give notice of termination of policy to the broker procuring the insurance; Nordaas v. Hubbard, 48 Fed. 922, admitting evidence of custom in port of charging lighterage to the vessel loading; United States v. Pine River, etc., Co., 89 Fed. 915, 61 U. S. App. 86, holding, to affect the construction of a statute, a custom must be so universal as to leave no room for doubt that the law was made with reference to it; Schmidt v. Louisville, etc., R. Co., 101 Ky. 471, 41 S. W. 1024, 38 L. R. A. 819, sustaining a contract for operating a railroad which omitted to specify the number of trains, holding the court could fix the details according to public needs; Wolff v. Campbell, 110 Mo. 119, 19 S. W. 623, striking out part of an answer setting up an alleged custom, contract being unambiguous; Evans v. Western Brass Mfg.

Co., 118 Mo. 554, 24 S. W. 176, admitting evidence to show custom in the marble trade as to thickness of slabs; Collender v. Dinsmore, 55 N. Y. 206, 14 Am. Rep. 228, holding that the letters C. O. D. formed part of a contract with an express company; Sharp v. Clark, 13 Utah, 521, 45 Pac. 569, holding parol evidence admissible to prove custom of taking stock off a train at any place paying freight charges to point of delivery, though billed through.

Customs and usages.— Parties who contract on a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary; hence, in sale of barley, usage to deliver in sacks may be shown, p. 366.

Cited and affirmed in Hostetter v. Park, 137 U. S. 40, 34 L. 572, 11 S. Ct. 4, as to a maritime contract for delivery by tug and barge of the cargo "without delay;" Hostetter v. Gray, 11 Fed. 181, holding established usages relating to a voyage, are impliedly made part of the contract; Marx v. National S. S. Co., 22 Fed. 684, construing bill of lading with reference to London custom, with reference to transshipment of goods on through bills; M'Keefrey v. Connellsville, etc., Co., 56 Fed. 217, 17 U. S. App. 35, construing a contract for supplying coke to furnaces, with reference to the usages of railroad companies as to supply of cars to coke producers and of the producers, with regard to their customers, in case of a shortage; Albion Phosphate M. Co. v. Wyllie, 77 Fed. 547, as to custom of trade in Germany in the sale of phosphate rock, of time of delivery to buyer; Pickering v. Weld, 159 Mass. 524, 34 N. E. 1082, holding that a custom in port of Boston, as to care of goods by consignee, after delivery on wharf, entered into a contract of affreightment; Clarke v. Hall, etc., Lumber Co., 41 Minn. 107, 42 N. W. 785, holding that the liability of a buyer of logs to pay scaling charges by a boom company, would be determined by the usage of the like business in that market. Cited generally in The Dictator, 30 Fed. 638.

Evidence is admissible which only tends to define the meaning of a contract in an important point left indefinite by its written terms: in this case, on a contract to deliver barley, to show custom to deliver in sacks, p. 366.

Citing cases which apply the rule are: Grace v. American Central Ins. Co., 109 U. S. 283, 27 L. 934, 3 S. Ct. 210, excluding evidence of usage of insurance companies to give notice terminating a policy to the broker who obtained the insurance; Balfour v. Wilkins, 5 Sawy. 434, F. C. 807, admitting extrinsic evidence of custom of port as to "rainy day," in charter-party; Central Trust Co. v. Wabash, etc., R. Co., 34 Fed. 256, where a construction placed upon a contract and adopted for many years, as to a matter not provided for in the contract, was enforced as part of the contract: Hewitt v. San Jacinto, etc., Irr. Dist., 124 Cal. 190, 56 Pac. 895, holding

that a contract for a water supply, which required notice to be given when the water was required, was not a contract for a constant flow; Bradbury v. Butler, 1 Colo. App. 435, 29 Pac. 464, admitting evidence of custom to show on whose certificates a contractor for a ditch was to receive payments, the contract being silent.

Distinguished in Cincinnati v. Gas Light, etc., Co., 53 Ohio St. 286, 41 N. E. 241, as not involving the doctrine of practical construction by the parties.

Customs and usages.— If a single witness has full knowledge and long experience on the subject of his testimony, and testifies explicitly as to antiquity, duration and universality of the usage, and is uncontradicted, the usage is to be regarded by the jury as established, p. 366.

Cited and rule affirmed in Greenwich Ins. Co. v. Waterman, 54 Fed. 843, 6 U. S. App. 549, rejecting evidence of usage of insurance agents for lack of explicit statements in the witnesses' evidence; Jones v. Hoey, 128 Mass. 587, accepting evidence of a single witness to prove usage of computation of weight; Wootters v. Kauffman, 67 Tex. 493, 3 S. W. 466, rejecting evidence of a single witness to prove a custom relating to cotton sales, when contradicted; Southwest. Va. M. Co. v. Chase, 95 Va. 57, 27 S. E. 829, holding the testimony of one witness sufficient to establish the custom of a county as to land surveys.

13 Wall. 367-373, 20 L. 594, HALL v. RAILROAD COS.

Carriers.— As between common carrier of goods and an underwriter upon them, liability for loss is primarily on the carrier, while liability of insurer is only secondary, p. 370.

Citing cases which apply the principle are: Chicago, etc., R. Co. v. Pullman Car Co., 139 U. S. 88, 35 L. 101, 11 S. Ct. 493, holding that payment of the insurance did not affect the right of the insurer to sue the railway company in name of insured; Regan v. New York, etc., R. Co., 60 Conn. 133, 25 Am. St. Rep. 311, 22 Atl. 505, holding that when owner recovers whole loss from the insurer, he holds the claim against the carrier in trust for insurer; Home Mutual Ins. Co. v. Oregon R. & N. Co., 20 Or. 572, 23 Am. St. Rep. 153, 26 Pac. 858, affirming the right of subrogation and holding that the liability of a wrongdoer to the owner was first and principal, that of the insurer secondary.

Insurance.— Right of marine insurers to proceed against carrier, after payment of a total loss, does not arise out of any abandonment; there can be no abandonment where there has been total destruction, and an insured may recover for a total loss without it, p. 371.

Cited in The Burlington, 73 Fed. 2[redacted]2, holding that on paym[redacted] by an insurer as for a total loss a for[redacted]al abandonment to him [redacted] not required.

Insurance.— Insurer, after paying [redacted]oss, is entitled to be sul[redacted] gated to all means of indemnity wh[redacted]ch assured held against [redacted] party primarily liable. The same ru[redacted]e applies to marine and [redacted] insurance, pp. 370, 371.

Cited and ruling applied in Mobile[redacted] etc., R. Co. v. Jurey, [redacted] U. S. 595, 28 L. 531, 4 S. Ct. 571, hol[redacted]ding that an insurer ag[redacted] fire having paid the loss might reco[redacted]er the entire loss susti[redacted] without regard to the amount of insu[redacted]nce paid; Phœnix Ins. [redacted] Erie Transportation Co., 117 U. S. 32[redacted] 29 L. 878, 6 S. Ct. 754, [redacted]ing the insurer can take nothing by [redacted]ubrogation but the righ[redacted] the assured; St. Louis, etc., R. Co. v. [redacted]ommercial Ins. Co., 139 [redacted] 235, 35 L. 157, 11 S. Ct. 557, holdin[redacted] that in an action by t[redacted] surer the principal question was as [redacted]o the right of the owr[redacted] recover; United States v. American [redacted]obacco Co., 166 U. S. 4[redacted] L. 1083, 17 S. Ct. 621, holding that t[redacted] right of insurers to r[redacted] from the government the value of [redacted]stroyed stamps depend[redacted] the right of the tobacco company; T[redacted]e Ocean Wave, 5 Bis[redacted] F. C. 10,417, holding that reinsurers [redacted] could maintain libel [redacted] to recover their contribution of the c[redacted]rrier though the shipp[redacted] been fully satisfied; Phœnix Ins. Co. [redacted] v. E. & W. Transp. [redacted] Biss. 29, F. C. 11,112, affirming righ[redacted] of insurer of goods [redacted] transit, after payment of loss, to sue [redacted]arrier; Rintoul v. Ne[redacted] Central, etc., R. Co., 21 Blatchf. 444, [redacted]7 Fed. 909, holding [redacted] insured could only recover the full va[redacted]lue of goods destroy[redacted] the carrier; Phœnix Ins. Co. v. Liver[redacted]ol, etc., S. S. Co., 22 [redacted] 398, 22 Fed. 729 (The Montana), su[redacted]ining libel by insur[redacted] cover amount paid for loss of goods [redacted]sea; Amazon Ins. Co [redacted] Iron Mountain, 1 Flipp. 619, F. C. 2[redacted], holding that a ca[redacted] not set up any different defense [redacted]ainst the underwr[redacted] against the owner; The Liberty, N[redacted] 4, 7 Fed. 280, hol[redacted] an insurer of cargo, on payment of t[redacted]e loss, could maint[redacted] in admiralty in his own name agains[redacted] vessel causing the [redacted] Frank G. Fowler, 8 Fed. 364, to sa[redacted]e effect in similar [redacted] Anchoria, 9 Fed. 641, holding that w[redacted]en the insurer has [redacted] of the loss the owner of the cargo [redacted]ay file libel on hi[redacted] count for the balance of the loss an[redacted] for the insurer fo[redacted] paid by him; The Grand Republic, 1[redacted] Fed. 400, holding [redacted] gagees of a ship, to whom a portion [redacted]of the loss has bee[redacted] the insurer, may become co-libellan[redacted]s in their own b[redacted] also on behalf of the insurers for the [redacted]full amount of the [redacted] Rintoul v. New York Central, etc., [redacted]o., 20 Fed. 818, h[redacted] owner might contract with the carri[redacted]r to give him th[redacted] any insurance. provided there were [redacted] no fraud or [redacted]

practiced on the insurer; The Sidney, 23 Fed. 90, holding that the right of subrogation does not depend on contract, but on relation of parties and arises on payment by the insurer of the loss; S. C., 27 Fed. 122, holding that in admiralty, as in equity, the insurer might maintain suit in his own name as the real party in interest; Springfield, etc., Ins. Co. v. Richmond, etc., R. Co., 48 Fed. 361, holding that an assured could not be compelled to join in an action of tort commenced by one of several insurers which had paid its proportion of a loss; Norwich Union Fire Ins. Co. v. Standard Oil Co., 59 Fed. 987, 19 U. S. App. 460, holding that an action to recover loss could not be defended on the ground of payment by an insurer; Wachusett Nat. Bank v. Sioux City Stove Works, 63 Fed. 870, holding that in equity creditors are entitled to be subrogated to the rights of an indorser in regard to securities held by him; Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 192, holding the question of who should bring suit did not concern the defendant carrier; Regan v. New York, etc., R. Co., 60 Conn. 139, 25 Am. St. Rep. 316, 22 Atl. 507, holding that a carrier was not entitled to inquire particulars of insurance nor to set off recovery of insurance against his liability; Mercantile Marine Ins. Co. v. Clark, 118 Mass. 289, holding that underwriters, who had paid to a mortgagee as for a total loss, were entitled to be subrogated to his rights in damages recovered by him in an action of tort for conversion of the vessel; Hartford Fire Ins. Co. v. Wabash, etc., R. Co., 74 Mo. App. 112, holding insurance company having paid a loss caused by railroad, entitled to recover amount paid from the railroad company, notwithstanding it had settled with assured for a smaller amount; Bound Brook Mar. Fire Ins. Co. v. Nelson, 41 N. J. Eq. 487, 5 Atl. 591, holding that where an insured sold the property, and took a mortgage for part of purchase money exceeding the insurance, retaining the policy, the insurer was entitled to the mortgage on tendering the amount secured by it; Germania Fire Ins. Co. v. Memphis, etc., R. Co., 72 N. Y. 92, 28 Am. Rep. 115, holding a defense of exemption clause in bill of lading was valid; Fayerweather v. Phœnix Ins. Co., 118 N. Y. 327, 23 N. E. 193, 6 L. R. A. 806, holding that a bill of lading which gave the carrier the benefit of any insurance prevented a recovery under a policy containing an agreement for subrogation of assured's claims.

Cited in dissenting opinion in Phœnix Ins. Co. v. Erie, etc., Transportation Co., 118 U. S. 210, 29 L. 880, 6 S. Ct. 1176, majority holding provision in bill of lading that carrier should have benefit of any insurance valid as between carrier and shipper. See note to 54 Am. Dec. 697, on subrogation.

A carrier is not an insurer; the law raises against him a conclusive presumption of misconduct or breach of duty in relation to every loss not caused by excepted perils, p. 372.

Cited and relied on in The Queen, 78 Fed. 171, holding that in a libel by various shippers, for damages by sea water owing to negligence, the burden of proof was on the carrier to bring himself within the excepted perils; Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 195, holding that common carriers by water were in nature of insurers and liable for every loss not covered by bill of lading.

Insurance.— Underwriter who has paid a loss is entitled to recover amount paid by suit in name of assured against a carrier who caused the loss, p. 373.

Citing cases which apply this principle are: The Potomac, 105 U. S. 634, 26 L. 1195, holding that the insurers, on paying the loss, were entitled to an assignment of the owners' right of action; Wager v. Providence Ins. Co., 150 U. S. 108, 37 L. 1017, 14 S. Ct. 58, holding that when bill of lading provides that the carrier shall have the benefit of any insurance, such provision limits the right of subrogation of the insurer on paying the shipper the loss to recover over against the carrier; The Planter, 2 Woods, 494, F. C. 11,207a, holding that underwriters, after payment of loss, might maintain a suit to recover for loss of property jettisoned; Northern Ins. Co. v. St. Louis, etc., R. Co., 5 McCrary, 128, 15 Fed. 841, holding that the act of 1875 did not enable the insurance company, as assignee of a right of action founded on tort, to maintain a suit in Federal court in its own name; First Presbyterian Soc., etc. v. Goodrich Transp. Co., 10 Biss. 315, 7 Fed. 259, holding that after payment by the insurer of the loss action cannot be in name of the insured; Carstairs v. Mechanics, etc., Co., 18 Fed. 475, holding that an insured who has shipped under a bill of lading, giving the carrier the benefit of any insurance, could not maintain an action against the insurer on an open policy; Norwich Union Fire Ins. Co. v. Standard Oil Co., 59 Fed. 988, 19 U. S. App. 460, holding that where the property exceeds in value the amount of the insurance, suit must be in name of the assured, but if insurer pays the full value of the loss he may sue in his own name; The Ohio, 91 Fed. 560, 62 U. S. App. 110, in a libel, where the damages sought included those of both owners and underwriters, there was no need to aver that suit was for benefit of the insurer; Carpenter v. Eastern Transp. Co., 71 N. Y. 579, holding defendant was not entitled to show that plaintiff was insured and had received insurance; Insurance Co. v. Railroad Co., 41 S. C. 412, 44 Am. St. Rep. 728, 19 S. E. 860, holding that an assured who received his whole loss from insurer held the claim against the carrier in trust for the insurer; Brighthope R. Co. v. Rogers, 76 Va. 446, affirming right of insurance company, after payment of loss, to maintain action against carrier in name of assured. See notes to 65 Am. Dec. 577, and 44 Am. St. Rep. 738, on this point.

13 Wall. 373-379, 20 L. 611, SALT CO. v. EAST SAGINAW.

Taxation.— The power of State legislatures to make contracts exempting certain property from taxation reaffirmed, p. 376.

Cited and relied on in Wells v. Mayor, etc., of Savannah, 107 Ga. 3, 32 S. E. 669, holding that portions of the city "Commons," sold by the city on a perpetual lease, were not exempt from taxation; Farris v. Vannier, 6 Dak. Ter. 213, 42 N. W. 41, 3 L. R. A. 724, in concurring opinion, holding that a tax under section 17, chapter 28, political code, as amended in 1885, is valid.

Bounties.— A bounty law is not a contract, except to bestow the promised bounty on those who earn it, so long as the law remains unrepealed, p. 377.

Cited and applied in Ingram v. Colgan, 106 Cal. 125, 46 Am. St. Rep. 230, 38 Pac. 316, 28 L. R. A. 189, holding the coyote scalp act of 1891 constitutional; Shiner v. Jacobs, 62 Iowa, 394, 17 N. W. 613, affirming the power of the legislature to repeal or modify section 798 of the code providing exemption to persons planting forest trees; Commissioners v. Hudson, 20 Kan. 75, holding that a planter under the hedge fences act of 1867 could only have a vested right in the bounty already earned or accrued under the act; Robertson v. Land Commissioners, 44 Mich. 276, 6 N. W. 659, holding that a certificate of sale of State swamp lands is not a contract that such land shall be always exempt from taxation; Manistee, etc., R. Co. v. Commissioners, 118 Mich. 351, 76 N. W. 634, holding that the laws of 1891 and 1893, exempting railroads from taxation, did not create unrepealable contracts; Ex parte Goodin, 67 Mo. 639, holding that a firewarden, who was entitled to a certificate of exemption from service as a juror, could not by subsequent legislation be rendered liable to serve; Cushman v. Hale, 68 Vt. 452, 453, 35 Atl. 385, holding that the act No. 41 of 1886 conferred no vested rights to share of fines until collected, and that act was properly repealed by statute of 1894.

Constitutional law.— Statute exempting property of manufacturers of salt, used in its manufacture, from taxation, and giving a bounty on all produce over a certain amount, is merely a bounty law, not a contract, and may be repealed at any time, p. 377.

See note to 72 Am. Dec. 684, on power of State to grant perpetual immunity from taxation.

Constitutional law.— Charters granted to private corporations are contracts, and if no right to alter or repeal is reserved, stipulations as to taxation or other matters bind both parties, p. 378.

Cited in Grand Lodge of Masons v. New Orleans, 44 La. Ann. 667, 11 So. 151, holding exemption from taxation subsequent to grant of charter, a mere terminable license.

Corporations formed under general laws are entitled to the benefit of specific provisions and exemptions contained in those laws, p. 378.

Cited in Reithmiller v. People, 44 Mich. 285, 6 N. W. 669, holding that a liquor dealer's license did not entitle the dealer to sell liquor on a holiday prohibited by subsequent legislation; Franklin Street Society v. Manchester, 60 N. H. 350, holding that a citizen can have no vested right in the continuance of any statute of general exemption.

Bounties.— General encouragements held out to all persons to engage in a particular business, whether by bounties or drawbacks or otherwise, are always under legislative control and subject to repeal, p. 379.

Citing cases affirming the validity of laws operating as bounty laws until repealed are Welch v. Cook, 97 U. S. 542, 24 L. 1112, exempting manufacturing property from taxation for ten years; Grand Lodge v. New Orleans, 166 U. S. 147, 41 L. 952, 17 S. Ct. 524, exempting the Grand Lodge Hall from State and parish taxation; Dunlap v. State, 76 Ala. 466, exempting members of fire companies from jury service, collecting authorities; County Commrs. v. Woodstock Iron Co., 82 Ala. 153, 2 So. 132, exempting buildings and machinery of certain manufacturing enterprises from taxation for ten years. Cited in general discussion in Detroit v. Detroit, etc., Plank R. Co., 43 Mich. 146, 5 N. W. 279, and Pennsylvania R. Co. v. Bowers, 124 Pa. St. 192, 16 Atl. 838, 2 L. R. A. 623.

Distinguished in Mobile, etc., R. Co. v. Kennerly, 74 Ala. 573, holding that under the provision in the railway charter the company's property could only be taxed for municipal purposes in city of Mobile to the special limit prescribed.

13 Wall. 379–386, 20 L. 627, SLAUGHTER v. GERSON.

Sales.— Misrepresentation which will vitiate a contract of sale must not only relate to a material inducement to the contract, but one which the complaining party could not verify, on which he relied, and by which he was actually misled to his injury, p. 383.

Cited and principle applied in Richardson v. Walton, 49 Fed. 895, refusing to cancel a contract dissolving a partnership when plaintiff was not deceived as to the basis of settlement; Rocchi v. Schwabacher, 33 La. Ann. 1368, refusing damages on purchases of lard found to be of inferior quality when purchaser had opportunity to, but did not, inspect before purchase; City Nat. Bank v. Hickox, 4 N. Mex. 215, S. C., 5 N. Mex 32, 16 Pac. 915, in action on note given as part consideration, holding purchaser not entitled to relief when he might have ascertained the value on inquiry; First Nat. Bank v. Worth, 2 S. Dak. 489, 51 N. W. 99, holding that a party could not recover damages for false representations unless believing

them to be true he also acted on the faith of them and was injured; Sioux Banking Co. v. Kendall, 6 S. Dak. 547, 62 N. W. 378, to same effect, in action charging fraudulent representations as to promissory notes given as part of purchase money; Fowler v. McCann, 86 Wis. 431, 56 N. W. 1086, holding where plaintiff did not rely on false representations as to amount of land cleared and value of farm he had not been damaged.

Equity will not relieve a party from the consequences of his own inattention and carelessness, p. 388.

Cited and principle relied on in Dingle v. Trask, 7 Colo. App. 21, 42 Pac. 188, refusing relief from a chattel mortgage given as collateral security, executed without examination; Pierce v. Ten Eyck, 9 Mont. 358, 23 Pac. 424, holding a purchasing partner could not recover from selling partner a collection which he might have ascertained by examination of the books; Short v. Pierce, 11 Utah, 40, 39 Pac. 476, holding purchasers to blame for not investigating an alleged coal agency with a railroad company. See note, 32 Am. St. Rep. 384, on carelessness a bar to relief.

Sales.— Where means of knowledge are available to both parties, if purchaser does not avail himself of them, or when he seeks verification of vendors' statements from other sources, and acts thereon, he will not be heard to say he has been deceived by vendor's misrepresentations, p. 388.

Citing cases which apply this rule are: Farnsworth v. Duffner, 142 U. S. 47, 35 L. 933, 12 S. Ct. 165, refusing to rescind contract when purchaser of land in West Virginia had investigated vendor's title and purchased on strength of his counsel's opinion; The Mattano, 52 Fed. 880, 8 U. S. App. 111, in a libel in rem for repairs to a vessel refusing a claimed deduction for waste when the defendant had means of knowing whether or not plaintiff had tools for the work in his yard; Henderson v. Henshall, 54 Fed. 324, 7 U. S. App. 565, sustaining action for damages for false representations leading to an exchange of lands, plaintiff being dissuaded by defendant from inspecting them; Bement v. La Dow, 66 Fed. 188, refusing to rescind contract for manufacture of patented medicine when the falsity of the representation relied on was easily ascertainable and opportunity for investigation had been afforded; New Orleans, etc., Co. v. Musgrove, 90 Ala. 429, 7 So. 748, refusing to rescind contract for sale of land on showing that maps were furnished and the lands were examined by purchasers and reported on by their expert; James v. Bocage, 45 Ark. 289, holding a purchaser of a machine could not, after trial and offer to pay a reduced price which vendor accepted, rescind the new contract thereby created; McGibbons v. Wilder, 78 Iowa, 534, 43 N. W. 522, holding a purchaser was under no obligation to have land surveyed by a surveyor to ascertain true boundaries and might rely on representa-

tions of owner; Collins v. Jackson, 54 Mich. 192, 19 N. W. 950, holding purchaser cannot recover damages for false representations as to value of stock of dry goods when he failed to make any examination of the stock; Cobb v. Wright, 43 Minn. 85, 44 N. W. 663, holding a grantor not entitled to recover damages for making a deed without consideration on false representation of grantee that whole title belonged to grantee; Ordway v. Continental Ins. Co., 35 Mo. App. 434, holding party compromising with insurance company, with knowledge of facts, cannot allege fraud; Long v. Warren, 68 N. Y. 432, refusing damages on sale of a farm as to existence of "quack grass" which purchaser could have seen on inspection; Schumaker v. Mather, 133 N. Y. 596, 30 N. E. 757, awarding damages on an exchange of stock farms as to number of stock when plaintiff made two attempts at examination, but was prevented by action of defendant and relied on his statements; Mahaffey v. Ferguson, 156 Pa. St. 169, 27 Atl. 23, holding that where a sale is induced by fraud the purchaser on discovery must, if he refuse to complete, notify his refusal promptly; Wyman v. Wilmarth, 1 S. Dak. 178, 46 N. W. 192, holding that where a general financial statement was made to enable a trader to obtain goods on credit, substantially true at the time it was made, a charge of obtaining goods on false pretenses could not be sustained; Washington Central Imp. Co. v. Newlands, 11 Wash. 214, 39 Pac. 367, holding that a false statement by vendor of his intention to build an hotel on adjoining land no ground for rescinding contract for sale of other land; Grim v. Byrd, 32 Gratt. 302, rescinding contract for sale of real estate for false representations by purchaser as to value of certain shares constituting the purchase consideration and solvency of the company; Lake v. Tyree, 90 Va. 724, 19 S. E. 789, refusing to cancel contract for purchase of building lots, when purchaser, being in the locality, did not inspect them, but relied on statement made in good faith by an agent who had not seen the land; Ludington v. Renick, 7 W. Va. 282, refusing to rescind contract for sale of land where the purchaser had investigated the amount of claims against the estate sold and acted on the information; Prince v. Overholser, 75 Wis. 650, 44 N. W. 776, holding that a verbal representation by vendor that a bounty land warrant would locate homestead land would not justify rescission of contract when purchaser had examined the warrant before buying; Farr v. Peterson, 91 Wis. 187, 64 N. W. 864, refusing to cancel contract for purchase of land which purchaser had previously visited and examined with a view to purchase. See notes to 2 Am. Dec. 81, on fraud as to quantity; 15 Am. Rep. 386, same point, and 32 Am. St. Rep. 385, on carelessness as a bar to relief.

Distinguished in Leicester Piano Co. v. Front Royal, etc., Co., 55 Fed. 295, 8 U. S. App. 374, where the purchaser's agent was only on the property for a few minutes and for another purpose

and made no investigation of financial condition of vendor, holding the purchaser was not estopped from alleging misrepresentation as to indebtedness; Whiting v. Price, 172 Mass. 241, 70 Am. St. Rep. 264, 51 N. E. 1084, holding that a purchaser of a bond purporting to be secured by a first mortgage of all the property of a company entitled to recover for false representation by vendor that it was secured by a mortgage of real estate of great value when the company did not own any real estate; Smith v. Griswold, 6 Or. 447, setting aside a sale of claims against the government for false representation, the subject of the sale not being open to inspection of both parties.

Miscellaneous.— Morris v. Courtney, 120 Cal. 66, 52 Pac. 130.

13 Wall. 386–389, 20 L. 564, ALEXANDER v. ROULET.

Public lands.— Power of prefects of California to grant pueblo lands within their jurisdiction, ceased on acquisition of country by United States, p. 387.

Distinguished in Scott v. Dyer, 54 Cal. 434, sustaining a grant in the pueblo of San Francisco, made by an alcalde. after termination of the authority of Mexican officials.

13 Wall. 389–396, 20 L. 505, THE SIREN.

Army and navy.— Prize money is not allowed where enemy vessels are captured or destroyed by the navy with the co-operation of the army, p. 395.

Followed in Porter v. United States, 106 U. S. 611, 27 L. 287, 1 S. Ct. 543, denying right of Admiral Porter to prize money for vessels of Confederacy destroyed on the James and York rivers, Virginia; The Nuestra Señora de Regla, 108 U. S. 101, 27 L. 666, 2 S. Ct. 292, as to vessel seized unlawfully as prize of war by order of general in command of army in Port Royal, afterwards released.

Army and navy.— No one can have any interest in any prize, except by grant or permission of the United States, p. 393.

Cited in United States v. Steever, 113 U. S. 754, 28 L. 1136, 5 S. Ct. 769, holding that award and distribution of prize money is only made according to the laws in force and the facts existing at the time of the capture.

13 Wall. 397–413, 20 L. 597, TARBLE'S CASE.

Habeas corpus.— Judicial officer of a State has no jurisdiction to issue habeas corpus for discharge of person held under authority of United States by its officer, pp. 402, 412.

Citing cases which affirm and rely on this principle are: Logan v. United States, 144 U. S. 284, 36 L. 436, 12 S. Ct. 623, holding the United States bound to protect from assault, prisoners for offense

against laws of Congress; In re Robb, 9 Sawy. 552, 565, 587, 588, 19 Fed. 35, 37, 38, 39, holding that a State official, in charge of a fugitive from justice, for delivery to another State, is pro hac vice an officer of the United States (note this case was overruled by Robb v. Connolly, in 111 U. S. 624, 28 L. 542, 4 S. Ct. 544, vide post); In re Neagle, 14 Sawy. 352, 39 Fed. 847, 5 L. R. A. 84, holding that United States courts can discharge from custody an officer of the United States, held in custody under State process; In re Johnson, 46 Fed. 659, holding that when a prisoner, under order of Federal court, is released by order of State court, he is liable to rearrest; In re Coppenhaver, 115 Mo. 355, 40 Am. St. Rep. 355, 24 S. W. 152, refusing to discharge on habeas corpus, county justices committed for refusing obedience to order of Circuit Court, directing levy of a tax. Cited in general discussion in United States v. Lee, 106 U. S. 222, 27 L. 152, 1 S. Ct. 262, and Bradley v. Beeth, 153 Mass. 156, 26 N. E. 429. See notes to 37 Am. Dec. 306, on authority of State court on habeas corpus; 47 Am. Dec. 165, on power of court to compel production of children and other persons, and 5 Am. Rep. 68.

Distinguished in Robb v. Connolly, 111 U. S. 624, 28 L. 545, 4 S. Ct. 544, holding that State court can compel production of an alleged fugitive from justice of another State, held for surrender to that State. See note to 9 Sawy. 552, as to status of officer in charge of a fugitive from justice. In re Hale, 73 Ala. 274, to same effect as Robb v. Connolly, supra. See note to 37 Am. Dec. 304, as jurisdiction whether concurrent in Federal and State courts.

Habeas corpus.—No State can authorize its judges or courts to exercise judicial power by habeas corpus or otherwise, within jurisdiction of another and independent government, p. 408.

Cited and principle relied on in Ex parte Dowell v. Bowman, 111 U. S. 142, 28 L. 385, 4 S. Ct. 305, denying authority of State court to take property in possession of United States marshal, under execution issued by Federal court. In re Johnson, 167 U. S. 120, 42 L. 108, 17 S. Ct. 837, denying writ to prisoner forcibly held under sentence of death by marshal of District of Indian Territory. Tarble's Case v. Parker, 1 Fed. 624, denying power of Circuit Court to demand the possession of prisoner held by officer of State court under legal process.

United States—Courts—National and State governments are absolutely independent, except that authority of United States is supreme when any conflict arises between the two governments, and which decision thereof by national tribunals, p. 406, 407.

Cited and principle applied in Ex parte Royall, 117 U. S. 241, 29 L. 872, 6 S. Ct. 734, affirming power of Federal court to discharge one in custody for violation of Federal Constitution, and also held under State process for violation of State law. In re Neagle, 14 Sawy. 264, 39 Fed. 833, affirming power of Circuit Court on habeas corpus to discharge government officer, held for murder, under

State process; Case of the Electoral College, 1 Hughes, 588, F. C. 4,336, holding that Federal court could discharge members of the electoral college imprisoned for contempt by State court for performance of duties under Federal Constitution and laws; Friedman v. Israel, 26 Fed. 802, affirming power of Federal court, after removal, to order marshal to take property held by attachment by the sheriff and hold it for Federal court.

Constitutional powers of national government include power to provide for government of land and naval forces; its control is plenary and exclusive, p. 408.

Cited in Ex parte Frederick Bright, 1 Utah, 155, defining power of civil authorities over soldiers for civil offenses.

Habeas corpus.— Writ should be refused if application show that prisoner is confined under authority of United States, by its officer; otherwise the judge or court may inquire into cause of, and authority for imprisonment, p. 409.

Cited in Robb v. Connolly, 111 U. S. 633, 28 L. 545, 4 S. Ct. 549, holding State courts might inquire, by habeas corpus, whether alleged fugitive from justice of another State, held by a State officer for conveyance thither, was legally detained. See notes to 37 Am. Dec. 202, and 22 Am. St. Rep. 424.

Habeas corpus.— Federal officer, in charge of prisoner, must make proper return to writ from State court, as to cause and authority for imprisonment, sufficient to show distinctly that imprisonment is under authority of United States, and process or orders under which prisoner is held should be produced with the return, pp. 409, 410.

Distinguished in Robb v. Connolly, 111 U. S. 629, 632, 28 L. 543, 544, 4 S. Ct. 547, 548, holding State official having custody of fugitive from justice of another State, not an officer of United States.

Habeas corpus.— When return to writ shows prisoner is in custody of Federal officer, under authority of United States, State court can proceed no further, p. 410.

Distinguished in Robb v. Connolly, 111 U. S. 634, 28 L. 545, 4 S. Ct. 549, State court may inquire into detention of alleged fugitive from justice of another State.

13 Wall. 413–418, 20 L. 637, KITCHEN v. BEDFORD.

Trusts.— Under a trust to expend certain bonds in purchase of lands, sale of bonds for a nominal sum is fraudulent breach of trust; buyer and sub-buyer are participes criminis and bound to redeliver bonds to the settler on demand, p. 417.

Distinguished in Smith v. American Nat. Bank, 89 Fed. 841, 60 U. S. App. 447, showing that whenever an action at law for breach of trust had been sustained, the third party had full knowledge

of the trust; Newsom v. Board of Commrs., 103 Ind. 530, 3 N. E. 165, holding that in an action to recover taxes illegally collected, a demand is not necessary.

Husband and wife.— Neither by law of Arkansas nor by common law is gift by husband to wife during marriage valid, p. 418.

Trusts.—Purchasers of trust property, with knowledge of a trust, and its breach, are bound to restore it on demand, or are liable to an action for trover for its fair value at time of demand, p. 418.

Affirmed in Kennedy v. Baker, 59 Tex. 156, the statute of limitations begins to run from the time of conversion by trustee in breach of the trust.

13 Wall. 418-432, 20 L. 655, DAVENPORT v. LAMB.

Public lands.— At common law, patent issued to deceased person passes no title; the rule would apply equally to grants by the government, but for the act of Congress of May 20, 1836, p. 427.

Cited and principle applied in De la Vergne, etc., Co. v. Featherstone, 49 Fed. 917, holding the grant of a patent for an invention to a deceased inventor is void; Beley v. Naphtaly, 73 Fed. 127, 44 U. S. App. 232, holding that every interest in land is assignable or descends to heirs, unless prohibited by statute. See notes to 69 Am. Dec. 447, and 83 Am. Dec. 467.

Public lands.— Act of May 20, 1836, as to patents issued in names of deceased persons, is limited by similar provisions in Oregon donation act; such patent will inure to the parties named in that act only, p. 427.

Cited and ruling applied in Lamb v. Davenport, 18 Wall. 314, 21 L. 762, holding that sales of settlers' claims in Oregon, prior to the donation act, were, as between the contracting parties, valid; Hutchinson Investment Co. v. Caldwell, 152 U. S. 70, 38 L. 358, 14 S. Ct. 505, holding that in States where recognized, illegitimate children are capable of inheriting, they are heirs within the meaning of the pre-emption law (R. S., § 2269); Semple v. Bank, 5 Sawy. 398, F. C. 12,660, affirming the title under the act of one of the claimants in principal case; Hershberger v. Blewett, 55 Fed. 176, holding that the heirs to whom a patent for land under the donation act was issued took as purchasers, not by descent. See note to 83 Am. Dec. 468, on statute of 1836.

Public lands.— On death of married claimant entitled under Oregon donation act, children and surviving husband or wife take in equal shares, children of deceased child taking per stirpes, p. 428.

Cited and followed in Cutting v. Cutting, 6 Sawy. 404, 6 Fed. 267, holding the word "children" in the donation act included grandchildren per stirpes; Traver v. Tribou, 8 Sawy. 516, 522, 15 Fed. 29,

33, following principal case in a suit for partition under donation act in same estate; Traver v. Baker, 8 Sawy. 539, 15 Fed. 190, to same effect; Proebstel v. Hogue, 8 Sawy. 597, 15 Fed. 586, holding that as to a donation under section 5 of the donation act in the case of death of a married claimant before patent and intestate, the share passed under the local law of descents.

Public lands.— Prior to 1850, title to all land in Oregon was vested in United States, and under territorial laws settlers had only possessory right, pp. 429, 430.

Cited in Shively v. Bowlby, 152 U. S. 51, 38 L. 350, 14 S. Ct. 567, holding that a donation claim, under act of 1850, bounded by the Columbia river, did not include lands below high-water mark.

Vendor and purchaser.— Covenant to convey, if covenantor obtained the fee from the government, is limited to title acquired directly from the United States, p. 430.

Cited in St. Louis Mining Co. v. Montana Min. Co., 171 U. S. 657, 19 S. Ct. 63, holding that a located mining claim may be sold or mortgaged before patent issues.

Public lands.— Whether, under Oregon donation act, on death of claimant prior to patent, title vests in statutory heirs as purchasers or as of inheritance, not decided, p. 431.

Cited and still not decided in Lamb v. Davenport, 18 Wall. 316, 21 L. 762.

13 Wall. 432–433, 20 L. 514, WEST TENNESSEE BANK v. CITIZENS' BANK.

Contracts.— State courts cannot entertain an action based upon transactions in unlawful currency, p. 433.

Cited and affirmed in Stevenson v. Williams, 19 Wall. 577, 22 L. 164, holding that contracts for a loan of Confederate money were invalid.

Courts.— Decision of State court, based on rules of jurisprudence not connected with Constitution of State, is not reviewable by Supreme Court on writ of error under section 25 of judiciary act, p. 433.

Cited and principle applied in Stevenson v. Williams, 19 Wall. 577, 22 L. 164, denying power to review judgment of State court annulling a judgment on notes given for a loan in Confederate money; Chicago, etc., R. Co. v. Wiggins Ferry Co., 119 U. S. 624, 30 L. 523, 7 S. Ct. 402, dismissing case involving the faith and credit given to acts of incorporation construed in the light of the decisions and law of another State; New Orleans W. W. Co. v. Louisiana Sugar, etc., Co., 125 U. S. 33, 34, 36, 39, 31 L. 613, 614, 615, 8 S. Ct. 749, 751, 752, dismissing writ of error in suit between

rival water companies claiming monopoly under city ordinance; Kreiger v. Shelby R. Co., 125 U. S. 46, 31 L. 678, 8 S. Ct. 756, dismissing writ of error in case where State Supreme Court had construed acts of its own legislature, as to effect of subsequent, on prior legislation; Winona, etc., R. Co. v. Plainview, 143 U. S. 393. 36 L. 200, 12 S. Ct. 538, holding the Supreme Court had jurisdiction only when the State court had given effect to a legislative enactment which impaired the obligation of a prior contract.

13 Wall. 434–449, 20 L. 659, CLINTON v. ENGLEBRECHT.

Trial.— Defendant does not, by challenging peremptorily and for cause, waive an inherent and fatal objection to entire panel. p. 441.

Cited and applied in Commonwealth v. Walsh, 124 Mass. 38, holding that partiality or misconduct in the issue and transmission of the venire might be ground for challenge to the array; Dupont v. McAdow, 6 Mont. 230, 9 Pac. 926, defendant not compelled to select a jury from a panel of less than twenty-four regular jurors.

Territories.— Basis of organization of territorial governments is to leave to inhabitants all powers of self-government consistent with supremacy and supervision of national authority, and with fundamental principles established by Congress, p. 441.

Cited and relied on in the following cases in which the powers of the territorial legislatures has been affirmed: Territory v. Scott. 8 Dak. 400, 20 N. W. 407, to change the location of the seat of government; Territory v. O'Connor, 5 Dak. 404, 41 N. W. 749, 3 L. R. A. 358, to pass local option law of 1887; Territory v. Cox. 6 Dak. 507, 508, power of governor to remove managing officers of a public institution from office summarily; United States v. Ensign. 2 Mont. 399, the territorial code of civil procedure or civil practice act; Baca v. Perez, 8 N. Mex. 199, 42 Pac. 166, to provide for the employment of subordinate officers of the legislature and their charge on the public treasury; Whitmore v. Hardin, 3 Utah, 130, 1 Pac. 467. to pass act of March 6, 1852, giving Probate Courts jurisdiction in divorce for statutory causes; People v. Douglass, 5 Utah, 291, 14 Pac. 803, to pass act conferring jurisdiction on justices of the peace to try cases of battery and other misdemeanors of the same grade; United States v. Jones, 5 Utah, 553, 18 Pac. 234, holding that, under section 262 of the criminal practice act, two defendants charged with a felony under United States law were entitled to be tried separately; Wagner v. Harris, 1 Wyo. 198, power to create municipal corporations. Cited in dissenting opinion in Coler v. Board, 6 N. Mex. 166, 27 Pac. 640, majority holding the territorial legislature had power to authorize issue of railroad aid bonds by counties; Lincoln-Lucky, etc., Mining Co. v. District Court, 7 N. Mex. 516, 38 Pac. 590, majority holding that the Supreme Court of the territory can issue writs of prohibition to the District Courts

of the territory; Guild v. First Nat. Bnk, 4 S. Dak. 582, 57 N. W. 504, majority sustaining law of 1881, providing for a different rate of interest in certain counties; Mackey v. Ensensperger, 11 Utah, 159, 39 Pac. 542, majority holding that, under territorial act of March 10, 1892, a verdict concurred in by less than twelve jurors would support a judgment.

Territories.—The whole matter of selecting, impanelling, and summoning jurors is left to territorial legislature, p. 444.

Citing cases which apply the rule are: Reynolds v. United States, 98 U. S. 154, 25 L. 246, that a Utah grand jury is sufficient when composed of the number prescribed by territorial statute; Miles v. United States, 103 U. S. 310, 26 L. 483, sustaining a trial of a challenge to a juror for actual bias, as prescribed by territorial law of Utah; Thiede v. Utah Territory, 159 U. S. 515, 40 L. 241, 16 S. Ct. 64, holding a criminal defendant in Utah Territory not entitled to be furnished with a list of witnesses; United States v. Collins, 1 Woods, 515, 522, F. C. 14,837, holding the act of 1872 (17 Stat. 19) has no reference to the selection of jurors for United States courts; United States v. Antz, 4 Woods, 180, 16 Fed. 124, holding that, in the absence of a statutory provision, courts cannot dispense with a venire for the summoning of a grand jury; Beery v. United States, 2 Colo. 197, 198, 200, 201, holding that, in the absence of special legislation, a jury in the territorial court, in a case arising under the Constitution and laws of the United States, may be summoned under an open venire directed to the marshal; Territory v. Scott, 3 Dak. 410, 20 N. W. 412, affirming the power of the territorial legislature to fix and change the location of the seat of government; United States v. Hailey, 2 Idaho, 80, 3 Pac. 204, holding that, in cases in the Federal courts, the practice is in all cases regulated by the laws in force in the State or territory; Commonwealth v. Brown, 121 Mass. 78, holding that the provisions of general statutes, chapter 132, as to the drawing and selecting of jurors, are constitutional; United States v. Reynolds, 1 Utah. 228, quashing indictment for polygamy found by grand jury of twenty-three, as not contemplated by the territorial statute; United States v. Miles, 2 Utah, 23, holding that, in the selection of jurors, the territorial statutes control when not in conflict with United States law, and triers were properly appointed; People v. Ritchie, 12 Utah, 195, 42 Pac. 213, holding that section 3400, subdivision 2, of 2 Compiled Laws 1888, as to impeachment of verdicts, was binding on the territorial courts; Nickels v. Griffin, 1 Wash. Ter. 387, in separate concurring opinion, saying that, in the territory, an admiralty case must come before the Supreme Court on appeal in the same manner as a suit in equity; France v. Connor, 3 Wyo. 463, 27 Pac. 575, holding that by the territorial laws, dower had been abolished in Wyoming. Cited in dissenting opinion in Reis v. Lawrence, 63 Cal. 139, majority not deciding, but assuming, invalidity of a decree of divorce made

by the Probate Court of Utah Territory of a citizen of California; Palmer v. Cowdrey, 2 Colo. 5, majority holding that the jurisdiction and practice of the courts of the territory, both in chancery as well as in law, may be defined and regulated by the legislative assembly; Beery v. United States, 2 Colo. 209, in general discussion of the regulation of practice in territorial courts; Mackey v. Enzensberger, 11 Utah, 173, 39 Pac. 547, majority holding that, under territorial act of 1892, verdict concurred in by less than twelve jurors would support a judgment.

Distinguished in Page v. Burnstine, 102 U. S. 668, 26 L. 270, holding that revised statutes, section 858, applies both to courts of the District of Columbia and Federal, Circuit and District Courts; United States v. Gardner, 25 Fed. Cas. 1254, 1257, holding that the designation and selection of jurors for Federal courts is to be made by Federal not State officers; United States v. Mays, 1 Idaho, 766, holding that in Idaho the courts may, by general rules, prescribe method to be pursued by the District Court while sitting for the trial of offenses against laws of United States; United States v. Kuntze, 2 Idaho, 450, 21 Pac. 408, holding that it is proper to issue an open venire to the marshal of the United States when United States are parties to case.

Territories.— Regulations of judiciary act of 1789, in regard to selection of jurors, have no reference to territories, p. 445.

Cited and affirmed in In re Osterhaus, 16 Fed. Cas. 895, the principal case is limited to holding that territorial courts are not affected by laws relating solely to Federal courts; Lynch v. Grayson, 7 N. Mex. 41, 32 Pac. 154, holding that on appeal of a cause, tried by the court without a jury, the court would deal with the questions in the same manner and to same extent as if it had been tried by a jury.

Territories.— When for twelve years Congress has taken no action on a territorial law, it is a reasonable inference that it has approved the law, p. 446.

Cited and applied in the following cases, in which the implied sanction of Congress was held to have been given: Camon v. United States, 171 U. S. 287, 18 S. Ct. 859, holding that sales of vacant public lands made by State of Sonora, under the Mexican government, must be considered as grants to be recognized under the treaty of 1853; Farris v. Vannier, 6 Dak. 207, 42 N. W. 41, 3 L. R. A. 722, as to territorial law of 1877 providing exemptions of certain property from taxation; Territory v. Cox, 6 Dak. 525, to same effect, as to law of 1877, giving the governor power to fill all vacancies occurring in territorial offices; O'Donnell v. Glenn, 8 Mont. 257, 19 Pac. 305, as to territorial system of laws regulating the manner of locating and recording mining claims, so far as not in conflict with United States law; Baca v. Perez, 8 N. Mex. 195,

42 Pac. 164, the employment of additional subordinate officers, provided for in joint resolution No. 5, approved January 24, 1895, and their payment out of the territorial treasury; Greeley v. Winsor, 1 S. Dak. 630, 48 N. W. 218, as to the territorial statute of 1887, authorizing an independent appeal from an order sustaining or overruling a demurrer; Guild v. First Nat. Bank, 4 S. Dak. 583, 57 N. W. 505, as to law of 1881, providing for a different rate of interest in certain counties; Nixon v. Reid, 8 S. Dak. 512, 67 N. W. 59, 32 L. R. A. 319, as to statute of 1866 relating to the granting of ferry leases; United States v. McMillan, 10 Utah, 187, 37 Pac. 264, as to territorial act of February 20, 1874, prescribing the fees of clerks of District Courts; State v. Norman, 16 Utah, 462, 52 Pac. 988, as to section 3 of chapter 7, laws of 1892, respecting adultery and its punishment; France v. Connor, 3 Wyo. 461, 27 Pac. 575, holding that section 18 of the Edmunds-Tucker act of Congress, on the subject of dower, related solely to Utah territory, and that by the Wyoming statute dower had been abolished in that territory.

Distinguished in People v. Clayton, 4 Utah, 432, 11 Pac. 210, denying approval by implication of act of 1878, providing for the election of a territorial treasurer and auditor, same being in conflict with the organic law and revised statutes, section 1857.

Jury.— Making of jury lists by County Court in Territory of Utah is not a judicial act, its members act as a board not as a judicial body, p. 446.

Cited in dissenting opinion in United States v. Jones, 5 Utah, 561, 564, 18 Pac. 238, 240, arguendo.

Courts.— Fact that territorial Supreme Court judges are appointed by president does not make their courts, courts of United States; there is no District Court of United States, in sense of Constitution, in a territory, p. 447.

Cited and affirmed in Good v. Martin, 95 U. S. 98, 24 L. 344, holding that in the District Court of Colorado the evidence of two witnesses, who had an interest in the issue, was properly excluded under 13 Stat. 351; Reynolds v. United States, 98 U. S. 154, 25 L. 246, holding that a grand jury of fifteen in territorial District Court of Utah was sufficient to find an indictment; McAllister v. United States, 141 U. S. 182, 35 L. 695, 11 S. Ct. 952, holding that the words "judges of the courts of the United States," in revised statutes, section 1768, does not apply to the district judge of the District of Alaska; Steamer Coquitlam v. United States, 163 U. S. 351, 41 L. 186, 16 S. Ct. 1119, holding that appeal lay from the District Court of Alaska to the Circuit Court of Appeals for the Ninth Circuit; United States v. McMillan, 165 U. S. 510, 41 L. 807, 17 S. Ct. 398, affirming the rule but holding by the act of 1853, Congress had extended the provisions of the fee bill to the territorial courts; United States v. Haskins, 3 Sawy. 271, 273, F. C. 15,322,

holding that for the trial of crimes against the United States, under section 33 of the judiciary act, the territorial courts are included in the term "Courts of the United States;" Blackburn v. Wooding, 56 Fed. 547, 15 U. S. App. 84, holding that a case originally brought in territorial court by a citizen of another State was properly removable to Federal court after admission of Washington as State; In re Dana, 68 Fed. 901, holding that an action for libel cannot be removed for trial to the District of Columbia under the judiciary act, section 33; Beery v. United States, 2 Colo. 195, holding that an offense, under laws of the United States, committed in any county constituting part of the district in which the one of the territorial courts having jurisdiction in such cases was fixed, was within the jurisdiction of that court; United States v. Hailey, 2 Idaho, 29, 3 Pac. 244, holding section 955, revised statutes, does not apply to a suit in District Court of the territory; Manning v. French, 149 Mass. 398, 21 N. E. 946, 4 L. R. A. 842, holding that the court of commissioners of Alabama claims had power to admit and prevent attorneys from practicing before it; Territory v. Murray, 7 Mont. 259, 15 Pac. 149, holding that territorial courts have no power, under revised statutes, section 725, to punish for contempt; Walker v. New Mexico, etc., R. Co., 7 N. Mex. 288, 34 Pac. 43, affirming constitutionality of act of 1889, sections 1 and 2, authorizing special verdicts; Braithwaite v. Jordan, 5 N. Dak. 235, 65 N. W. 714, 31 L. R. A. 253, holding that appeals in admiralty cases in the territorial District Court are governed by the old rules and practice in admiralty; Fuller v. Johnson, — Okl. —, 58 Pac. 747, holding territorial court not United States court within Oklahoma statute of limitations; Nickels v. Griffin, 1 Wash. Ter. 380, also in separate concurring opinion, page 385, holding that appeals in admiralty cases must be brought to the territorial Supreme Court under regulations prescribed by the territorial legislature; McCann v. United States, 2 Wyo. 252, 298, holding that the territorial court had no jurisdiction under the act of Congress of March 3, 1875, to punish larcenies and receivers of stolen goods; Swan v. United States, 3 Wyo. 157, 9 Pac. 994, separate concurring opinion holding that revised statutes, section 1014, does not apply to the taking of bail in criminal cases for violation of laws of Congress in territories; In re Murphy, 5 Wyo. 304, 40 Pac. 399, holding that the territorial courts had no jurisdiction of crimes against the Federal government.

Qualified in Lincoln-Lucky Mining Co. v. District Court, 7 N. Mex. 508, 38 Pac. 585, holding that the territorial courts, when engaged in United States business, were United States courts. Distinguished in In re Osterhaus, 18 Fed. Cas. 895, holding that territorial courts are Federal courts for the purposes of the act of 1884 (13 Stat. 74) relating to punishments for counterfeiting coin.

Territories.— Attorney and marshal appointed under organic law of a territory may properly be called United States officers, but

the making up of jury lists and designation of jurors are subject to regulation of territorial law, p. 448.

Cited and ruling affirmed in Hussey v. Smith, 99 U. S. 24, 25 L. 315, but sustaining acts of United States marshal as officer de facto, in serving process in a foreclosure suit, making sale, and executing deed to the purchaser before the decision of the principal case; Black v. Clendenin, 3 Mont. 47, holding the United States marshal was not entitled to serve the processes issuing from the local courts.

Miscellaneous.— Cited in United States v. Fisher, 109 U. S. 145, 27 L. 886, 3 S. Ct. 155, not in point; Maynard v. Hill, 125 U. S. 204, 31 L. 656, 8 S. Ct. 726, and Beery v. United States, 2 Colo. 190, incidentally; Palmer v. Cowdrey, 2 Colo. 3, as giving the grounds for the decision of Orchard v. Hughes, 1 Wall. 73, 17 L. 560.

13 Wall. 449–453, 20 L. 602, UNITED STATES v. VIGIL.

Public lands.— Mexican departmental assemblies being without power to dispose of public domain, except for cultivation or settlement, grant in New Mexico, in consideration of constructing two wells and factories, was void, pp. 451–452.

Cited and applied in Hayes v. United States, 170 U. S. 649, 42 L. 1179, 18 S. Ct. 740, holding as invalid a grant to Hayes in county of Socorro, New Mexico, made by the territorial deputation in 1825, for similar reasons; County Commrs. v. Central Colorado Impt. Co., 2 Colo. 634, holding that a Mexican grant, which would have been void because made in excess of the quantity authorized by the Mexican law, had become valid to the extent so authorized by a subsequent confirmation of Congress. Cited, arguendo, in Emeric v. Alvarado, 64 Cal. 556, 2 Pac. 432.

13 Wall. 453–456, 20 L. 515, TUCKER v. SPALDING

Patents.— In action at law for damages for infringement, it is for jury to determine diversity or identity in principle of parents, although principles by which question must be decided are mainly propositions of law, p. 455.

Cited and ruling applied in Royer v. Schultz Belting Co., 135 U. S. 325, 34 L. 218, 10 S. Ct. 835, holding the question of infringement should have been left to jury in action at law for damages; Coupe v. Royer, 155 U. S. 578, 39 L. 268, 15 S. Ct. 204, to same effect, as to an action at law for infringement of an invention for treating hides; Wilgus v. Germain, 72 Fed. 777, 44 U. S. App. 369, holding, in action at law for infringement of patent for lawn sprinklers, the questions of identity and difference were properly submitted to the jury; Newton Mfg. Co. v. Wilgus, 90 Fed. 485, in citation of Wilgus v. Germain, supra, as to conclusiveness of judgment in an action at law for infringement; Overweight, etc., Co. v.

Improved Order, etc., Assn., 94 Fed. 158, holding, in an action for infringing an elevator patent, that where a specific element is not claimed as a device by itself, it is in effect admitted as not the invention of the patentee.

Patents.— If a machine will actually do more than inventor claims, and its structure and action would suggest to an ordinary skillful mechanic the double use, the adaptation is not a new invention or patentable, p. 456.

Citing cases which apply this principle are: Stow v. Chicago, 104 U. S. 550, 26 L. 817, as to a prior invention of wooden pavement; Fond du Lac Co. v. May, 137 U. S. 406, 34 L. 718, 11 S. Ct. 102, denying validity of a patent for improvement in construction of prisons, being merely an adaptation of old mechanism; Yale Lock Mfg. Co. v. Norwich Nat. Bank, 19 Blatchf. 130, 6 Fed. 385, affirming a patent for a safe-locking device, where a new result was produced and there was invention in the combination; Leonard v. Lovell, 29 Fed. 315, holding a refrigerator patent void for want of novelty; Rapid Service Store R. Co. v. Taylor, 43 Fed. 253, sustaining a patent for a cash and parcel carrier, with a spring starter, as not anticipated by prior English patents for atmospheric railways nor by loom patents; Appleton Mfg. Co. v. Star Mfg. Co., 60 Fed. 415, 18 U. S. App. 492, holding a patent corn reducer and separator, patented as a process, void for want of novelty; Galt v. Parlin, etc., Co., 60 Fed. 422, 18 U. S. App. 518, holding a patent for an improvement in wheelbarrows, void for want of novelty; Wright, etc., Co. v. Clinton, etc., Co., 67 Fed. 793, 33 U. S. App. 188, limiting a patent for improvement in weaving wire cloth to the new combination of prior means to the new purpose; Griswold v. Wagner, 68 Fed. 499, 37 U. S. App. 171, holding the transfer of hinging and journal devices found in coffee roasters to waffle irons, not patentable; Goshen Sweeper Co. v. Bissell Carpet Sweeper Co., 72 Fed. 75, 37 U. S. App. 555, disallowing an alleged improvement in carpet sweepers, consisting merely in duplicating part of the mechanism; Schreiber v. Grimm, 72 Fed. 675, 43 U. S. App. 10, holding patent for a cask support, void for want of invention; Stearns & Co. v. Russell, 85 Fed. 228, 54 U. S. App. 614, holding a machine for pill dipping, not patentable; Union Gas-Engine Co. v. Doak, 88 Fed. 90, holding that the mere change in a gas-igniting device, from a rotary to a reciprocating movement, was not a patentable novelty. Cited, arguendo, in Eachus v. Broomall, 115 U. S. 436, 29 L. 422, 6 S. Ct. 232.

Modified in Potts v. Creager, 155 U. S. 607, 39 L. 279, 15 S. Ct. 198, holding that if the relations be remote, and use of old device produce a new result, it may be patentable.

Patent.— In action at law, for infringement, neither trial nor appellate court may decide that one patent covers or does not cover the invention of the other, p. 456.

13 Wall. 456-465, 20 L. 629, BUTLER v. WATKINS.

Trial.— A plaintiff, who does not ask for any instructions, cannot, on appeal, be heard to complain that full instructions were not given, p. 462.

Fraud.— A manufacturer may not fraudulently induce another to withhold his products from sale, without being answerable for injury occasioned, p. 463.

Fraud.— Whether acts of a defendant were in fact fraudulent, and his purpose to deceive, and whether alleged consequences resulted, are facts to be submitted to jury, p. 463.

Fraud.— To maintain action it is sufficient to show that defendant was guilty of deceit with design to deprive plaintiff of some profit or advantage, and acquire it for himself, whenever loss or damage has resulted, p. 464.

Fraud.— Actual fraud is always attended by an intent to defraud, which may be shown by any evidence tending thereto, p. 461.

A corporation may be responsible for the fraudulent acts of its agent in inducing a contract, although it never assented to the proposals nor sanctioned the contract, p. 463.

Affirmed in Sherman v. Commercial Printing Co., 29 Mo. App. 38, holding a corporation cannot, by by-laws, avoid liability for torts of its servants within scope of their authority.

Fraud.— If a motive for a fraudulent act can be shown in one case, it may be justly inferred that similar conduct towards another in relation to a like subject was actuated by the same spirit, p. 464.

Cited and principle applied in New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 599, 29 L. 1000, 6 S. Ct. 880, in action on policy on life of a third person, admitting evidence to show plaintiff obtained other insurances on same life about same time, reviewing authorities; Mack v. Jones, 31 Fed. 190, holding that statements by a merchant, made to obtain credit, are not to be held fraudulent because not agreeing precisely with his books; Continental Ins. Co. v. Insurance Co. of Pennsylvania, 51 Fed. 888, 1 U. S. App. 201, admitting evidence of commission of other and similar frauds about same time, on other insurance companies; Mudsill Min. Co. v. Watrous, 61 Fed. 180, 22 U. S. App. 12, admitting evidence of attempted sales of other mines on fraudulent samples of ore, in action to rescind mining contract; Pennsylvania M. L. I. Co. v. Mechanics' Sav. Bank & T. Co., 72 Fed. 423, 37 U. S. App. 692, 38 L. R. A. 59, and n., in defending action on policy, admitting evidence to show intent of insured in omitting a previous policy from his statement as to other insurance; Mayo v. Wahlgreen, 9 Colo. App. 518, 50 Pac. 44, in action for deceit in land contract, admitting evidence of statements by vendor to other parties as to what he had paid for the land, and a complaint in another action by

vendor; Minx v. Mitchell, 42 Kan. 694, 22 Pac. 711, rejecting questions to a defendant testifying in his own behalf as to other trades of land, unless so similar in character that same motive might be reasonably imputed; Cook v. Perry, 43 Mich. 627, 5 N. W. 1057, holding, in an action for false representations, evidence was admissible that defendant had made same representations to another person; Wilkinson v. Dodd, 42 N. J. Eq. 249, 7 Atl. 334, in action to charge managers of an institution with loss resulting from an illegal loan, holding that charges in the bill, of making other illegal loans, were not impertinent nor scandalous; Archer v. Long, 38 S. C. 279, 16 S. E. 1000, admitting an account-book, kept by one of the parties, on a charge of fraud, to show intention of the parties, Ludom v. Furniture & Carpet Co., 12 Utah, 179, 42 Pac. 209, where the issue was one of fraud in purchase of goods, charging that the defendant was insolvent, admitting interrogatories and answers as to changing the articles of association; Piedmont Bank v. Hatcher, 94 Va. 231, 26 S. E. 506, in suit to set aside a conveyance, as intended to subject the land to payment of certain notes, admitting evidence to show that the notes were procured by fraud; dissenting opinion in United States v. Budd, 144 U. S. 170, 36 L. 389, 12 S. Ct. 580, arguendo.

Distinguished in West Florida Land Co. v. Studebaker, 37 Fla. 36, 19 So. 179, holding that statements in newspaper advertisements were irrelevant in an action for fraud and deceit in sale of lands; McKay v. Russell, 3 Wash. 383, 28 Am. St. Rep. 47, 28 Pac. 909, rejecting evidence of a distinct and independent transaction, having no bearing on the case at issue.

13 Wall. 465–474, 20 L. 507, CAUJOLLE v. FERRIE.

Judgment.— Grant of letters of administration by proper court, directed by statute to grant them to "relatives of the deceased," is conclusive in another suit, upon question of grantee's legitimacy, that having been the question at issue at time of grant, pp. 471–474.

Cited and principle applied in Veach v. Rice, 131 U. S. 314, 33 L. 170, 9 S. Ct. 737, holding that the judgments of the Court of Ordinarily in Georgia, in matters relating to estates of decedents, are not open to collateral attack; Holmes v. Oregon, etc., R. Co., 6 Sawy. 285, 5 Fed. 534, holding that a grant of administration on an estate, vested in an administrator appointed by another court of competent jurisdiction, was void; S. C., 7 Sawy. 387, 9 Fed. 234, to same point and effect; Berney v. Drexel, 12 Fed. 394, holding that the decision of the surrogate as to the competency of a person to act as executor was conclusive against collateral attack; Comstock v. Herron, 55 Fed. 812, 6 U. S. App. 626, holding the judgment of the State Probate Court on matters within the scope of its authority, would have same effect in Federal courts as was given to it by the State laws; Howell v. Budd, 91 Cal. 349, 27 Pac. 748, holding

that where the right to a grant depends solely on whether or not the applicant is the child of the deceased, the grant, until reversed on appeal, is conclusive in all courts, so far as the parties to the proceedings are concerned; Sly v. Hunt, 159 Mass. 153, 38 Am. St. Rep. 405, 34 N. E. 188, 21 L. R. A. 688, and n., sustaining conclusiveness of record of probate of a will contested for unsoundness of mind, on question of sanity in an action on contract for services rendered; Smith v. Central Trust Co., 154 N. Y. 338, 48 N. E. 554, holding that an adjudication by a competent court of another State that a trust was created by a will, was binding on courts of New York, even though that court should be of another opinion; Frame v. Thormann, 102 Wis. 671, 79 N. W. 44, holding that a grant of administration in another State, in which the question of domicile was not raised, did not preclude an independent grant in State as to the property therein; dissenting opinion in Conery v. Water-Works Co., 41 La. Ann. 945, 7 So. 21, majority holding former judgment not an estoppel when subject-matter was different.

Distinguished in Matter of Patterson, 146 N. Y. 331, 40 N. E. 990, holding that an order appointing an alleged husband to administer, was no bar to the next of kin, actually existing, asserting their right to the whole estate and to have the decree, distributing the estate to the administrator, cancelled; Williams v. Williams, 68 Wis. 71, 53 Am. St. Rep. 261, 23 N. W. 116, holding decree of divorce did not estop woman from proving illegality of the marriage in a suit for dower against estate of a subsequent husband.

13 Wall. 475–479, 20 L. 542, THE ARIADNE.

Collision.— Duty of lookout is of highest importance, and law requires indefatigable care and sleepless vigilance; the rigor of the requirement rises according to speed and power of vessel, p. 479.

Cited and relied on in The Oregon, 158 U. S. 198, 39 L. 948, 15 S. Ct. 808, holding that on a steamship under charge of a river pilot, under circumstances proved, there should have been a lookout on either bow, but it was not negligence to have only one; The J. W. Everman, 2 Hughes, 20, F. C. 7,591, holding that a vessel entering a harbor at night-time was put on her utmost vigilance and the master and crew should be on deck; The Express, 44 Fed. 896, holding collision caused by having no proper lookout on either ship; Flint, etc., Co. v. Marine Ins. Co., 71 Fed. 220, sustaining validity of paragraph 5 of rule 8 of supervising inspectors, requiring all passenger and freight steamers to have, in addition to regular pilot, one of the crew on watch in or near the pilot-house.

Collision.— Every doubt as to performance of duty and effect of non-performance should be resolved against the vessel sought to be inculpated, until she vindicates herself by conclusive testimony to the contrary, p. 479.

Cited and rule applied in The Ancon, 6 Sawy. 123, F. C. 348, holding vessel to blame where the lookout was dismissed by the second mate, who assumed the duties and was himself negligent; Robinson v. Detroit, etc., S. N. Co., 73 Fed. 892, 43 U. S. App. 190, holding that where a tug had no lookout it was a fair presumption that, if she had had one, the collision might have been avoided.

Collision.— Fault of sailing ship does not excuse fault of steamer, if latter were in any degree a contributory cause of collision, p. 479.

Cited and rule applied in The Sunnyside, 91 U. S. 221, 23 L. 307, collision between sail and steamer, holding it was the duty of the sailing vessel, under the circumstances, to change her course when the steamer was drifting, waiting for a tow; The Frank Moffat, 2 Flipp. 297, F. C. 5,060, where absence of a proper light held negligence on part of propeller, contributing to the collision; The Columbia, 23 Blatchf. 270, 25 Fed. 845, holding where the ship, having the right of way, received no response to her signals, she was to blame for keeping on her course; Meyers, etc., Co. v. The Emma Kate Ross, 41 Fed. 828, holding that a vessel, whose duty it was to keep her course, should not anticipate the movements of another vessel and give way; New York Harbor, etc., Co. v. New York, etc., R. Co., 148 N. Y. 580, 42 N. E. 1088, in suit for damages arising out of collision between steamboat and ferry-boat, holding both to blame.

Collision.— Both vessels being in fault, damages must be divided, p. 479.

Cited and rule applied in The Max Morris, 137 U. S. 9, 34 L. 587, 11 S. Ct. 31, decreeing divided damages in case of personal injury, but not fixing the proportions, and collecting authorities.

Collision.— Concurrence of judgments of lower courts raises a prima facie presumption of correctness, but Supreme Court, if of contrary opinion, must not neglect its duty by declining to give it judicial effect, p. 479.

Cited in The City of Augusta, 80 Fed. 298, 50 U. S. App. 43, conclusions of district judge relied upon as of great value in a doubtful case.

13 Wall. 480-497, 20 L. 698, CARPENTIER v. MONTGOMERY.

Public land.— Where one of boundaries of Mexican grant in California is so uncertain that it cannot be defined, title is imperfect until confirmed by United States, p. 493.

Cited in Pinkerton v. Ledoux, 129 U. S. 354, 32 L. 709, 9 S. Ct. 402, holding that if the petition and writ of possession did not enable the jury to definitely locate the boundaries, the finding in an action of ejectment must be for defendant.

Public lands.— Confirmation of Mexican grant in California inures solely to benefit of confirmee, as regards legal estate and right to patent; but the equitable rights are preserved and can be enforced by proceedings in equity, pp. 494, 495.

Cited in Rector v. Gibbon, 111 U. S. 291, 4 S. Ct. 612, holding that equity will constitute the holder of the legal title a trustee for the real owners and compel a conveyance; Widdicombe v. Childers, 124 U. S. 405, 31 L. 430, 8 S. Ct. 520, holding that a patent vests the patentee with the legal title, but does not determine the equities; Bouldin v. Phelps, 12 Sawy. 312, 30 Fed. 560, holding that a party claiming under an imperfect Mexican grant cannot maintain ejectment against another whose claim has been confirmed.

Public lands.— Fifteenth section of act of 1851, respecting settlement of California titles, explained, p. 495.

Cited in Manning v. San Jacinto Tin Co., 7 Sawy. 424, 9 Fed. 730, holding that, as between a locator of a mining claim under the act of 1866 and a patent issued for a Mexican grant confirmed before the location, the patent is conclusive.

Public land.— While patent on a pre-emption right confers legal title, patentee may be subjected in equity to any just claim of a third party, even to extent of holding title for his use, p. 496.

Cited in dissenting opinion in Galliher v. Cadwell, 3 Wash. Ter. 514, majority holding that one who has been allowed to perfect his entry without notice and has paid for the land cannot be charged in equity as a trustee.

Ejectment cannot be maintained by holder of equitable title against one holding under patent, p. 497.

Cited in Suttle v. Richmond, etc., R. Co., 76 Va. 288, holding that in ejectment the plaintiff must show the legal title and a present right of possession; Nelson v. Triplett, 81 Va. 237, to same effect.

Miscellaneous.— Brown v. Kalamazoo Cir. Judge, 75 Mich. 278, 13 Am. St. Rep. 440, 42 N. W. 828, 5 L. R. A. 228, and n., incidentally; Arnold v. Sinclair, 12 Mont. 278, 29 Pac. 1134, arguendo.

13 Wall. 497-506, 20 L. 663, CHEW v. BRUMAGEN.

Parties.— Where a bond and mortgage are assigned as collateral security, assignee becomes holder of legal right under an express trust, and assignor is not a necessary party to a suit on the bond, p. 505.

Cited and principle applied in Rejall v. Greenhood, 92 Fed. 947, holding beneficiaries not necessary parties to suit to set aside a deed creating a trust, collecting authorities; Watkins v. Bryant, 91 Cal. 504, 27 Pac. 777, to same effect, collecting authorities. See note to 64 Am. Dec. 532, on assignment of insurance.

Mortgage.— On suit by assignee of bond and mortgage, decree merges entire bond and mortgage in judgment, and assignor has no further right under the bond against the obligor, p. 505.

13 Wall. 506-517, 20 L. 702, FRENCH v. EDWARDS.

Statutes.— Statutory requisitions intended for guidance of officers in conduct of their business are directory, unless accompanied by words importing that the acts shall not be done in any other manner or time; but when intended for protection of the citizen, and disregard of them would injure his property, they are mandatory. The power of the officer is then limited by the manner and conditions prescribed for its exercise, p. 511.

The following citing cases affirm and rely upon this holding: Jaffray v. McGehee, 107 U. S. 364, 27 L. 496, 2 S. Ct. 370, the mode of sale by assignees in bankruptcy, prescribed by statute of Arkansas, is mandatory; Lyon v. Alley, 130 U. S. 184, 32 L. 902, 9 S. Ct. 483, holding the provisions of the laws of the District of Columbia governing assessments for cost of making improvements on streets mandatory; Erhardt v. Schroeder, 155 U. S. 129, 39 L. 96, 15 S. Ct. 46, directions to customs officers in classifying imports held directory; Schroeder v. Young, 161 U. S. 341, 40 L. 725, 16 S. Ct. 515, holding that a sale under an alias execution for full amount of judgment, which had been partially satisfied by a prior sale, would avoid sale as to purchaser with notice; Le Roy v. Reeves, 5 Sawy. 104, F. C. 8,272, holding a tax sale of three lots in solido, void; Mora v. Munez, 7 Sawy. 460, 10 Fed. 637, holding a sale for taxes in disregard of statutory provision requiring sale of the smallest quantity that anyone would take to pay judgment, void; Powder River Cattle Co. v. Board, 45 Fed. 326, holding the provision of Montana statute, that before assessing the assessor should demand a list of property from the taxpayer, was mandatory; Western Ranches v. Custer County, 89 Fed. 580, to same effect; State Auditor v. Jackson County, 65 Ala. 150, holding requirement of revenue law of 1868 that auditor shall not apportion values of railroad among the several counties traversed before equalization, mandatory; Rector v. Board, 50 Ark. 126, 6 S. W. 521, the assent of a majority of adjoining owners to a local improvement is jurisdictional and mandatory under act of 1881; Carpenter v. Gann, 51 Cal. 194, the direction in act of 1861 that sheriff in selling property for taxes shall sell only the smallest quantity that a purchaser will take is mandatory; Frink v. Roe, 70 Cal. 320, 11 Pac. 830, to same effect, and a tax deed reciting sale in one parcel is void; Reynolds v. Lincoln, 71 Cal. 185, 12 Pac. 450, to same effect, where the return showed the statute had not been followed, the recitals in deed to the contrary cannot be regarded; McGrath v. Wallace, 116 Cal. 552, 48 Pac. 720, holding that a return to a sheriff's sale which failed to show that the amount bid was the sum of the judgment

and costs, and that the sale of whole parcel was necessary, reported a void sale; Riverside Co. v. Howell, 113 Ill. 261, holding statutory requirements that the annual appropriations be made within the first quarter of fiscal year and amount ascertained, and then levy and assessment, mandatory; Weyer v. Second Nat. Bank, 57 Ind. 207, holding section 60 of act for settlement of decedents' estates, requiring authority of court for a sale by executor, mandatory; Easton v. Savery, 44 Iowa, 656, holding that a levy of taxes made in June instead of September, as required by law, was only directory, the taxpayer being in no way prejudiced; Burlington Gas Light Co. v. Burlington, 101 Iowa, 462, 70 N. W. 629, provisions in code, section 825, as to time of delivery of assessment-book to clerk of township for equalization, held directory when taxpayer had the opportunity of presenting his objections and being heard; Hubbell v. Polk Co., 106 Iowa, 620, 76 N. W. 655, holding that a tax levy made December instead of September, by which no prejudice was caused to taxpayer, was valid, the statute being directory; State v. Beard, 34 La. Ann. 278, holding that the requirements of act of 1878, as to official oaths and bonds, were mandatory; Cox v. Bryan, 81 Md. 291, 31 Atl. 854, holding the provisions of act of 1890 as to time for appeals from the registration of voters were mandatory, the appeal must be after the final day of October sitting and within one week thereafter; West Hampton v. Searle, 127 Mass. 507, holding the requirements of statute of 1861, as to form and contents of assessment-rolls, were merely directory; Bailey v. Haywood, 70 Mich. 191, 38 N. W. 210, holding that directions of sections 851 and 852 of the redemption from taxes law were mandatory, and a sale for taxes prematurely returned as delinquent was void; Thomas v. Chapin, 116 Mo. 399, 22 S. W. 785, holding direction in revenue law of 1889 as to the tax-book was directory only and involved no obligation that it should be in a single volume with one certificate instead of two volumes with two certificates; Rose v. Trestrail, 62 Mo. App. 358, holding that a proviso in ordinance ordering street work requiring completion within a certain time was mandatory; Guinotte v. Egelhoff, 64 Mo. App. 366, holding that an advertisement for new bids, required by an ordinance, was a condition precedent to the letting of a contract; Loeb v. Milner, 21 Neb. 401, 32 N. W. 209, holding that if a mortgagee in possession sell before complying with all the requirements of the statute he will be liable for any damage the mortgagor may sustain thereby; Davis v. Sawyer, 66 N. H. 36, 20 Atl. 101, holding statutory requirement that tax collector shall send tax bills to non-resident owners or their known agents, mandatory; Bank v. Gilmer, 116 N. C. 708, 22 S. E. 5, holding provisions of chapter 453, acts of 1893, as to form of assignment and proceedings in insolvency, imperative; Sharpe v. Engle, 2 Okl. 628, 39 Pac. 885 (and see dissenting opinion in 3 Okl. 16, 41 Pac. 347), holding section 5627, statutes of Oklahoma, mandatory as to duty

were, under the Louisiana code, entitled to compensation for reconstructing the road, though sale was subsequently set aside for fraud.

Distinguished in Loos v. Wilkinson, 113 N. Y. 491, 10 Am. St. Rep. 496, 21 N. E. 393, 4 L. R. A. 356, and n., grantee of deed, in fraud of creditors, is entitled to be allowed for taxes, etc., while in possession, but not for insurance.

Vendor and purchaser.— The rule of the civil law that a possessor, even in bad faith, may have the value of his improvements, does not obtain in common law or English equity, which requires that he who seeks equity must come into court with clean hands, pp. 523, 524.

Cited and principle applied in German Bank v. United States, 148 U. S. 581, 37 L. 569, 13 S. Ct. 705, holding that the government could not be held liable for the amount of cancelled bonds at suit of plaintiffs, who were liable to real owners for the wrongful acts leading to the cancellation; In re Mead, 16 Fed. Cas. 1277, holding a purchaser of property fraudulently conveyed by a bankrupt not entitled to reimbursement for improvements; Millington v. Hill, 47 Ark. 311, 1 S. W. 550, holding that a purchaser buying in fraud of the rights of other creditors may be dispossessed of his purchase by the creditors; Hawley v. Tesch, 88 Wis. 241, 59 N. W. 677, holding a fraudulent purchaser not entitled to credit for improvements voluntarily made on trust property.

Mortgages.— A foreclosure sale and purchase made by second mortgagees, in fraud of rights of prior creditors, is not void absolutely, but only voidable as to those creditors, and satisfaction of the creditors' claims will render the purchaser's title good as against all the world. If the purchasers pay off a prior mortgage on the property, they are not entitled to be subrogated to rights of the mortgagee on being dispossessed by the prior creditors, p. 524.

Cited and affirmed in Barnes v. Chicago, etc., R. Co., 8 Biss. 521, F. C. 1,016, further litigation in same matter; Johnson v. Moore, 33 Kan. 99, 5 Pac. 411, holding a mortgagee, who fraudulently alters the mortgage deed, is not entitled to be subrogated to rights of a prior mortgagee, whose mortgage he has paid off; In re Mead, 16 Fed. Cas. 1277, holding a purchaser of property fraudulently conveyed by a bankrupt, not entitled to reimbursement for money paid in reduction of incumbrances; Heintze v. Bentley, 34 N. J. Eq. 566, holding that a deed, fraudulent in fact, as against creditors, is as to them absolutely void; Hoffman v. Fleming, 43 W. Va. 764, 28 S. E. 791, holding that a fraudulent grantor could not compel a creditor to look first to other property before attacking the fraudulent conveyance.

Equity.— Mistake as to legal effect of transactions of which persons are chargeable with notice, is a mistake of law, and does not

entitle parties paying money under such mistake to recover it, p. 524.

Cited and applied in Pulliam v. Pulliam, 10 Fed. 73, holding that, ordinarily, money paid under a mistake of law cannot be recovered, while if paid under a mistake of fact, without negligence, it may; Allen v. Galloway, 30 Fed. 467, in equity courts of United States there can be no relief from a mistake of law, refusing relief to rectify a mistake concerning an account on which a compromise settlement had been made.

Miscellaneous.— Barnes v. Chicago, etc., R. Co., 122 U. S. 15, 30 L. 1132, 7 S. Ct. 1051, incidentally; also Barnes v. Chicago, etc., R. Co., 8 Biss. 518, F. C. 1,016.

13 Wall. 526-531, 20 L. 631, COMMONWEALTH v. BOUTWELL.

United States.— When Congress has prescribed a time within which claims of a State for expenses incurred in suppressing Rebellion shall be presented, secretary of treasury cannot be compelled by mandamus to pay a claim presented after that time, pp. 529-531.

Cited and relied on in United States v. Lamont, 155 U. S. 308, 39 L. 163, 15 S. Ct. 99, denying mandamus to compel secretary of war to sign a contract for work, in lieu of one with same contractor, for same work, previously signed; Board of Commrs v. King, 67 Fed. 209, 32 U. S. App. 1, refusing mandamus to compel levy of a special tax to pay a judgment against a county, in the absence of any statute requiring such levy; Lord v. Bates, 48 S. C. 109, 26 S. E. 218, refusing mandamus to compel State treasurer to refund a lost bond not actually surrendered; Kuechler v. Wright, 40 Tex. 632, holding that State District Court had power to issue mandamus to compel commissioner of general land office to perform a meré ministerial duty.

13 Wall. 531-568, 20 L. 491, STOCKWELL v. UNITED STATES.

Customs duties.— Forfeitures or penalties incurred under act of Congress, for illegal importations, are debts due to United States, which may be recovered in civil action for debt, p. 542.

Cited and relied upon in In re Rosey, 6 Ben. 511, F. C. 12,066, holding that penalties under 13 Stat. 296, 297, 302, as amended, were provable as debts in bankruptcy; United States v. Tilton, 7 Ben. 310, F. C. 16,525, holding that a pardon of one convicted for an offense against the revenue laws, was a bar to civil suit for penalties; In Matter of Vetterlein, 13 Blatchf. 45, F. C. 16,929, holding a judgment in favor of the United States for value of goods forfeited under customs revenue laws, was provable as a debt in bankruptcy; United States v. Younger, 92 Fed. 673, holding that a violation of statute exempting sailor's clothes from attachment, is

not the subject of a criminal prosecution; Washington v. McGeorge, 146 Pa. St. 252, holding that a municipal license can be recovered in an action of debt before justice of the peace, if no other remedy is provided; Davidson v. Mo. Pac. R. Co., 3 Tex. App. Civ. 217, holding that an action for debt to recover a penalty for overcharge on freight, may be brought by the party aggrieved.

Debt lies whenever there is due plaintiff a sum certain, or which can be readily rendered certain without resort to future valuation, it is immaterial in what manner obligation was incurred or by what evidenced, p. 542.

Cited and principle applied in Carrol v. Green, 92 U. S. 513, 23 L. 739, holding that the liability of stockholders to contribution for debts of the corporation was enforceable in an action on the case, not of debt; United States v. The C. B. Church, 1 Woods, 277, F. C. 14,762, holding an action of debt was the proper way to recover penalty for violation of sections 1 and 4 of 16 Stat. 440, for carrying petroleum on passenger steamers; M'Vickar v. Jones, 70 Fed. 757, holding that in Kansas, an action of debt would lie to enforce the individual liability of a stockholder for corporate debts; Omaha Nat. Bank v. Mutual B. L. Ins. Co., 81 Fed. 939, holding that a certificate of loan on a life policy created an indebtedness on which, after demand, an action for debt would lie; Bagley v. Shoppach, 43 Ark. 377, sustaining action against collector of taxes for excessive fees and penalty, as founded on fraud; Baltimore, etc., Tel. Co. v. Lovejoy, 48 Ark. 303, 3 S. W. 184, holding justices of the peace have no jurisdiction to enforce the collection of a statutory penalty, the debt, though in form ex contractu, is in reality founded on a tort.

Customs duties.— Importation of dutiable goods without payment of duties, creates property rights in the government, and receipt, concealment and disposal of such goods is a wrong to property rights and a fit subject for indemnity, p. 546.

Cited in United States v. Jordan, 2 Low. 541, F. C. 15,498, holding that in order to give a right under the statute, the neglect to pay the duties must have arisen after the goods were brought within the limits of the port of destination.

Partnership.— Knowledge of one partner that goods are illegally imported is presumptively knowledge of all partners, p. 547.

Cited and applied in Strang v. Bradner, 114 U. S. 561, 29 L. 250, 5 S. Ct. 1041, holding partners responsible for false and fraudulent representations made by one of the firm in the course of partnership business; Taylor v. Gilman, 23 Blatchf. 329, 24 Fed. 635, holding the right to recover a penalty or forfeiture may be founded on the doings of agents; United States v. Amann, 24 Fed. Cas. 780, holding that where the law imposes a duty on a principal who em-

ploys an agent to do it, he is bound to see that the duty is properly performed; Rippetoe v. Dwyer, 65 Tex. 708, holding that all members of a firm are held to have notice of any transaction with one member relating to the business and within the scope of the partnership. See notes to 67 Am. St. Rep. 46, on fraud of one partner binding the partnership, and 67 Am. St. Rep. 50, on partners criminally liable for torts of one partner.

Distinguished in Schreiber v. Sharpless, 6 Fed. 179, holding that a principal could not be held responsible for violation of a penal statute by his agent, done without his knowledge; M'Donald v. Hearst, 95 Fed. 659, 660, holding that a principal is not liable for violation of copyright, and revised statutes, section 4965, by his agents and servants in his absence, without his direction, consent and knowledge.

Customs duties.— Act of 1823 respecting smuggling was remedial in its nature as providing indemnity for loss, p. 547.

Reconsidered and modified in United States v. Claflin, 97 U. S. 552, 24 L. 1085, affirming S. C., 14 Blatchf. 59, 60, F. C. 14,799, holding that the act of 1866 required that construction of act of 1823 be considered both remedial and punitive; United States v. Tilton, 7 Ben. 310, F. C. 16,525, holding that a pardon of one convicted for smuggling was a bar to a civil action for the penalties. Cited also in United States v. Reid, 21 Blatchf. 430, 17 Fed. 498, holding that an execution against the body of defendant could not be issued on a judgment for value of goods forfeited under revenue laws; United States v. De Goer, 38 Fed. 83, holding that section 66 of act of 1799 was mainly punitive and that an action for forfeiture under it abated by death of defendant; United States v. Riley, 88 Fed. 481, holding in actions to enforce a forfeiture of the value of alleged fraudulent importations of merchandise at port of New York, the summons must be indorsed so as to indicate the statute on which the claim was based; Herriman v. The B. C. R. & N. R. Co., 57 Iowa, 191, 10 N. W. 340, holding an action to recover statutory penalty for excessive freight charges was subject to bar of statute of limitations.

Customs duties.— Section 2 of act of 1823, respecting illegal importations, applies both to illegal importers and accessories after the fact and was not repealed by act of 1866; an offending party may be both civilly and criminally responsible for the same act, p. 552.

Cited and affirmed in United States v. Claflin, 97 U. S. 549, 550, 24 L. 1084, affirming S. C., 14 Blatchf. 56, 57, F. C. 14,799, as correct ruling where the liabilities were incurred under the act of 1823, before the passage of act of 1866, same being preserved under act of February 16, 1867; United States v. Tilton, 7 Ben. 311, F. C. 16,525, holding that a pardon of one convicted for illegal smuggling is a

bar to a civil suit for the penalties; Von Cotzhausen v. Nazr Biss. 53, 15 Fed. 897, in construction of term "merchandise, used in revised statutes, § 3082; United States v. A Lot of Jew 13 Blatchf. 65, F. C. 15,626, holding that in a suit against good forfeiture, the holder could not be held for violation of re statutes, § 3082; United States v. Jordan, 2 Low. 538, F. C. 15 holding that according to the construction of the act of 182 principal case an importer was liable to a penalty or forfeitu treble value, one as importer and two as receiver; United S v. Maxwell, 3 Dill. 280, F. C. 15,750, holding a defendant ma prosecuted on a criminal information for violation of the int revenue laws; United States v. Auffmordt, 19 Fed. 903, holding the amendment of revised statutes, section 2864, in 1875, did supersede the moiety act of 1874. Cited in general discussio United States v. Jordan, 2 Low. 542, F. C. 15,408, on effect o vised statutes, § 5596, as to prior repeal of act of 1823, and dis ing from ruling of United States v. Claflin, infra, and see Sn v. State, — Tex. Cr. —, 52 S. W. 549.

Overruled in United States v. Claflin, 97 U. S. 552, 24 L. affirming S. C., 14 Blatchf. 59, 60, 61, 62, F. C. 14,799, holding the act of 1866 was both punitive and remedial, and in effec pealed act of 1823, and no suit was maintainable under earlie for any acts done after enactment of act of 1866.

Miscellaneous.— Cited incidentally in In re Platt, 7 Ben. 273, 1 11,212, United States v. Three Tons of Coal, 6 Biss. 402, 1 16,515, United States v. Hughes, 12 Blatchf. 561, F. C. 15,417, United States v. Hughes, 26 Fed. Cas. 423, not in point. No 28 Am. Dec. 487, on fraudulent purchaser of goods taking no

13 Wall. 568–580, 20 L. 707, TWENTY PER CENT. CASES.

United States.— Under law of 1867, increasing certain go ment employee's pay 20 per cent., neither a commission n warrant of appointment is necessary to entitle employee to 1 fits of law; it includes all persons in the civil service employe the head of department or bureau of any division of depart charged with that duty, p. 576.

Affirmed in Twenty Per Cent. Cases, 20 Wall. 184, 22 L. 3 adjudicating claims of employees under the resolution.

United States.— Office of warden of the jail is a bure division of the department of the interior, and watchmen or g employed by him are within the resolution of 1867, increasin ployees' wages 20 per cent., p. 580.

Cited and affirmed in United States v. Allison, 91 U. S. 3 L. 373, holding employees of the congressional printer n cluded in the resolution, as the printing office is not under c of a bureau of the department of the interior; United Sta

Ashfield, 91 U. S. 319, 23 L. 397, holding that a watchman in public grounds at Washington, under charge of the chief engineer of the army, was employed in one of the executive departments, and entitled to the benefit of the resolution; United States v. Meigs, 95 U. S. 749, 24 L. 579, holding the deputy clerk, crier and messengers of the Supreme Court of District of Columbia not within the resolution; United States v. M'Donald, 72 Fed. 902, 44 U. S. App. 461, holding that an assistant in office of district attorney, whose appointment was authorized on condition that the district attorney was to pay the salary, was not an employee of the United States.

13 Wall. 581–601, 20 L. 638, BLYEW v. UNITED STATES.

Courts.— Murder of a negro by a white is not within jurisdiction of Circuit Court under act of 1866, giving Federal jurisdiction of cases affecting persons denied civil rights by State laws, merely because two witnesses were negroes, incompetent under law of Kentucky to testify in State courts. Witnesses are not persons affected within the act, p. 593.

Action.— The words "case" and "cause" are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in court, a suit or an action, p. 595.

Cited in Erwin v. United States, 37 Fed. 479, 2 L. R. A. 234, holding that a proceeding for contempt for failure to obey an order of court is a distinct and independent suit for which district attorney was entitled to docket fee; Taylor v. United States, 45 Fed. 539, holding fees for making dockets and indexes, taxing cost, etc., in cases against witnesses for contempt are properly allowable; State v. Strauder, 11 W. Va. 808, 816, 27 Am. Rep. 613, 619, holding that a colored man indicted for murder is not entitled to have case removed into Federal court on the ground of prejudice, and State law prohibiting negroes from sitting on juries.

13 Wall. 602–603, 20 L. 527, MASON v. ROLLINS.

Courts.— Appeals in equity in proceedings against collectors and commissioners of inland revenue, filed after act of July 13, 1866, dismissed for lack of averments of citizenship, required by judiciary act, p. 603.

No citations.

13 Wall. 603–604, 23 L. 708, INSURANCE CO. v. BARTON.

Appeal and error.— Granting or refusal of motion for new trial in Federal court is wholly in discretion of judge, and cannot be reviewed, p. 604.

Followed in Railway Co. v. Heck, 102 U. S. 120, 26 L. 59, Southwestern Virginia Imp. Co. v. Frari, 58 Fed. 173, 8 U. S. App. 444, and Wambole v. Foote, 2 Dak. 28, 2 N. W. 252, all to same effect.

Distinguished in Nolan v. Colorado Cent. Cons. M. Co., 63 Fed. 934, 27 U. S. App. 427, sustaining writ of error to review a judgment founded on an award of arbitrators.

13 Wall. 604–608, 20 L. 547, DOOLEY v. SMITH.

Tender.— Allegation that plaintiff owed a certain sum on a note upon a certain day and tendered that amount upon said day in legal-tender treasury notes, is a good plea of tender, pp. 605, 606.

Tender.— Withdrawal of tender paid into court does not alter legal effect of the tender, when made by consent of court, providing for continuance of the legal effect, p. 606.

Tender.— A valid tender stops running of interest, p. 606.

Tender of United States legal-tender treasury notes in payment of a mortgage is valid, though made before enactment of legal-tender statutes, p. 607.

Cited and ruling applied in Railroad Co. v. Johnson, 15 Wall. 195, 21 L. 178, holding a tender in notes for coupons on railroad bonds valid; United States v. Reese, 92 U. S. 253, 23 L. 577, holding that the judgment of Congress, that legal-tender notes were required for the needs of the country, was conclusive on the court; Bissell v. Heyward, 96 U. S. 587, 24 L. 680, holding that a judgment for amount due on a contract, payable in Confederate currency, was in 1863 to be ascertained in United States legal-tender notes as the standard of value and not in gold or sterling exchange; Legal-Tender Case, 110 U. S. 438, 28 L. 211, 4 S. Ct. 124, affirming value as legal tender of reissued treasury notes; Bowen v. Clark, 46 Ind. 410, sustaining a tender of treasury notes in satisfaction of a judgment; Longworth v. Mitchell, 26 Ohio St. 344, sustaining a tender of treasury notes for a privilege of purchase contained in a lease. See note to 87 Am. Dec. 125.

13 Wall. 608–616, 20 L. 709, PAIGE v. BANKS.

Copyright.— In contract between author and publishers, provision that publisher should have copyright would authorize them to apply for it, and if author should take it out in his own name, it would inure to their benefit, p. 615.

Cited and applied in Yuengling v. Schile, 20 Blatchf. 462, 12 Fed. 106, holding that a third person may become by a transfer, verbal or written, of the right, entitled to obtain a copyright as owner or proprietor.

Copyright.— Agreement whereby publishers took copyright of certain reports "to them and their assigns forever," at a time

when law only gave copyright for twenty-eight years, held to have given them also right to additional fourteen years afterwards, allowed by act of 1831, in view of acquiescence of author in this construction for ten years, pp. 615-616.

13 Wall. 616-623, 20 L. 501, INSURANCE CO. v. BAILEY.

Insurance.— Marine and fire policies are contracts of indemnity, and an absolute sale of the property bars an action on the policy, pp. 618, 619.

Insurance.— Life insurance is not necessarily a contract of indemnity; it is sufficient to show the policy is not invalid as a wager policy and that the beneficiary had an insurable interest in the life of the insured, p. 619.

Cited and relied on in Sides v. Knickerbocker L. I. Co., 16 Fed. 652, holding that a tenant of the holder of a life interest is entitled to recover face value of policy on landlord's life, irrespective of value of the leasehold; Exchange Bank v. Loh, 104 Ga. 470, 31 S. E. 469, 44 L. R. A. 382, in separate concurring judgment, holding that a contract for life insurance is not a contract of indemnity; Guardian, etc., Ins. Co. v. Hogan, 80 Ill. 45, 22 Am. Rep. 184, holding that mere relationship of father and son does not constitute an insurable interest on the part of the son, unless accompanied by a reasonable expectation of pecuniary advantage; Nye v. Grand Lodge, 9 Ind. App. 139, 36 N. E. 432, holding the weight of authority supports the proposition that the element of indemnity is not necessary to a contract of life insurance; Rombach v. Insurance Co., 35 La. Ann. 234, 48 Am. Rep. 241, holding a man has no insurable interest in the life of his mother-in-law; Olmsted v. Keyes, 85 N. Y. 598, sustaining policy taken out by husband on his own life, payable to a trustee, for benefit of wife; Appeal of Corson, 113 Pa. St. 447, 6 Atl. 217, and note to 56 Am. Rep. 197, holding that if a policy is valid at its inception, it is unnecessary to prove that beneficiary had an insurable interest at maturity; Croswell v. Association, 51 S. C. 112, 28 S. E. 208, holding a son has an insurable interest in life of his mother, which will support an assignment to him of policy taken by mother on her own life for benefit of daughter; Clemmitt v. New York L. I. Co., 76 Va. 360, holding that wife and children had insurable interests in policy taken out by the husband and father for their benefit. See notes to 57 Am. Dec. 95, on what constitutes an insurable interest; 84 Am. Dec. 291, on insurable interest in life of another, and 3 Dill. 453, and n., F. C. 8,854.

Equity.— Equitable relief cannot be had when remedy at law is plain, adequate and complete, nor can party seeking to enforce a legal right resort to equity in first instance if remedy at law is as practical and efficient to the ends of justice, p. 621.

Citing cases which affirm and apply the principle are: United States v. Huckabee, 16 Wall. 435, 21 L. 464, holding that District Court had no jurisdiction of an information for seizure under the confiscation act when the parties were in possession under a grant from the United States; Clements v. Macheboeuf, 92 U. S. 418, 23 L. 504, affirming jurisdiction of suit to set aside deeds executed by an agent on ground of fraud; Ivinson v. Hutton, 98 U. S. 83, 25 L. 68, sustaining jurisdiction to correct an account on dissolution of partnership, there being no relief at law; Tyler v. Savage, 143 U. S. 94, 95, 36 L. 88, 12 S. Ct. 345, sustaining jurisdiction of bill by creditors for discovery and appointment of a receiver and relief from a stock subscription induced by fraud; Walla Walla v. Walla, etc., Water Co., 172 U. S. 12, 19 S. Ct. 82, affirming jurisdiction to enjoin a city from erecting water-works by which an irreparable injury was threatened; Sullivan v. Portland, etc., R. Co., 4 Cliff. 226, F. C. 13,596, holding the remedy for breach of an agreement to set aside portion of an usurious interest was at law not in equity; The Magic Rutile Co. v. Elm City Co., 14 Blatchf. 113, F. C. 8,950, holding a court of equity will not sustain a bill merely for damages for breach of contract; Gowdy v. Green, 69 Fed. 866, dismissing bill by a colored person for an injunction to restrain State officials from acting under the registration laws, denying his right to vote; Ætna Life Ins. Co. v. Smith, 73 Fed. 318, dismissing bill to cancel policy, on ground of fraudulent misrepresentations, which would constitute a valid defense to action on policy; Grether v Wright, 75 Fed. 748, 43 U. S. App. 770, holding Federal court in equity may enjoin an assessment and collection of a State tax under State law giving that remedy; Pokegama, etc., Co. v. Klamath River, etc., Co., 96 Fed. 55, allowing suit for injunction where remedy at law involved delay; Youngblood v. Youngblood, 54 Ala. 488, dismissing bill to recover usurious interest and charging fraud, but seeking no discovery or equitable relief and where the rights of the parties were strictly legal; Jones v. Newhall, 115 Mass. 252, 15 Am. Rep. 105, refusing to decree specific performance of contract when the only matter outstanding is the payment of the purchase money; Phipps v. Kelley, 12 Or. 216, 6 Pac. 709, affirming that section 16 of the judicature act was intended as a vindication of the constitutional right of trial by jury.

Distinguished in Dow v. Berry, 18 Fed. 125, holding that section 723, revised statutes, is declaratory only, and sustaining bill in equity for discovery of price for which a machine held in trust had been fraudulently sold and recovery of the proceeds.

Equity.— Cases in which equity will interfere in the enforcement of a legal right examined, p. 621.

Cited in New York L. I. Co. v. Beard, 80 Fed. 67, affirming jurisdiction of equity to prevent multiplicity of suits at law, collecting authorities.

Equity.— Whenever court of law is competent to take cognisance of a right and has power to proceed to a judgment, affording a plain, adequate and complete remedy without aid of equity, plaintiff must in general proceed at law, because defendant has a right to trial by jury, p. 621.

Cited and relied on in Buzard v. Houston, 119 U. S. 351, 353, 30 L. 453, 454, 7 S. Ct. 251, 253, denying jurisdiction in equity of a bill to rescind contract on ground of fraud and recover money paid under it, as an action of deceit would afford a full, adequate and complete remedy; Walker v. Brown, 58 Fed. 25, dismissing bill against administrators to enforce an alleged lien on bonds of deceased arising under contract; In re Foley, 76 Fed. 395, holding that Federal courts had no jurisdiction of administration proceedings, but could decide a question of fact presented by a petition of an illegitimate son claiming an acknowledgment of paternity; Alger v. Anderson, 92 Fed. 708, holding that where equitable relief is sought and secondary relief of a legal nature, if suit in equity fails, the Federal courts cannot retain jurisdiction in equity to administer the legal relief; Home Life Co. v. Selig, 81 Md. 204, 31 Atl. 503, refusing relief in equity to cancel policies alleged to have been obtained through fraud and to restrain actions thereon.

Distinguished in Wehrman v. Conklin, 155 U. S. 328, 39 L. 174, 15 S. Ct. 134, enjoining prosecution of an action of ejectment to recover possession of lands to which the title was in dispute.

Equity.— Where defendant has good defense at law to purely legal demand, he should be left to it, unless he is prepared to prove some special circumstance to show that he may suffer irreparable injury if denied a preventive remedy, p. 623.

Cited and principle applied in Life Ins. Co. v. Bangs, 103 U. S. 783, 26 L. 610, holding suit in equity will not lie to give effect to defenses which might have been fully set up in an action at law; Deweese v. Reinhard, 165 U. S. 389, 41 L. 758, 17 S. Ct. 341, refusing to enjoin prosecution of an action of ejectment where any defense to the apparent legal title was created by matters of statute and record and was available in action at law; Gindrat v. Dane, 4 Cliff. 263, F. C. 5,455, holding that where the cause of action was a purely legal demand and the defense will be as complete at law as in equity, a suit in equity will not be sustained; San Diego Flume Co. v. Souther, 90 Fed. 167, 61 U. S. App. 140, dismissing bill for cancellation of contract for default of proof that there was no adequate remedy at law; Grangers' Life, etc., Ins. Co. v. Kamper, 73 Ala. 347, refusing equitable relief in delivery up of stock notes and cancellation of stock subscriptions, where there was adequate defense at law, and no special circumstances shown; Payson v. Lamson, 134 Mass. 598, dismissing bill to restrain prosecution of action at law, where the defense was equally available at

law or in equity; Teft v. Stewart, 31 Mich. 372, dismissing bill, charging fraud in obtaining deed to land, and praying only a judgment in damages, the remedy at law being adequate.

Distinguished in Hancock v. Dick, 114 Mich. 340, sustaining bill to declare a policy obtained by fraud, void, and to have same cancelled, and enjoining prosecution of action at law on the policy already commenced.

Miscellaneous.— Connecticut M. L. I. Co. v. Bear Co., 26 Fed. 583, not in point.

13 Wall. 623–632, 20 L. 474, UNITED STATES v. RUSSELL.

War.— Exigencies arising in time of war or impending public danger defined, and held to justify taking of private property by government. In such case the government is not a trespasser, but is bound to make full compensation to owner, pp. 627, 628.

Cited and principle applied in Cammeyer v. Newton, 94 U. S. 234, 24 L. 75, holding use of a patented caisson coffer-dam, by authority and under directions of the United States, was no defense to an action for infringement; United States v. Pacific R. R., 120 U. S. 239, 30 L. 638, 7 S. Ct. 496, holding that where railroad bridges had been destroyed during the Civil War and rebuilt by the government as a military necessity, it was not entitled to offset the cost of reconstruction against the company's claim for transport service; Brady v. Atlantic Works, 4 Cliff. 412, F. C. 1,794, holding government contractors not entitled to make a patented dredging-boat, without consent of patentee; Sumner v. Philadelphia, 23 Fed. Cas. 396, holding the city liable to make compensation for undue detention of a vessel in quarantine by city officers. See notes to 87 Am. Dec. 509, and 4 Am. St. Rep. 403. Cited in dissenting opinion in Dow v. Johnson, 100 U. S. 171, 25 L. 637, majority holding army officer not liable to civil action in local courts for injuries resulting from acts ordered by him in his military character in time of war.

Courts.— When employment and use of private property by government is such as to raise an implied promise on its part to reimburse owner for services rendered and expenses incurred, and ownership of the property is not disturbed, it is not appropriated by government so as to prevent jurisdiction of Court of Claims, p. 632.

Cited and principle relied on in Coleman v. United States, 152 U. S. 99, 38 L. 369, 14 S. Ct. 474, denying that in suits to vacate patents to public lands brought by private owners in the name of the United States, there was any implied contract by the United States to compensate the attorneys as assistant district attorneys; United States v. Berdan Fire-Arms Co., 156 U. S. 569, 39 L. 536, 15 S. Ct. 425, holding that the use of an invention in the government musket, with the permission of the inventor and his assignee, raised an im-

plied contract to pay compensation, of which the court could take cognizance.

Distinguished in United States v. Kimbal, 13 Wall. 646, 20 L. 505, holding that a claim for damage to a private steamboat after its impressment by government on termination of its chartered voyage, during the Civil War, was not within jurisdiction of Court of Claims, but must be settled by the executive or legislative branches of the government; Schillinger v. United States, 155 U. S. 170, 39 L. 111, 15 S. Ct. 87, denying jurisdiction of Court of Claims in claim against government for tort in infringing a patent; United States v. Winchester, etc., R. Co., 163 U. S. 254, 256, 41 L. 150, 151, 16 S. Ct. 996, 997, holding the court had no jurisdiction of claim for rails removed by the government from railroad seized and appropriated by it during the Civil War.

Miscellaneous.— Miscited in Hockaday v. Commissioners, 1 Colo. App. 377, 29 Pac. 292.

13 Wall. 633–635, 20 L. 711, PUGH v. UNITED STATES.

Court of Claims has no jurisdiction of a claim for destruction of property by military forces of government during Civil War, nor for rents collected by government from abandoned lands, p. 635.

Followed in United States v. Winchester, etc., R. Co., 163 U. S. 255, 256, 41 L. 150, 151, 16 S. Ct. 997, denying jurisdiction of Court of Claims for rails removed by government from a railroad, seized and appropriated during the Civil War.

13 Wall. 636–646, 20 L. 503, UNITED STATES v. KIMBAL.

Court of Claims has no jurisdiction of a claim for injuries to a vessel, occasioned by tortious act of a government officer in compelling its master to put to sea after termination of its government charter, pp. 645, 646.

Cited and affirmed in Morgan v. United States, 14 Wall. 534, 20 L. 739, holding that the stranding of a ship, chartered to government, in crossing the bar, was a sea risk, for which government was not liable, although master was compelled to put to sea by military order, and the Court of Claims had no jurisdiction; Reybold v. United States, 15 Wall. 207, 21 L. 58, to same effect, where the act of master in putting to sea was voluntary.

13 Wall. 646–654, 20 L. 685, WHITE v. HART.

States — Constitutional law.— Constitutions adopted by various Confederate States at close of Civil War, were submitted to Congress as voluntary laws, and State is estopped to assail their binding character on ground of coercion by Congress. The action of Congress cannot be inquired into, the judicial is bound to follow

the action of the political department of the government, and is concluded by it. Congress has no power to supersede the national Constitution, p. 649.

Cited and principle applied in In re Smith, 8 N. B. R. 405, 22 Fed. Cas. 401, holding the Federal Constitution does not preclude Congress from passing laws impairing the obligation of contracts, and sustaining the amendment of 1873 to the bankruptcy act; Smith v. Good, 34 Fed. 208, holding that the determination by the State officers on the question of the due adoption of an amendment to Rhode Island Constitution was binding on the Federal courts; State v. Bank of Tennessee, 5 Baxt. 91, in separate opinion, holding that the joint resolution of Congress, restoring Tennessee to her rights in the Union, did not make the action of the State that of the general government; The Homestead Cases, 22 Gratt. 286, 12 Am. Rep. 513, holding that the homestead exemption law of Virginia of 1870, could not be sustained on the plea that it had been sanctioned by Congress in approving the new Constitution; dissenting opinion in Koehler v. Hill, 60 Iowa, 659, 15 N. W. 636, majority holding State courts had power to review action of legislature in matter of an amendment to State Constitution.

Distinguished in Koehler v. Hill, 60 Iowa, 612, 15 N. W. 613, affirming the power of the judicial department of a State to review the action of the legislature in the matter of an amendment to the State Constitution.

States.— At no time were the rebellious States out of the Union; their rights under the Constitution were suspended, not destroyed; their constitutional duties and obligations remained the same, p. 651.

Affirmed in Keith v. Clark, 97 U. S. 462, 24 L. 1074, showing that acts passed by legislature of Tennessee, while in rebellion, were binding on State, except when in aid of Rebellion or conflicting with Constitution and laws of the United States; State v. Bank of Tennessee, 5 Baxt. 24, 40, 43, holding that the constitutional prohibition against impairing contracts continued during the Rebellion, notes of the bank are entitled to priority of payment, whether issued before or after the Rebellion commenced, and State legislation, repudiating liability on notes issued after the secession, is void. See also S. C., in separate opinion, p. 74; The Homestead Cases, 22 Gratt. 283, 12 Am. Rep. 511, holding that the Virginia Constitution, article XI, section 1, and the homestead exemption act of 1870, were invalid as to prior debts.

States.— A State after Rebellion had no more power to do any act prohibited by Federal Constitution than before Rebellion or after restoration to normal position in the Union; it can no more impair the obligation of a contract by adopting a constitution than by passing a law, p. 652.

Cited and principle applied in Taylor v. Thomas, 22 Wall. 490, 22 L. 793, holding that "cotton notes," authorized by legislature of Mississippi, 1861, were void and not receivable for taxes after reorganization; Oliver v. Memphis, etc., R. Co., 30 Ark. 131 denying power of legislature to repeal charter provisions, exempting the railroad's property from taxation; Grand Lodge of Masons v. New Orleans, 44 La. Ann. 666, 11 So. 151, holding that the statute of 1855, exempting the Masonic Grand Lodge hall from taxation, is not a provision of the charter, and is repealed by the Constitution of 1879; State v. Hickman, 9 Mont. 379, 23 Pac. 743, 8 L. R. A. 405, holding that the constitutional provision, fixing the salary of the secretary of State, had the effect of a law, and no further legislation was required to authorize the State treasurer to pay the salary; The Homestead Cases, 22 Gratt. 282, 12 Am. Rep. 510, adjudging the Constitution of Virginia, article XI, section 1, and the homestead exemption act of 1870, invalid as to prior debts. Cited, arguendo, in Berry v. Bellows, 30 Ark. 203; dissenting opinion in Louisiana v. Jumel, 107 U. S. 760, 27 L. 465, 2 S. Ct. 169.

Contract.— Laws, which subsist at time and place of making of contract, and where it is to be performed, enter into and form part of it as if expressly referred to or incorporated in its terms, p. 653.

Cited and relied on in McCandless v. Richmond, etc., R. Co., 38 S. C. 113, 16 S. E. 432, 18 L. R. A. 444, holding that where an amended charter was granted, subject to legislative power of amendment, a subsequent statute, rendering the company liable for damages by fire, caused by its engines, was constitutional; Graham v. Chicago, etc., R. Co., 53 Wis. 490, 10 N. W. 616, holding that causes of action, which accrue by reason of the violation of an existing statute, are not affected by its repeal, whether they be in tort or contract.

Constitutional law.— The ideas of validity and remedy are inseparable, and both are parts of the obligation, which are guaranteed by the Constitution from invasion. A State may modify the remedy, but not so as to impair substantial rights; any legislation producing this result is void, hence State Constitution, closing courts against remedy on any debt, consideration for which was a slave, is void as to pre-existing contract, pp. 653, 654.

Citing cases which apply this principle are: Osborn v. Nicholson, 13 Wall. 656, 20 L. 693, holding Arkansas Constitution of 1868, prohibiting the enforcement of contracts for purchase of sale of slaves, invalid as to prior transactions; Delmas v. Insurance Co., 14 Wall. 667, 669, 20 L. 759, 760, reprinted as note, 25 La. Ann. 349, 350, holding that when a State court affirmed the invalidity of a contract, based on a consideration in Confederate money, on a constitutional provision inhibiting its enforcement, the question must depend on the date of

Cited and relied on in New Orleans W. W. v. Louisiana Sugar, etc., Co., 125 U. S. 35, 31 L. 613, 8 S. Ct. 750, holding that on writ of error to State court, the Supreme Court could review a judgment based wholly on State Constitution, but not if it were based on the previous law of the State; Hinds v. Wilcox, 22 Mont. 12, 55 Pac. 358, in concurring opinion, holding the inheritance tax act of 1897 did not apply to an estate of a testator, who died in 1896, as vested rights accrued on the death.

Constitutional law.— All contracts are inherently subject to paramount power of the sovereign, the exercise of which is never understood to involve their violation within meaning of contract clause of National Constitution; the power acts on the property, not upon the contract, p. 660.

Cited and applied in United States v. Inlots, 26 Fed. Cas. 491, a tenant at will is not entitled to compensation on the property, being taken by the government; Vermont, etc., R. R. v. Vermont, etc., R. R., 63 Vt. 21, 21 Atl. 266, 10 L. R. A. 565, sustaining constitutionality of acts of 1882 and 1884, relating to railroad taxation, so far as regarded their operation on a pre-existing lease of a railroad.

Constitutional law.— Contracts relating to slaves, valid when made, were not affected by the thirteenth amendment to the Constitution, p. 662.

Cited and relied upon in Boyce v. Tabb, 18 Wall. 548, 21 L. 757, sustaining judgment on a note given for price of slaves in 1861; Hall v. United States, 92 U. S. 31, 23 L. 600, holding that a contract between slaves, made prior to the emancipation, created no obligation and conferred no rights as to either of the parties; Holmes v. Sevier, 154 U. S. 583, 20 L. 876, 14 S. Ct. 1203, holding that emancipation had no effect on validity of note, given for purchase of slaves, valid when made; Anderson v. Mills, 28 Ark. 183, sustaining notes and mortgage given on contract for purchase of slaves; Richardson v. Thomas, 28 Ark. 389, ruling that in action on notes given for purchase of land, slaves, etc., before the Civil War, the subsequent emancipation of the slaves had no effect; Hedgman v. Board, 26 Mich. 54, 12 Am. Rep. 299, holding that a child of fugitive slaves does not become a citizen of the United States under act of 1802, by coming to reside in the United States; Blease v. Pratt, 3 S. C. 514, holding that liberation of a slave cannot be set up as a defense to a bond for the purchase of such slave, on the ground of failure of consideration; Lewis v. Woodfolk, 2 Baxt. 51, holding that a change in the Louisiana Constitution, annulling existing contracts for slaves, was unconstitutional; Henderlite v. Thurman, 22 Gratt. 480, 12 Am. Rep. 536, holding that a bond given for price of slaves before their emancipation was not destroyed by the thirteenth amendment. Cited obiter in Ponts v. Reggio, 25

La. Ann. 644, in considering validity of mortgage given to secure price of slaves.

Constitutional law.— Rights acquired by deed, will or contract of marriage, or other contract executed according to statutes subsequently repealed, subsist afterwards, as they were before, in all respects as if the statutes were still in full force, p. 662.

Cited in Lerma v. Stevenson, 40 Fed. 359, holding that a valid Spanish grant is protected by the treaty of Guadalupe Hidalgo and cannot be nullified by the State without inquiry; Speer v. Mayor, etc., 85 Ga. 68, 11 S. E. 808, 9 L. R. A. 408, as a case cited by plaintiff to illustrate meaning of "due process of law." See note to 40 Am. Dec. 281.

Statutes are not deemed repealed, nor vested rights destroyed, by implication, unless the implication is so clear as to be equivalent to an explicit declaration, p. 662.

Cited and relied on in Warten v. Matthews, 80 Ala. 431, ruling that the amendment of 1883, to section 2126 of code of 1876, was not retrospective, vested rights having accrued; State v. Newark, 39 N. J. L. 386, holding that the constitutional amendment of 1875 was self-executing and repealed all special laws as to taxation of property.

13 Wall. 664–672, 20 L. 682, EX PARTE RUSSELL.

Court of Claims.— "Final disposition" of suit in Court of Claims, within act of 1868, respecting new trial within two years thereafter, has reference to its final determination on appeal (if an appeal is taken), or if none is taken, then to its final determination in the Court of Claims; it is the end of the litigation, p. 669.

Affirmed in United States v. O'Grady, 22 Wall. 647, 22 L. 773, holding the United States not entitled to deduct a counterclaim from sum adjudged by Court of Claims, when there was no appeal and no motion for new trial; Belknap v. United States, 150 U. S. 591, 37 L. 1192, 14 S. Ct. 184, holding the new trial may be granted at a term subsequent to that at which the judgment was rendered.

Appeal and error.— Grant of new trial by Court of Claims, after decision by Supreme Court on appeal and receipt of its mandate, is not objectionable as being in effect an appeal from Supreme Court, since the grant of new trial under such circumstances implies that a new case has been made out, involving fraud or other wrong on the government, p. 669.

Affirmed in Young v. United States, 95 U. S. 642, 24 L. 467, holding decision of Court of Claims, granting a new trial within prescribed jurisdiction, not subject to review; Belknap v. United States, 150 U. S. 591, 37 L. 1192, 14 S. Ct. 184, holding mandate of Supreme

Court does not take away power or interfere with discretion of Court of Appeals to grant new trial.

Mandamus.— When court declines to hear a case or motion on ground of its own incompetency, or that of the party to be heard, mandamus is proper remedy, p. 670.

Cited in Delgado v. Chavez, 5 N. Mex. 648, 25 Pac. 948, in examination of cases in which mandamus will lie, collecting numerous authorities.

Mandamus.— Supreme Court cannot, by mandamus, cause the Court of Claims to vacate their allowance of an appeal. A motion to dismiss the appeal, where improperly allowed, is an adequate remedy, pp. 670, 671.

Cited in United States v. Young, 94 U. S. 259, 24 L. 153, holding that where Court of Claims, after judgment and appeal to Supreme Court, grants a new trial, the appellant may move to dismiss the appeal.

Courts.— Motion to dismiss an appeal may be heard in Supreme Court before the term in which, in regular order, record ought to be returned, if record is actually brought in and printed, p. 671.

Followed in Thomas v. Wooldridge, 23 Wall. 288, 23 L. 136, dismissing an appeal on motion; Clark v. Hancock, 94 U. S. 493, 24 L. 146, the like as to a writ of error to State Supreme Court; Hamill v. Bank, 7 Colo. App. 473, 43 Pac. 904, approving the practice for dismissing an appeal in State Supreme Court.

13 Wall. 672-679, 20 L. 607, INSURANCE CO. v. THWING.

Shipping.— Warranty "not to load more than registered tonnage" does not include ballast and dunnage, p. 674.

Shipping.— Merchandise carried under bill of lading, but used as dunnage, is not legally dunnage; it remains cargo and is part of vessel's lading, subject to duties, and covered by insurance on cargo, p. 677.

Shipping.— Freight is never paid on dunnage; if freight is received and paid on merchandise, that merchandise is cargo and not dunnage, and comes within the warranty, p. 677.

Denied in Thwing v. Great Western Ins. Co., 111 Mass. 108, holding that use of coal as dunnage, although freight was paid on it, did not constitute a breach of policy as to overloading.

13 Wall. 679-738, 20 L. 666, WATSON v. JONES.

Religious societies.— Religious organizations come before the courts as other voluntary associations for benevolent or charitable purposes, and their property and contract rights are equally under

protection of law, and actions of their members subject to its restraints, p. 714.

Cited and principle applied in Bartlett v. Hipkins, 76 Md. 27, 24 Atl. 532, affirming jurisdiction of courts, in a dispute between rector of a parish and vestry. See exhaustive note to 68 Am. St. Rep. 864.

Abatement and revival.— When plea of "other suit pending" is set up, case must be same, as to parties, rights asserted, and relief sought; relief must be founded on same facts and title; identity must be such that an adjudication of one could be pleaded in bar to the other, p. 715.

Citing cases which apply this principle are: The Haytian Republic, 154 U. S. 124, 38 L. 932, 14 S. Ct. 993, rejecting plea where the same rights were not asserted and claim of relief was not founded on same facts; Brooks v. Vermont, etc., R. Co., 14 Blatchf. 465, F. C. 1,964, rejecting plea, in suit by bondholders to foreclose mortgage, where the parties were different and the plaintiff bondholders had no control over and could not be barred by it; Dwight v. Central Vermont R. Co., 20 Blatchf. 205, 9 Fed. 789, refusing plea, when suit not brought on same facts nor for same relief, in suit by stockholders against directors and lienors to recover possession of road; Logan v. Greenlaw, 12 Fed. 17, holding a suit to subject individual assets of a partner to a debt no bar to suit in equity against both partners to subject partnership assets in hands of surviving partners to debts of same plaintiff and other creditors; The Normandie, 40 Fed. 591, rejecting plea, and holding that a suit in personam in admiralty was no bar to a subsequent suit in rem for same cause of action; Liggett v. Glenn, 51 Fed. 389, 4 U. S. App. 438, holding that a suit by a stockholder to protect and enforce his and other stockholders' rights was no bar to a suit by a creditor to reach assets of a corporation; Marks v. Marks, 75 Fed. 333, where two suits with substantially the same object are brought, one in State and the other in Federal court, and the former is removed into Federal court and jurisdiction is first acquired in the State court, their plea of other suit pending is available; Valley Bank v. Shenandoah Nat. Bank, — Iowa, ——, 79 N. W. 392, stating the test for determining sufficiency of plea of other suit pending; Heyman v. Covell, 36 Mich. 159, holding that a plea in abatement to the jurisdiction must always show another forum where the rights have already become subject to judicial authority; dissenting opinion in Providence, etc., S. S. Co. v. Hill Mfg. Co., 109 U. S. 607, 27 L. 1048, 3 S. Ct. 620, majority holding proceedings in Federal court, for limitation of liability of shipowner, superseded all other actions, which would be enjoined.

Courts.— When property is in possession of marshal of State court, as receiver, Federal court cannot decree possession to a

litigant there, nor enjoin parties to whom State court has ordered its receiver to deliver it from taking possession, pp. 718, 719.

Cited and relied on in People's Bank v. Calhoun, 102 U. S. 262, 26 L. 103, where railroad property was in hands of a receiver appointed by Federal court, proceedings on an attachment granted by State court would be enjoined; Dial v. Reynolds, 96 U. S. 341, 24 L. 644, holding that, except under the bankrupt act, no Federal court could grant an injunction to prevent a proceeding at law in State court; In re Sawyer, 124 U. S. 220, 31 L. 409, 8 S. Ct. 492, denying jurisdiction of Federal court of bill to restrain removal of a city officer for malfeasance or to issue injunction; Mercantile Trust Co. v. Lamoille Valley R. Co., 16 Blatchf. 327, F. C. 9,432, holding that Federal court would entertain bondholder's foreclosure suit of property in possession of State court receiver, but would not disturb that possession nor interfere with the receivership; Wilmer v. Atlanta, etc., R. Co., 2 Woods, 428, F. C. 17,775, on application for writ of assistance, holding that State court had power to appoint a receiver and place him in charge of property, while a bill for foreclosure of same property was pending in Federal court; service of process gives jurisdiction over the person, seizure over the property; Hutchinson v. Green, 2 McCrary, 476, 6 Fed. 838, refusing injunction to control disposition of property by a receiver appointed by State court; Domestic, etc., Society v. Hinman, 2 McCrary, 548, 13 Fed. 165, when propery was in custody of State court by virtue of service of writ of replevin, the possession would not be interfered with by Federal court by appointment of a receiver; Ruggles v. Simonton, 3 Biss. 330, F. C. 12,120, holding the Federal court could not enjoin sale by sheriff upon execution under order of State court; Dupont v. Boshong, 8 Fed. Cas. 110, holding that the act of 1875 had repealed, in effect, the restriction against injunction by Federal courts of proceedings in State courts; Gates v. Bucki, 53 Fed. 966, 12 U. S. App. 69, holding that by a levy on attachment and institution of proceedings in equity to settle the title to the attached property in State court, the property was withdrawn from jurisdiction of Federal court, so that a foreclosure suit would not bind it; Reinach v. Atlantic, etc., R. Co., 58 Fed. 44, holding that Federal court could not interfere with proceedings in State court, confirming an extension of a prior bond mortgage in a suit for foreclosure of a subsequent mortgage, as the State court had jurisdiction of subject-matter and parties; Louisville Trust Co. v. Cincinnati, 73 Fed. 734, holding Federal court could not, by injunction, prevent the city from enforcing a judgment obtained in State court; Edwards Mfg. Co. v. Sprague, 76 Me. 62, holding that suits in equity for injunction to stay action in State court and prevent levy of execution, are not removable to Federal court before the injunction is issued; Hill Mfg. Co. v. Providence, etc., S. S. Co., 113 Mass. 501, 18 Am. Rep. 533, holding

that the jurisdiction of State court over an action against ship-owner for damage by fire, having once attached, could not be defeated by subsequent proceedings in Federal courts; Stone v. Sargent, 129 Mass. 507, affirming power of State court to consider a bill of exceptions allowed by a judge of Superior Court to his own order for removal of a cause to Federal court; Fulbright v. Higginbotham, 133 Mo. 676, 34 S. W. 876, holding that injunction was a proper remedy to determine right to the use of church property. Cited, arguendo, in Gay v. Brierfield, etc., Co., 94 Ala. 311, 33 Am. St. Rep. 129, 11 So. 356, 16 L. R. A. 567.

Distinguished in Bridges v. Sheldon, 18 Blatchf. 517, 7 Fed. 45, holding that revised statutes, section 720, did not prevent a master appointed by Federal court to take a deposition in another State from punishing for contempt in serving a defendant with process of State court, when attending on the taking of the deposition. See also note to 38 Am. Rep. 721.

Courts.— When State court has decreed delivery of possession to certain persons, it is competent for Federal court to inquire into nature and character of possession, and if it is of a fiduciary character, not involved in first suit, a second suit may be maintained to declare, define and protect the trust, p. 720.

Cited generally in Bailey v. M. E. Church, 71 Me. 476.

Distinguished in Domestic, etc., Society v. Hinman, 2 McCrary, 547, 18 Fed. 165, as not involving any question of trust, the court could not interfere when claim was by absolute owner.

Courts.— Under prayer for general relief, court should grant any relief authorized by pleadings and proof not in conflict with a decree granted by another court nor disturbing possession of property in hands of that court, p. 720.

Cited in Gay v. Brierfield, etc., Co., 94 Ala. 319, 33 Am. St. Rep. 137, 11 So. 359, 16 L. R. A. 571, State court may entertain creditor's bill assailing mortgage bonds for fraud, despite a pending Federal suit, but relief granted must not conflict with jurisdiction of Federal court.

Religious societies.— Property rights of ecclesiastical bodies discussed and determined, in cases where, first, property is expressly devoted to teaching or support of specific form of religious belief; second, property is held by an independent religious congregation; third, property is held by a religious body, part of a general church organization. Duty of the courts in such cases defined, pp. 722-727.

Cited in Lamb v. Cain, 129 Ind. 509, 510, 29 N. E. 20, 14 L. R. A. 526, in general discussion of subject, deciding rights of the property of Church of the United Brethren in Christ; Harrison v. Hoyle, 24 Ohio St. 325, holding the denominational part of the name of a religious organization is a mere matter of description, and not of

limitation, and is not a covenant as to the exercise of its powers or the uses of its property.

Religious societies.— Property may be dedicated by way of trust for purpose of sustaining definite religious doctrines, and it is duty of courts to see that such property is not diverted from the trust to different uses, p. 723.

Cited and principle applied in Brundage v. Deardorf, 55 Fed. 842, holding that in the enforcement of a trust, when the remedy is not as complete at law as in equity, a trustee may appeal to a court of equity to assist him as it would a cestui que trust; Baker v. Ducker, 79 Cal. 374, 21 Pac. 765, decreeing recovery of property for the Reformed Church, which had been fraudulently diverted by a majority of the members to other purposes; Bates v. Houston, 66 Ga. 202, sustaining bill in equity by trustees of a church to restrain its use by a minority of its members, to the exclusion of the majority, and to compel its restoration to trustees; Gaff v. Greer, 88 Ind. 125, 45 Am. Rep. 452, holding that trustees of a church were competent to sue for recovery, though the legal title was in the church as a corporation; Smith v. Pedigo, 145 Ind. 389, 33 N. E. 786, 19 L. R. A. 440, 145 Ind. 410, 44 N. E. 369, 32 L. R. A. 844, holding that property given to a church is held in trust, which no member or association, less than the whole, may divert or change; Mt. Zion Church v. Whitmore, 83 Iowa, 147, 49 N. W. 84, 13 L. R. A. 203, and n., to same effect, denying right of a majority of members of a Baptist church to divert the property to promulgate doctrines different from the faith of the church; Perry v. Wheeler, 12 Bush, 553, arguendo, that in inquiring into the Constitution and regularity of a board of reference of the Episcopal Church, the court was not retrying the merits of the controversy before such board; State v. Riedy, 50 La. Ann. 260, 23 So. 328, holding that where the subject-matter of a suit relates to the property rights of religious societies, it is within the court's jurisdiction; Kuhl v. Meyer, 42 Mo. App. 484, affirming jurisdiction of equity to deal with controversies resulting from dissensions between members of a religious society; Fadness v. Braunborg, 73 Wis. 293, 41 N. W. 95, holding that in order that equity may interfere, there must be such a real and substantial departure from designated faith or doctrine as will be in contravention of the trust. See valuable note in 68 Am. St. Rep. 866.

Religious societies.— Where a schism leads to a separation into distinct bodies, if the principle of government is that majority rules, then numerical majority of members must control right to use of property. If powers of control are vested in officers, those who adhere to acknowledged organism are entitled to use of property. The minority can claim no rights, p. 725.

Cited and principle applied in Smith v. Pedigo, 145 Ind. 393, 409, 44 N. E. 363, 369, 32 L. R. A. 839, 844, holding that the title to property of a divided church is in that part which is acting in harmony with its own law; Hackney v. Vawter, 39 Kan. 629, 18 Pac. 704, granting injunction to restrain the introduction of music and form of worship into a Christian church, against the protest of the controlling officers, as a perversion of the church property; Nance v. Busby, 91 Tenn. 313, 18 S. W. 876, 15 L. R. A. 803, and n., holding that when the trust was specific, courts would prevent the diversion of church property by a majority, which had abandoned the original faith and order.

Distinguished in Smith v. Pedigo, 145 Ind. 389, 33 N. E. 786, 19 L. R. A. 440, on rehearing, collecting authorities, holding majority of a church may not repudiate original faith and continue to hold property.

Religious societies.— Where property is acquired for general use of a religious congregation, which is itself part of a large and general organization of some religious denomination, then, so long as any existing religious congregation can be ascertained to be that congregation or its regular and legitimate successor, it is entitled to use of property, p. 726.

Cited and relied on in Wheelock v. First Presb. Church, 119 Cal. 485, 51 Pac. 844, holding that a bill in equity would lie to compel distribution of property of a church duly divided by competent church authority into two new and independent organizations; Holt v. Downs, 58 N. H. 176, holding sixth article of bill of rights does not, in Congregational Church, authorize a parish to control election of teachers of church connected with parish.

Religious societies.— Where a religious congregation is part of a large and general organization of some religious denomination, and questions of discipline or faith or ecclesiastical rule, custom, or law, have been decided by the highest of that church's judicatories, legal tribunals must accept such decisions as binding on them in the application to the case before them, p. 727.

Cited and principle applied in Brundage v. Deardorf, 92 Fed. 228, 230, accepting decision of General Conference of Church of the United Brethren in Christ, on question of adoption of an amendment in the society's constitution; Schweiker v. Husser, 146 Ill. 428, 34 N. E. 1081, holding that the appointment of the place for the next session of the conference of the Evangelical Association, was purely an ecclesiastical matter, over which the association had absolute control; Gaff v. Greer, 88 Ind. 132, 45 Am. Rep. 453, holding the court was bound by decision of the presbytery that a majority had seceded from a church and forfeited its rights to the property; White Lick Quar. Meet. of Friends v. White Lick Quar. Meet. of Friends, 89 Ind. 152, holding that court was bound by the

recognition by the proper yearly meeting of one of the two bodies into which a quarterly meeting had divided; O'Donovan v. Chatard, 97 Ind. 422, 49 Am. Rep. 463, holding court had no jurisdiction of a suit by a Roman Catholic priest, against his bishop, for removing him from office; Lamb v. Cain, 129 Ind. 513, 29 N. E. 21, 14 L. R. A. 527, holding court bound by decision of General Conference of Church of the United Brethren in Christ, as to due adoption of amended constitution; Brayshaw v. Ridout, 79 Md. 458, 29 Atl. 516, mandamus will lie to compel register of a parish in Maryland to enroll a resident of the parish as a member of the Protestant Episcopal Church, no question of doctrine, discipline, or worship being involved; Bear v. Heasley, 98 Mich. 289, 310, 315, 57 N. W. 274, 281, 283, 24 L. R. A. 622, 623, 627, in adjudicating rights of property of the United Brethren in Christ, consequent on the adoption of the revised confession of faith; Pounder v. Ashe, 44 Neb. 680, 63 N. W. 50, enjoining a person deposed from the ministry of the Evangelical Association from acting as a minister, and interfering with church property; Powers v. Budy, 45 Neb. 213, 63 N. W. 477, refusing to review decision of church tribunal, concerning question of discipline; Everett v. First Presbyterian Church, 53 N. J. Eq. 511, 517, 32 Atl. 751, 753, holding the court was bound by decision of the presbytery as to the fitness of a candidate to act as pastor of a church; Connitt v. Reformed Protestant, etc., Church, 54 N. Y. 561, 562, holding that decisions of ecclesiastical courts, in ecclesiastical matters, where they had jurisdiction, were binding on civil courts; Baxter v. McDonnell, 155 N. Y. 101, 49 N. E. 671, 40 L. R. A. 676, holding that decision of ecclesiastical court, as to right of priest of Roman Catholic Church, to recover arrears of salary, was a bar to a subsequent action at law against the bishop for same; Ricke v. Floyd, 6 Ohio C. C. 128, holding that the courts were bound by decision of General Conference of the United Brethren in Christ as to due adoption of amended constitution; Philomath College v. Wyatt, 27 Or. 455, 459, 462, 467, 31 Pac. 218, 219, 37 Pac. 1022, 1024, 26 L. R. A. 80, 82, 85, 87, holding that the action of the General Conference of the United Brethren in Christ, in adopting a report declaring that the amended constitution and confession of faith was the organic law of the church, was reviewable by the civil courts; Jarrell v. Sproles, — Tex. Civ. App. —, 49 S. W. 908, holding that, as to Baptist congregations, resolutions of the councils were not conclusive as to the whole body; Herman v. Plummer, 20 Wash. 366, 55 Pac. 315, holding court had no jurisdiction to adjudicate recovery of possession of property of a local theosophical society, by a by-law of which the executive committee was made a court of final appeal in disputed questions. See valuable note in 68 Am. St. Rep. 865, 870.

Criticised in Watson v. Garvin, 54 Mo. 377, 385, holding that civil courts did not interfere with decrees of ecclesiastical courts where no property rights were concerned, only because they had

no jurisdiction in such matters. Distinguished in Brundage v. Deardroff, 55 Fed. 846, 847, 848, holding the rule did not apply to a question as to which of two General Conferences of the "Church of the United Brethren in Christ," was entitled to recognition as the proper governing body; Perry v. Wheeler, 12 Bush, 550, 551, 552, holding that courts have jurisdiction to inquire into the organization of a board of reference under the canons of the Episcopal Church, and to decide if it acted within the scope of its authority; Goodman v. Jedidjah Lodge, No. 7, 67 Md. 126, 9 Atl. 18, the rules and laws made by lodges of a beneficial organization will not be recognized by the courts, when they confiscate property or take away property rights arbitrarily; Watson v. Garvin, 54 Mo. 382, 384, holding that when property rights are concerned, civil courts will not be bound by decisions of ecclesiastical courts.

Religious societies.— The law knows no heresy and is committed to support of no dogma, establishment of no sect. Decisions of tribunals created for decision of controverted questions of faith within voluntary religious organizations cannot be reviewed in ordinary judicial tribunals, pp. 728–729.

Cited in State v. Hebrew Congregation, etc., 31 La. Ann. 207, 33 Am. Rep. 219, refusing mandamus to compel a religious society to restore a duly expelled member; Philomath College v. Wyatt, 27 Or. 472, 37 Pac. 1026, 26 L. R. A. 88, holding that acquiescence in church constitution for more than fifty years is conclusive on the civil courts as to its validity; Schlichter v. Keiter, 156 Pa. St. 122, 27 Atl. 51 (in opinion of lower court, affirmed on appeal), holding that the new constitution of the United Brethren in Christ was sufficiently adopted by a majority of the whole persons voting, Nance v. Busby, 91 Tenn. 326, 18 S. W. 879, 15 L. R. A. 807, and n., holding that civil courts cannot review the action of an ecclesiastical body (Baptist) in excommunicating a member, but will inquire as to the orthodoxy of those claiming property held on trust.

Religious societies.— When persons separate themselves from a church organization, deny its authority, denounce its action and refuse to abide by its judgments, they have no right to church property or use of it, p. 734.

Cited in Reeves v. Walker, 8 Baxt. 283, by withdrawal of trustees of a Methodist Episcopal church they lost all beneficial interest in the property.

Miscellaneous.— Miscited in Wiggin v. Knights of Pythias, 31 Fed. 124.

13 Wall. 738–742, 20 L. 473, THE MABEY.

Admiralty.— A commission to examine witnesses in Supreme Court will be refused where no excuse is shown why they were not examined in lower courts, but a second application may be made on showing cause, pp. 740–741.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

DECEMBER TERM, 1871.

Vol. 81.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT, DECEMBER TERMS, 1870, 1871,

AND REPORTED HEREIN,

VOLUME 81,

AS HAVE ALSO BEEN REPORTED IN

14 WALLACE.

14 Wall.	Title.	Here in.	14 Wall.	Title.	Here in.
1	United States v. Crusell,	821	108–109	The Thames,	807
4–5	" "	822	109	Mahan v. United States,	764
5	Cockroft v. Vose,	875	111–112	" "	765
8–9	" "	876	113	Foulke v. Zimmerman,	785
9	Bank of West Tennessee v. Citizens' Bank of Louisiana,	514	113–116	" "	786
			116	The Bridgeport,	787
9–10	" "	515	118–120	" "	788
10–12	Palmer v. Marston,	826	120	Armstrong v. Morrill,	765
12	" "	827	131–134	" "	768
12–15	Sevier v. Haskell,	827	134–137	" "	769
15	" "	828	137–140	" "	770
15–17	Steines v. Franklin County,	846	140–144	" "	771
17–20	" "	847	144–147	" "	772
20–23	" "	848	147–150	" "	773
23	" "	849	150–151	" "	774
23	Kennebec R. R. v. Portland R. R.,	850	152	*Ex parte* Newman,	877
25–26	" "	851	161–164	" "	878
26–28	Bartemeyer v. Iowa,	792	164–167	" "	879
28	Ward v. United States,	792	167–170	" "	880
37	" "	794	170	The Scotia,	822
37–38	" "	795	180–181	"	823
38–41	" "	796	181–184	"	824
41–44	" "	797	184–187	"	825
44–53	Henderson's Distilled Spirits,	815	187–189	"	826
53–56	" "	816	189	The Java,	834
56–59	" "	817	198	"	837
59–63	" "	818	199	"	838
63–66	" "	819	199–200	The Merrimac,	873
66–69	" "	820	200–203	"	874
69	" "	821	203–204	"	875
69–79	Christmas v. Russell,	762	204–213	The Mabey and Cooper,	881
79–82	" "	763	213–216	" "	882
82–84	" "	764	216	Carpenter v. Bowyer,	882
85	Hurley v. Street,	786	231–233	" "	883
86–87	" "	787	233–236	" "	884
87	Traders' Bank v. Campbell,	832	236–237	" "	885
94–96	" "	833	238	Caperton v. Ballard,	885
96–98	" "	834	241–243	" "	886
98	The Thames,	804	244	Gibson v. Warden,	797
104–105	" "	805	244–246	" "	799
105–108	" "	806	246–250	" "	800

14 Wall.	Title.	Here in.	14 Wall.	Title.	Here in.
250–252	Gibson v. Warden,	801	457–462	United States v. Ballard et al.,	845
252	Hook v. Payne,	887	462–463	" "	846
255–257	" "	889	463–467	Black v. Curran,	849
257	" "	890	470–472	" "	850
258–265	The Vaughan and Telegraph,	807	472	Dolton v. Cain,	830
265–268	" "	808	476–477	" "	831
268–270	" "	809	477–479	" "	832
270–275	The Cayuga,	828	479	Cross v. United States,	721
275–278	"	829	483–484	" "	722
278–279	"	830	484	Dirst v. Morris,	722
279	Easley v. Kellom et al.,	890	490–491	" "	723
282	" "	891	491	Collins v. Riggs,	723
282	City of Lexington v. Butler,	809	493	" "	724
289	" "	810	493	United States v. Powell,	726
289–293	" "	811	497–500	" "	727
293–296	" "	812	500–503	" "	728
296–297	" "	813	503–504	" "	729
297	Bigler v. Waller,	891	504	Phœnix Ins. Co. v. Hamilton,	729
303	" "	892	507–508	" "	730
303–307	" "	893	508–510	" "	731
307–308	" "	894	511	Gorham Company v. White,	731
308–310	Dent v. Emmeger,	838	524–526	" "	736
310–313	" "	839	526–529	" "	737
313–314	" "	840	529–531	" "	738
314	French v. Shoemaker,	852	531	Morgan v. United States,	738
324–327	" "	854	534–535	" "	739
327–330	" "	855	535	United States v. Justice,	753
330–333	" "	856	546–547	" "	754
333–335	" "	857	547–550	" "	755
336–342	The Laura,	813	550	" "	756
342–344	"	814	550	United States v. Hunt,	739
344–345	"	815	552–553	" "	740
345	The Continental,	801	553–561	Turner v. Smith,	724
354–357	"	802	561–564	" "	725
357–360	"	803	564	Gregg v. Moss,	740
360–361	"	804	568–569	" "	742
361–368	Pugh v. McCormick,	789	569	" "	743
368–372	" "	790	570	Philpot v. Gruninger,	743
372–375	" "	791	576–578	" "	744
375	" "	792	578	" "	755
375	Insurance Companies v. Weide	894	579	The Delaware,	779
380–381	" "	895	596–597	"	781
381–383	" "	896	597–600	"	782
383	Bk. of Bethel v. Pahquioque Bk.	840	600–603	"	783
391	" "	841	603–606	"	784
391–395	" "	842	607–611	Leary v. United States,	756
395–398	" "	843	611–613	" "	757
398–401	" "	844	613	Erskine, Collector, v. Holmbach,	745
401–402	" "	845	616–618	" "	747
402	O'Dowd v. Russell,	857	618–620	"	748
404–405	" "	858	620	Mowry v. Whitney,	860
406	The Steamer Webb,	774	639	" "	861
413–415	" "	775	639–642	" "	862
415–417	" "	776	642–645	" "	863
417–418	" "	777	645–648	" "	864
419	Smith v. Mason, Assignee,	748	648–650	" "	865
425–427	" "	750	650–653	" "	866
427–430	" "	751	653	" "	867
430–433	" "	752	653	The Key City,	896
433	" "	753	659–661	"	898
434	Mowry v. Whitney,	858	661	"	899
439–440	" "	859	661	Delmas v. Merchants' Mut. Ins. Co.,	757
440–441	" "	860			
442	Improvement Co., v. Munson,	867	662	" "	758
442–444	" "	870	665–668	" "	759
444–447	" "	871	668–670	" "	760
447–450	" "	872	670	Propeller Co. v. United States,	760
450–452	" "	873	674–675	" "	761
452	Nicolson Pavement Co. v. Jenkins,	774	675–676	" "	762
456–457	" "	778	676	Willard v. Presbury,	719
			680–682	" "	741

THE DECISIONS

OF THE

Supreme Court of the United States

AT

DECEMBER TERM, 1871.

JOSEPH C. WILLARD, *Appt.*,
v.
GEORGE G. PRESBURY, JR., *et al.*

(See S. C. 14 Wall. 676-682.)

Washington city may assess adjoining proprietors for paving streets—bill, unsustained by the proofs.

Congress may authorize Washington city to assess the expense of repairing streets with a new and different pavement, or of repairing an old one, upon the adjacent proprietors of lots.

Bill to compel the lessor to pay the tax levied on a hotel (of which the appellees are lessees, and bound by their covenant to pay the same) upon the ground that the lessor procured the passage of the city ordinances to make the improvement in the street by fraudulent misrepresentations; Held, unsustained by the proofs.

[No. 91 of Dec. Term, 1869.]

Argued Feb. 25, 1870. Decided Mar. 7, 1870.

APPEAL from the Supreme Court of the District of Columbia.

The bill in this case was filed in the court below by the appellees, to obtain an injunction against the collection of a certain tax, or a decree for the payment of the same by the appellant.

The court having entered a decree in favor of the petitioners and for the payment of said tax by the respondent, Joseph C. Willard, the said respondent took an appeal to this court.

The case is fully stated by the court.

Messrs. W. F. Mattingly and *W. D. Davidge*, for appellant:

1. In a suit between private individuals, the court will not inquire as to the motives which actuated legislators in passing a law, and declare a law a nullity because it was obtained by fraud.

Fletcher v. *Peck*, 6 Cranch, 130.

2. The decree is not warranted by the evidence.

There is not a scintilla of evidence to prove the contract between the corporation and Willard, alleged in the bills; on the contrary, the mayor of the city, R. Wallach, Esq., their own witness, swears that there was no agreement by which Mr. Willard was to be personally responsible for the cost of the pavement.

The complainants had a plain, adequate, and complete remedy at law. They should have paid the tax and sued Willard at law.

Russell v. *Clark*, 7 Cranch, 88; 1 Story, Eq., § 69, n. 2; *Jesus College* v. *Bloom*, 3 Atk. 262; *Hardwick* v. *Forbes*, 1 Bibb. 212; *Fowle* v. *Lawrason*, case of account, 5 Pet. 503; *Crane* v. *Bunnell*, 10 Paige, 340.

The act passed May 26, 1824, amending the charter of 1820, in § 13, authorizes the tenant, when made liable for taxes, to deduct the same from the rent, with 25 per centum additional, thus giving the appellees an undoubted remedy at law.

Messrs. Richard T. Merrick and *Robert J. Brent*, for appellees:

The appellant took no evidence, and the proof taken by the appellees is uncontradicted.

A corporation is but a person at law, and if its agents or officers act fraudulently, it is the fraud of the corporation, and subjects it to the same remedy as if it were a natural person.

Ang. & Ames, Corp. § 387; *Phila., Wil. & Balt. R. Co.* v. *Quigley*, 21 How. 202, 16 L. ed. 73.

Where a street is once opened and paved, and has become one of the public highways of the city, repaving it with a new and different pavement, or repairing the old one when necessary, is a part of the general duty of the corporation, and for which special assessments cannot be levied on the adjoining property.

Hammet v. *Philadelphia*, S. C. of Pa., reported in the Law Register, July, 1869.

Joseph C. Willard, having obtained the passage of the ordinance to repave the street, by misrepresentation if not fraud, a court of chancery will compel him to pay the amount of the assessment he thereby caused to be levied on the property of the appellees.

State v. *Reed*, 4 H. & McH. 6.

The court may and should protect them by ordering the assessment to be levied on the reversionary estate of Joseph C. Willard in the premises, on the principle of marshaling securities.

1 Story, Eq., § 633.

The lease from Joseph C. Willard to the appellees contains a covenant that the lessees shall pay all taxes and special assessments; and said Willard having caused and procured a special assessment to be levied on said premises by representing that he was liable to pay the same, should be held to the liability assumed by him,

and decreed to pay the assessment levied upon the premises.

1 Story, chap. VI., § 256, and cases there cited.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the supreme court of the District of Columbia.

The bill was filed by the appellees against Willard, the appellant, and the mayor, aldermen, and common council of the city of Washington, to compel the former to pay a certain municipal tax or assessment for paving streets, and to enjoin the latter from collecting the same from the complainants. The bill charges that they are the lessees of Joseph C. and Henry A. Willard, of the premises known as Willard's hotel, in this city, situate on the corner of Pennsylvania avenue and Fourteenth street, and that the lease contains a covenant that the lessees shall pay all taxes imposed by Congress, or by the municipal authorities of the city. That the portion of Fourteenth street in front of the premises had been graded and paved, and the pavement was in good condition and repair; that notwithstanding this the common council of the city passed an ordinance, October 12, 1865, directing that Fourteenth street, including the portion referred to, should be regraded and repaved, although as to this portion it was wholly unnecessary, and had not been called for **678*]** *by the adjacent proprietors of lots; that the ordinance, as originally drafted, omitted this portion, and would have thus been adopted had it not been for the misrepresentations of Joseph C. Willard, the appellant, and his contract with the mayor and common council in respect to the payment of the expenses; that said Willard persuaded the authorities to improve the portion of the street mentioned, by representing that he and his brothers were the exclusive owners of all the property contiguous to it; that they all desired the work to be done; and that he and they would be required to pay all the assessments, well knowing that said representations were untrue, and that said work was not necessary and was not desired by the adjacent owners; and also well knowing that by the appellees' covenant in their lease, they would be required to pay the assessment. The bill further charges that the appellant agreed with the mayor and common council, that if they would pass the ordinance requiring the work to be done, he would pay the full amount of the expense assessed; that the grading and paving has since been completed, and the assessments made upon the adjacent owners, and the sum of $1,835.08 has been charged upon the property included in the lease which the said appellant refuses to pay, and caused the same to be demanded of the appellees. The bill prays the common council be enjoined from collecting the assessment, or that it be set aside for irregularity; or if not, that the appellant be decreed to pay it.

There were four witnesses examined in the case. Mr. Wallach, the mayor at the time the ordinance was passed and the work done, who states, in substance, that Willard, the appellant, had an interview with him while the ordinance was pending in the city council, and expressed great anxiety for its passage; that he made no representations to him while the bill was pending; that after the ordinance was passed and while the work was in progress, it was not the intention of the witness to regrade and repave the portion of the street between the avenue and F street, *to which Willard's [***679** hotel is adjacent; that had been paved within a few years with cobble stone; that the appellant urged him to pave it with the new material; and as an inducement, he said he had the entire portion of one side to pay for; and that he and his brother owned a larger portion of the property fronting on it than any one person. On the witness's suggestion that there might be objections on the part of Mrs. Farnum and Mrs. Burke, the owners of the remaining portion, he said if they objected he would be responsible for their assessments. The witness thinks that he would not have had the paving done at that time had it not been for the representations and urgent request of the appellant; that he had full power in the matter given him in the ordinance. The witness also states there was no agreement between him and the appellant that he was to be personally responsible for the assessments or cost of the pavement. Willard gave him to understand that he would have to bear the expense of the pavement in front of his property.

Mr. Owen, an alderman at the time, a witness, states that he drew the original ordinance for paving the street, and omitted the portion of Fourteenth street between the avenue and F street to which Willard's hotel is adjacent; that the appellant presented an ordinance which included this portion, and witness amended his so as to include it. He had omitted this portion as it was well enough paved with cobble stones. He had a conversation with the appellant while the ordinance was pending. He seemed vexed at the delay, and said he and his brother would have to pay for most of the work, and that the other property owners were fully able to pay for their proportion, except as to the Burch property, and, if that was any objection, he would pay it himself. The witness states that he knew of no inducements held out by Willard to procure the passage of the ordinance, except what he had stated.

Mr. Chadwick, one of the appellees, was called as *a witness. He states that before tak- [***680** ing the lease he took a full survey of the property and its surroundings; that the pavement of Fourteenth street in front was in good condition, and when taken up was the best in the city. He received a notice from J. C. and H. A. Willard, the landlords, to take up the pavement of the street and put a new one down, at which he was greatly surprised; and that, shortly after, workmen proceeded to take up the old pavement; that he had no knowledge of the ordinance until the work was begun; that the street at the time needed no repair.

Mr. Ball, called as a witness, simply stated, in answer to a question, that the street, at the time the old pavement was taken up, was in the best condition.

The court, upon this evidence, decreed that Willard, the appellant, should be liable personally to pay the assessments levied upon the premises leased to the appellees, directing that, if not paid in ten days, the city authorities should proceed and sell his reversionary interest therein, to pay the same.

The act of Congress passed February, 1865,

provided "that the corporation (of the city of Washington) shall have full power and authority to levy taxes on particular wards, parts, or sections of the city, for their particular local improvement, and to cause the curbstones to be set, the foot and carriageways (or so much thereof as they may deem best) to be graded and paved." Another clause in the same act provides "that the corporation, etc., is hereby authorized to lay and collect a tax upon all property bordering upon each street or alley that may be paved, sewered, lighted, cleaned or watered by said corporation, in accordance with the provisions of this act."

On the 12th October, 1865, the city authorities passed an ordinance which provided for the grading and paving of Fourteenth street from the north side of Canal street to the north side of H. street, including the section of the street in dispute, with the same kind of pavement as is now laid in F street north; to replace or reset the curb stones, repair or renew the sidewalks or foot pavement, etc.; and to defray the expenses incurred, it directed a special tax to be levied, under authority of the act of Congress of 23d February, 1865, on all lots or parts of lots along the said Fourteenth street, the said taxes to be assessed and collected in the same manner as provided by the act of May 23, 1853.

Some question has been made by the counsel for the appellees as to the power of Congress to confer upon the city authority to assess upon the adjacent proprietors of lots the expense of repairing streets with a new and different pavement or repairing an old one. It is asserted that this should be a general tax on the city. But the power, we think, cannot well be denied. The Constitution confers upon Congress the authority to exercise exclusive legislation over this district. Art. 1, § 8.

The bill seeks to compel Willard to pay the tax levied on the hotel (of which the appellees are lessees, and bound by their covenant to pay the same), upon the grounds:

681*] *1. That he procured the passage of the city ordinance to make the improvement in the street by fraudulent misrepresentations to the mayor and common council, with the intent to cast upon the lessees the burden of the tax, and to benefit his own reversionary interest in the premises; and,

2. That he had agreed with the mayor and common council, if they would pass the ordinance requiring the improvements to be made, he would pay the full amount of any assessments or tax for and on account of the expense of the same.

On looking into the proofs in the record it will be seen that this second ground for charging Willard, the appellant, with the expense of the improvements is wholly unsustained. No such agreement was made as alleged in the bill.

And as it respects the first ground, the only evidence in support of it is that, pending the ordinance before the city council, in a conversation with Alderman Owen, he said that he and his brothers would have to pay for most of the work, and that the other property owners along there were fully able to pay their proportions, except as to the Burch property, and if there was any objection as to that he would pay for it himself—that portion of it. The witness said that he knew of no inducements held out by Willard to procure the passage of the ordinance, except as stated above.

Without stopping to inquire whether a misrepresentation simply to one of the aldermen constituting the board, to induce him to pass an ordinance for the improvement of a street, could be regarded as making out a case of misrepresentation that would subject the guilty party to any responsibility for its passage, or whether, if such responsibility was established, the appropriate remedy would not be an action at law, it is sufficient to say, in the present case, that there is no evidence in the record showing that the representations made were untrue, and hence the first ground for subjecting the appellant also fails.

We say nothing as to the representations made to the mayor after the passage of the ordinance and while the work was in progress, or how far these might subject the appellant *to liability, as that evidence is not pertinent to the issue made in the bill before us. [*682

The decree below reversed; cause remitted, with directions to dismiss the bill.

ALEXANDER CROSS, *Appt.*, *v.* UNITED STATES.

(See S. C. 14 Wall. 479–484.)

Re-trial in court of claims—successive suits for rent—plea of former recovery.

1. Where Congress directed the court of claims to rehear a claim which had been decided against by that court on account of the informality of the papers; held, that Congress intended that such court should wholly disregard such informality.

2. In covenant for non-payment of rent, payable at different times, a new action lies as often as the respective sums become due and payable.

3. Where the suit is for instalments of rent not due when a former suit was instituted, and they were not included in it in any stage of the proceeding, the plea of former recovery is no bar.

[No. 196.]

Argued Oct. 31, 1872. Decided Nov. 11, 1872.

APPEAL from the Court of Claims.

The case is stated by the court.

Mr. **J. J. Coombs** for appellant.

Mr. **Geo. H. Williams**, *Atty. Gen.*, **C. H. Hill**, *Asst. Atty. Gen.*, for appellee.

Mr. Justice **Davis** delivered the opinion of the court:

The only question in this case relates to the proper construction of the joint resolution of Congress of July 2d, 1864, for the relief of Alexander Cross. The action of Congress was based on the following state of facts:

One Daniel Saffarans, in 1851, according to the forms of law, leased to the United States for a period of ten years, at a certain monthly rent, a warehouse in San Francisco. The claimant, Cross, advanced the money to complete the building and was compelled, for his own protection, to purchase the property and the contract of lease. The contract was assigned to him and the warehouse occupied by the government for a period of three years, when Mr. Guthrie, the Secretary of the Treasury, against his written protest, rescinded the contract.

On the 15th of November, 1856, Cross peti-

tioned the court of claims for relief, but failed to obtain it, on the ground that the assignment of the lease was defective and insufficient to vest in him a legal title to the accruing rents. This adverse decision, in conformity with the law at that time, was reported to Congress, and while the proceeding was pending there, the joint resolution referred to was passed.

This resolution, after reciting that the decision in question was rendered on the sole ground of an alleged technical defect in the release, directs that the case be remanded to the court of claims for a further authority to render judgment for the petitioner, if he were found to be the equitable owner of the lease, notwithstanding the defective assignment, on condition that he secure the government by a proper indemnifying bond against any claim which the heirs or representatives of Saffarans, who was then deceased, should make on account of the "contract or lease." In accordance with these directions, Cross, in July, 1864, by a supplemental petition, asked the court of claims to rehear the cause and give him judgment for the instalments of rent claimed in his original petition, embracing the periods of time between the 14th day of August, 1853, and the 14th day of November, 1856. This was done, and the present action was brought two years afterwards, to recover the instalments of rent which were not included in the first suit.

The court below held that this suit could not be maintained, because the power and authority conferred upon it by the joint resolution had been exhausted when it reheard the cause and rendered judgment.

Was this ruling correct?

This would be to take a narrow view of the legislative intention in this case and to give substantial effect to the technical defenses which have distinguished this litigation. There is no defense now on the merits, nor was there when the case went to Congress. It went there, not because the United States was not bound by the covenants of the lease, but for the reason that, in the opinion of the court of claims, Cross had not the legal right to enforce the obligation. Saffarans had undertaken to to assign the lease to Cross, and no question was made as to his ownership until the Secretary of the Treasury attempted to rescind the contract. Then it was discovered that the assignment lacked legal formality, and the government availed itself of this defense, and this only, in the court of claims to defeat the action. In this state of case Congress was called upon to act.

The technical defect in the mode of assignment was the only obstacle encountered by Cross in the prosecution of his claim, yet while it remained it was effectual to prevent a recovery. To remove it and allow a trial on the merits required the assent of Congress, and this was given. That the waiver by Congress of the right of the United States to make this defense was not limited to any particular suit, but was extended to the entire controversy respecting the lease, seems clear enough from the language of the resolution itself. The court of claims was told if it found Cross to be the equitable owner of the lease, and in justice and equity entitled to the rents (if any) due thereon from the United States, to render judgment in his favor, notwithstanding any technical defect in the assignment of the lease. And to leave no room for doubt on the subject, the court was directed further to take bond from Cross to indemnify the government "against any demand which may be set up and established by or on behalf of the heirs or representatives of Saffarans, under or by virtue of said contract or lease." Why the extent of this requirement, if the waiver was only applicable to the rents in controversy in the proceeding then *pending before [*484 Congress? We cannot suppose, without an express declaration to that effect, that Congress intended to legislate in a manner that would enable a creditor of the government to obtain only a part of his claim when the whole of it was deemed by the court that tried the case to be meritorious.

It is true the lease was at an end when Congress acted and the court reheard the cause, and Cross could, by proper amendment to his petition, have embraced also that portion of his demand for which he now sues; and that would have been the proper course for him to have pursued, but he was not compelled to take it. In covenant for non-payment of rent, payable at different times, a new action lies as often as the respective sums become due and payable. As this suit is for instalments of rent not due when the first suit was instituted, and as they were not included in it in any stage of the proceeding, the plea of former recovery has no application.

On the finding of facts by the court below, judgment should have been rendered for the claimant for $69,515.01.

It is, therefore, ordered that the judgment be reversed and the cause remanded to the Court of Claims, with directions to enter judgment for that sum.

JOHN DIRST, *Plff. in Err.*,
v.
WILLIAM B. MORRIS.

(See S. C. 14 Wall. 484-491.)

Record, when admissible to show title—error, when reviewed—priority of mortgage under recording acts.

1. Record in a foreclosure suit is admissible in evidence, in establishing title, although one of the defendants has not been served with process in the case.
2. This court, sitting as a court of error, cannot pass upon the weight or sufficiency of the evidence, as it does in equity appeals.
3. In such a case, where there was no special finding of the facts, if a jury is waived and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence.
4. Where there was no proof that the mortgagee, when the mortgage was given, had any notice of a prior unrecorded deed, the mortgage has priority.

[No. 180.]

Argued Oct. 29, 1872. Decided Nov. 11, 1872.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Mr. **Samuel W. Fuller** for plaintiff in error.

Messrs. Thomas Dent, J. M. Carlisle, and **J. D. McPherson** for defendant in error.

Mr. Justice **Bradley** delivered the opinion of the court:

This was an action of ejectment brought by Morris, the defendant in error, against Dirst, the plaintiff in error, for the recovery of a certain quarter section of land in Kendall county, Illinois. In 1837 the lot belonged to one Russell, and the plaintiff in ejectment claimed title through a mortgage given by Russell to the Solicitor of the Treasury, in December of that year, upon that and other lands, to secure a debt due from him to the United States. Russell had previously, in May, 1837, given a deed for the land in question to one Breese; but this deed was not recorded in the proper office until 1864; and there is no evidence that it was known to the agents of the government when the mortgage was given. The plaintiff in error claims under this deed to Breese. In 1840, the mortgage given to the government was foreclosed and the property sold, the government being the purchaser; from which the defendant in error deraigns title by intermediate conveyances.

On the trial of the cause before the court, a jury having been waived, the plaintiff in ejectment, having first put in the mortgage to the government, offered in evidence the record of the foreclosure suit; to which the defendant objected on the ground, amongst others, that Breese had not been served with process in the cause. To prove this he referred to the record itself, and also proved by parol that Breese was not in Chicago in 1840, but was in New York; and further produced the original subpœnas and files in the cause. The papers showed that Breese was made a party to the bill, and that his name had been included in the subpœna, and the record recited that the subpœna was returned by the marshal into the clerk's office, executed by all the defendants; but the return of the subpœna did not show any service on **487***] Breese. Nevertheless, *the court admitted the record in evidence, and the defendant excepted.

We think there was no error in admitting this evidence, whether Breese was served with the subpœna or not. If he was not served, and could show that fact, he was not bound by the decree. But the decree and sale formed a link in the plaintiff's chain of title from Russell, and at this stage of the cause the deed from Russell to Breese had not been given in evidence. So far as yet appeared, the evidence was not only admissible, but effective to transfer the title. But it was admissible in any view, for it tended to show title from a party formerly seised, and the plaintiff had a right to exhibit it, subject to such decision with regard to its effect as might become necessary after all the evidence was in.

The same remarks apply to the admission of the deed from the Solicitor of the Treasury to the plaintiff's grantor.

The only other alleged error necessary to be noticed is the ruling of the court at the close of the trial.

The defendant, on his part, had produced Breese's deed, and mesne conveyances to himself, and evidence to show that under this title in 1864, he had taken possession of the property, which, till then, was unoccupied. He now insisted that his right was paramount to that of the plaintiff. But the court decided that the plaintiff was entitled to recover, notwithstanding the possession taken by the defendant, and found the issues generally in the plaintiff's favor.

The particular reason why or ground on which this decision was made is not specified. The court was exercising the functions of both court and jury, and whether, as matter of fact, it regarded the proof sufficient to show that Breese had been served with process in the foreclosure suit, or whether, as matter of law, it regarded that fact as not material, or what other view of the case it may have taken, does not appear and, therefore, no error can be asserted in the decision. This court, sitting as a court of error, cannot pass as it does in equity appeals, upon the weight or sufficiency of the evidence; and there *was no special finding [***491** of the facts. Had there been a jury, the defendant might have called upon the court for instructions, and thus raised the questions of law which he deemed material. Or had the law, which authorizes the waiver of a jury, allowed the parties to require a special finding of the facts, then the legal questions could have been raised and presented here upon such findings as upon a special verdict. But as the law stands, if a jury is waived and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence.

However, as there was no proof that the government agents, when the mortgage was given, had any notice of Breese's unrecorded deed, and as the mortgage in such case would have the superior efficacy, and would entitle the mortgagee or his assigns to possession of the land on non-payment of the money at maturity, we do not see on what possible ground the defendant could have claimed to succeed.

No error appearing on the record, the judgment of the court below is affirmed.

JOSHUA COLLINS *et al., Plffs. in Err.,*
v.
LAURASON RIGGS.

(See S. C. 14 Wall. 491-493.)

Redemption from mortgage sale—tender of amount—distribution of.

1. To redeem property which has been sold under a mortgage, it is not sufficient to tender the amount of the sale where it is less than the mortgage debt. The whole mortgage debt must be tendered or paid into court.
2. Such money will be subject to distribution between the mortgagee and the purchaser at the mortgage sale in equitable proportions, so as to reimburse the latter his purchase money, and pay the former the balance of his debt.

[No. 181.]

Submitted Oct. 29, 1872. Decided Nov. 11, 1872.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is sufficiently stated by the court.

Mr. **B. C. Cook** for plaintiffs in error.

Messrs. **Thomas Dent, Carlyle & McPherson** for defendant in error.

Mr. Justice **Bradley** delivered the opinion of the court:

This case is, substantially, similar to that of

Dirst v. *Morris*, *ante*, 722, and raises the same question. It has, however, the additional feature of proof offered by the defendants in ejectment, to show that they had tendered to the plaintiff during the pendency of the action, a certain sum as redemption money for the premises in controversy, from the mortgage given by Russell as described in *Dirst* v. *Morris*. The amount tendered was the amount for which the lot was struck off at the marshal's sale under the decree of foreclosure, together with taxes, interest and costs. The court simply decided that the evidence, as presented, was not competent or sufficient to constitute a defense to the action; but upon what ground, whether of fact or law, does not appear. Clearly the criterion was incorrect by which the amount tendered was gauged.

To redeem property which has been sold under a mortgage for less than the mortgage debt, it is not sufficient to tender the amount of the sale. The whole mortgage debt must be tendered or paid into court. The party offering to redeem, proceeds upon the hypothesis that, as to him, the mortgage has never been foreclosed and is still in existence. Therefore he can only lift it by paying it. The money will be subject to distribution between the mortgagee and the purchaser, in equitable proportions, so as to reimburse the latter his purchase money and pay the former the balance of his debt.

The judgment must be affirmed.

DAVID TURNER, *Plff. in Err.*,
v.
JAMES M. SMITH.

(See S. C. 14 Wall. 553-564.)

Sale of lands for taxes—commissioner not required to sell personal property—rent charge cut off by sale.

1. Under the amendment to the 7th section of the act of June 7, 1862, passed Feb. 6, 1863, where a private person bid a sum sufficient to pay the tax, interest and cost, the commissioner is not bound to bid off the land for a sum not exceeding two thirds its value, or to make it bring that much.
2. The statute does not require the tax commissioners to hunt up the owner not to make the tax out of personal property.
3. The tax is a direct tax on the land, and on all the estates, interests and claims connected with or growing out of the land, and a rent charge was cut off and destroyed by it.

[No. 202.]

Argued Oct. 31, 1872. Decided Nov. 11, 1872.

IN ERROR to the Supreme Court of Appeals of the Commonwealth of Virginia.

In May, 1861, R. M. & J. M. Smith were the occupants, and claimed to be the owners, of a house and lot of ground situate in the city of Alexandria, Va. At the commencement of the Civil War, they abandoned their residence and went within the military lines of the Confederate States. Mar. 1, 1864, the said property was sold by the tax commissioners, under authority of the act of Congress for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes; and was purchased by the appellant, David Turner, to whom a tax sale certificate was executed by said commissioners. Turner was thereupon placed in possession of the property, and still continues in possession.

After the close of the war, the Smiths instituted a proceeding against Turner upon a warrant of distress for rent, claiming that they were the owners of a yearly rent charge of $224, issuing out of and charged upon said house and lot. The warrant was levied upon the property of Turner, who gave a forthcoming bond, which being forfeited, proceedings were taken to obtain judgment thereon. Turner, under authority of the statute of Virginia, made defense, claiming that there was no rent due the Smiths, and that the distress was otherwise illegal. The jury found a special verdict, upon which the court rendered a judgment in favor of plaintiffs. To this judgment Turner obtained a writ of error to the fourth judicial district court, and afterwards to the supreme court of appeals of Virginia. Both of these affirmed the decision of the lower courts. See, 18 Gratt. 830.

The case further appears in the opinion.

Mr. **Francis L. Smith** for plaintiff in error.

Messrs. **C. W. Wattles** and *G. W. Brent* for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the supreme court of appeals of the commonwealth of Virginia, and the suit in that court involved title to land. The plaintiff in error claimed title under a sale for taxes, made by authority of the several acts of Congress of 1861 and 1862, for imposing and collecting a direct tax. The decision was against the title thus set up, and it is, therefore, properly before us for review.

Two propositions are relied on to defeat that title:

1. That the land was sold at the tax sale for less than two thirds of its assessed value.

2. That the plaintiffs below, in whose favor the judgment was rendered, were the owners of a rent charge on the land, which was not extinguished by the sale for the unpaid taxes.

1. The first of these propositions is founded on the amendment to the 7th section of the act of 1862 passed February 6, 1863. 12 Stat. at L. 640. The latter act undoubtedly was intended to be a substitute for the 7th section of the former, and to supersede it entirely. In a case of doubtful construction it is, therefore, important to consider what changes are made by the latter in regard to the matter now in controversy. By the original section the commissioners who were appointed for the collection of the tax were required, at the time and place of sale, to cause the lots and lands to be severally sold to the highest bidder for a sum not less than the tax, penalty and costs, and ten per centum per annum interest on said tax, pursuant to notice, and to strike off the same severally to the United States at that sum, unless some person should bid the same or a larger sum.

The amendment says that the commissioners shall be required, "at the time and place of sale, to cause the same to be severally sold to the highest bidder for a sum not less than the taxes, penalty and costs, and ten per centum per annum interest on said tax, pursuant to notice; in all cases *where the owners of said [*561

lots or parcels of ground shall not, on or before the day of sale, appear in person before the board of commissioners and pay the amount of said tax, with ten per centum interest thereon, with costs of advertising the same, or request the same to be struck off to a purchaser for less than two thirds of the assessed value of said several lots or parcels of ground, the said commissioners shall be authorized, at said sale, to bid off the same to the United States at a sum not exceeding two thirds of the assessed value thereof, unless some person shall bid a larger sum."

The first act and the second are alike in the provision that the land shall be sold to the highest bidder for a sum not less than what is due on it for tax, interest and cost. This, in both cases, refers to bids by others than the United States. In reference to bids made by the commissioners on behalf of the United States, there is a change. The first statute made it imperative that the commissioner should strike off the land to the United States at the amount of the tax, interest and costs, unless others bid that or a larger sum; and it is a fair inference that the commissioners were not authorized to bid at all for the land, unless it be called a bid to strike it off to the government, when no one else would take it, for the tax, interest, and costs.

The second statute makes a material change in this part of the law. When the owner does not pay, or request the same to be struck off to a purchaser for a less sum than two thirds of its value, the commissioners are authorized to bid off the same to the United States at a sum not exceeding two thirds of such assessed value.

The intention in making this change seems to us to be to remove the restriction by which the United States must either take the land for the taxes or let it go to whoever would pay the taxes, or any greater sum, if he was the highest bidder. After the amount due was offered, the government was, by the first statute, no longer a competing bidder, and the owner was at the mercy of private bidders. Under the new statute the commissioner could become a **562*]** *competitor after the amount of the tax was bid, with two limitations. First, he should not bid against a purchaser whom the owner, by request, preferred. And, second, he should not bid beyond two thirds of the value.

Instead of being bound to bid that sum, he was authorized to bid any sum not exceeding that, and could not bid that if the purchaser requested that it might be struck off to a friend for less than that sum. If the language had been that he was authorized to bid it off at two thirds, it would be a forced and unnatural construction of the section to hold that the words were imperative. The language which would express that idea would be that he was required to do it, or that he should not bid it off for a less sum. But here, while he is authorized to bid, that bid may be for any sum not exceeding two thirds its value.

But the sale in this case comes within the first category. The United States did not bid at all. A private person bid a sum sufficient to pay the tax, interest and costs, and the commissioner let him have it, and we see nothing in the statute which forbids it. Certainly we cannot infer because the United States authorized the commissioner in a defined contingency to bid off the land for a sum not exceeding two thirds its value, that he was, therefore, bound, in all cases to make it bring that much.

We think there was error in the appellate court of Virginia in holding the sale void because this was not done.

2. In the act of August 5, 1861, apportioning the tax of $20,000,000 among the states, according to population, provision is made for its collection out of the lands within those states, if not paid by the states. Under the provisions of that act it might admit of some doubt whether the tax was in its essence a tax on the land, and on all the various estates into which the fee may have been divided, or was a tax on the owner of the land, and levied on the interest of the owner in it, and on no other subordinate or incorporeal interest. But no tax was ever collected, or any land sold under that act. The states which, in the war for the support of which this tax was levied, supported the general government, *assumed and paid the portion al- [***563** lotted to each. With regard to the states which were in insurrection, Congress passed a new law for the assessment and collection of their portion under which the sale in this case was made. That act, the statute of 1862, to which we have already referred, directed the commissioners to whom the collection of the tax was intrusted, to take the last assessment of the value of the lands made in each state for state taxation as the basis on which the tax charged to that state by the act of 1861 should be apportioned among the several lots and parcels within that state, and a penalty of fifty per cent was added in each case for non-payment. The President was directed to declare by his proclamation what states or parts of states were in insurrection, and "thereupon the said several lots or parcels of land became charged respectively with their respective portions of said direct tax, and the same, together with the penalty, became a lien thereon without any further proceedings whatever." 12 Stat. at L. 422. Section 3 gave a time in which this tax might be paid, and § 4 proceeds to say that "the title of, in, and to each and every parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States, and upon the sale hereinafter provided for shall vest in the United States, or in the purchaser at such sale, in fee simple, free, and discharged from all liens, encumbrances, right, title, and claim whatsoever."

There is nothing in the statute which requires the tax commissioners to hunt up the owner, or to make the tax out of personal property of his, or which may be found upon the land. It is clearly a direct tax on the land, and on all the estates, interests and claims connected with or growing out of the land. All this was forfeited to the United States on non-payment of the taxes, and passed with the sale to the purchaser, subject alone to the right of redemption, which the law allowed. In that respect it was a defeasible title, but in all other respects perfect, complete, and entire. The language of the statute is explicit to this purport, and the policy and necessity of the government, which could not *look after the [***564** fugitive and hostile owners, required such a tax, and such a mode of collecting it.

We are of opinion, therefore, that the sale being a valid one, the rent charge of the defendant in error was cut off and destroyed by it.

The judgment of the Court of Appeals is reversed, and the cause remanded for further proceedings in conformity to this opinion.

UNITED STATES, *Plff. in Err.*,
v.
JAMES W. POWELL *et al.*

(See S. C. 14 Wall. 493-504.)

Distiller's bond—distillery warehouse—sureties, how far bound.

1. Where a distiller, gave a bond, conditioned that he should faithfully comply with all the provisions of law in relation to the duties and business of distillers, he is bound to pay the wages of the storekeepers placed by the government in charge of his distillery warehouse, as required by a Joint Resolution of Congress, passed after the execution of his bond.
2. A distillery warehouse is a bonded warehouse within the meaning of the joint resolution.
3. Such distiller must pay the government for work done by the storekeepers, or for money paid for their *per diem* wages, on Sunday.
4. The sureties in such bond are bound in the same manner as their principals.

[No. 188.]

Submitted Oct. 29, 1872. Decided Nov. 11, 1872.

IN ERROR to the Circuit Court of the United States for the Middle District of Tennessee.

This was an action of debt brought by the United States against the defendants in error, as principals and sureties, on two distillers' bonds given under the 7th section of the internal revenue law of July 20, 1868, 15 Stat. at L. 127, one of which bore date Dec. 1, 1868, and the other Apr. 29, 1869, and each of which was conditioned as follows: that "If the said James W. Powell and Henry J. Hildebrand shall, in all respects, faithfully comply with all the provisions of law in relation to the duties and business of distillers, and shall pay all penalties incurred or fines imposed on them for a violation of any of the said provisions, etc., then this obligation shall be void; otherwise it shall remain in full force." The condition of the bond dated Dec. 1, 1868, was preceded by a recital stating that said Powell and Hildebrand intended, on and after that date, to engage in the business of distilling, etc.; and the condition of the other bond was preceded by a similar recital, that they intended to engage in the same business on and after May 1, 1869.

The 15th section of the said act, 15 Stat. at L. 130, enacts that every distiller shall provide a warehouse, to be used only for the storage of spirits of his own manufacture, and also declares such warehouse, when approved by the Commissioners of Internal Revenue on report of the collector, to be a "bonded warehouse," etc., and that it shall be in charge of an internal revenue storekeeper, assigned thereto, etc. And by a proviso to the Joint Resolution of Mar. 29, 1869, 16 Stat. at L. 52, the proprietors of "all internal revenue bonded warehouses" are thereafter required to reimburse the United States the expenses and salaries of all storekeepers or other officers in charge of such warehouses.

The declaration contains two counts. The first count alleges that, under the first bond, the said Powell and Hildebrand engaged in the business of distilling, Dec. 1, 1868, and continued so engaged until Apr. 30, 1869, during which month a certain internal revenue storekeeper was duly in charge of their warehouse, at a salary of $4 *per diem* for 28 days, which was paid to him by the plaintiffs. The second count alleges that, under the second bond, the said Powell and Hildebrand engaged in the business of distilling on May 1, 1869, and continued so engaged until after Apr. 30, 1870, during which time certain internal revenue storekeepers were duly in charge of their warehouse at different periods stated, at a salary of $4 *per diem*, which was paid to them by the plaintiffs. The amounts so paid, as aforesaid, were demanded in reimbursement of the plaintiffs, and the breaches assigned in the declaration are, the refusal of the said Powell and Hildebrand to pay the plaintiffs those amounts, or any part thereof.

The defendants put in a general plea of performance, accompanied by a number of special pleas, setting up:

1. That at the time of the execution of the bonds, or at any time since, the said Powell & Hildebrand, as distillers, were not bound to pay the wages of the storekeepers who had charge of their distillery warehouse, etc.

2. That the warehouse attached to their distillery is not a bonded warehouse in contemplation of law, etc.

3. That the plaintiff paid the said storekeepers for working on Sunday, etc.

4. That at the date of the bond dated Dec. 1, 1868, plaintiff was bound to pay the said storekeepers, and that the act of Mar. 29, 1869, if applicable to distillery warehouses, cannot change or alter the liability of the sureties, nor increase their responsibility, etc.

A replication was filed by plaintiff, containing a general denial, and issue was joined. The parties then went to trial, and a verdict was rendered for defendants.

Among other charges the court gave the following, to which exception was taken by the district attorney:

1. "That under the first of said bonds, given before the public resolution of March, 1869, neither the distillers nor their securities were liable for reimbursement of the storekeepers' salaries, either before or after the passage of said Resolution.

2. That the reimbursement to the United States by the distiller, of the salaries of storekeepers, was not one of the duties of the distillers, for the performance of which the second bond was given, and that neither the distillers nor their sureties were liable upon said bond for the failure of the distillers to make such reimbursement, although, perhaps, the distillers might be liable in an action for debt or assumpsit, brought against them alone for said reimbursement.

3. That, at any rate, no recovery could be had of the amount paid to the storekeepers for services performed by them on Sundays, as the law did not contemplate their employment upon Sunday.

Messrs. Geo. H. Williams, Atty. Gen., and **C. H. Hill,** *Asst. Atty. Gen.*, for plaintiff in error:

The condition that the principals "Shall

faithfully comply with all the provisions of law in relation to the duties and business of distillers" is to be understood as embracing such provisions of law as may be in force during the period for which the bond is given, whether enacted before or after the execution of the bond.

King v. *Nichols*, 16 Ohio St. 83; *Boody* v. *U. S.* 1 Woodb. & M. 163.

That the condition of a bond given under the 7th section of the act of 1868, applies to provisions of law concerning the duties and business of distillers enacted subsequently to the date of that act, but prior to the execution of the bond, can admit of no doubt.

See, *Farr* v. *Hollis*, 9 Barn. & C. 315; *State* v. *Bradshaw*, 10 Ired. 229.

The act of Mar. 29, 1869, requiring proprietors of all internal revenue bonded warehouses to reimburse the United States the expenses and salaries of all storekeepers in charge of such warehouses, clearly extends to distillers.

The appointment of storekeepers for distillery warehouses is provided for by the 52d section of the act of July 20, 1866, 15 Stat. at L. 145, and their duties are prescribed by that, and the 21st section of the same act. From the nature of these duties, which embrace, among other things, the custody of the warehouse, they would seem to be in some respects, if not in all, continuous from day to day throughout the entire week or month, Sundays included, as long as the storekeeper remains in office; and, so far from the law not contemplating his employment upon Sunday, just the contrary is manifestly its intent.

(No counsel appeared for defendant in error).

Mr. Justice **Clifford** delivered the opinion of the court:

Persons intending to engage in the business of a distiller are required to give notice in writ-
498*] ing to the assessor of the *district, stating their names and places of residence and the place or places where the business is to be carried on; and before proceeding with the business they are required to make and execute a bond in the form prescribed by the commissioner, with at least two sureties to be approved by the assessor of the district, conditioned that the principal shall faithfully comply with all the provisions of law in relation to the duties and business of distillers, and that he will pay all penalties incurred or fines imposed on him for a violation of any of the said provisions. 15 Stat. at L. 127.

Pursuant to that requirement the two defendants first named in the declaration made and executed the two bonds therein described, conditioned in the very words of the 7th section of the act containing the requirement, as appears by the record.

Distillers are also required by the 15th section of the act to provide at their own expense a warehouse, situated on and to constitute a part of their distillery premises, to be used only for the storage of distilled spirits of their own manufacture; and the provision is that such warehouse, when approved by the commissioner, on report of the collector, shall be deemed to be a bonded warehouse of the United States and be known as a distillery warehouse; and that it shall be under the direction and control of the collector of the district and in charge of an internal revenue storekeeper assigned thereto by the commissioner.

Provision is also made by the Joint Resolution of the 29th of March, 1869, that the proprietors of all internal revenue bonded warehouses shall reimburse to the United States the expenses and salary of all storekeepers or other officers in charge of such warehouses, and that the same shall be paid into the Treasury and accounted for like other public moneys. 16 Stat. at L. 52.

Most of the material facts are either admitted or not controverted by the pleadings. It is conceded as follows: (1) That the principal defendants engaged in the business of a dis-
*tiller for the periods mentioned in the [*499
declaration; (2) that they constructed warehouses for the storage of distilled spirits of their own manufacture; (3) that the warehouses were in charge of internal revenue storekeepers assigned thereto by the commissioner; (4) that the plaintiffs paid the *per diem* wages of the storekeepers, and that they demanded of the defendants to be reimbursed the amount so paid for that service, and that the defendants refused to pay as requested, and that the bonds described in the declaration were duly executed.

Payment being refused, the plaintiffs brought an action of debt to recover the amount. Service having been made the defendants appeared and pleaded as follows: (1) Performance; (2) that they were not bound to pay the wages of the storekeepers in charge of their distillery warehouse; that the storekeeper was an officer appointed and selected by the plaintiffs, and that he was placed by them in the distillery warehouse of the defendants; and that they, the plaintiffs, were bound to pay his *per diem* wages; (3) that the warehouse attached to their distillery is known as a distillery warehouse, and not as a bonded warehouse, as it constitutes a part of their distillery premises, and that the defendants are not bound to pay the wages of the storekeeper; (4) that the plaintiffs have no right to be reimbursed for the wages they paid to the storekeeper for service rendered or work done on Sunday or the Lord's day; (5) superadded is also the separate plea of the sureties—that the plaintiffs at the time the first bond was executed were bound to pay the storekeeper in charge of the warehouse, and that the subsequent act, even if applicable to distillery warehouses, cannot change or alter their liability as sureties, nor can it increase their responsibility.

1. Performance, certainly, is not proved as matter of fact, as it is not pretended that the defendants have reimbursed the plaintiffs for any part of the amount which the latter paid to the storekeepers for their *per diem* wages while they were in charge of the defendants' distillery warehouses, which is all that need be remarked in respect to that defense.

*2. Undoubtedly, the storekeeper is [*500
an officer appointed and selected by the plaintiffs, but the question whether the defendants are bound to reimburse the plaintiffs the amount paid for their *per diem* wages while in charge of their distillery warehouses is a question of law depending upon the construction of the Joint Resolution to which reference has been made. Argument to show that the ques-

tion must be answered in the affirmative, if the Joint Resolution is applicable to the case, is hardly necessary, as the language is explicit that the proprietors of all internal revenue bonded warehouses shall reimburse to the United States the expenses and salary of all storekeepers or other officers in charge of such warehouses.

3. Attempt is made to show that a distillery warehouse is not a bonded warehouse within the meaning of the joint resolution, but the proposition cannot be maintained, as the act of Congress provides that such a warehouse, when approved by the commissioner, on report of the collector, shall be deemed a bonded warehouse of the United States; and it matters not that the act provides that it shall be known as a distillery warehouse, as the requirement of the act is that it shall be under the direction and control of the collector of the district, and be in charge of an internal revenue storekeeper assigned thereto by the commissioner. Beyond all doubt, therefore, the internal revenue bonded warehouse referred to in the joint resolution includes the bonded warehouse known as the distillery warehouse described in the 15th section of the act imposing taxes on distilled spirits. 15 Stat. at L. 130.

4. Suppose that it is so, still it is contended by the defendants that they are not bound by the first bond to reimburse the plaintiffs for the amount paid to the storekeeper for that service, because the bond was made and executed before the passage of the joint resolution.

It must be admitted that any substantial addition by law to the duties of the obligor of a 501*] bond, after the execution *of the instrument, materially enlarging his liabilities, will not impose any additional responsibility upon his sureties, unless the words of the bond, by a fair and reasonable construction, bring such subsequently imposed duties within its provisions. *Farr* v. *Hollis*, 9 B. & C. 332. Conceding that rule to be correct, it becomes necessary to examine the recitals and condition of the bond first described in the declaration, as the question must depend very largely upon the construction of the language there employed. By the recital of the bond it appears that the principals therein named intended, on and after that date, to be engaged in the business of distillers within the fifth collection district of the state, and the condition of the bond is that they shall in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers, and that they shall pay all penalties incurred or fines imposed on them for a violation of any of the said provisions. Stronger language to signify an intention to stipulate that the principals in the bond should comply with duties subsequently imposed by law in relation to the business of a distiller could not well be employed, as the language of the bond is that they shall faithfully comply with all the provisions of law in relation to the duties and business of distillers, knowing, as all the obligors did, that Congress might at any time enact new provisions imposing new duties or vary those already imposed. *Bartlette* v. *Governor*, 2 Bibb, 586; *Minor* v. *Mech. Bk.* 1 Pet. 73. Both parties, it must be assumed, knew that changes might be made in that behalf at any time, and the defendants must have understood that it never could have been intended that a new bond should be required with every modification made in relation to the duties and business in which the principals in the bond were about to engage. Where a person was elected sheriff and executed a bond to the county, conditioned that he would well and faithfully in all things discharge the duties of the office during his continuance in the same by virtue of his said election, the supreme court of *Ohio held that the language of [*502 the bond was broad enough, not only to embrace any duty imposed at the date of the bond, but any also that might be imposed upon the officer by law during the term for which the bond was given. *King* v. *Nichols*, 16 Ohio St. 82; *United States* v. *Bradley*, 10 Pet. 343; *Cameron* v. *Campbell*, 3 Hawks, 285. Bonds in such cases, as well as in cases like the one before the court, are required to secure the faithful discharge of the duties ordinarily imposed upon the principal obligor, without reference to the time when the law was passed imposing the duty; and where, as in this case, the language of the bond is sufficiently comprehensive to embrace duties subsequently imposed, of a character corresponding with those required at the date of the bond, the construction which gives a prospective as well as a retrospective operation to the condition of the bond may well be adopted as both reasonable and just to all concerned. *White* v. *Fox*, 22 Me. 341; *United States* v. *Hodson*, 10 Wall. 406, 19 L. ed. 939; *United States* v. *Tingey*, 5 Pet. 127.

Exceptional cases may, doubtless, arise, as where the condition of the bond is, in terms, or by a fair and reasonable construction, limited to existing duties, or where the appointment is a temporary one, to expire at the end of the next session of the Senate. Different rules are applied in the case of a temporary appointment, as the commission is for a different tenure, and unless there is something in the act under which the first commission issued showing that it contemplated a permanent and continuing responsibility under laws subsequently passed, the rule is that the liability of sureties must be strictly confined to the duties created by the acts passed antecedent to the date of the bond. *U. S.* v. *Kirkpatrick*, 9 Wheat. 730.

Given, as the second bond was, subsequent to the passage of the joint resolution, the defense that the bond is not embraced in that provision is entirely without merit and is, accordingly, overruled.

5. Reimbursement for services rendered or work done by the storekeepers, or for money paid for their *per diem* wages *on Sun- [*503 day or the Lord's day, it is insisted cannot be lawfully claimed, because the law, it is said, did not contemplate their employment on that day.

Storekeepers, of the kind, may be appointed by the Secretary of the Treasury, in such numbers as may be necessary, with such compensation, not exceeding $5 per day, as shall be determined by the commissioner. They are required to take an oath faithfully to perform the duties of their office, and to give a bond to be approved by the commissioner for the faithful discharge of their duties, and they are to have charge of the warehouses to which they may be respectively assigned, under the direction of the collector controlling the same, which ware-

house, it is provided, shall be in the joint custody of such storekeeper and the proprietor thereof; and the provision is that the warehouses shall be kept securely locked, and shall at no time be unlocked or opened, or remain open, unless in the presence of such storekeeper or other person who may be designated to act for him, by the collector, in case of absence from sickness or from any other cause. 13 Stat. at L. 146. Safe custody of the articles deposited in the warehouse is one of the primary duties of the storekeeper, and it is clear that he is required to perform that duty on Sunday as well as on every ordinary working day of the week, as such custody is a work of necessity and, therefore, is not unlawful, even in jurisdictions where worldly labor or business on the Lord's day is forbidden by law. *Powhattan S. Co.* v. *Appomattox R. R. Co.* 24 How. 255, 16 L. ed. 686.

6. Sufficient has already been remarked to show that the defense set up in the separate plea filed by the sureties cannot be maintained, as the language employed in the conditions of the respective bonds is comprehensive enough to bring the case within the duty imposed upon the proprietors of internal revenue bonded warehouses by the joint resolution which requires such proprietors to reimburse the United States for the expenses and salary paid to such storekeepers or other officers in charge of such warehouses.

504*] *Diametrically opposite views were entertained by the presiding justice in the circuit court, and he accordingly instructed the jury that neither the distillers nor their sureties were liable to the plaintiffs under the first bond. (2) That the reimbursement to the plaintiffs, by the distillers, of the salaries of storekeepers was not one of the duties of the distillers for which the second bond was given (*White* v. *Fox*, 22 Me. 341; *State* v. *Bradshaw*, 10 Ired. 232). (3) That the plaintiffs could not recover the amount paid to the storekeepers for services performed by them on Sundays, as the law did not contemplate their employment on that day.

Under those instructions the jury returned their verdict for the defendants, and the plaintiffs excepted and removed the cause in this court. Having determined that the instructions were erroneous, it only remains to remark that *the judgment must be reversed, and the cause remanded, with directions to issue a new* venire.

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, NEW YORK, *Plff. in Err.*, *v.* VINCENT HAMILTON *et al.*

(See S. C. 14 Wall. 504-510.)

Insurance by partner—on grain in store.

1. Insurance can be effected in the name of a nominal partnership where the business is carried on by and for the use of one of the partners, especially where the policy was effected mainly for the benefit of the owners of grain held by the nominal partnership on commission.

2. Where the grain insured was in the sole custody and care of a railroad company, and the agent of the insurers made no inquiry, as to who were the owners or interested therein, the omission to notify the defendant of the dissolution of the partnership was not a concealment which would avoid the policy.

[No. 150.]

Argued Apr. 23, 24, 1872. Decided Nov. 18, 1872.

IN ERROR to the Circuit Court of the United States for the Northern District of Ohio.

This action was commenced by the defendants in error in the court of common pleas, Lucas county, Ohio, upon a policy of insurance, issued by the plaintiff in error. Upon petition of the insurance company, the case was removed to the United States circuit court. Trial was had in that court, which resulted in verdict and judgment for the plaintiffs. The defendant brought the case to this court by writ of error.

The case appears in the opinion.

Messrs. **Alvin C. Bradley** and *E. C. Benedict*, for plaintiff in error:

A policy on the interest of two, cannot be supported by proof of interest in only one. It makes no difference whether the joint interest had ceased before the policy or had never existed, or whether, existing at the date of the policy, it was afterwards terminated by one, without consent of the insurer, selling his interest.

Work v. *Ins. Co.* 11 Cush. 271; *Graves* v. *Ins. Co.* 2 Cranch, 419; *Tate* v. *Ins. Co.* 13 Gray, 79; *Burgher* v. *Ins. Co.* 17 Barb. 274; *Wood* v. *Ins. Co.* 31 Vt. 552; *Sadler's Co.* v. *Babcock*, 1 Wils. 10, 2 Atk. 554; *Howard* v. *Ins. Co.* 3 Den. 301; *Murdock* v. *Ins. Co.* 2 N. Y. 220; *Tillou* v. *Ins. Co.* 5 N. Y. 405; *Catlett* v. *Ins. Co.* 1 Paine, 594; *Bell* v. *Ansley*, 16 East, 141.

Cook, alone, at the date of the policy and of the fire, held the grain in question in trust or on commission. He alone was the bailee, and alone had an insurable interest. Hamilton had no custody, was no bailee, and had no insurable interest. No action, therefore, can be maintained; not a joint action, because the interest was sole; nor a sole action, because the policy was joint.

The policy was void for fraud.

All untruth uttered with intent to deceive others for the benefit of the deceiver, is *contra bonos mores*. The untruth of the continuance of this firm was kept up, that Cook might profit by "the prestige" and that Hamilton might have what little he did, done without commission. To speculate out of the deception was in both minds. In New York and Georgia, such a use of names is a statutory misdemeanor (3 Kent, Com. 31, n. *a*) and it is hard to say why every consignment thus obtained was not a felony, in which Cook was principal and Hamilton accessory. True, they remained liable, just as if they had been partners; but Hamilton himself had withdrawn whatever he had that made his name attractive. But the name remained, and business continued to follow it. It increased the demand for insurance. Had Cook been left to himself in name, as he was in resources, he would have needed less; and the defendant, while it would certainly have been invited to a smaller risk, might possibly have refused altogether. This deception, concerted *malo animo et causa lucri*, increased risk and loss and, perhaps, was at the bottom of both.

Messrs. M. R. & R. Waite, **P. Phillips**, *Bissell & Gorrill*, for defendants in error:

NOTE.—*Insurance; material misrepresentations avoid policy*—see note, 7 L. ed. U. S. 335.

Partnership interest as full ownership for the purpose of insurance—see note, 18 L. R. A. 482.

The agreement whereby the name and credit of Hamilton were loaned to Cook, created a partnership in every matter thereafter transacted by either with others, under said firm name, and within the scope of such business. It was what the law defines as a nominal partnership. Pars. Part. 31.

Such agreement was lawful. Every man may as properly lend his name and credit as any other thing which he owns. Pars. Part. 116.

The nominal partnership once created, the right of either partner to bind the other in all matters appertaining to the business carried on in said firm name, is precisely the same as if the partnership were actual. The firm is as to all the world, except the partners themselves, an actual copartnership.

Pars. Part. 41, 61, 115-119, 134, 135, 95, 413, 414.

Hamilton had an insurable interest. He would have been responsible to the owners of the grain, had no insurance been effected.

Batem. Com. L. § 471; *Buck* v. *Ins. Co.* 1 Pet. 151.

Insurance effected by Cook under the authority which Hamilton had conferred, inured to Hamilton's benefit.

1 Phil. Ins. § 26; 2 Phil. Ins. 1851.

To remove every possible objection, we at the trial withdrew our claim for the value of Hamilton and Cook's individual grain.

We certainly are entitled to our verdict for the value of goods consigned to Hamilton and Cook under instructions to insure.

2 Phil. Ins. §§ 1958, 1965; *Ins. Co.* v. *Jackson*, 16 B. Mon. 258-261; 1 Phil. Ins. §§ 385, 660.

This action was commenced in the state court, and was properly brought in the name of Hamilton, as well as Cook. 2 Saund. & C. Ohio St. 953, § 27; Pars. Part. 134, 135; Coll. Part. § 96.

The insurance company did not expect any action from Hamilton in protecting the grain against loss by fire. The sole custody and care devolved upon the railroad company.

The bargain between him and Cook, whereby the latter was to have all the profits and, as between themselves, pay all the losses, is in no way material to the risks against which plaintiff agreed to insure.

There was, therefore, no obligation on the part of Cook to disclose to plaintiff in error the exact nature of the partnership relation. This silence does not come within the legal definition of a concealment.

1 Phil. Ins. §§ 531, 676, 571, 573, 588, 640, 660; Pars. Part. 414.

For the same reason there was nothing which can be considered a misrepresentation. Plaintiff made no inquiries; nor did defendants in error upon this point make any statement whatever. 1 Phil. Ins. §§ 524, 539.

Mr. Justice **Bradley** delivered the opinion of the court:

Hamilton and Cook were partners in the **505***] grain commission *business at Toledo, Ohio, and kept their consignments of grain in store in an elevator at that place, belonging to the Michigan Southern Railroad Company, whose employees had the entire charge of it. Hamilton retired from the firm in July, 1867, but no notice of the dissolution was given and, by mutual agreement, Cook was allowed to carry on the business in the partnership name until the end of the year. During this period, insurance to the amount of $10,000 was effected with the plaintiffs in error, in the name of the firm, Hamilton & Cook, against loss or damage by fire on the "grain in store; their own, or held by them in trust, or on commission, or sold and not delivered;" this being the usual method of taking insurance among commission merchants in Toledo; and the loss for which this action was brought by Hamilton & Cook, occurred on the 21st of December, whilst the policy was running. The defense set up was: First, want of insurable interest in Hamilton; and second, misrepresentation and concealment with regard to the interest. The case comes upon exceptions to the charge of the court, which was in favor of the plaintiffs below; and the principal question is: whether insurance can be effected in the name of a nominal partnership where the business is carried on by and for the use of one of the partners.

Hamilton was a nominal partner, held out to the world as a member of the firm by his own consent, and affected with every liability of a partner—to consignors' creditors, and all persons dealing with the concern. The plaintiffs claimed that this was a sufficient interest to support the policy, at least, in a commission business where insurance was effected for the benefit of the real owners of the goods. It is objected that a nominal partner is only held such, adversely, for the purpose of subjecting him to liability as a partner, and not for the purpose of giving him the benefits and advantages of a partner. But whilst this is generally true, the interest of a nominal partner in the liabilities of the firm is such as should entitle him, in the absence of any attempt to defraud, to join with the other members of the firm in effecting insurance on the property of the concern. As Chief Justice Jones remarked in *De Forest* v. *Fulton Ins. Co.* 1 Hall, 110: "It does not always require either the legal title or beneficial interest in the property to entitle a party otherwise connected with it to effect a valid insurance upon it. A carrier may insure goods he contracts to convey, yet he has neither the *legal title nor the beneficial [*508 interest in them, but he is responsible for their loss."

But the case of a nominal partnership carried on for the benefit of one or more members of the firm seems to be still stronger. For it may be said that the legal interest in the business is in the firm, whilst the beneficial interest is in the member or members for whose use it is carried on. In the case before us, as to all the world except themselves, the legal interest of the business was in the firm of Hamilton & Cook, the beneficial interest in Cook alone. And as it is well settled that a trustee or agent may insure the property held in that capacity for the benefit of all concerned, there seems to be no valid reason why persons constituting a nominal partnership should not be competent to effect insurance as well as transact the other business in the partnership name. In this case the intimate connection of Hamilton with the business, and the fact that as between him and the consignors of the grain insured, the railroad company with whom it was stored, and all

other persons dealing with it, he was actually a partner, and incurred all the responsibility and risk attaching to that relation, constituted, in our judgment, a sufficient basis of interest for effecting insurance in the name of the firm. The doctrine, established by a number of cases, that nominal partners are proper plaintiffs, as well as proper defendants, in actions by and against the firm, lends support to this view. Pars. Part. 134; Story, Part. §§ 241, 242; 1 Smith, L. Cas. 1190.

The case before us is an especially strong one, from the fact that the policy was effected mainly for the benefit of the owners of grain held by Hamilton & Cook on commission. The action was prosecuted solely for their benefit. The plaintiffs, on the trial, expressly waived any claim for grain belonging to themselves, individually, and asked a verdict only for the value of the grain which was received on commission, claiming to recover this amount for the use and **509*]** *benefit of the owners. The liberality with which policies of this character, issued to trustees and agents for the benefit of parties really interested, are sustained by the courts, is stated and illustrated in the case of *The Insurance Company* v. *Chase*, 5 Wall. 509, 18 L. ed. 524, decided by this court in December term, 1866. As looking in the same direction, we may refer to the cases in New York which decide that a sale by a retiring partner, to his copartners, of his interest in the firm, is not a breach of the condition that the policy shall be void if the property is conveyed without the consent of the insurance company. *Hoffman* v. *Ætna Ins. Co.* 32 N. Y. 405.

The other ground of defense was that there was misrepresentation and concealment, as to the interest, which vitiated the policy. It is laid down by this court in *The Columbian Ins. Co.* v. *Lawrence*, 2 Pet. 49, that an applicant for insurance is bound to fair dealing with the underwriters and, in his representations, should omit nothing which it is material for them to know; nothing which would probably influence the mind of the underwriter in forming or declining the contract. This doctrine is repeated in several subsequent cases, and is, undoubtedly, the well-established law. But its application will depend upon the circumstances of each case. Generally speaking, it is undoubtedly true that any misrepresentation with regard to the ownership of the property insured will suffice to vitiate the policy. But policies are constantly applied for and granted on general stocks of goods, held in trust or on consignment for numerous and unknown parties. In such cases it is not expected, nor would it be possible, that the insurers should be informed as to the ownership. They are content to insure for the benefit of whom it may concern. Of course an omission to disclose the ownership in such cases cannot be regarded as an improper concealment. In some cases it is important to the insurers to know who is interested in the property, in order that they may form a judg- **510*]** ment as to the probable *care which will be bestowed in its custody and preservation. In other cases this knowledge may be a matter of little importance. In the case before us the grain insured was in the sole custody and care of the railroad company, and the insurers were little concerned, as, in fact, their agent made no inquiry, who were the owners or interested therein; and no representation was made on the subject, further than to make the application in the name of Hamilton & Cook, and to ask for a general insurance on the grain in the elevator, whether their own, or held by them in trust, or on commission, etc. Under the circumstances of the case we do not see that anything material for the insurers to know, or that would have had a bearing on taking the risk or fixing the premium, was concealed or withheld. On this subject the court, at the request of the plaintiffs' counsel, charged the jury that if no representations were made with regard to the individuals who composed the firm of Hamilton & Cook, there was no misrepresentation which could avoid the policy, and that if Hamilton & Cook had no actual care or custody of the grain, but that so far as regards its preservation from fire, it was entirely in the control of the railroad company, and so understood by the defendant's agent when the policy was effected, the omission to notify the defendant of the agreement of dissolution could not be considered a concealment which would avoid the policy. Under the circumstances of the case, we do not think there was any error in this charge.

The judgment is affirmed.

Dissenting, Mr. Justice **Clifford.**

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*THE GORHAM MANUFACTURING COMPANY, *Appt.*, v. GEORGE C. WHITE. [*511

(See S. C. 14 Wall. 511-531.)

Patent for designs—identity of—test of infringement.

*1. The acts of Congress which authorize the grant of a patent for designs, contemplate not so much utility as appearance; and the thing invented or produced for which a patent is given, is that which gives a peculiar or distinctive appearance to the manufacture or article to which it is applied.

2. It is the appearance to the eye that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense, and identity of appearance, or sameness of effect upon the eye, is the main test of substantial identity of design.

3. It is not essential to identity of design that the appearance should be the same to the eye of an expert. If, in the eye of an ordinary observer giving such attention as a purchaser usually gives, two designs are substantially the same; if the resemblance is such as to deceive such an observer and sufficient to induce him to purchase one, supposing it to be the other, the one first patented is infringed by the other.

[No. 168.]

Argued Apr. 24, 25, 1872. Decided Nov. 18, 1872.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

This action was commenced in the court below by the appellant, upon letters patent granted to John Gorham, Gorham Thurber, and Lewis Dexter, Jr., for a new design for spoon and fork handles. It is in the usual form, and sets forth the grant of the patent, its assignment to the complainant, and the infringement by the

*Headnotes by Mr. Justice STRONG.

defendant, and prays for an injunction and account.

The circuit court rendered a decree in favor of the defendant, and the complainant appealed to this court. The answer admitted the grant of the patent, but denied infringement.

The case is stated in the opinion.

Messrs. **C. M. Kellar** and **C. F. Blake,** for appellant:

It is not pretended by the plaintiff that the defendant's pattern is exactly like theirs; but it is claimed that the differences are immaterial, have no effect upon the artistic result of the designs, and that the patterns are so much alike that, in the language of the court in *Crawshay* v. *Thompson*, 4 Man. & G. 363, the infringing goods are "calculated to deceive the unwary, or persons moderately skilled in the article, and to injure the sale of the plaintiff's goods."

The question, then, is: Is the imitation close enough to amount to an infringement of the patent? It is agreed on all hands that, so far as the outline of the handles goes, the two classes of exhibits are substantially alike, and that the differences which have been pointed out relate only to the ornamentation.

We start, then, with the plain spoon of the plaintiff's outline, without ornament, and proceed to compare it with the plaintiff's and defendant's ornamentation. The first thing that strikes the eye is, that each differs from the plain handle in this; that in each there is a shoulder, and at each shoulder a scroll. In the plaintiff's design the scroll is on the outer thread; in the defendant's it is upon the inner thread, which proceeds downwards from the upper part of the handle; but both are scrolls; both break the monotony of the surface; one scroll turns in one direction, the other scroll turns in the opposite direction, but both make little bosses which are, at first sight, a striking feature of the plaintiff's design. The top of both exhibits is crowned by the meeting of the lines of the threads. In the plaintiff's design they turn outwards; in the defendant's they turn inwards. In the plaintiff's design a boss of metal surmounts these two scrolls; in the defendant's a boss, a little larger, shaped like a shield, crowns the in-turning bosses; but both break the outline of the top of the handle, and both have a broken surface, which is a relief to the eye of the observer.

In the plaintiff's design there are two threads which surround the handle; in the defendant's there is but one. But the defendant's thread is nearly of equal width with the two threads of the plaintiff's and produces substantially the same effect upon the eye, to wit: to relieve the bald surface of the shank, and to give it lightness and elegance. In defendant's, the shank terminates at the bowl in a point; in the plaintiff's the end of the shank is rounded; but the difference is very slight, and requires close examination to see it.

It is nowhere pretended that a spoon or fork with the threaded handle, having bosses at the shoulder and crowned by the meeting of the threads, and with a boss surmounting this crown, was ever known before; and it is submitted that in this state of the art, to use one wider thread for two threads, and in-turning scrolls for out-turning scrolls, is a mere colorable evasion, and not substantially a different design. In other words, that the devices of the defendant are simply the equivalents of the plaintiff's design, in an artistic point of view.

How is this to be decided Is it by considering each line and scroll an independent device, and regarding the patent as being a patent for the combination of them as instrumentalities? Or is it for the design as a whole, to produce a certain artistic effect upon the eye?

To answer this question, it is needful to consider the purpose of the act of Congress under which this patent was granted. It was designed to foster and encourage the decorative arts. The decorative arts appeal solely to the eye. Threads, bosses, scrolls, tips, considered individually and apart, have no special artistic value or effect upon the eye. It is their relation to that which they are employed to decorate, and to the parts with which they are united to produce the general effect, which gives them their artistic signification. It is the eye of the observer which is to determine whether or not the design, as a whole, is or is not artistic, and whether or not it embodies the same artistic idea or thought.

The means proposed to encourage the decorative arts is, to secure to those who devote to them time, study and attention, the reward of a market for their productions. This market is made up, not of professional experts, but of persons who purchase the articles either for sale or for use. It is uncontradicted that this latter class would, going to the market to purchase silverware, purchase one of these patterns, supposing they were purchasing the other.

The learned judge who tried the case below, treated this patent as being for a combination of instrumentalities, precisely as he would treat a patent for a combined machine, as being for a combination of its operative parts. Now, looking at the matter technically, there can be no doubt that, even in this point of view, if the devices used by the defendant are the equivalents of those used by the plaintiff (that is to say, producing substantially the same effect in substantially the same manner), then they are within the patent.

Take the threads of the plaintiff and the threads of the defendant; what is the function of each when it is placed upon the spoon or fork? Clearly to break its blank surface and give it variety, lightness, and elegance. Do not both operate upon the eye in the same manner, to wit: by narrowing the plain surface of the shank and the upper part of the handle? What is the office of the scrolls at the shoulder? To break the monotony of the thread and to give the eye something to rest upon; and the same office is performed in the same way by the ornamentation at the top of both. All these effects are produced upon the eye, and are the functions of the devices in both patents.

The court below also erred in the construction of the statute.

Patents for designs are granted under the provisions of § 3 of the patent act of Aug. 29, 1842, as amended by § 11 of the patent act of Mar. 2, 1861. The last-named act differs only from the former, as to the duration of such grants, and the fees to be paid to the government therefor.

Section 3 of the act of 1842 authorizes the grant of letters patent for any new and original

design for a manufacture, whether of metal or other material or materials, and after enumerating various other designs, or any new and original shape or configuration of any article of manufacture.

The court below says: "A design for a configuration of an article of manufacture is embraced within the statutes as a patentable design, as well as a design for an ornament to be placed on an article of manufacture. The object of the former may solely be increased utility, while the object of the latter may solely be increased gratification to a cultivated taste addressed through the eye."

This, we submit, is error.

The sole purpose of this provision of the statute is to encourage the development of beauty and taste in matters of art, whether as applied to the fine arts or to manufactures.

As applied to manufactures, it is to add to what is useful, beauty of configuration and ornamentation.

A change of form which produces a useful result, is the subject-matter of patent as an invention. *Davis* v. *Palmer*, 2 Brock. 298.

A configuration addressed to the eye may incidentally increase utility, and still be patentable as a design; but if the object be increased utility alone, it is not patentable as a design.

If the defendant's spoons and forks are so close an imitation of plaintiff's design that purchasers will mistake the one for the other, it must be for the reason that the configuration and ornamentation of the two are substantially alike.

Designs have characteristic features which impress the eye as the characteristic features of a mechanical organization impress the reason. And in the one case as in the other, the minor details may be varied to any extent. So long as they do not vary the impression on the eye in the one case, and the impression on the reason in the other case, the design as the mechanical organization will remain, in substance, the same.

Each produces the same result in precisely the same way, and each, as applied to a plain spoon of the outline of both, has substantially the same artistic result; and so within the strictest definition of the law of equivalents, the defendant's ornamentation as applied to the plain spoon of this outline, must be regarded as the equivalent of the plaintiff's ornamentation, when so applied.

The decided cases in England and in this country contain but little which is authority upon the question involved in this case. In addition to the chancery suit above cited, there is only the case of *Root* v. *Ball*, 4 McLean, 177, which has a direct bearing upon it, and that decides that a design which produces substantially the same appearance as that described in the patent is an infringement. The law of trade-mark is this: "That no person shall use upon his goods a mark which has been adopted by another, and become known in the market as indicating that the goods so marked are his. These trade-marks, like designs, appeal to the eye, and are to be judged solely by the effect they produce upon the mind of the ordinary purchaser. Their purpose is to secure to the person using the trade-mark his market, and the purpose or design of the patent is to secure the inventor his market; but it has long been recognized that a trade-mark would be of no value if it was not infringed, unless it was copied exactly and accurately. The courts have long held the rule which is laid down in the case of *Seixo* v. *Provezende*, L. R. 1 Ch. App. 192.

"What degree of resemblance is necessary, from the nature of things, is a matter incapable of determination *a priori*. All that a court of justice can do is to see that no trader can adopt a trade-mark so resembling that of a rival that ordinary purchasers, purchasing with ordinary caution, would be likely to be misled. It would be a mistake to suppose that the resemblance must be such as to deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use."

Walton v. *Crowley*, 3 Blatchf. 440; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Knott* v. *Morgan*, 2 Keen, 213; *Clement* v. *Haddick*, 22 Law, 428; *Croft* v. *Day*, 7 Beav. 84; *Clark* v. *Clark*, 25 Barb. 76.

The construction of designs contended for by defendant's patents would make them of no practical use to designers. The law intends to reward him who has produced a new and beautiful ornament, with the pecuniary fruits which would result from the public desire to possess that ornament. The human eye is so constructed that it is not affected by a series of details as individual parts; but in looking at works of art it grasps the whole as an entirety. To allow another to produce substantially the same artistic effect, to give substantially the same pleasure to the eye, by preserving the spirit and effect of the new design, while deviating from it in details which are not readily perceived, would render nugatory the whole purpose of the statute, and falsify the promise of reward which it holds out to artists.

Not only this; the introduction of a new design in silver is attended with very serious expenses. Mr. Sperry says that, to one in the trade to introduce a new design, would cost for dies and other tools, from $3,000 to $4,000, and that to parties not in the business it would cost at least $6,000.

In view of this fact and of the comparatively small number of patterns which are a success, no manufacturer would be justified as a business man, in risking his money in bringing out new designs if, as soon as they were a success, they could, under the law, be successfully imitated by making small variations in details, not noticeable to the general public, which would thus take away the market from his goods.

Messrs. **Geo. Gifford** and *W. C. Witter*, for appellee:

The law applicable to inventions in machinery and to the infringement of patents for inventions in machinery, is applicable also to inventions of designs and to the infringement of patents for designs.

An invention of a machine usually consists of parts and the relation of parts, or the relation of parts only, resulting in a particular mode of operation, which is the characterizing feature of the invention.

The invention of a process usually consists of successive steps in the mode of procedure, producing successive intermediate results which tend to and terminate in the final result. This final result may be a new product or substance.

or it may be an old but improved product or substance, or it may be an old product produced in a more advantageous way.

The object to be attained by a design is not always limited to mere appearance; the end may be utility. Improvements, where mere changes of form are useful, may be patented as designs. and because useful, and not because of greater beauty or a more agreeable appearance.

The statute distinctly provides for such designs; the words of the statute are: "any new, useful and original shape or configuration of any article of manufacture."

A design is claimed as a unity, but it is made up of parts, nevertheless, like inventions in machinery, all of the parts in combination constituting the unity. The law, therefore, applicable to an invention in machinery is in like manner applicable to inventions of designs.

Booth v. *Garrelly*, 1 Blatchf. 247; *Root* v. *Ball*, 4 McLean, 177; *Wooster* v. *Crane*, 2 Fish. 583.

In determining the question of infringement of a patent for a design, the same principles and rules must be applied as are applicable in determining the question of infringement of a patent for a combination in machinery.

If the patented design consists of a new addition to some old design, then any other person has a right to take the same old part and add thereto a part substantially different from that added by the patentee, and the use of the design so composed would not infringe the patent. *Root* v. *Ball, supra.*

The court, in determining the question of infringement of a patent for a design, should be governed by the same rules as to similarities and differences that the Commissioner of Patents is in granting a patent.

The court, in comparing designs to determine the question of infringement, must be governed by some principle or rule. It cannot say that because two articles resemble each other in general appearance, and because one may be mistaken for the other by a cursory observer, therefore, one of them is an infringement of a patent for the other. Such resemblance may be due to something not invented by the patentee and not patented. Two articles may resemble each other in general appearance, when one of them in some part contains a patented design and the other has no such part, or anything corresponding therewith. Two spoons of corresponding size resemble each other, because they are spoons and have the form of spoons. This might be true, notwithstanding one might contain an ornament of one design, and the other an ornament of an entirely different design. So a spoon or fork-handle may have an old form in reference to the outline or general shape, and yet contain a patented design of an ornament on some part of it, which would not be noticed without having attention specially called to it. In such a case, evidence of a general resemblance of the two articles and that one might be mistaken for the other would not prove anything of use.

This is exactly the mistake made by the complainants in the examination of their witnesses in this case. They have examined in respect to general appearances, which are not due to the additions made by the patentee to the old article.

There must be reference not only to the general appearance of the article, but to the means of causing that general appearance.

The commissioner, in determining whether or not to allow a patent in such case, passes from the general appearance of the article on which the ornament is placed, to the ornament itself, to ascertain what the applicant has done; that is, to ascertain what figures or parts he has added, and which enter into the construction of the ornament; because if all that the applicant has done is to add a peculiar ornament to the old article, then any other person may add a substantially different ornament to the old article and not infringe.

The patent is granted for the novelty of the parts and the relation of the parts constituting the design, the same as for combinations of mechanism. In a machine, the parts and relations of parts are the means which produce the result; the result is the mode of operation or capacity of the machine. In like manner in a design, the parts and relations of parts are the means which produce the result; but in a design the usual result is appearance. The result, in case of a machine, is addressed to the judgment; while in case of a design, the result is in most instances, but not always, addressed to the eye. In neither case is the result patented or patentable; it is the means only that is the subject of a patent. *O'Reilly* v. *Morse*, 15 How. 62.

When White applied for his first patent, the complainant's patent having then been issued, White was required to describe in his specification the several parts which entered into the construction of his design, and which would and did distinguish it from that of the complainant, and from everything else then known, and it was for a design so identified that he obtained his patent.

When White applied for his second patent, he was required to describe and did describe peculiarities which distinguished the design for which he asked a patent, from the design which he had previously patented, and also from the complainant's design, and from all others then known.

These three patents (that is, the two White patents and the complainant's patent) were all distinct from and independent of each other.

The design covered by complainant's patent consists of the combination of two general divisions; one is the outline or the contour of the edge of the handle, and the other is the ornaments on the sides of the handle.

As nothing less than the whole is patented, there can be no infringement of the patent unless both of those divisions of forms be substantially employed. If the outline be used with substantially different side ornaments, or the side ornaments be used with a substantially different outline of the edge, then only one of the two elements constituting the patented combination would be used, and that, by well-settled principles, would not be an infringement of the combination.

The complainant's patent is expressly limited to peculiarities which the defendant's handles do not contain.

Complainant's patent describes, as peculiarities of their design, at least twelve things, none of which are in any design used by the defendant.

The following are described and represented as peculiarities of the design covered by complainant's patent, and none of these features are in any of the designs used by the defendant:

1. Three protuberances united form the upper tip of the handle.

2. A thread on the boundary of the handle, broken at the shoulders of the handle.

3. The boundary thread is turned at the shoulders into the form of rosettes having the appearance of two parts twisted together.

4. The stem of the handle between the shoulders and the bowl has two threads on each edge.

5. On each edge of the leaf or palm of the handle is a thread inside of the boundary thread.

6. These threads on the leaf or palm of the handle, and which are inside of the boundary thread towards the end of the handle, turn outward from each other, forming diverging scrolls.

7. These scrolls of the inner threads form a part of the outline or boundary of the handle.

8. The extreme upper end of the handle is formed by a tip inserted between these two scrolls.

9. The inner threads of the leaf or palm of the handle abut against the rosettes formed by the outer threads at the shoulders of the handle.

10. The surface of the handle, between the shoulder swells, which swell gradually, flattens towards the widest part of the leaf of the handle.

11. The inner threads on the stem of the handle unite near the bowl in a swell or boss.

12. On the under side of the handle a small raised leaf is inserted between the two threads on both sides.

Nothing is used by the defendant which is patented by complainant's patent. Nothing less than the whole of the parts in combination is patented, and that is not used by the defendant.

It is proved and conceded that none of these peculiarities of complainant's side ornaments are in the defendant's design. A large number of witnesses on the part of the defendant swear and give their reasons in detail; and there is not a single witness on either side, who swears to the contrary or who has pretended that the side ornaments in defendant's design, in themselves considered, are the same, or substantially the same, as the side ornaments in the complainant's design.

The design patented by White in his first patent, and which for a short time was used by the defendant, did not contain, as appears by the patent itself, the complainant's side ornaments; and it not only had side ornaments which were substantially different from those of the complainant, but they were patented as being different.

The design patented by White in his second patent, and which is the one since used by the defendant, has neither the complainant's outline of the handle of the spoon nor the side ornaments; that is, it has neither of the two classes of elements which constitute the design of the complainant.

The design patented to White by his first patent, which was dated Jan. 15, 1867, not containing the complainant's side ornaments, could not infringe complainant's patent, even assuming that it had the outline or edge contour used by the complainant, because in that case it would contain only one of the elements of the combination patented.

The complainant in the court below relied chiefly on the decisions in cases of trade-marks. It assumed that a trade-mark was so nearly the same as the subject-matter of a patent for a design as to make an adjudicated case in one, an authority for the other.

This is a mistake.

The law applicable to trade-marks is not the law which is applicable to letters patent.

A patent for a design, like a patent for anything else, must be governed by the law of patents. When a patent is taken, the patentee voluntarily commits the subject-matter of his patent to the province of the patent law. He voluntarily puts it in that class of property. He invokes the aid of the patent law for its protection, and he, therefore, voluntarily submits to, and must abide by that law.

Again; the subject-matter of a patent and that of trade-marks are not only governed by different law, but they are entirely different things. A design does not perform the office of a trade-mark; a trade-mark does not perform the office of a design. A trade-mark forms no part of the article on which it is placed; it is a mere sign and has no reference to any change in the article on which it is used. A trademark is placed on the article, not to change or affect the article, but to indicate the origin or ownership of the article. Such is not the function or office of a design. A design becomes and is part of the article itself; it is incorporated with the article, and is bought and sold and used as a certain part of the article, just as much as if it were a new mechanical combination. A design has reference to some alteration in the character of the article, a trade-mark has no such property.

The use of an infringing trade-mark is to fraudulently deceive the purchaser, causing him to believe that he is purchasing goods of one manufacturer, when in fact they were made by another. It is, therefore, a fraud, and intended to deceive and cheat the purchaser. The use of the White design by the defendant does not and cannot have any such effect. It has no result of such a kind. It is not used to deceive, and cannot be. No such result is claimed by the complainant. All it claims or pretends to claim is, that the design used by the defendant is upon plated articles, and that theirs is upon silver articles; and that because of some resemblance in general appearance to a cursory observer, parties will not so readily purchase their articles, for fear somebody will suppose that they have plated articles; that is, their claim is that the defendant's design must be suppressed because it is on plated articles and theirs is on silver articles. All that they complain of is, that the defendant's design being used upon plated articles will render it so common in the estimation of some, that they would not like to purchase a silver article, which, from general appearance, might seem to a cursory observer to be a similar thing.

They do not claim that anyone is deceived by the use of defendant's design, nor that there is any attempt to deceive anyone by such use.

What purchaser's eye is deceived by the de-

fendant's use of his designs? Does any purchaser of the plated goods, having on them the defendant's design, suppose he is buying silver goods? Does any purchaser of a spoon sold as a plated article for fifty cents, suppose that he is buying a silver spoon worth $4? Does a purchaser, when buying a plated spoon which is marked and sold as the manufacture of Rogers & Brother, suppose that he is purchasing a silver spoon manufactured by the Gorham Manufacturing Company?

But even if the design patented by complainant's patent were a trade-mark, and the design used by the defendant were a trade-mark so as to make it a question between two trade-marks, the latter would not be an infringement on the former. It is true that as between a trade-mark and an imitation of it, such general resemblance as would mislead buyers who exercise the usual amount of prudence and caution, may constitute an infringement; but in such case, the resemblance must be between the two trade-marks which are placed on the article; that, is the imitation trade-mark must in itself have a resemblance to the genuine trade-mark. The two things in such case to be compared is the individual imitation with the individual genuine. In making the comparison, neither the imitation nor the genuine article can include in its appearance the form or any other characteristic of the article on which the mark is placed. The general appearance referred to in such case, must be limited to the general appearance of the trade-mark, and cannot comprehend therein the appearance of the article on which the trade-mark is placed.

Mr. Justice **Strong** delivered the opinion of the court:

The complainants are the owners of a patent granted on the 16th day of July, 1861, to John Gorham, Gorham Thurber, and Lewis Dexter, Jr., for a new design for the handles of table spoons and forks, and their bill charges that their patent has been infringed by the defendant. The validity of the patent is not denied, nor is it controverted that the defendant has sold spoons and forks which had upon them designs bearing some resemblance to the design described in the complainant's patent. But it is contended that none of the designs on these articles thus sold are substantially the same as the design covered by the patent, and that they are all independent of anything secured to Gorham, Thurber, and Dexter, the patentees.

The sole question, therefore, is one of fact. Has there been an infringement? Are the designs used by the defendant substantially the same as that owned by the complainants? To answer these questions correctly, it is indispensable to understand what constitutes identity of design, and what amounts to infringement?

The acts of Congress which authorize the granting of patents for designs were plainly intended to give encouragement to the decorative arts. They contemplate not so much utility as appearance, and that, not an abstract impression or picture, but an aspect given to those **525*]** objects mentioned in the *acts. It is a new and original design for a manufacture, whether of metal or other material; a new and original design for a bust, statue, bas relief, or composition in *alto* or *basso relievo;* a new or original impression or ornament to be placed on any article of manufacture; a new and original design for the printing of woolen, silk, cotton, or other fabrics; a new and useful pattern, print, or picture, to be either worked into or on any article of manufacture; or a new and original shape or configuration of any article of manufacture—it is one or all of these that the law has in view. And the thing invented or produced, for which a patent is given, is that which gives a peculiar or distinctive appearance to the manufacture, or article to which it may be applied, or to which it gives form. The law manifestly contemplates that giving certain new and original appearances to a manufactured article may enhance its salable value, may enlarge the demand for it, and may be a meritorious service to the public. It, therefore, proposes to secure for a limited time to the ingenious producer of those appearances the advantages flowing from them. Manifestly, the mode in which those appearances are produced has very little, if anything, to do with giving increased salableness to the article. It is the appearance itself which attracts attention and calls out favor or dislike. It is the appearance itself, therefore, no matter by what agency caused, that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense. The appearance may be the result of peculiarity of configuration, or of ornament alone, or of both conjointly; but, in whatever way produced, it is the new thing, or product, which the patent law regards. To speak of the invention as a combination or process, or to treat it as such, is to overlook its peculiarities. As the acts of Congress embrace only designs applied or to be applied, they must refer to finished products of invention rather than to the process of finishing them, or to the agencies by which they are developed. A patent for a product is a distinct thing from a patent for the elements entering into it, or for the ingredients of which it is composed, or for the combination *that [***526** causes it. We do not say that in determining whether two designs are substantially the same, differences in the lines, the configuration, or the modes by which the aspects they exhibit are not to be considered; but we think the controlling consideration is the resultant effect. Such was the opinion of Lord Chancellor Hatherly in *McCrea* v. *Holdsworth*, 6 Ch. Ap. Law Rep. 418. That was a suit to restrain an infringement of a design for ornamenting a woven fabric. The defense was a denial that the design used by the defendants was the same as that to which the plaintiff was entitled. The ornament on both was, in part, a star, but on one it was turned in an opposite direction from that in the other; yet the effect of the ornament was the same to the eye. The Lord Chancellor held the important inquiry was whether there was any difference in the effect of the designs, not whether there were differences in the details of ornament. "If," said he, "the designs are used in exactly the same manner, and have the same effect, or nearly the same effect, then, of course, the shifting or turning round of a star, as in this particular case, cannot be allowed to protect the defendants from the consequences of the piracy." This seems most reasonable, for,

as we have said, it is the effect upon the eye which adds value to articles of trade or commerce. So in *Holdsworth* v. *McCrea*, 2 Ap. Cas. H. L. 388, Lord Westbury said: "Now, in the case of those things in which the merit of the invention lies in the drawing, or in forms that can be copied, the appeal is to the eye, and the eye alone is the judge of the identity of the two things. Whether, therefore, there be piracy or not is referred to an unerring judge, namely: the eye, which takes the one figure and the other figure, and ascertains whether they are or are not the same." This was said in a case where there was nothing but a drawing of the design.

We are now prepared to inquire what is the true test of identity of design. Plainly, it must be sameness of appearance, and mere difference **527***] of lines in the drawing or *sketch, a greater or smaller number of lines, or slight variances in configuration, if insufficient to change the effect upon the eye, will not destroy the substantial identity. An engraving which has many lines may present to the eye the same picture, and to the mind the same idea or conception as another with much fewer lines. The design, however, would be the same. So, a pattern for a carpet or a print, may be made up of wreaths of flowers arranged in a particular manner. Another carpet may have similar wreaths, arranged in a like manner, so that none but very acute observers could detect a difference. Yet in the wreaths upon one there may be fewer flowers, and the wreaths may be placed at wider distances from each other. Surely in such a case the designs are alike. The same conception was in the mind of the designer, and to that conception he gave expression.

If, then, identity of appearances, or as expressed in *McCrea* v. *Holdsworth*, *supra*, sameness of effect upon the eye, is the main test of substantial identity of design, the only remaining question upon this part of the case is, whether it is essential that the appearance should be the same to the eye of an expert. The court below was of opinion that the test of a patent for a design is not the eye of an ordinary observer. The learned judge thought there could be no infringement unless there was "substantial identity," "in view of the observation of a person versed in designs in the particular trade in question—of a person engaged in the manufacture or sale of articles containing such designs — of a person accustomed to compare such designs one with another, and who sees and examines the articles containing them side by side." There must, he thought, be a comparison of the features which make up the two designs. With this we cannot concur. Such a test would destroy all the protection which the act of Congress intended to give. There never could be piracy of a patented design, for human ingenuity has never yet produced a design, in all its details, exactly like another, so like, that an expert could not distinguish them. No counterfeit bank note is so identical in ap- **528***] pearance *with the true that an experienced artist cannot discern a difference. It is said an engraver distinguishes impressions made by the same plate. Experts, therefore, are not the persons to be deceived. Much less than that which would be substantial identity in their eyes would be undistinguishable in the eyes of men generally, of observers of ordinary acuteness, bringing to the examination of the article upon which the design has been placed that degree of observation which men of ordinary intelligence give. It is persons of the latter class who are the principal purchasers of the articles to which designs have given novel appearances, and if they are misled, and induced to purchase what is not the article they supposed it to be; if, for example, they are led to purchase forks or spoons, deceived by an apparent resemblance into the belief that they bear the "cottage" design and, therefore, are the production of the holders of the Gorham, Thurber, and Dexter patent, when in fact they are not,—the patentees are injured, and that advantage of a market which the patent was granted to secure is destroyed. The purpose of the law must be effected if possible; but, plainly, it cannot be if, while the general appearance of the design is preserved, minor differences of detail in the manner in which the appearance is produced, observable by experts but not noticed by ordinary observers, by those who buy and use, are sufficient to relieve an imitating design from condemnation as an infringement.

We hold, therefore, that if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.

Applying this rule to the facts of the present case, there is very little difficulty in coming to a satisfactory conclusion. The Gorham, Thurber, and Dexter design, and the two designs sold by the defendant, which were patented to Leroy S. White, one in 1867, and the other in 1868, are alike the result of peculiarities of outline or configuration, and of ornamentation. These make *up whatever is distinctive in ap- [***529** pearance, and of these, the outline or configuration is most impressive to the eye. Comparing the figure or outline of the plaintiff's design with that of the White design of 1867, it is apparent there is no substantial difference. This is in the main conceded. Even the minor differences are so minute as to escape observation unless observation is stimulated by a suspicion that there may be diversity. And there are the same resemblances between the plaintiff's design and the White design of 1868, and, with a single addition, the minor differences are the same. That additional one consists in this: At the upper part of the handle, immediately above the point where the broader part widens from the stem with a rounder shoulder, while the external lines of both designs are first concave, and then, gradually become convex, the degree of concavity is greater in the White design. How much effect this variance has must be determined by the evidence. In all the designs, the ornament is, in part, a rounded molding or bead along the edge with scrolls at the shoulder and near the top. There are, however, some diversities in this ornament, which are discoverable when attention is called to them. In the plaintiffs', the bead is interrupted at the shoulders and at the tip by the scrolls, while in both the designs of White it is continued unbroken around the scrolls. In the plaintiffs'

the scrolls turn inward at the shoulders and outward at the tip. In the White design they turn inward both at the shoulders and at the upper end. But there are the same number of scrolls in all the designs, and they are similarly located, all having the appearance of rosettes. In all, the external bead is formed by a depressed line running near the edge of the handle, but in the plaintiff's there is an inner line, making a second very thin bead, nearly parallel to the external bead common to them all. In the White designs this inner line is wanting on the stem of the handle, though not on the broad part, but as the single line is wider it presents much the same appearance as it would present if divided into two. There are other small differences which it is needless to **530***] specify. *What we have mentioned are the most prominent. No doubt to the eye of an expert they are all real. Still, though variances in the ornament are discoverable, the question remains: Is the effect of the whole design substantially the same? Is the adornment in the White design used instrumentally to produce an appearance, a distinct device, or does it work the same result in the same way, and is it, therefore, a colorable evasion of the prior patent, amounting at most to a mere equivalent? In regard to this we have little doubt, in view of the evidence. Both the White designs, we think, are proved to be infringements of the Gorham patent. A large number of witnesses, familiar with designs, and most of them engaged in the trade, testify that, in their opinion, there is no substantial difference in the three designs, and that ordinary purchasers would be likely to mistake the White designs for the "cottage," *viz.*, that of the plaintiffs. This opinion is repeated in many forms of expression, as, that they are the same pattern; that the essential features are the same; that seven out of ten customers who buy silverware would consider them the same; that manufacturers as well as customers would consider them the same; that the trade generally would so consider them; that, though there are differences, they would not be noticed without a critical examination; that they are one and the same pattern, etc., etc. This is the testimony of men who, if there were a substantial difference in the appearance or in the effect, would most readily appreciate it. Some think the White designs were intended to imitate the other, and they all agree that they are so nearly identical that ordinary purchasers of silverware would mistake one for the other. On the other hand, a large number of witnesses have testified on behalf of the defendant that the designs are substantially unlike, but when they attempt to define the dissimilarity they specify only the minor differences in the ornamentation, of which we have heretofore spoken. Not one of them denies that the appearance of the designs is substantially the same, or asserts that the effect upon the eye of an observer is different, **531***] or that ordinary purchasers, or *even persons in the trade, would not be led by their similarity to mistake one for another. Their idea of what constitutes identity of design seems to be that it is the possibility of being struck from the same die, which, of course, cannot be if there exists the slightest variation in a single line. They give little importance to configuration, and none to general aspect. Such evidence is not an answer to the complainants' case. It leaves undisputed the facts that whatever differences there may be between the plaintiffs' design and those of the defendant in details of ornament, they are still the same in general appearance and effect; so much alike that in the market and with purchasers they would pass for the same thing—so much alike that even persons in the trade would be in danger of being deceived.

Unless, therefore, the patent is to receive such a construction that the act of Congress will afford no protection to a designer against imitations of his invention, we must hold that the sale by the defendant of spoons and forks bearing the designs patented to Leroy S. White in 1867 and 1868 is an infringement of the complainants' rights.

The decree of the Circuit Court is reversed, and the cause is remitted, with instructions to enter a decree in accordance with this opinion.

Mr. Justice **Miller**, Mr. Justice **Field**, and Mr. Justice **Bradley** dissented in this case.

THOMAS P. MORGAN *et al., Appts.,*
v.
UNITED STATES.

(See S. C. 14 Wall. 531-535.)

Court of claims cannot render judgment for tort — when government not liable for loss of hired vessel.

1. Claimants cannot recover in the court of claims, on the ground that the injuries to their vessel were occasioned by the tortious act of an officer of the government in compelling their master, against his better judgment, to proceed to sea.

2. Where the United States hired a vessel to transport troops and munitions of war, the United States assuming the war risk, while the owners of the boat agreed to bear the marine risk, the stranding of the boat in going over a bar was owing to a peril of the sea, and her owners and not the government must bear the loss.

3. The peremptory order of the quartermaster to proceed to sea is outside the contract, and no recovery can be had thereon, by reason thereof, in such court.

[No. 225.]

Argued Nov. 8, 1872. Decided Nov. 18, 1872.

APPEAL from the Court of Claims.

The appellants hired, March 1, 1865, a vessel to the United States by charter party.

The owners were to keep the vessel stanch, tight, manned, victualed, appareled, and fit for merchant service.

The United States was to pay them $182.25 per day, except for time lost in consequence of the failure of the claimants to perform their covenant next above.

The United States was to employ the vessel and pay the *per diem* "until the said vessel is returned to the said party of the first part, in Philadelphia, in the same order as when received, ordinary wear and tear, damage by the elements, collision at sea or in port, bursting of boilers and breakage of machinery excepted." The charter was to continue in force as long as the War Department required the vessel.

The owners were to bear the marine risks.

The United States was to bear the war risk.

The vessel being at Brazos, St. Iago, Texas, under this charter, was ordered by the United

States Quartermaster there to put to sea. She was in charge of a government pilot, and was towed by a government tug. On the first attempt it was found that the water in the bar was too shallow to float the vessel; she struck; the tow-line parted; and after sustaining some damage, she returned to her landing. Then, against the judgment of the master and pilot, and with a full knowledge of the danger, the quartermaster required the attempt to be renewed, the exigency of the service, in his judgment, justifying the order.

The attempt was renewed, in obedience to this order, and the vessel was dragged over the bar sustaining such injuries as cost $6,890.80 to repair, and 45½ days of time were occupied in repairs, in which time a *per diem* of $8,292.37 accrued. The government paid $4,283.20 of the repairs and $2,281.06 of the *per diem*, being the amount of wages and board of master and crew who were employed on the repairs of the vessel.

The court of claims ruled that the government was not liable to pay any more.

Messrs. J. M. Carlisle, **J. D. McPherson**, and *N. P. Chipman*, for appellants:

The court erred in holding that the United States was not liable for the whole amount of the *per diem* and repairs; and that the United States was not liable to pay any more than they had paid.

Under the terms of the charter party the United States were *pro hac vice*, the owners of the vessel.

Trinity House v. *Clark*, 4 M. & S. 288; *Belcher* v. *Capper*, 4 M. & G. 502; *Newberry* v. *Colvin*, 7 Bing. 190, 1 Cl. & F. 283; *Morgan* v. *United States*, 5 Ct. Cl. 182; *Lander* v. *Clark*, 1 Hall. 355.

The United States was bound to pay the *per diem* unless the owners were in default.

It is true that the owners did not keep the vessel stanch and tight during all the time. But this they did in part and as to part were prevented from doing so by the act of the United States, and their failure cannot be set up to bar their action.

1 Ch. Pl. 358; *Young* v. *Preston*, 4 Cranch, 239.

Mr. **C. H. Hill**, *Asst. Atty. Gen.*, for appellee.

Mr. Justice **Davis** delivered the opinion of the court:

These claimants cannot recover on the ground that the injuries to their vessel were occasioned by the tortious act of the quartermaster at Brazos in compelling their master, against his better judgment, to proceed to sea; nor would their condition be improved if the vessel had been actually impressed into the service of the United States, for in neither case would the court of claims have jurisdiction. *Reed* v. *United States*, *ante*, 220; *United States* v. *Kimbal*, *ante*, 507. Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on the wrongful proceedings of an officer of the government.

The case, therefore, rests wholly on the contract of affreightment, and the inquiry is: Which of the two parties to it must bear the loss caused by the stranding of the claimants' vessel on the bar at the mouth of the harbor of Brazos.

The stipulations in the contract applicable to this subject leave no room for doubt how the question should be answered. The United States, being in a state of war, found it necessary to hire the injured vessel for the purpose of transporting troops and munitions of war to different ports and places, and entered into a contract with her owners to carry this purpose into effect. The vessel was to be officered and manned by the owners, who agreed at all times to keep her in repair and fit for the services in which she was engaged. In no sense were the United States the owners of the vessel, for they had nothing to do with her management, and only reserved to themselves the right to say she should be loaded and where she should go. In the condition of things then existing it became necessary to make provision for two classes of perils. This was done; the *United States assuming the war risk, while the owners of the boat agreed to bear the marine risk. If, therefore, the stranding of the boat in going over the bar was owing to a peril of the sea, her owners and not the government must bear the loss. [*535

That the high wind and low stage of water were the efficient agents in producing this disaster are too plain for controversy. They were the proximate causes of it, and in obedience to the rule, "*Causa proxima non remota spectatur*," we cannot proceed further in order to find out whether the fact of war did not create the exigency which compelled the employment of the vessel; if it did, it was known to the owners when the charter-party was formed, who, with this knowledge, became their own insurers against the usual sea risks, and must abide the consequences of their stipulation.

There is a certain degree of hardship in this case growing out of the peremptory order of the quartermaster to proceed to sea, but this is outside of the contract and, if worthy of being considered at all, must be addressed to another department of the government.

The judgment of the court of claims is affirmed.

UNITED STATES, *Appt.*,
v.
HENRY J. HUNT.

(See S. C. 14 Wall. 550-553.)

General ranks higher than brevet-general.

Under the act of Mar. 3, 1865, increasing the commutation price of the rations of any officer not above the rank of brevet brigadier-general, a brigadier-general is above such rank.

[No. 221.]

Argued Nov. 8, 1872. Decided Nov. 18, 1872.

APPEAL from the Court of Claims.

The petitioner, a brigadier-general of volunteers, claimed commutation pay under the 3d section of the act of March 3, 1865, 13 Stat. at L. 497.

The court of claims gave judgment in his favor, and the United States appealed and assigned as error that a brigadier-general is not entitled to the benefit of this provision.

Mr. **C. H. Hill**, *Asst. Atty-Gen.*, for appellants.

Mr. **T. J. D. Fuller** for appellee.

Mr. Chief Justice **Chase** delivered the opinion of the court:

The only question in this case arises under the act of Congress of March 3, 1865. That act increased the commutation price of officers' subsistence during the continuance of the Rebellion, to 50 cents per ration, with the proviso that the increase should not apply to any officer above the rank of brevet brigadier-general, nor any officer entitled to commutation for fuel and quarters.

The demurrer to the petition admits that the petitioner was a brigadier-general during the recent Civil War, and was not entitled to commutation for fuel and quarters. He was then entitled to the increased commutation of subsistence if his rank of brigadier was not above the rank of brevet brigadier.

The question is: Was it such?

Our duty in construing acts of Congress is to give the meaning to words which Congress obviously intended. It may be that in the strict sense of the military term the rank of brigadier and brevet brigadier is the same, but it is well known that practically they are by no means identical, and that the position of the former is, in many respects, better than that of the latter. Brevet rank is conferred, in theory at least, for special and meritorious services by commission from the President, under authority of an act of Congress. It does not entitle the holder to corresponding pay or command, except under special circumstances defined by law. When an officer holding rank by brevet receives a regular commission of the same grade, he is said to be promoted and to become a full officer of that rank. These circumstances make it evident that there is a difference of military position between an officer by brevet and an officer by regular commission, and that the one is less eligible than the other. And Congress seems to have referred to this distinction of position rather than to technical rank in the provision under consideration. If they did not, why employ the word "brevet" at all? Why use the term "brevet brigadier" when it was so easy to say brigadier, and thus avoid all ambiguity? We think that Congress had in view the distinc-
553*] tion *between brevet rank and regular rank, to which we have referred, and regarded the latter as above the former. The practice of the Department of War, as we understand, and of the accounting officers, has been in accordance with this view, and seems to us correct.

The judgment of the court of claims must, therefore, be reversed.

RICHARD GREGG, *Plff. in Err.*,
v.
WILLIAM S. MOSS.

(See S. C. 14 Wall. 564-569.)

Rejection of immaterial evidence — charge to jury, when sufficient.

1. It is not error which should reverse a judgment, to reject evidence where its rejection worked no harm to the party, whether it was strictly admissible or not.
2. This court cannot review a finding of a jury upon a question of fact.
3. Where the charge puts the case to the jury on fair grounds, and this court can see no objection to the legal propositions stated by the court and excepted to by counsel, the court will not reverse on account of the charge.

[No. 185.]

Submitted Oct. 29, 1872. Decided Nov. 18, 1872.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of assumpsit brought in the court below by the plaintiff in error against the defendant in error, to recover the sum of $10,000 alleged to have been loaned by him to the defendant and one William Kellogg, December 23, 1856, together with interest thereon. Four trials were had. The first resulted in a verdict for plaintiff for $17,112.88. In the second trial the jury disagreed. On the third, the jury found for the plaintiff for $17,350. On the fourth trial, the jury found for defendant. A motion for a new trial was made and overruled, and the plaintiff brought the case to this court by writ of error. Errors are alleged in the rulings of the court below, as to evidence and the instruction by the court to the jury. The nature of the exceptions as to the evidence appears in the opinion. The charge of the court to the jury was as follows:

"This is an action by the plaintiff to recover of the defendant $10,000 which he claims to have advanced to one Kellogg and Mr. Moss, on the 23d of December, 1865. It is alleged on the part of the plaintiff that, on and for some time before and after the 23d of December, 1856, there existed a business firm in Peoria, in this state, by the firm name of Kellogg, Moss, & Co., of which the plaintiff and defendant and one William Kellogg, with several other persons, were members; that, on the 23d day of December, 1856, said firm had drafts maturing on the 24th of December, the next day, to the amount of $10,000 in St. Louis, upon which one Elder was an accommodation indorser; that on the 23d of December, 1856, Elder called on Kellogg, who was the financial and active member of said firm, for funds with which to meet the drafts maturing the next day; that the firm not having the money, Kellogg and Moss united in a letter addressed to the plaintiff, Gregg (the letter which was introduced in evidence and which you have all examined) by which they promised, if the plaintiff would furnish two drafts of $5,000 each, at sixty days, they would see him paid. That, upon the faith of the promise contained in this letter, he, the plaintiff, advances to Kellogg and Moss the sum of $10,000. There is some conflict of testimony as to whether the proposition contained in this letter was accepted and the money paid by Gregg or not. Upon this question of fact you are the judges. But if you shall be satisfied, from the evidence, that Gregg did advance the money on this letter as he says, with the distinct understanding that Kellogg and Moss should be individually liable therefor, as alleged, then I am of opinion he can maintain this action for it. Kellogg and Moss might have made themselves individually liable to pay this money, although it was really obtained to pay a debt of the firm. It is for you to say whether they did so. If they promised to be individually responsible for the amount obtained, they are liable on such promise. It is objected on the part of the defendant that the letter only asks for drafts, and that

the plaintiff must show a literal compliance with the terms of the letter before he can recover; that is to say, he cannot, upon a request to furnish drafts, furnish money instead of drafts and hold Moss for the money. But the court is of opinion that the payment of money is a substantial compliance with the request contained in the letter. The object of the letter was to obtain funds to meet the drafts maturing the next day, and it seems to me too strict and technical a construction to insist that the plaintiff cannot recover on this letter because he paid money instead of drafts, the money having been accepted by one of the joint promisors in the letter. This is substantially the plaintiff's case, and if you are satisfied from the evidence that Gregg did advance the money in question on the faith of the individual promises of Kellogg and Moss, contained in their letter, the court instructs you, as a matter of law, that such facts make out a case for the plaintiff and he will be entitled to a verdict at your hands unless you shall be satisfied that the defendant has made out the defense set up. But you must be satisfied from the evidence that plaintiff paid the same on the credit of Kellogg and Moss, and not as an advance to the firm of which they were all members. The defense is substantially (in addition to the denial of plaintiff's case which is involved in the plea of general issue which puts the plaintiff on proof of his case) that, on the 1st of December, 1857, an agreement was entered into between the members of the old firm of Kellogg, Moss, & Co., and certain other parties, among whom was Gen. A. C. Harding, by which it was agreed that the moneys theretofore advanced by each member of the firm of Kellogg, Moss, & Co., and put into its capital stock, should be funded and provided for as particularly set forth in the agreement; that is to say, whatever money had been put in as capital stock, or by way of advancement to the firm, by each individual member thereof, should be funded, and that the plaintiff, at the time of becoming a party to this agreement, agreed that this sum of $10,000 which he had advanced for the purpose of paying Elder for the purpose of meeting drafts in St. Louis, should be considered as part of the capital put into the firm by Gregg and funded by him in the manner provided in the contract. There can be no doubt that this $10,000, if advanced by Gregg on this letter of Kellogg and Moss, was money paid for the use of said firm of Kellogg, Moss, & Co., and which he was entitled to treat at least in equity as a debt against said firm. The letter explains the transaction in that regard very fully, so that there is no mistake or escape from it. Whatever funds were advanced on that letter were to be advanced for the purpose of paying liabilities of the firm of which Gregg was a member. It was an advance to meet an indebtedness of the firm; to protect its commercial honor; and although Kellogg and Moss may have made themselves personally liable to pay the money within sixty days to Gregg, yet Gregg was at liberty to deem the firm also liable for it, especially if not paid within sixty days. If they made default, did not make payment or cause it to be made within sixty days, he might say that, having gone to increase the assets of the firm, the firm was liable, as well as Kellogg and Moss, for the payment of the money. Gregg, the plaintiff, had his election to hold the firm as well as Kellogg and Moss, to consider it as capital put with the firm by himself."

And to the foregoing charge of the court relating to the right of Gregg to have this election to hold the firm as well as Kellogg and Moss, the plaintiff, by his counsel, then and there excepted; and the court continued its charge as follows:

"It was also competent for Gregg to release or waive his claim against Kellogg and Moss for the payment of this $10,000, and rely solely on the firm for his readvancement, or upon any agreement which the firm might make for reimbursement to the members thereof for the capital they had put in.

"The agreement of December 1, 1857, is between the members of the old firm of Kellogg, Moss, & Co., and certain other parties by which it is substantially agreed that the old members of the firm of Kellogg, Moss, & Co. should fund their respective advances to the old firm. The amount which each member of the old firm was thus to have funded to be made up from a statement or vouchers to be made and furnished by each member of the old firm of the cash advances made by them respectively. Having a right to treat this $10,000 as a part of his advances to said firm, it is for you to say, under the evidence, whether the plaintiff did so, or agreed to do so."

And to the foregoing part of the charge, which says that Gregg had a right to treat the $10,000 as a part of his advances to the said firm, the plaintiff, by his counsel, then and there excepted. And the court continued its charge as follows:

"By the agreement of December 1, 1857, the new firm not only assumes to pay the outstanding liabilities of the old firm of Kellogg, Moss, & Co., out of the earnings of the Peoria & Oquawka Railroad, but also to pay in their order future advances, the operating expenses and funded capital of the members of the old firm of Kellogg, Moss, & Co. And this undertaking on the part of the new firm is a sufficient consideration to sustain the agreement to treat this $10,000 as a claim against the old firm instead of a claim against Kellogg and Moss individually."

And to the foregoing part of the charge, saying that "this undertaking on the part of the new firm is a sufficient consideration to treat the $10,000 as a claim against the old firm instead of a claim against Kellogg and Moss individually," the plaintiff, by his counsel, then and there excepted; and the court proceeded with the charge as follows:

"If, therefore, the evidence in the case satisfies you that Gregg, at the time of the agreement of the 1st of December, 1857, was made, assented to treat this $10,000 as a part of his advances to the firm of Kellogg, Moss, & Co., and to have the same funded as contemplated in said agreement, such assent on his part is binding upon him, and releases Kellogg and Moss from their promise to pay the said sum or see the same paid. It is a substitution of the liability of the new firm to ultimately reimburse this amount as a part of the capital put into the old firm by Gregg for the individual liability of Kellogg and Moss to Gregg. But it is for you

to say, under the evidence, whether such assent or agreement to fund was. in fact, made or not. If made, the defense is made out."

And to the foregoing part of the charge of the court, relating to the effect of Gregg's assent to treat the $10,000 as having been funded, and thereby releasing Kellogg and Moss from their promise to pay said sum, the plaintiff by his counsel then and there excepted; and the court proceeded with the charge as follows:

"If not made, that is to say, if Gregg did not assent thus to fund this specific sum of $10,000, and agree that he would treat this $10,000 as a part of his capital, then it is otherwise. Nor is it material whether the plaintiff afterwards included this amount in his statement of advances to the old firm or not. It is enough if you should be satisfied that he agreed to do so. Granting that Kellogg and Moss were liable to make it good to him in December, 1857, still if Gregg agreed that the sum for which they were so liable should be carried over to his capital stock with Kellogg, Moss, & Co., then the agreement is binding on the plaintiff because this sum had already clearly been put into the affairs of the firm, and either the plaintiff or Kellogg and Moss were entitled to have it charged up as part of the assets furnished and sunk in the past business of the firm."

And to the foregoing part of the charge of the court, holding that it was not material whether the plaintiff afterwards included this amount of $10,000 in his statement of advances to the old firm or not, the plaintiff, by his counsel, then and there excepted; and the court proceeded with the charge as follows:

"If the plaintiff agreed to charge it with his account against the firm, he thereby put Kellogg and Moss at rest in regard to this claim, and cannot now set up his failure or neglect to put this claim into his account as a reason to recover in this case. It is his own fault if he did not include this item in his account to be funded against the old firm, and he cannot take advantage of his own neglect in this particular. If he made a mistake in this regard, the defendant cannot be held liable for that mistake in this action. If they (Kellogg and Moss) had understood that their liability still existed on this letter, they might have taken action themselves to have had the claims provided for and funded to their credit among the accounts of the old firm."

And to the foregoing part of the charge, holding that it is the plaintiff's own fault that he did not include this item in his account to be funded against the old firm, and as the defendant's right to regard himself as put at rest as to the said claim, the plaintiff, by his counsel, then and there excepted; and the court proceeded in its charge as follows:

"Nor is it your or my province to go into an inquiry as to the fairness of this contract of the 1st of December, 1857. The firm of Kellogg, Moss, & Co. was then conceded to be seriously embarrassed if not insolvent. Other parties proposed to come in and take charge of the affairs of the firm. Some of the old partners chose to step out and take bonds of indemnity against the liabilities of the old firm. The terms upon which all this should be done were agreed upon, and their fairness or unfairness is not involved in any inquiry that we are to make. There is one point, and that is as to interest, upon which no question has been made. If you find for the plaintiff, he is entitled to interest on the claim from the time that he made his advances; if not, you will simply say you find for the defendant."

Mr. **Obadiah Jackson** for plaintiff in error.

Messrs. **Harding** & *McCoy* for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This cause has been submitted to us on printed arguments on each side, with replies and counter replies, none of which contains any regular assignment of errors, as required by the 21st rule of this court. The record presents a bill of exceptions of thirty printed pages of testimony, which is certified to be all that was given on the trial, and the arguments address themselves to the entire merits on this evidence.

We have felt very much inclined to dismiss the writ of error or affirm the judgment, without an attempt to look up the questions of law which might possibly be involved in the record, for the number of cases coming to this court in which the bill of exceptions embodies all the evidence offered, and counsel, tempted by this, argue before us the whole case as if the verdict concluded nothing, requires a decisive remedy.

As far as we are able to see, there are but two questions of law raised by the record.

The first relates to the exclusion of a single item of evidence offered by the plaintiff, and the second to the charge of the court.

The action is brought on a written statement dated in 1856, and signed by defendant and Wm. Kellogg. It is in the form of a letter, requesting plaintiff to furnish them with money to the amount of $10,000, which they wish to place in the hands of Mr. Elder, for immediate use, and they promise to repay it within sixty days. No question is made but that the money or its equivalent was advanced by plaintiff. But it seems that there existed at that time in Peoria, where the transaction occurred, and where all the parties resided, a partnership, styled Kellogg, Moss, & Co., of which plaintiff and defendant and Kellogg and others were members, and that the money furnished by Gregg was used for the benefit of this partnership. The defendant alleged that the money was advanced by plaintiff to the partnership and on its credit, and not on the individual credit of Kellogg and Moss; and if this were not so at the time, that the plaintiff afterwards agreed that this sum, with others advanced by him to the partnership, should become capital in the partnership business, and thus increase his share of the capital.

The plaintiff proved the signatures to the letter, and that the sum mentioned in it was received by Mr. Kellogg, partly in money and partly in paper which answered the purpose, and in the further progress of his case he offered to prove by a competent witness that only a few minutes after Kellogg had obtained the money he told the witness that he had received the money from the plaintiff, and had fixed Elder off, and that Elder had gone home. The exclusion of this testimony is the occasion of the first bill of exception.

*We have a learned argument on the [*569

vexed question of the admissibility of the declarations of one partner, or joint obligor, against the other. But we are of opinion that the ruling of the court presents no error which should reverse the judgment, because its rejection worked no harm to the plaintiff. The execution of the paper was not denied, nor was it controverted, except by the general form of the pleading, that Kellogg had received the money. It had already been proved by several other witnesses and was at no time made a point in the case. The whole controversy before the jury turned on the question whether the money so received was advanced by Gregg on the credit of Kellogg and Moss alone, and if so, whether he had afterwards agreed to convert it into capital. The admission of Kellogg that he had received the money from Gregg gave no light on either of these questions. The judgment should not be reversed for the rejection of this testimony, whether it was in strict legal principle admissible or not.

The brief of the plaintiff proceeds to argue that the evidence before the jury does not sustain either of the allegations of advancing the money to the partnership, or the agreement of the plaintiff to convert it into capital of the partnership. With this we can have nothing to do. It was the province of the jury to determine whether either of these allegations was proved, for either of them was a valid defense to this action, and they have found in favor of defendant.

It is claimed, however, that the instructions of the court on this branch of the subject were erroneous—to the prejudice of the plaintiff.

We have examined carefully the points of the charge objected to as well as the other parts of it and, without elaborating the matter, we are of opinion that it puts this, the turning point of the case, to the jury on fair grounds, and we can see no objection to the legal propositions stated by the court and excepted to by counsel.

The judgment is, therefore, affirmed.

570*] *BRIAN PHILPOT *et al., Plffs. in Err.,*
v.
ALICE B. GRUNINGER, Exrx. of Lawrence Gruninger, Deceased.

(See S. C. 14 Wall. 570-578.)

Consideration of contract—motive, and expectation—note, consideration of—rejection of immaterial evidence.

1. There is a clear distinction sometimes between the motive that may induce to entering into a contract, and the consideration of the contract.
2. An expectation of results often leads to the formation of a contract: but neither the expectation nor the result is the cause or meritorious occasion requiring a mutual recompense in fact or in law.
3. A conveyance of the property made to a firm, is an adequate consideration for a note given by one of the firm for the same.
4. The rejection of evidence which did not injure the defendants, is no ground of error.

[No. 177.]

Argued Oct. 28, 1872. Decided Nov. 18, 1872.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of assumpsit, brought by Lawrence Gruninger, and after his death prosecuted by his widow, against the plaintiffs in error, as copartners, in the circuit court of the United States for the northern district of Illinois, on a promissory note for $3,000 made by plaintiffs in their firm name, at Philadelphia, Pa., May 6, 1865, and payable on demand to the testator, Lawrence Gruninger, or order. Plaintiffs pleaded a total and also a partial failure of consideration. Philpot and Picket pleaded jointly; Sherman separately. Verdict and judgment were rendered for defendant in error, and plaintiffs prosecuted this writ.

The facts are stated in the charge of His Honor, Judge Drummond, to the jury, as follows: "These parties, the deceased, Lawrence Gruninger, and Philpot and Picket, the defendants, and Sherman, but particularly Philpot and Picket, seem to have been concerned, in the fall of 1864, in oil operations in Pennsylvania, and October 19 of that year, Gruninger sold to Philpot and Picket, in consideration of a certain sum of money, paid and to be paid thereafter, his interest and claim in a lease of lot 15, on the Smith farm, on Cherry Run, Venango county, upon which there was a flowing well of about one hundred barrels of oil, more or less, per day, his claim being one half of the working interest, or one quarter of all the oil produced upon the lot.

"On the same day Gruninger sold to Philpot and Picket his interest in a well in the Coombs lease, on the Blood farm—the claim being one eighth of the working interest, in consideration of a certain sum of money to be paid by Philpot and Picket.

"February 24, 1865, Picket wrote a letter to Gruninger, in which he said he had just heard that Gruninger had returned from Massachusetts; that he had received a letter from Gruninger which he intended to answer at once. He says, further, that he was glad to learn that Gruninger had got back among them, and hoped that he would be able to come and see them before long. The letter ends with this paragraph: 'I think we can fix up that Blood farm matter satisfactorily when you come up. If we can do any thing to your advantage, we shall be glad to do so.'

"April 21st, some parties, among whom were Philpot, Sherman, & Co., entered into an agreement by which they were to put certain interests in lands, oil wells, etc., into a concern which was to form a joint-stock company.

"May 6, 1865, the date of the note given by the defendants, this memorandum was added by Gruninger to the agreement between Philpot, Sherman, & Co., and the other parties; 'May 6, 1865. It is agreed this day that Lawrence Gruninger is to put into the company one half the working interest, it being one quarter of all the oil on or to be produced on the lease of lot 11, on Smith's farm, on Cherry Run, on the same terms and conditions as the balance of the parties,' etc. And also to take the same proportion or pro rata of the profits in said company, at and for the sum of $30,000. And, on the same day, Gruninger sold to Philpot, Sherman, & Co. one eighth of the working interest, being one sixteenth of all the oil produced from well No. 2, lot 7, of Oil Creek, Blood farm. And on the same day also, the defendants ex-

with when valid on its face and issued by a person actually exercising the duties of assessor of that collection district.

The remedy of the taxpayer is to pay his tax under protest and bring an action of *assumpsit* to recover it back.

Phila. v. *Collector*, 5 Wall. 731, 18 L. ed. 616; *Lincoln* v. *Worcester*, 8 Cush. 55.

Upon the third plea and the replication thereto, this action, therefore, will not lie, and judgment should have been arrested.

2. The replication to the third plea is bad, as it omits to allege an appeal to the commissioner of internal revenue for an abatement of the tax. This is a condition precedent to an action to recover back the tax. *Collector* v. *Hubbard*, *ante*.

This defect is fatal to the maintenance of the action and is not aided by verdict, because it was a matter collateral to the issue tried and covered by the verdict, and cannot be presumed to have been proved at the trial.

1 Wms. Saund. 228, *a*, 228, *b*; *Rushton* v. *Aspinall*, 2 Doug. 679; *Jackson* v. *Pesked*, 1 M. & S. 234; *Smith* v. *Jackson*, 1 Paine (C. C.) 486.

The defendant in error cannot take advantage of allegations or recitals in other parts of the record not connected therewith, to make good any defect in his replication. That must stand or fall by itself.

1 Chit. Pl. 8th Am. ed. 563; *Davies* v. *Penton*, 6 B. & C. 216.

Messrs. Smith & **Stark**, for defendant in error:

The collector is liable to an action by a person whose property has been taken by the collector for a tax not owing to the United States.

The internal revenue act clearly recognizes the right of action.

Act of June 30, 1864, § 44, 13 Stat. at L. 239, as amended by § 9 of the act of July 13, 1866; 14 Stat. at L. 111; *Phila.* v. *Collector*, *supra*.

Although the error be made by the assessor, he is not liable where he had jurisdiction, but the collector who commits the wrongful act is the proper defendant.

Assessors v. *Osbornes*, 9 Wall. 567, 19 L. ed. 748.

The last point made by the counsel for defendant below, and that on which he chiefly relied, was that the replication to the third plea does not allege that the plaintiff took an appeal from the assessment to the commissioner of internal revenue.

The argument for the plaintiff in error is understood to be based on the principle that where a right of action is given by a statute the declaration thereon must negative the exceptions in the statute. The exception in this statute is claimed to be created by § 19, act of July 13, 1866, 14 Stat. at L. 152.

The rule of pleading on which the objection is grounded, is thus accurately and carefully stated by Chitty (1 Chit. Pl. 255):

"In pleading upon statutes where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exception; but if there be an exception in a subsequent clause, that is a matter of defense, and the other party must show it, to exempt himself from the penalty."

There are several answers to this argument:

First. This provision of § 19 is not in the enacting clause of § 44. The last-named section was in the first internal revenue act, passed in 1864, and has remained in force, except as amended by the act of 1866, 14 Stat. at L. p. 111, in particulars immaterial to the present question. The provision relied upon by the plaintiff in error was enacted two years afterwards, and is not in form or substance an amendment to § 44, nor an exception thereto. It is by no means, therefore, within the rules above laid down.

Second. The provision of § 19 is a restriction or limitation upon the right to sue theretofore existing. It is, therefore, matter of defense. If available in this case as a bar to the action, it should have been set up by the defendant in his plea or rejoinder.

Rex. v. *Hall*, 1 T. R. 320; cited, 1 Saund. 262; *R. Co.* v. *Hanks*, 36 Ill. 281; Chit. Pl. 254.

Third. The limitation relied upon by the defense does not apply at all to this action. It relates exclusively to suits "for the recovery of any tax alleged to have been erroneously or illegally assessed or collected." It cannot fairly be stretched so as to include this action of trespass *de bonis*.

Fourth. The third plea is defective in not alleging that the tax in question was lawful or owing by the plaintiff. In a direct action against the collector, there is no presumption in favor of the validity of this assessment.

Fifth. If the replication be defective, yet the fault is cured by the verdict. The defendant below should have demurred. The omission to set up the appeal to the commissioner might have been bad on general demurrer, and yet good after verdict.

Renner v. *Bank*, 9 Wheat. 581; *Dobson* v. *Campbell*, 1 Sumn. 319; *Stockton* v. *Bishop*, 4 How. 155; *Brown* v. *Barry*, 3 Dall. 365; *Roberts* v. *Graham*, 6 Wall. 578, 18 L. ed. 791; *Machmurdo* v. *Smith*, 7 T. R. 517; *Weston* v. *Mason*, 3 Burr. 1725; *Carson* v. *Hood*, 4 Dall. 108; *Smith* v. *United States*, 1 Gall. 261; *Jackson* v. *Pesked*, 1 M. & S. 237; *Dobson* v. *Campbell*, 1 Sumn. 319; *Townsend* v. *Jemison*, 7 How. 706.

By going to trial, the defendant below waived the point he ought to have made on a demurrer.

Townsend v. *Jemison*, 7 How. 706; *Aurora City* v. *West*, 7 Wall. 82, 19 L. ed. 42.

Mr. Justice **Field** delivered the opinion of the court:

This was an action of trespass, for the seizure by the defendant and conversion to his use, of certain personal property of the alleged value of $10,000 belonging to the plaintiff. It was commenced in a court of the state of Wisconsin, and was thence transferred, on a writ of certiorari, to the circuit court of the United States.

The declaration is in the usual form in such cases, and alleges that the seizure and conversion were made in May, 1869, at Milwaukee, in the state of Wisconsin. To this the defendant pleaded the general issue and two special pleas, in which he justified the acts complained of, on the ground that they were done by him as collector of internal revenue of the first collection district of Wisconsin, in the enforcement of

an assessment chargeable against the plaintiff, duly made by the assessor of the district and certified to him with an order directing its collection. Both pleas set up the same defense of justification as collector of internal revenue, 615*] *differing only in the particularity with which the facts of assessment and distraint and sale of the property were detailed.

To the first special plea the plaintiff replied, *de injuria sua propria absque tale causa*, that the defendant committed the several trespasses mentioned in the declaration of his own wrong, and without the cause alleged by him; and upon this replication issue was joined.

To the second special plea the plaintiff replied, that the tax assessed, which was upon tobacco sold and materials used in its manufacture, was never chargeable to him, inasmuch as he did not manufacture and sell or remove within the period mentioned in the assessment, the tobacco described or any part thereof, and that he had paid all the taxes chargeable against him upon the tobacco manufactured by him and sold or removed for consumption or use during that period. To this replication the defendant rejoined, that the plaintiff had not paid the sum assessed against him as stated in the plea, for the tobacco thus manufactured by him and sold or removed for consumption. The conclusion was to the country, and the plaintiff joined in the issue.

On the trial which followed, the jury found the several issues in favor of the plaintiff, and assessed his damages accordingly.

The defendant then moved in arrest of judgment and, the motion being denied, brought the case here on error.

Several grounds were stated for the motion, but they amounted substantially to this: that the second special plea, designated in the record as the third plea, set forth a good defense to the action, inasmuch as it showed that the seizure and conversion complained of were made by the defendant as collector of internal revenue, in the enforcement of a tax regularly and legally assessed against the plaintiff; and that the replication did not answer this plea, because it did not allege that the plaintiff had taken an appeal from the assessment to the commissioner of internal revenue, without which the action was not maintainable.

We do not think that the omission mentioned affected the character of the replication, or that the insertion of the allegation would have aided it. The defect of the replication consisted in the fact that it raised an immaterial issue. An appeal to the commissioner of internal revenue from an assessment is only a condition precedent to an action for the recovery of taxes paid. It is not a condition precedent to any other action where such action is permissible.

The collector could not revise nor refuse to enforce the assessment regularly made by the assessor in the exercise of the latter's jurisdiction. The duties of the collector in the enforcement of the tax assessed were purely ministerial. The assessment duly certified to him, was his authority to proceed and, like an execution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the subject-matter, constituted his protection.

Whatever may have been the conflict at one time, in the adjudged cases, as to the extent of protection afforded to ministerial officers acting in obedience to process, or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts, and render judgment thereon, it is well settled now, that if the officer or tribunal possess jurisdiction over the subject-matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although *serious errors may have been [*617 committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued. *Savacool* v. *Boughton*, 5 Wend. 171; *Earl* v. *Camp*, 16 Wend. 563; *Chegaray* v. *Jenkins*, 5 N. Y. 376; *Sprague* v. *Birchard*, 1 Wis. 457.

Now, the replication to the second special plea did not deny the jurisdiction of the assessor to make an assessment under the circumstances alleged in the plea; nor that the assessment made by him was duly certified to the defendant as collector of the district, with an order to proceed to enforce it, nor that the property assessed was subject to taxation; but only averred that the assessment made was not chargeable against the plaintiff, because he had not manufactured and sold or removed the property assessed within the period mentioned, and had paid all the taxes chargeable against him upon such property—an averment which, if true, would only have shown that the assessor had erred in his judgment in making the assessment, and could not have controlled the action of the collector, nor have justified him in suspending the enforcement of the tax. A judgment debtor might as well complain of the enforcement of an execution by a sheriff on the ground that the court erred in finding that he was indebted to the plaintiff and so giving judgment against him.

An immaterial issue having been thus tendered, the proper course for the defendant to pursue was to demur to the replication, and thus force the plaintiff to join issue on the merits of the defense pleaded, or to allow judgment to pass against him. Had the issue here made been the only one in the case tendered to the defense pleaded by the second special plea, the defendant, not being able to set up that defense under the general issue, would have been entitled after verdict to an arrest of judgment and an award of repleader. Gould, Plead. ch. x., § 29. But such was not the fact here. The first special plea set up the same defense as the second. In both of the special pleas the defendant justified the seizure and conversion of *the property, described in the declara- [*618 tion, as collector of internal revenue, under an assessment against the plaintiff duly made by the assessor of the district and certified to him. The difference in the language used in the two pleas, and in the particularity with which the

assessment of the tax and the distraint and sale of the property were set forth, did not change the substantial identity of the defense made.

Now, the replication of *de injuria*, which was interposed to the first special plea, put in issue the material averments of that plea. It threw upon the defendant the burden of proving so much of the plea as constituted a defense to the action. As no error in the ruling of the court on the trial is presented, we are forced to presume that the defendant was afforded every opportunity allowed by law to establish the facts averred by him. To arrest judgment upon the verdict rendered on this issue because an immaterial issue was formed upon a replication to another plea setting up the same defense, and award a repleader, would be, in effect, to allow the same matter to be twice tried. Such being the case, the granting or refusing the motion rested in the discretion of the court below, with which this court will not interfere.

We are aware of numerous decisions in this country to the effect that the replication *de injuria* is only a good replication where the plea sets up matter of excuse, and is not good where the plea sets up matter of justification, although the justification be under process from a court not of record, or rest upon some authority of law other than a judgment of a court. Such are the decisions of the supreme court of New York (*Griswold* v. *Sedgwick*, 1 Wend. 131; *Coburn* v. *Hopkins*, 4 Wend. 577), and they proceed upon the supposed doctrine of the resolutions in *Crogate's Case*, 8 Coke, 132. But an examination of that case will show that the doctrine is not supported to the extent laid down in the New York decisions. The third resolution in *Crogate's Case* does state that a replication *de injuria* is bad where the justifica-
619*] tion is under authority *of law, but, as observed by Mr. Justice Patteson, in *Selby* v. *Bardons*, 3 Barn. & Ad. 1, this, if taken to the full extent of the terms used, is inconsistent with that part of the first resolution which states that where the plea justifies under proceedings of a court not of record the replication may be used. In that case the declaration was in replevin for goods and chattels. The avowry of the defendant stated that the plaintiff was an inhabitant and occupier of a tenement in a certain parish; that a rate for the relief of the poor of the parish was duly made and published, in which the plaintiff was rated at £7, that he had notice of the rate and was required by the defendant, as collector, to pay the same, which he refused; that he was then summoned before two justices to show cause why he refused; that he appeared, but showing no cause, the justices issued a warrant to the defendant to distrain the plaintiff's goods and chattels, under which he, and the other defendant as his bailiff, took the goods and chattels mentioned in the declaration. To this avowry the plaintiff filed the plea of *de injuria*, to which a special demurrer was interposed, assigning for cause that the plea offered to put in issue several distinct matters, and was pleaded as if the avowry consisted wholly in excuse of the taking and detaining and not as a justification and claim of right. The court considered at length both causes, and held that the plea was good. On error to the court of exchequer chamber this ruling was affirmed (3 Tyr. 430), and the decision, it is believed, has never been departed from in the English courts. The plea *de injuria* in this case to the avowry stands like the replication *de injuria* to a plea setting up similar matter in an action of trespass. There is no distinction in the effect of the plea in one case and the replication in the other. This was held by the King's Bench in the case cited, and by the court of exchequer chamber on error.

This case is authority for the sufficiency of the replication to the first special plea. Other cases might be cited to the same purport. The decisions in England on this point will *be found collected in a learned note to [*620 *Crogate's Case* by Mr. Smith in his Leading Cases, and the decisions in this country will be found collected in an equally learned note by the American editors of that work.

But aside from the considerations mentioned, however the replication might be regarded in some courts on special demurrer, its defective character, if at all defective, was cured by the verdict. The objection to its sufficiency to put the averments of the plea in issue cannot be raised after verdict. *Lytle* v. *Lee*, 5 Johns. 112, and the cases there cited.

Judgment affirmed.

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*JAMES R. SMITH, *Appt.*, [*419
v.
GEORGE MASON, Assignee of Frederick P. Sawyer *et al.*

(See S. C. 14 Wall. 419-433.)

Summary proceedings in bankruptcy—when suit necessary—parties.

1. Where a fund was transferred by a firm, one of whom subsequently become bankrupt, a contest for the fund between the transferee and the assignee in bankruptcy cannot be determined in a summary way by the district court sitting in bankruptcy, without due process of law, but only by a suit in equity or an action at law.
2. An appeal in such case may be taken from the supreme court of the District of Columbia to this court.
3. Strangers to the proceedings in bankruptcy not served with process, and who have not voluntarily appeared and become parties to such a litigation, cannot be compelled to come into court under a petition for a rule to show cause.

[No. 193.]

Argued Nov. 8, 1871. Decided Nov. 20, 1871.

APPEAL from the Supreme Court of the District of Columbia.

The petition in this case was filed in the court below by the appellee, as a bankrupt assignee to restrain George Taylor from paying out a certain sum of money alleged to be due to the bankrupt, Sawyer. Subsequently an order was made against the appellant, as claiming some interest in said fund, to show cause why said money should not be paid to the said appellee. An intervention was made by Risher & Hall, as surviving partners of said bankrupt, also claiming said fund. An order was made by said court that George Taylor pay over said money to the assignee, appellant; but on appeal, the general term of said court reversed

said order, and entered a decree declaring that the appellant, Smith, had no right to the said money, and ordering said George Taylor to pay over the same to the surviving partners, Risher & Hall. Whereupon the said Smith took an appeal to this court.

The case is further stated in the opinion of the court.

Messrs. **More** *&* ***Bright*** and *George Taylor*, for appellant:

1. The court in bankruptcy could not take jurisdiction in cases like this, by mere order served on strangers to come in and answer. Neither Taylor nor Smith claimed anything from the bankrupt's estate, and neither of them was before the court claiming any debt or demand under the bankruptcy.

Sec. 1 of the act establishing the system; *Ex parte Bacon*, 2 Dea. & Chit. 181; 2 Mallory, 441, and other references in Taylor's Bankrupt L. pp. 61, 62.

2. The assignee of Sawyer had no right to sue for or recover the funds of the partners, Sawyer, Risher, & Hall. He had no right to interfere with the partnership property or assets until the partnership debts were fully paid, and then only on an accounting between the partners, and so far as the individual interests of Sawyer existed. And in any action for the recovery of partnership claims, the assignee and solvent partners should join. See, *Eckhardt* v. *Wilson*, 8 T. R. 140; Taylor, Bankrupt L. and references, p. 96.

3. The court below erred in going into an examination of the accounts between Sawyer, Risher, & Hall and George E. Biddle & Co. No notice of any kind was ever served on Biddle & Co.; and yet it will be seen in the record that the court went into the examination of their accounts, and in their absence, and without notice, decided that the claim of Biddle & Co. had been paid and discharged, and that they were bound to return the order on and acceptance of Taylor to the firm of Sawyer, Risher, & Hall, and swear that Smith had no right to the funds in dispute. One of the fundamental principles of law is that the rights of persons shall not be prejudiced without due notice.

R. Co. v. *Trimble*, 10 Wall. 377, 19 L. ed. 951.

4. The court *in banc* on appeal erred in making a decree in the case. It had appellate jurisdiction only, and should have returned the case to the court of bankruptcy for further proceedings; but their decree shows the impropriety and irregularity of the whole proceeding, for the court decreed the funds to Risher & Hall, the solvent and surviving partners, as against Smith a stranger in the court.

Sec. 1 of the act, and references in Taylor, Bankrupt L. pp. 61, 62.

Mr. **Geo. W. Paschal**, for appellees:

As we understand it, Smith objects to the jurisdiction of the court over the subject-matter and the parties.

But to this we answer, that it is our desire, as we had supposed it to be his, to have this court settle the right. And if the question of jurisdiction is to be raised, we suggest that underlying the whole is the principle that no appeal lies in such a case from the general term of the supreme court of the District of Columbia to this court, in a strictly bankrupt proceeding. To this we might cite the bankrupt statute and the great case, *Ex parte City Bank of New Orleans*, 3 How. 311, *et seq.*; 2 Brightly, Dig. p. 75, § 6.

The principle that this court can only exercise appellate jurisdiction in pursuance to acts of Congress is not an open question. *Barry* v. *Mercein*, 5 How. 119.

If it be conceded that § 9 of the bankrupt act of 1867 (2 Brightly, Dig. p. 78, § 17) is a negative pregnant and that it allows appeals from the circuit court to the Supreme Court, in all cases where the matter in controversy exceeds $1,000, it does not follow that such appeal lies from the supreme court of the District of Columbia; much less that such power has been exercised in a manner to give this court jurisdiction.

There is, in fact, no appeal order by the court; there is no appeal bond, such as is required by the statute; there is no notice of appeal; and no evidence that the appeal was taken in term, or ever, in fact, taken at all. These are all jurisdictional facts.

Washington Co. v. *Durant*, 7 Wall. 694, 19 L. ed. 164; *Castro* v. *United States*, 3 Wall. 49, 18 L. ed. 163; *The San Pedro*, 2 Wheat. 132; *Villabolos* v. *United States*, 6 How. 90; *Bacon* v. *Hart*, 1 Black, 38, 17 L. ed. 52.

We insist, however, that under the 1st and 2d sections of the bankrupt act, and the broad principles of the *Bk. of N. O.*, the court, in the exercise of the powers given, has the right to do precisely what was done in this case; that is, to determine the right of the claimants to a fund in which the bankrupt estate had an interest.

2 Brightly, Dig. p. 74, §§ 1, 2, and notes; same law, 14 Stat. at L. 517, § 1; and see particularly the conclusion, *Ex parte Bank, supra.*

The suit was brought originally by the assignee against the partners of the bankrupt for account. This fund was in the district, in the hands of the attorney of the firm, and the assignee brought the suit to enjoin the payment, either to the nonaccounting partners or to Smith, who was understood to have set up some claim to the fund. Smith was properly cited to assert his claim to the fund. At this point the surviving partners intervened and set up their rights.

The bankrupt court, in the exercise of its legitimate powers, acquired a summary equitable jurisdiction over the subject-matter and the parties; and having become thus possessed of the cause, it might fully proceed to adjudicate the right.

We are not limited to the English principles. *In re Klein*, 1 How. 277; *Mitchell* v. *Great Works Mill. Mfg. Co.* 2 Story, 648; *Ex parte Bowie*, 15 Pitts. L. J. 448; 1 Bank. Reg. 185; *Ex parte Alexander*, 8 Am. Law R. (N. S.) 423; 3 Bank. Reg. 6; 2 Brightly, Fed. Dig. p. 23.

The appellant objects to the jurisdiction, because neither Smith nor Risher & Hall were creditors of the bankrupt, urging a claim against the estate. But they were claiming an interest in the bankrupt's assets, and no disposition could be made of this fund until the rights of these claimants should be settled. The jurisdiction expressly extends to the collection of all assets of the bankrupt; to the marshaling and disposition of the different funds and assets among all the creditors; and to all acts, matters and things to be done under and in vir-

tue of the bankruptcy, until the final distribution and settlement of the bankrupt's estate, and the close of the proceedings in bankruptcy. The circuit and district courts have given an enlarged interpretation to this section, as may be seen by reference to 2 Brightly, Dig. p. 74, notes, *a*, *b*, *c*.

The appellant objects that the court heard evidence of the state of the accounts between the firms of Sawyer, Risher, & Hall, and George E. Biddle & Co., without the latter having been made parties. But to this it is answered:

1. That no such objection was urged or considered in the court below and, therefore, it cannot be considered here. 2. That as they had delivered the paper in controversy to Smith, to whom they had indorsed it, they were not necessary parties. 3. That they were heard by affidavits, without the power of cross-examination by Risher & Hall. 4. That, as their possession was but a hypothecation, and Smith only claims by hypothecation, and under the act of Congress of 1852, neither could obtain the money, except through the indorsement of Sawyer, Risher, & Hall, it was perfectly right to hear proof to show that the contingency upon which the money should become theirs had never happened and was impossible. 5. They were, in fact, represented by Smith.

The decree that the fund did not belong to Smith was perfectly correct. The paper was not stamped and, therefore, had no validity as a contract. It had no element of negotiability; not being for any certain sum; it had no negotiable words. Smith's evidence showed that he paid nothing for it; he had parted with nothing; he only took it as a collateral security for a debt due him by Biddle & Co.; gave them no credit for it, nor was he to give any until he should realize the money; and, therefore, there was no element of good faith in his possession, nothing that would have enabled him to maintain an action against Taylor in his own name, or to urge an equity against Sawyer, Risher, & Hall.

The most that ever could have been said of the paper, had it been stamped, is, that it was an appointment in favor of Biddle & Co.; but an appointment legally and necessarily subject to the control of Sawyer, Risher, & Hall.

Mr. Justice **Clifford** delivered the opinion of the court:

Jurisdiction, power and authority in cases in bankruptcy, when the bankrupt resides in this District, are conferred upon and vested in the supreme court of the District, to the same extent and subject to the same rules, regulations, and restrictions as are enacted and prescribed in respect to the jurisdiction, power, and authority of the district courts of the United States, where the bankrupt resides in any one of the judicial districts within the several states. 14 Stat. at L. 541.

By the terms of the act establishing the supreme court of the District the court consists of four justices, any three of whom may hold a general term, and any one of them may hold a circuit court or special term for the purposes and under the conditions therein prescribed, or may hold a district court of the United States, in the same manner and with the same powers and jurisdiction as are possessed and exercised by the Federal district courts within the several states. 12 Stat. at L. 763.

Enough appears in the record to show that one Frederick P. Sawyer, of the firm of Sawyer, Risher, & Hall, was adjudged bankrupt by the supreme court of this District sitting in bankruptcy, and that George Mason, the appellee in this case, was appointed assignee of his estate by decree of the bankrupt court. He commenced the proceeding in this case by the petition exhibited in the transcript, in which he represents that George Taylor, as agent of that firm, had collected from the United States the sum of $4,744.19 for *the firm, and that [*426 other funds due to the firm, it was expected, would soon come into his hands; that Risher & Hall, the other two members of the firm prior to the bankruptcy of the senior partner, made an assignment of the claim, from which that amount was realized, to George E. Biddle & Co., as collateral security for the payment of a certain indebtedness of their firm to the said assignees, which indebtedness the petitioner believes has been paid; that the assignees of the claim afterwards made an assignment of their interest in the same to James R. Smith, as collateral security for their indebtedness to him, which, as the petitioner believes, has also been paid: wherefore he prayed that the said George Taylor might be restrained from paying out said money, or any other money which might come into his hands belonging to the same firm, pending the petition, and that the respondent might be required to give bond for the safekeeping of the money and for its production in court when ordered.

Such an order was issued, and the party holding the money was enjoined and required to give bond as prayed. Subsequently the petitioner presented another petition to the same court, in which he represented that James R. Smith also claimed an interest in the fund in question, and prayed that an order might be made requiring him to show cause on a day therein named why the fund should not be paid to the petitioner. Smith appeared and filed an answer to the rule, to the effect following: (1) That the court had no jurisdiction to proceed against him in that mode; (2) that the money enjoined came to him by regular assignment for a valuable consideration before the senior partner of the firm was adjudged bankrupt, and that he was, and is, the bona fide owner of the claim; (3) that neither the assignee of the bankrupt's estate nor his creditors have any right to any part of said funds.

Before the hearing, the other partners of the firm, to wit, Risher & Hall, intervened and alleged that the money enjoined rightfully belonged to them and not to the respondent in the rule, because the assignment of the claim, as they *represented, was made by the sen- [*427 ior partner of their firm merely as a security to the said assignees, to be applied by them to the payment of the debt due by their firm to those assignees; that it was expressly understood that if the assignors paid the debt before the claim was collected from the United States the claim should revert to them, the assignors; that they paid their entire debt to those parties before the claim was allowed at the Treasury Department, and that they, as the representatives of the firm since the bankruptcy of the senior

partner, are entitled to the money: wherefore they pray that an order may be passed directing the depositary to pay the same to them, or, if it be paid to the said assignees, that it be so paid to their use.

Evidence was introduced by the interveners tending to show that the indebtedness of the original owners of the claim to the assignees of the same had been paid, and that the respondent in the rule held the claim merely as collateral security for his assignors. On the other hand, the respondent in the rule was examined, and he testified that he obtained the assignment of the claim in good faith and for value, without notice that his assignors held it subject to any conditions, or that it was not their property in case the indebtedness of their assignors was discharged before the claim was collected. He produced the assignment duly executed by the original owners, directing the depositary to pay the amount to the assignees when collected at the proper department, and also introduced the deposition of the senior partner of the firm to which the claim was assigned, and he deposed that his firm transferred and assigned the same to the respondent in the rule with the knowledge and consent of the original owners; that they, the assignees, took the order or draft at its date in the regular course of business, and that they assigned the same for value to the respondent, and that the accounts of the original owners with his firm have never been settled, but that they are still largely indebted to his firm. Hearing was had, but the court was of the opinion that the respondent took the order 428*] or draft *merely as collateral security; that he was not a bona fide purchaser of the same; that he was to credit the proceeds when collected to his assignors, and that they were to credit the same to the original owners.

Pursuant to that finding the court entered a decretal order that the depositary of the claim should pay the net balance in his hands to the assignee in bankruptcy for the benefit of the creditors of the original owners. Immediate application was made by the respondent for an appeal to the general term, which was granted on the following day. Due appearance was entered not only by the appellant but also by the interveners as well as by the assignee in bankruptcy, and they were again heard before all the justices of the court; and the court being of opinion that there was error in the decree and that the interveners, as the solvent partners of their firm, were entitled to the money, entered a decree dissolving the injunction, and directing the depositary of the money to pay the net balance in his hands to those parties as the survivors of the original owners of the claim; whereupon the respondent appealed to this court.

Instituted as the proceeding was to restrain the depositary of the claim from paying out the money which he had collected, or any which might thereafter come into his hands, it is quite clear that the alleged purpose of the petitioner was accomplished when the injunction was granted as prayed in the petition, as the party respondent in that proceeding never filed any answer and testified in the case that the order restraining him from paying out the money was procured by him so that he might not be required to act without the directions of the court. Had the matters terminated there the appellant would not have had any right of appeal to this court, as he was an utter stranger to the proceedings. He was not made a party to the petition nor was he served with process, nor did he voluntarily appear. Whatever the purpose of the petition was, or by whomsoever the injunction was procured, the proceeding was commenced and terminated without the knowledge of the appellant, and before any steps were taken by the petitioner or anyone else to *connect the appellant with the [*429 litigation. More than a year and a half before that petition was filed the original owners of the claim had assigned and transferred the same to the assignors of the appellant, and had directed, in writing, the depositary in whose hands they had placed it for collection to pay the same when collected to their said transferees; and the record shows that the depositary of the claim accepted the draft or order at the time and agreed to pay the same as directed whenever the same should come into his hands, less expenses and commissions. None of these facts are contradicted, and the appellant proved that the assignees of the claim, within a few days after receiving the same, assigned and transferred the same to him for full value in the usual course of business.

Beyond all doubt, therefore, the case is one where the appellant claimed absolute title to and dominion over the matter in controversy between him and the assignee of the bankrupt's estate. Absolute title to the matter in controversy is also claimed by the assignee in bankruptcy, as appears by his second petition, in which he prayed that the appellant might be summoned to show cause why the fund should not be paid to him as such assignee.

Suggestion may be made that the decree gives the fund to the interveners, but the court will at present re-examine the case as between the parties first made in the second petition, before the solvent members of the firm to which the claim originally belonged were permitted to intervene in the litigation, as it is quite obvious that the whole proceeding subsequent to their intervention is irregular, and that the decree must be reversed if it be held that the bankrupt court had no jurisdiction to proceed and determine the right of property as between the assignee and the transferee of the same for value in that mode of proceeding.

Neither the depositary of the fund nor the appellant claimed anything from the estate of the bankrupt, and the appellant contends that the bankrupt court cannot take jurisdiction in such a case by a rule to show cause, served on a stranger to come in and answer in support of his title or *claim to such a fund or to [*430 any other property over which he claims absolute dominion.

Power and jurisdiction in all matters and proceedings in bankruptcy are conferred upon the district courts, and those courts as courts of bankruptcy are authorized to hear and adjudicate upon the same according to the provisions of the bankrupt act. Examined separately the clause of the 1st section of the act, which provides that the powers and jurisdiction therein granted and conferred may be exercised as well in vacation as in term time, and that a judge sitting in chambers shall have the same powers

and jurisdiction as when sitting in court, would seem to afford some support to the views of the assignee in this case, that all the powers and jurisdiction of the district courts, when sitting as courts in bankruptcy, may be exercised in a summary way without process, as by a rule to show cause, as in a motion to set aside a verdict in an action at common law, or in a collateral proceeding in a suit in equity. Most matters and proceedings in bankruptcy may, doubtless, be heard and adjudicated by the district court in that way, but that general clause in the 1st section, which is referred to as supporting the unlimited scope of that power and jurisdiction, must be considered in connection with all the other provisions of the bankrupt act, as is expressly required by the preceding clause of the same section, in which it is enacted that the district courts shall hear and adjudicate upon all matters and proceedings in bankruptcy according to the provisions of the bankrupt act. Superadded to that general clause, and as an exposition of the same, is another and more important clause, in which is given a specific enumeration of the cases and controversies to which that general jurisdiction extends, and it is plain that the enumeration does not include "suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee touching any property or rights of property of said bankrupt transferable to or vested in such assignee." On the contrary, the third clause of the 2d section expressly enacts that circuit 431*] *courts shall have concurrent jurisdiction with the district courts of all such suits at law or in equity, provided the suit at law or bill in equity shall be brought within two years from the time the cause of action accrued. 14 Stat. at L. 518; *Morgan* v. *Thornhill*, *ante*, 63.

Controversies, in order that they may be cognizable either in the circuit or district court under that act, must have respect to some property or rights of property of the bankrupt transferable to or vested in such assignee; and the suit, whether it be a suit at law or in equity, must be in the name of one of the two parties described in that clause and against the other, as appears by the express words of the provision. Such a suit, whether at law or in equity, may be commenced either in the district or circuit court, at the election of the party suing; and if in the former, it is clear that the case, when it has proceeded to final judgment or decree, may be removed into the circuit court for re-examination by writ of error, if it was an action at law, or by appeal if it was a suit in equity, provided the debt or damages claimed amount to more than $500 and the writ of error is seasonably sued out, or the appeal is claimed and the required notices are given within ten days from the rendition of the judgment or decree. *Knight* v. *Cheney*, 5 Nat. B. R., 309. None of those regulations, however, apply to petitions for revision under the first clause of the 2d section, nor does the bankrupt act fix any precise limitation to the right of a party aggrieved by the ruling, decision or decree of the district court to file a petition for that purpose in the circuit court. Power to revise all cases and questions which arise in the district courts, in such a proceeding, "except when special provision is otherwise made," is conferred upon the circuit courts by the first clause of the same section, but the court is of the opinion that the power conferred by that clause does not extend to any case where special provision for the revision of the case is otherwise made, as where it is provided that an appeal will lie from the district court to the circuit court, or where a writ of error will lie from *the circuit court to the district court in [*432 the manner provided in the laws of Congress allowing appeals and writs of error. 5 *Ibid.* 310.

Special provision is made for the revision in the circuit court of controversies like the one exhibited in this record, and the court is of the opinion that such causes cannot be commenced by a petition for a rule to show cause, as in this case, nor be determined in a summary way by the district court sitting in bankruptcy, without due process of law. *Ex parte Bacon*, 2 Moll. 441. Cases of the kind before the court fall directly within the third clause of the section under consideration, and must, in the judgment of the court, be determined by a suit in equity or an action at law, as the case may be; and where an action at law is the proper remedy the parties are entitled to a trial by jury if the value in controversy shall exceed $20. Concurrent jurisdiction in such cases, it must be conceded, is vested in the circuit and district courts, and it is equally clear that either party, where the proceeding is correct, may remove the cause, in a proper case, when it has proceeded to final judgment or decree, into the Supreme Court for re-examination, as provided in other causes outside of the bankrupt act.

Possession and control of the claim had been surrendered by the original owners long before the senior partner of the firm was adjudged bankrupt, and the depositary of the same had duly accepted the order or draft transferring the proceeds of the same to the assignors of the appellant, showing that the assignee in bankruptcy had neither the possession nor the right of possession to the same at the time the petition for the rule was filed. Independent of the injunction, which was granted without notice to the appellant, he was apparently entitled, and if the evidence he introduced is believed, he was, in fact, entitled to demand and to receive the whole fund as his own property. Suffice it to say, without expressing any opinion as to the weight of the evidence, the appellant claimed the fund as his own property, and if his *claim is just and legal, the pos- [*433 session of the depositary was his possession, and if the assignee in bankruptcy would devest him of the possession and control of the fund he must do it by a suit at law or in equity, as provided in the third clause of the 2d section of the bankrupt act. Equity would certainly have jurisdiction in such a case, as in that mode of proceeding all the parties could be brought before the court. Extended remarks in respect to the decree in the case appear to be unnecessary, as it is as clear as anything in legal decision can be that the interveners could not claim to devest the appellant of his interest in the funds by becoming parties to a rule like the one before the court, nor in any other manner than by due process of law.

Objection is also made that the appeal is irregular, as having been prosecuted from the supreme court of the District, but the regulations of the 49th section of the act afford a satisfactory answer to that objection, which is all that need be said upon the subject. Want of notice of the appeal comes too late after a general appearance, but the record shows that the appeal was duly claimed and that the appellant filed his appeal bond in open court and that the same was duly approved by the Chief Justice who presided at the hearing when the final decree was entered in the cause.

Strangers to the proceedings in bankruptcy, not served with process, and who have not voluntarily appeared and become parties to such a litigation, cannot be compelled to come into court under a petition for a rule to show cause, as in this case; nor is the exercise of such a jurisdiction necessary, as the third clause of the 2d section of the bankrupt act affords the assignee a convenient, constitutional and sufficient remedy to contest every adverse claim made by any person to any property or rights of property transferable to, or vested in, such assignee.

Decree reversed and cause remanded for further proceedings, in conformity to the opinion of this court.

UNITED STATES, *Appt.*,
v.
PHILIP S. JUSTICE.

(See S. C. 14 Wall. 535-550.)

Acceptance of sum in satisfaction of disputed claim.

Where a claim against the government was referred to a commission and the party whose claim was disputed went before it, participated in its proceedings, and took the sum found to be due him without protest, he will be held to have accepted it in full satisfaction of his demand.

[No. 222.]

Argued Nov. 8, 1872. Decided Nov. 25, 1872.

APPEAL from the Court of Claims.

The suit of Philip S. Justice was brought in the court of claims, to recover a balance of $10,870, alleged to be due him for certain arms alleged to have been furnished the United States, under a contract with the ordnance department.

The court of claims gave judgment for the claimant for $10,870, from which this appeal is taken.

The facts of the case are sufficiently set forth in the opinion of the court.

Messrs. Geo. H. Williams, **William McMichael,** and **C. H. Hill,** for appellant:

In caliber and quality, the arms were not according to contract. They were not serviceable, nor did they equal the sample furnished by the contractor; the court of claims having found, as a fact, that "these arms, furnished by claimant, were not, in all respects, similar to the sample arm," which, although qualified by the subsequent language of the court, nevertheless goes to show a failure to comply with the condition of Lieutenant Treadwell's letter of August 17, 1861, which provides that the muskets shall be equal in all respects to the sample deposited with him.

These arms were furnished directly by the claimant. The presumption is that he knew their defective character, and he cannot take advantage of a nominal inspection at the arsenal by subordinates, to screen himself from the consequences of the careful inspection subsequently made by the responsible officers. The obligation of his contract with the United States was, not that his arms should pass an inspection, but that they should be of a certain caliber, quality and standard, and this obligation he failed to fulfil.

He assented to the retention of the defective arms by the United States at the rate which, although less than the contract price, was fully equal to their value. He was not entitled to more.

1 Pars. Cont. 591; *Germaine* v. *Burton,* 3 Stark. 32; *Cary* v. *Gruman,* 4 Hill (N. Y.) 625; *Dows* v. *Durfee,* 10 Barb. 213; *Hitchcock* v. *Hunt,* 28 Conn. 343.

The result of the examination of Mr. Justice's claim by the commission was a settlement by which he was allowed at the rate of $15 each for the defective arms. This was in full of his account.

Mr. Justice accepted the sum allowed after having attended the meetings of the commission, and with full knowledge that it was intended as a final payment of his account; and by this action he was concluded from making any further claim on the United States.

United States v. *Adams,* 7 Wall. 463, 19 L. ed. 249; *United States* v. *Child, ante,* 362; *United States* v. *Clyde, ante,* 479.

The final settlement was made in December, 1862. The petition in this case was sworn to October 12, 1867, and there is no evidence of any protest or complaint on the part of the claimant until the filing of this petition. He acquiesced in the final settlement for nearly five years.

Mr. **J. Hubley Ashton,** for appellee:

1. The claimant here had an executory contract, the validity and regularity of which nobody ever doubted, to furnish a number of arms of a certain description at a fixed price. It was made upon the exhibition of a sample which proved satisfactory to the agents and experts of the government. The arms were to be inspected by those agents and experts according to that sample, and they were to be rejected if found unsatisfactory and accepted if found satisfactory. Arms of the kind contracted for were delivered and the requisite number, upon full inspection by the experts of the United States, was accepted and appropriated to the contract.

Complaints being made against the arms by the troops who had used them, the ordnance bureau stopped the payment of this voucher. The arms yet in store were reinspected by Lieutenant Treadwell, and he again certified to their character and quality as conformable to the contract. Then an investigation was undertaken by a board of civilians. Inspections di-

NOTE.—*Accord and satisfaction by part payment*—see note, 20 L. R. A. 785.
Payment of less sum for greater—see note, 26 L. ed. U. S. 1186.

rected by them also show the arms to be, on an average, equal to the sample. They first make a report condemning all the claimant's arms as unserviceable, and suggesting a deduction from the whole contract price of the entire lot; and then, nearly a month after, they take this back, and find that only about half of the arms had been the subject of the complaint. This report, on its face, is founded on a total misconception of the contract of the claimant, *viz.*, that it was to furnish what they call a "serviceable" arm, when he expressly stipulated to supply an arm equal to the sample. When the claimant exposes the error of the first report, he protests against any repudiation of the contract on the part of the government. Afterwards he receives, in due course of business, from the Treasury Department, a draft for $2,301.25 and certificates of indebtedness for $6,000 and in a letter to the United States Treasurer, he acknowledges the receipt of this draft and these certificates, amounting in all to $8,301.25.

He gives no other receipt or acquittance.

He is not required to take the Treasury draft and the certificates of indebtedness, or the amount payable on them, in full satisfaction of the whole claim, and he never acknowledged that amount to be in full satisfaction of the whole claim. No such condition is imposed or fulfilled.

Plainly, then, the doctrine of the *Frémont* contract cases, and the *Clyde Case* does not apply.

In *United States* v. *Child, ante*, 362, Mr. Justice Miller rests the decision upon the effect of the receipt in full, required by the government before payment, and executed by the claimant contemporaneously with the payment of the amount allowed.

Mr. Justice Bradley, in *United States* v. *Clyde, ante*, 479, rests the decision there also upon the receipt in full.

But there are other and manifest legal differences between this case and the preceding cases, which render the decisions in the latter totally inapplicable to the former.

In the first place, the nature and character of the demand here involved were different from those asserted in the cases cited.

The present demand here was for an ascertained and liquidated and an undisputed amount. It was liquidated by the legal voucher of the proper officer; acknowledging the fact of the contract, the receipt of the arms, their character as in compliance with the contract, the price payable, and the sum due. It was liquidated in the full and absolute sense of the rule of the common law, that the payment of a smaller sum cannot be in accord and satisfaction of a larger debt which is fixed and liquidated.

By that rule such a debt as this cannot be discharged by the payment of a less sum, even though it be acknowledged to be received in full satisfaction.

Cumber v. *Wane*, 1 Str. 426; 1 Smith L. Cas. part 1, 439.

A fortiori, it cannot be discharged by the receipt of a less sum, which is not agreed to be taken in full satisfaction.

Neither in the *Adams*, nor in the *Child*, nor the *Clyde Case* was the claim liquidated in any absolute sense.

It may be mentioned, also, though it is scarcely necessary to do so, that the circumstances attending the payment of the sum remitted to the present claimant by the Treasury Department, were wholly different from those attending the payment of the amounts allowed in the previous cases.

There is nothing in what occurred in reference to this payment, certainly nothing brought home to the knowledge of the claimant, even tending to show that the Executive Department intended that it should be regarded as anything else than what it was in fact—a partial payment of the amount liquidated by the voucher.

But if the proceedings of the accounting officers could be presumed to have been known to the claimant, the character and amount of the deduction from the face of the voucher preclude the idea that he took, or meant to take, the reduced amount in satisfaction of this debt.

Such a presumption would be contrary to all experience of human nature. For by the manner of stating this account in the auditor's office, the government proposed to enforce restitution of over $8,000, already in the pocket of the claimant, for arms not embraced at all in this voucher. A reduction of the price was made, not only of the 472 muskets in this voucher, but of over 800 other muskets long since paid for; and the supposed overpayment on account of these latter was deducted from the amount certified to be payable in the last voucher.

The appearance of the claimant before the ordnance board cannot, of course, prejudice his right to recover this debt.

The board took cognizance of the matter solely upon the action of the War Department. The claimant protested before it that, as his arms were accepted after inspection by government authority, the United States could not rightfully decline to pay for all so accepted. In other words, he denied there, as he had the right to do, that there was power anywhere to release the government from the obligation of its contract with him.

He was, at the same time, not unwilling to aid the board or the War Department in any proper investigation of the facts of the case.

Mr. Justice **Davis** delivered the opinion of the court:

It is impossible to escape the conclusion, after reading the evidence which the court of claims incorporates with its finding of facts in this case, that the arms obtained by the government from Justice were unserviceable and even unsafe for the troops to handle, whether they were equal to the sample arm furnished by him or not. It is true they had been accepted by Lieutenant Treadwell, with whom the contract of purchase was made, after inspection by subordinates appointed by him; but when difficulty arose in relation to them he said, in justification of his conduct, and to show his interpretation of the contract, that he had instructed these inspecting officers to reject all the arms that, in their opinion, were not good and in all respects fit for use in the field. That the duty with which these officers was charged *was, to [*547 say the least, negligently performed is evident from the result of the subsequent inspection

which was ordered. This inspection was in response to serious complaints from three regiments of Pennsylvania volunteers which had been armed with the muskets in controversy. The arms of each regiment were inspected by a separate commissioned officer of experience, and all united in condemning them as worthless and, indeed, dangerous to those using them.

In this state of case, the chief of the ordnance bureau informed the Secretary of War that he deemed it his duty to withhold payment of one of the vouchers given for these arms until the matter could be further investigated, and recommended reference of the entire subject to the commission then sitting in Washington, which had been constituted by the proper authority "to audit and adjust all contracts, orders, and claims on the War Department in respect to ordnance, arms, and ammunition." In accordance with this recommendation the case was referred to this commission, which, after full investigation and a patient hearing given to Justice, reported that he had not fulfilled his obligation to furnish "a serviceable arm" to the government, and fixed a basis on which the account should be settled. This basis of settlement was adopted, and in accordance with it the Secretary of the Treasury, on the 8th of December, 1862, pursuant to a requisition of the War Department, drew his warrant on the Treasurer of the United States in favor of Justice for the amount found due by the accounting officers, which was transmitted to him, and receipt of it acknowledged by letter. After waiting until the five years' limitation to actions of this kind had nearly expired, he brings this suit to recover the balance of the claim, according to the original contract price, and the question is, can he maintain it?

In the nature of things, during such a war as we have just passed through, contracts would in many instances be made by some of the numerous subordinates intrusted with that duty, in disregard of the rights of the government, or if properly made, would be so unfaithfully exe- [548*] cuted that the *public service would suffer unless their further execution were arrested. Although every just government is desirous of making full compensation to its creditors in all cases of fair dealing, it cannot afford to recognize this rule where an imposition has been practised upon it. Of necessity it acts through agents, and cannot, therefore, assure its own protection as natural persons in dealing with each other. What, then, was the proper course for the government to pursue in relation to these disputed claims? To pay them, in the existing condition of the country, would set a bad example and lead to the most ruinous consequences, and to withhold payment altogether until Congress or the court of claims should act, would be, in case the claim should prove to be meritorious, a hardship. Common fairness required that some mode should be adopted for the speedy adjustment of these differences between the creditor and the government, and what better mode for the accomplishment of this object than the appointment of a commission of intelligent and disinterested persons to hear the respective parties and to settle the allowance to be made? We know by the history of the times, that several commissions for this purpose were appointed during the war, and the record discloses the fact that when this controversy arose there was one sitting in this city, constituted by the Secretary of War under the authority of the President, to audit and adjust claims of like character. It is fair to presume, in the absence of anything in the record to the contrary, that the creation of this commission was a necessity produced by the number and magnitude of the claims presented to the ordnance bureau which the head of it deemed unjust and was, therefore, unwilling to pay. This commission, like all others with similar authority, possessed no judicial power, nor did it attempt to exercise any. It could not compel a claimant to appear before it and submit to its action, nor would its decision, in case there were no adversary party, have any conclusive effect. If, on the contrary, the party whose claim was disputed went before it, participated in its proceedings, and took the sum found to be due him without protest, he *cannot [*549 afterwards be heard to say that he did not accept this in full satisfaction of his demand. This voluntary submission and reception of the money is an acceptance on the part of the claimant of the mode tendered him by the government for the settlement of his disputed claim, and precludes him from any further litigation.

It is always in the power of parties to compromise their differences. One way of doing this is by arbitrators, mutually chosen; but from such submission neither party is at liberty to withdraw after the award is made. The condition of the government creditor is better than this, for if dissatisfied with the allowance made him by the commission, he can refuse to receive it, or can accompany his receipt of it, if he chooses to take it, with a proper protest. This protest is necessary to inform the government that the compromise is rejected, and that this rejection leaves the claimant free to litigate the matter in dispute before the court of claims. If with this knowledge and under these circumstances the money is paid, there can be no just cause of complaint on either side and the status of the parties is not affected by anything which transpired before the commission.

These views dispose of this case. If it be conceded that the guns obtained from Justice were equal to the sample furnished, still it is manifest they were not a serviceable arm, and were besides unsafe, and that the government withheld the payment of the voucher because the contract, in the opinion of the ordnance bureau, was unfaithfully executed. The contract, with the accompanying papers, were referred to the ordnance commission. Justice appeared before it to contest the position of the government and, although he offered no evidence, argued his case in writing. And as if to leave no doubt of his intention to abide the result, he succeeded, two weeks after the commission had reported on the matter to the chief of ordnance, in getting an error against him corrected. And when this was done, and the account stated in conformity with this correction, he receives the amount allowed him without an intimation of dissatisfaction. It is difficult to suppose that at this time *he had any other purpose than to ac- [*550 quiesce in the decision which was made. If his purpose were different, why the long delay in instituting suit? It is hard to believe that the

course subsequently taken was not the result of an afterthought.

The recent cases in this court of *United States* v. *Adams*, 7 Wall. 463, 19 L. ed. 249, and *United States* v. *Child*, *ante* 362, are like this in principle, although they contain some elements not applicable here.

The judgment of the Court of Claims is reversed, and this cause is remanded to that court, with instructions to dismiss the petition.

607*] ARTHUR LEARY *et al.*, *Appts.*,
v.
UNITED STATES.

(See S. C. 14 Wall. 607–613.)

Charterer, when considered owner of vessel — construction of.

1. If the charter-party let the entire vessel with a transfer of its command and possession and consequent control over its navigation to the charterer, he will generally be considered as owner for the voyage or service stipulated.
2. If the charter-party let only the use of the vessel, the owner at the same time retaining its command and possession, and control over its navigation, the charterer is a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed.
3. Stipulations in a charter of a vessel to the government that the general owners shall keep the vessel in good condition during the existence of the charter and receive on board certain goods at the request of the government, and refuse to receive other goods without its assent, are conclusive that the possession and control of the vessel had not passed to the government, but had been retained by the general owner.
4. Under a clause in the charter-party, by which the government agreed that in case the vessel should be destroyed or damaged by any extraordinary marine risk, the owners should be indemnified; held, that a collision with a sunken anchor in the harbor was an ordinary risk for which the government is not liable.

[No. 232.]

Argued Nov. 14, 1872. Decided Nov. 25, 1872.

APPEAL from the Court of Claims.

The petitioners in the court below claimed $95,637.15, for damages growing out of the charter to the United States of their steamer called the Mattano.

November 19, 1862, they chartered to the United States, the steamer Mattano, for the military service of the government, at the rate of $250 per day for every day the vessel should be retained in service. The substance of the charter is given in the opinion.

During the charter, while the Mattano was lying at a wharf at Port Royal, S. C., the military harbor master ordered the master of the Mattano to back out his boat, to make room for another. The master of the Mattano objected to doing so, as it was dangerous; but he was ordered peremptorily to do it. In executing this order, the Mattano struck on the fluke of a sunken anchor, which caused her to sink.

This accident was not due to any want of skill on the part of the master and crew of the Mattano.

The court of claims rendered a decree adverse to the petitioners, and they appealed to this court.

Messrs. **Chipman** and *Hosmer* and **Thomas J. Durant** for appellants.

Messrs. **Geo. H. Williams**, *Atty. Gen.*, *C. H. Hill*, *Asst. Atty.-Gen.*, for appellee.

Mr. Justice **Field** delivered the opinion of the court:

The appellants seek a reversal of the decree in this case, on grounds which amount substantially to these: 1. That the United States were the owners of the injured vessel, by the terms of the charter-party, during the continuance of the service stipulated, and were, consequently, responsible for the damages sustained by the vessel, whilst engaged in the service. 2. That the damages to the vessel were occasioned by her running an extraordinary marine risk under compulsion from the United States and for indemnity against such damages the charter-party stipulated.

There is no doubt that under some forms of a charter-party the charterer becomes the owner of the vessel chartered for the voyage or service stipulated and, consequently, becomes subject to the duties and responsibilities of ownership. Whether in any particular case such result follows must depend upon the terms of the charter-party considered in connection with the nature of the service rendered. The question as to the character in which the charterer is to be treated is, in all cases, one of construction. If the charter-party let the entire vessel to the charterer with a transfer to him of its command and possession and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But, on the other hand, if the charter-party let only the use of the vessel, the owner at the same time retaining its command and possession and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed. In the first case, the charter-party is a contract for the lease of the vessel; in the other, it is a contract for a special service to be rendered by the owner of the vessel.

In examining the adjudged cases on this subject we find some differences of opinion, especially in the earlier cases, as to the effect to be given to certain technical terms used *in [*611 the charter-party in determining whether the instrument parts with the entire possession and control of the vessel, but no difference as to the rule of law applicable when the construction is settled. All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the general owner of such command, possession and control is incompatible with the existence at the same time of such special ownership in the charterer. *Christie* v. *Lewis*, 2 Brod. & B. 410, 434; *Marcardier* v. *The Chesapeake Ins. Co.* 8 Cranch, 39, 49; *The Volunteer*, 1 Sumn. 551, 556; *Drinkwater* v. *The Spartan*, Ware, 149, 154; *Donahoe* v. *Kettell*, 1 Cliff. 135; Holt, Ship. 461–471.

If, now, in the light of these observations, we look at the charter-party in this case, we shall find little difficulty in disposing of the first ground for reversal presented by the appellants. The vessel here was chartered for the purpose of

plying in the harbor of Port Royal, in South Carolina, or for such other service as the government might designate, and the provisions which the charter-party contains on the part of the owners sound only in covenant. But if they engage that during the existence of the charter the vessel shall be kept tight, stanch, well fitted, tackled and provided with every requisite, and with the necessary men and provisions; that the whole of the vessel, with the exception of the necessary room for the accommodation of the crew and the storage for the cables and provisions, shall be at the sole use and disposal of the government; that no goods or merchandise shall be laden on board otherwise than from the government, or with the assent of its agent, on pain of forfeiture of the amount that may become due on the charter; and that the owners will receive on board all lawful goods and merchandise which the government may think proper to ship. In consideration of these stipulations the United States agree that the owners shall re-
612*] ceive the sum of $250 *per day for each day the vessel is retained under the charter, and that they will supply the vessel with coal; and in case the vessel, whilst executing the orders of the government, shall be destroyed or damaged by a hostile force or by being compelled to run any extraordinary marine risk, that the owners shall be indemnified.

The stipulations here designated on the part of the owners imply the possession and command of the vessel by them, and would be inconsistent with such possession and command by the government.

Stipulations that the general owners shall keep the vessel in good condition during the existence of the charter and receive on board certain goods at the request of the government and refuse to receive other goods without its assent, would be out of place and inappropriate if the government were, at the same time, special owners of the vessel for the service stipulated, having the vessel in its entire possession and control. Great weight was given to similar clauses by the King's bench, in *Campion* v. *Saville*, 2 Barn. & Ald. 511, and by the supreme court of New York, in *Clarkson* v. *Edes*, 4 Cow. 477. In each of these cases they were held conclusive that the possession and control of the vessel had not passed to the charterer, but had been retained by the general owner.

The fact that the service stipulated in the present case was to be rendered for the government cannot alter the natural import of the terms used in the charter-party, or change its construction, although in a doubtful case that fact might be entitled to much consideration.

2. The second ground presented by the appellants for a reversal of the decree is readily answered. The risk that the vessel incurred in complying with the orders of the harbor master was not an extraordinary marine risk within the meaning of the charter-party. The term extraordinary is there used to distinguish an unusual risk which the vessel might be compelled to run by order of the government, from those risks which would be covered by an ordi-
613*] nary *marine policy, and which might be expected to arise from the service in which the vessel was engaged. The contract of the government was not intended to apply to the usual risks attendant upon the performance of a service such as was here mentioned, but the risks outside and beyond them.

The risk incurred was of a possible collision with a sunken anchor in the harbor. This was an ordinary risk which every vessel must run that enters a harbor, and is one which every marine policy covers.

Decree affirmed.

JOHN T. DELMAS, *Plff. in Err.*,
v.
MERCHANTS' MUTUAL INSURANCE COMPANY, John Henderson, *et al.*

(See S. C. 14 Wall. 661-670.)

State court decision as to contract payable in Confederate money, when reviewable in this court—subsequent constitutional provision—stamps, when not necessary to contract.

1. A decision of a state court, that a contract of which the consideration was Confederate money was void, does not of itself raise one of those Federal questions which belong to this court to settle, when made upon the general principles of public policy.
2. But when the court expressly rests its decision of the same question on a state constitutional provision, which declares all contracts, the consideration of which was Confederate money, to be void, and on no other ground, this court has jurisdiction of the question whether that provision is in conflict with the Constitution of the United States.
3. Where the contract was valid when made, any subsequent constitutional provision which makes it void, is in violation of the Federal Constitution on the subject of impairing the obligation of contracts.
4. The state court erred in deciding that the contract was void by reason of the said subsequent constitutional provision of the state concerning contracts for which Confederate notes were the consideration.
5. Stamps are not necessary on the extension of time for the payment of a note, and on the reinscription of a mortgage.

[No. 227.]

Argued Nov. 12, 1872. Decided Nov. 25, 1872.

IN ERROR to the Supreme Court of the State of Louisiana.

In the fifth district court of New Orleans, Bressole Gilbert and wife brought suit against one Joseph Menard, and procured an order to sell certain real property belonging to him, to satisfy their claim.

The property of Joseph Menard was sold by the sheriff to John Henderson, for $5,625 cash, and according to the practice in Louisiana, Henderson paid to the sheriff the amount due to the judgment creditor, with costs, charges, taxes, etc., and retained in his own hands the remainder, $3,499.07, to be by him applied to the payment of the mortgages subsequent to those of the judgment creditor. This sale took place July 1, 1867.

Aug. 1, 1867, The Merchants' Mutual Insurance Company of New Orleans brought suit in the fifth district court of New Orleans, in a form of action peculiar to the Louisiana prac-

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NOTE.—*Contracts payable in Confederate notes; tender of*—see note to Thorington v. Smith, 19 L. ed. U. S. 361.

What laws are void as impairing the obligation of contracts—see note to Fletcher v. Peck, 3 L. ed. U. S. 162.

tice, alleging themselves to be owners of a promissory note of $5,000, subscribed by Joseph Menard, dated May 28, 1857, at one year, and that the note was secured by mortgage on the same property which Henderson had bought at sheriff's sale; they prayed for judgment against Henderson, making the property he had purchased liable for their claim.

In consequence of this proceeding of the Merchants' Mutual Insurance Company, August 9, following, Henderson applied by petition to the fifth district court from which the writ he purchased under had issued, setting out the fact of his purchase, its terms and conditions. He set out that various mortgages existed on the property subsequent in date to the one under which he had purchased and declared himself ready to pay to the parties the $3,499.07 he had retained, but was unable to decide on their conflicting claims.

He also alleged that the Merchants' Mutual Insurance Company had instituted in the fifth district court of New Orleans a suit against him, Henderson, and Joseph Menard, to make the same property he (Henderson) had purchased at the sheriff's sale subject to a mortgage of $5,000, made May 19, 1857.

He further alleged that he had been garnished by John T. Delmas, a mortgage creditor of Joseph Menard in the sum of $4,560.

He prayed for an injunction against the Merchants' Mutual Insurance Company restraining it from proceeding against the property, and for an order to all the parties setting up claims against the property to interplead as to the balance in his hands, of $3,499.07.

John T. Delmas answered that he obtained a judgment against Joseph Menard in the second district court of New Orleans, and on fi. fa. issued on said judgment, seized the surplus of the price of the property in the hands of John Henderson, which he (Henderson) had bought under the execution against Menard; and that by reason of his judgment, the said seizure, and his mortgage, he was entitled to the money in Henderson's hands. That his mortgage had precedence over that of the Merchant's Mutual Insurance Company.

He answered further, that the mortgage claimed by the said company was null and void and barred, as well as the note it was given to secure, by prescription. He prayed that he might be declared entitled to the money in Henderson's hands, in preference to the Merchants' Mutual Insurance Company, and all others.

The Merchants' Mutual Insurance Company answered by a general denial, prayed that it might be paid by preference as special mortgagee, and that the claim of Henderson, the plaintiff, and of Delmas and others, the interveners might be rejected.

They filed a further answer, alleging that the judgment obtained against Menard and Vignaud was of no validity, because the consideration of the obligation or claim of Delmas against Menard was Confederate currency, although no such plea was interposed by Menard; that the judgment was not *res judicata* against respondent, the Merchants' Mutual Insurance Company, who claimed the right to interpose the illegality of the original transaction in bar of Delmas' claim to be paid by preference; they prayed that Delmas' judgment should be declared void and of no effect.

Other parties also put in answers.

These issues were tried in the fifth district court of New Orleans, May 9, 1868, when judgment was rendered against Henderson, Delmas, and others, and in favor of the Merchants' Mutual Insurance Company.

The main contest was between the Merchants' Mutual Insurance Company and John T. Delmas, the fifth district court arriving at its conclusion by treating the judgment rendered by the second district court in favor of Delmas as an absolute nullity, on the ground that the contract involved in the suit in which said judgment had been rendered was based upon Confederate money.

When Delmas offered the record from the second district court, showing his judgment, the Merchants' Mutual Insurance Company offered to prove by oral testimony that the judgment was based upon a contract, the consideration of which was Confederate money, to which testimony Delmas' counsel objected on the ground that the matter could not be inquired into collaterally in another court for the purpose of treating the judgment as a nullity, but the fifth district court overruled the objection, and Delmas' counsel took his bill of exceptions.

The defendant, John T. Delmas, then appealed to the supreme court of Louisiana, where the judgment of the fifth district court, so far as he, Delmas, was concerned, was affirmed.

Delmas then sued out a writ of error to bring the case here.

Mr. **Thomas J. Durant** for plaintiff in error.

Mr. **A. G. Riddle** for defendants in error.

Mr. Justice **Miller** delivered the opinion of the court:

By the Civil Code of Louisiana, the purchaser of property sold under a mortgage, retains in his own hand the amount which his bid may exceed the sum necessary to satisfy the mortgage, and costs of the proceeding under which it was sold. For this surplus, he is responsible to the holders of other liens, if there be any on the same property.

The case before us is a petition in the nature of the equitable bill of interpleader, brought by Henderson to have it determined by the court to which of several claimants such a surplus in his hands should rightfully be paid.

The contest finally became narrowed to Delmas on one side and the insurance company on the other; and this contest was decided by the supreme court of Louisiana, in favor of the latter.

Delmas has prosecuted a writ of error, and relies upon two propositions ruled against him by that court, as bringing the case within the revisory power of this court.

1. The first of these is that the court below decided that a judgment in his favor, which was otherwise conceded to be a valid prior lien, was void because the consideration of the contract on which the judgment was rendered was Confederate money.

2. That the note under which the insurance company claimed had been extended as to time of payment, and the mortgage given to secure

it re-inscribed, without having the stamps affixed which such agreements required.

1. In regard to the first of these propositions this court has decided, in the case of *Thorington* v. *Smith*, 8 Wall. 1, 19 L. ed. 361, that a contract was not void because payable in Confederate money; and, notwithstanding the apparent division of opinion on this question in the case of *Hanauer* v. *Woodruff*, 10 Wall. 482, 19 L. ed. 991, we are of opinion that on the general principle announced in *Thorington* v. *Smith* the notes of the Confederacy actually circulating as money at the time a contract was made may constitute a valid consideration for such contract.

The proposition involved in this conclusion, **666***] however, does *not of itself raise one of those Federal questions which belong to this court to settle conclusively for all other courts. When a decision on that point, whether holding such contract valid or void, is made upon the general principles by which courts determine whether a consideration is good or bad on principles of public policy, the decision is one we are not authorized to review. Like in many other questions of the same character, the Federal courts and the state courts, each within their own spheres, deciding on their own judgment, are not amenable to each other.

Accordingly, in several cases coming here on writ of error to the state courts where the same question of the sufficiency of Confederate money and the sale of slaves as a consideration for a contract was the error complained of, we have dismissed the writ because it appeared that the state court had rested its decision on this ground of public policy, tested by which the contract was void when made. *Bethel* v. *Demaret*, 10 Wall. 537, 19 L. ed. 1007; *Bk. of W. Tenn.* v. *Citizens' Bk. ante*, 514; *Worthy* v. *Marston, post*, 826; *Sevier* v. *Haskell, post*, 827; *Jacoway* v. *Denton, ante*, 645, not reported.

In *Bethel* v. *Demaret*, the first of these cases, the opinion of the supreme court of the state was expressly based on the general doctrine and the previous decisions of that court, and not on the constitutional provision. In the next case, *The Bk. of W. Tenn.* v. *Cit. Bk. of La.*, that court speaks both of the constitutional provision and the adjudications of that court made prior to the adoption of the article 127 of the Constitution. And as it was apparent from the record that the judgment of the court of original jurisdiction was rendered before that article was adopted, we could not entertain jurisdiction when the decision in that particular point was placed on a ground which existed as a fact and was beyond our control and was sufficient to support the judgment, because another reason was given which, if it had been the only one, we could review and might reverse.

In the case before us that court say, in express language, that they hold the judgment of **667***] the plaintiff in error void *because the 127th section of the state Constitution declares that it shall be so held. That article reads as follows: "All agreements, the consideration of which was Confederate money, notes, or bonds, are null and void, and shall not be enforced by the courts of this state." This provision was made a part of the Constitution of Louisiana after the contract now in dispute was made, and if the contract was valid then, this provision clearly not only impairs but absolutely destroys its obligation within the meaning of the 10th section of the first article of the Constitution of the United States.

It has long been settled that under the act of Congress of 1824, and by reason of the peculiarity of the practice in the courts of that state, the opinions delivered by the appellate court of Louisiana are treated by us as part of the record, and are looked into to learn what they decided when their judgments are brought here by writs of error. *Cousin* v. *Blanc*, 19 How. 207, 15 L. ed. 604; *Almonester* v. *Kenton*, 9 How. 9. So long as they in those opinions placed the invalidity of this class of contracts on the ground of a public policy existing at the time the contract was made, or so long as they left us to infer that such was the ground, having once before so decided, the decision presented no question over which we had any revisory power. But when, going a step further, they expressly rest the decision of the same question on the constitutional provision we have quoted, and on no other ground, the question necessarily arises, is that provision in conflict with the Constitution of the United States? And the answer to this question depends solely on the validity of the contract when made; for, if valid, then the Federal Constitution protects it from all subsequent acts of state legislation, whether in the form of constitutional or ordinary legislative enactments. *Hart* v. *White, ante*, 685.

It may be said that since we know that the supreme court of Louisiana has in other cases held this class of contracts void in their inception, for the very reasons for which *the [***668** Constitution annuls them, we are bound to follow the state courts in that decision. But, as we have already said, this is not the class of questions in which we are bound to follow the state courts. It is not based on a statute of the state, or on a construction of such a statute, nor on any rule of law affecting title to lands, nor any principle which has become a settled rule of property, but on those principles of public policy designed for the protection of the state or the public, of which we must judge for ourselves, as they do when the question is fairly presented.

Besides, this court has always jealously asserted the right, when the question before it was the impairing of the obligation of a contract by state legislation, to ascertain for itself whether there was a contract to be impaired. If it were not so, the constitutional provision could always be evaded by the state courts giving such construction to the contract, or such decisions concerning its validity, as to render the power of this court of no avail in upholding it against unconstitutional state legislation. *Bridge Prop.* v. *Hoboken Co.* 1 Wall. 145, 17 L. ed. 576; *J. B. Bk.* v. *Skelly*, 1 Black, 436, 17 L. ed. 173.

These views are in precise conformity to what has been held by this court in the analogous subject of slaves as a consideration of contracts made before the abolition of slavery. The case of *Worthy* v. *Marston*, decided at this term, was a writ of error to the supreme court of Louisiana, on the ground that that court had held

such a contract void. And it was urged that it was so held by that court under § 128 of the Louisiana Constitution, which declared contracts for slaves void, in the same terms that § 127 declared contracts for Confederate money void; but this court dismissed the writ of error for want of jurisdiction, because the supreme court of Louisiana had said in its opinion that it did not place the decision on the constitutional provision, but on the ground that the same principle had been promulgated and acted on in that court before the constitutional provision was adopted.

669*] *Yet, in the case of *Hart* v. *White*, *ante*, 685, in which the supreme court of the state of Georgia held such a contract void by reason of a provision in the Constitution of that state, adopted after the contract was made, this court entertained jurisdiction and reversed the judgment. This was done on the ground taken in the present case, namely: that the contract being in our judgment valid when made, any constitutional provision which made it void was in violation of the Federal Constitution on the subject of impairing the obligation of contracts; and any judgment of a state court resting on such enactment of a state Constitution, after the date of the contract, must be reversed in this court on error.

We are of opinion, for these reasons, that there was error in the supreme court of Louisiana in deciding that the judgment of Delmas was void by reason of the constitutional provision of that state concerning contracts for which Confederate notes were the consideration.

As the case must be reversed for this reason, we might pass without examination the question raised in regard to the necessity of stamps on the extension of time for the payment of the note, and on the re-inscription of the mortgage; but as that may arise again in the further progress of the case, we will dispose of it now. As regards the latter, which is the mere act of the party who holds the mortgage, we are at a loss to perceive any ground on which this act of re-inscription—the same as recording a deed the second time—can be held to be an agreement requiring a stamp. The assent of the mortgagor is not necessary, nor was it asked or given. Nor do we believe it was the purpose of the stamp act to hold a mere extension of the time of payment, indorsed on the note, without any consideration for such extension, or change in any other term or condition of the contract, to be an agreement requiring a stamp.

In the case of *Pugh* v. *McCormick*, *post*, decided at the present term, it was held that the indorsement of a note by which the bill passed **670*]** to the indorsee, *did not require a stamp, and also that a writing on the back of the note by the indorser waiving demand, protest and notice, and agreeing to be liable without them, was good without a stamp. We think this ample authority for holding that a gratuitous extension of time did not require a stamp, as both the writings relied on in that case have more of the elements of an agreement than the one before us. In the matter of the stamp, we think the court committed no error.

But for the error first considered the judgment is reversed, and the case remanded for further proceedings, in conformity to this opinion.

THE NEW BEDFORD & NEW YORK STEAM PROPELLER COMPANY,
Appt.,
v.
UNITED STATES.

(See S. C. 14 Wall. 670–676.)

Contract, when vests ownership of vessel—extent of damages for loss of vessel.

An agreement between the plaintiff and the United States, where the transmission of the ownership of the vessel to the United States was contemplated at the option of the United States, is not a mere contract of affreightment.

Where the plaintiff was to have no more than $40,000 for the vessel if the United States took her, and this sum might be paid by the *per diem* hire, in which case the vessel was to become the property of the government, the contract vested an equitable ownership in the government.

Where the United States became insurer against war risks, and the vessel was destroyed by such risk before the freight earned amounted to the appraised value or price, the plaintiff's loss could not have exceeded what remained unpaid of that sum, and when the plaintiff has already received that sum it can have no further claim.

[No. 228.]

Argued Nov. 13, 1872. Decided Nov. 25, 1872.

APPEAL from the Court of Claims.

The appellants chartered the steamer Thorn to the government by a charter-party, dated Apr. 5, 1864, containing these clauses:

"The war risk to be borne by the United States, the marine risk to be borne by the owner, for a period of thirty days, and as much longer as her services may be required, to be employed in such service as party of the second part may direct."

"The said vessel is valued and appraised at the sum of $40,000, and should she be retained so long in the service of the United States that the money paid and due on account of said charter (deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a net profit of thirty-three per cent per annum on said appraised value) shall be equal to said appraised value, then the said vessel shall become the property of the United States, without further payment except such sum as may then be due on account of the services of said vessel, rendered under the said vessel's charter."

"And further: if, at any time during the continuance of this charter, the United States shall elect to purchase the said vessel, then they shall have the right to take her at the appraised value at the date of charter, and all money then already paid and due on account of said charter (deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a net profit of thirty-three per cent per annum on the original appraised value) shall apply on account of the said purchase."

The said steamer remained in the military service of the defendants until Mar. 4, 1865, when she was sunk in Cape Fear river, by the explosion of a torpedo placed there by the enemy. The owners presented to the government a claim of $40,000 for the loss of said steamer. This claim was transmitted by the Quartermaster General to the third auditor, Feb. 14, 1866, by letter, as follows:

Quartermaster General's Office,
Washington, D. C., Feb. 14, 1866.

Sir:

I have the honor to transmit herewith, for your information and official action, the final account for purchase of steamer Thorn, as follows:

For purchase of steamer 672*] Thorn. *By valuation as per charter	$40,000.00
By 33 per cent per annum from 12 M. April 5, 1864, to 4 P. M. March 4, '65	$11,996.11
By running expenses, 11 months, at $2,100 per month	$23,100.00
	$75,096.11
To amount received from U. S. for services from 12 M. April 5, 1864, to March 4, 1866, 4 P. M. being 333 7-24 days, at $150	$49,975.00
Less 23 5-24 days lost	$ 3,481.25
	$46,493.75
Balance due	$28,602.36

This vessel was sunk March 4, 1864, 4 P. M., near Fort Anderson, it is supposed, by the explosion of a torpedo.

This office is unofficially informed that additional papers relating to this claim have been filed in the office of the third auditor.

By order of the Quartermaster General.

Very respectfully, your obedient servant,
Geo. D. Wise,
Bvt. Brig.-Gen. and Q. M. in charge 3d Div.

Hon. John Wilson,
Third Auditor Treasury Department.

And June 15, 1866, the third auditor made the following adjudication:

Treasury Department,
Third Auditor's Office, June 15, 1866.

In pursuance of an Act of Congress, approved 3d of March, 1849, entitled "An Act to Provide for the Payment of Horses and Other Property Lost or Destroyed in the Military Service of the United States," as amended and corrected by the 5th section of this act of March 3, 1863, it is adjudged by me that there is due from the United States to the New Bedford & New York Steam Propeller Company, for the steamer Thorn, destroyed by a torpedo on the 4th day of March, 1865, near Fort Anderson, in Cape Fear river, N. C., while in the military service of the United States, the sum of twenty-eight thousand six hundred and two dollars and thirty-six cents ($28,602.36).

John Wilson,
Third Auditor.

The amount, so adjudged by the third auditor, was paid and received by the claimant, and no other further sum was ever paid on account of the loss of said steamer.

The court of claims found that the said steamer when she entered the service, and at the time of her loss, was of the value of $40,000; that the United States never at any time notified the claimant of their election to purchase said vessel, or to take her under the accruing or purchase clauses of the charter-party, above quoted.

As a conclusion of law upon these facts, the court of claims held that the United States, under such a charter-party, became the equitable owner of the vessel to the extent of the sum earned over and above the expenses and profits stipulated for, and that, to the extent of such sum, the owners had received payment on the price of the vessel, and that whether she was taken by the United States under the option given to purchase at any time, or perished by one of the perils against which the United States engaged to insure, this accruing clause was equally applicable. It was only the balance due on the price of the vessel which the original owner could claim, and not the amount of the valuation.

The claimants appealed.

Messrs. **N. P. Chipman** *&* *Hosmer*, **Thomas J. Durant**, and *C. F. Peck* for appellant.

Messrs. **Williams**, *Atty-Gen.*, and *C. H. Hill*, for appellee.

Mr. Justice **Strong** delivered the opinion of the court:

The agreement between the plaintiffs and the United States was not a mere contract of affreightment. The vessel, it is true, was let to hire for an indefinite period, not less than thirty days, and the charterers undertook to pay $150 for each and every day she might be employed under the contract, and to bear the war risk, the marine risk being borne by the plaintiffs. But, beyond this, the contract looked to a sale of the vessel to the charterers at a stipulated price. Her value was fixed at $40,000, and it was agreed that should she be retained in the service of the United States until the money paid and due on account of the charter should be equal to such value (after deducting therefrom the cost of running and keeping her in repair, together with a percentage on her appraised value), she should become the property of the United States without further payment, except of such sum as might then be due on account of her hire under the charter. Another clause in the agreement stipulated, in effect, that at any time during the continuance of the charter, namely: while the vessel was employed by the charters, and until she should be returned to the owners at New York, the United States might elect to purchase her, they might take her at her appraised value (*viz.:* $40,000), in which case all money paid and due on account of the charter, after making the deductions above mentioned, it was agreed should be applied on account of the purchase. The plain meaning of these stipulations is that transmission of the ownership of the vessel to the United States was contemplated; that the transmission of ownership was to be at the option of the United States; that in no event were the *plaintiffs to have more than [*675 $40,000 for her, and that this sum might be paid in full by the *per diem* hire, in which case the vessel was to become the property of the government so soon as the hire, less the specified deductions, should equal in amount the price named, or at such earlier time as the United States might elect to take her at that price. The plaintiffs, therefore, were in no

contingency entitled to more than the price fixed for the vessel by the contract. Whether received as freight or in direct payment of the stipulated price, all money which was paid them or became due to them, was consideration for the transmission of title, if the United States chose so to regard it. In effect, therefore, the contract vested an equitable ownership in the defendants, proportioned to the money paid and due under the charter. Had a third party, with knowledge of the agreement, bought the vessel from the plaintiffs, he would doubtless have acquired only a right to the purchase money remaining unpaid at the time of his purchase, if the charterers had afterwards elected to take the vessel during her retention as purchasers, or had retained her until the freight equaled the price agreed upon.

It is true the United States became insurers against war risks, and the vessel was destroyed by such a risk before the freight earned amounted to the appraised value or price. But as insurers they were only bound to make good the loss the plaintiffs sustained, and as the plaintiffs had agreed to sell for $40,000, that loss could not have exceeded what remained unpaid of that sum. It cannot be doubted that the United States had also under the contract an insurable interest. Suppose both they and the plaintiffs had insured severally for their interests, as they might have done, with another underwriter, could more than $40,000, the value of the vessel, have been recovered on both the policies? That will not be maintained. Or, suppose the plaintiffs had insured against marine risks, and the vessel had been lost by one of them. By the contract they undertook such risks. If the vessel had been lost on the day before the freight, less the deductions agreed upon, would have amounted to her 676*] *entire value, could the plaintiffs have recovered the whole $40,000, and have retained it, together with the $39,850 paid or due for freight? Would not the policy have inured to the benefit of the United States to the extent of the payments made? To hold that it would not would be giving to the contract a most unreasonable construction. And if not, how can the plaintiffs now be entitled to the whole value of the vessel, in addition to all they have received for her hire, as if no part of her price had been paid, or as if the United States had no interest? We think they are not thus entitled. In our opinion the government had an equitable interest in the vessel at the time she was lost, and as the interest of the plaintiffs amounted to no more than $40,000, which sum they have already received, they have no further just claim.

The judgment is affirmed.

HARRY H. CHRISTMAS *et al.*, *Appts.*,

v.

W. A. GAINES and H. S. Julien, Exrs. of John W. Russell, Deceased, *et al.*

(See S. C. "*Christmas* v. *Russell*," 14 Wall. 69–84.)

Original bill —equitable assignment, what is— bill of exchange or check is not—an order is.

1. Where a bill is essentially an original one, and not auxiliary to an action at law, as where other parties are made in the bill and different interests involved, the jurisdiction of the circuit court must depend upon the citizenship of the parties.
2. An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment.
3. To constitute an equitable assignment, the transfer must be such that the fundholder can safely pay the assignee, and is compellable to do so, although forbidden by the assignor.
4. A bill of exchange or check is not an equitable assignment *pro tanto* of the funds of the drawer in the hands of the drawee, but an order to pay out of a specified fund is.

[No. 75.]

Argued Nov. 16, 1871. Decided Jan. 22, 1872.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

The case is stated by the court.

Messrs. **P. Phillips** and *J. D. Freeman* for appellants.

Messrs. W. P. Harris, **J. H. Ashton**, and *T. N. Lindsey* for appellees.

Mr. Justice **Swayne** delivered the opinion of the court:

This is an appeal in equity from the decree of the circuit court of the United States for the southern district of Mississippi.

Two questions have been argued and are presented for our consideration. They are:

Whether the residence of the parties as disclosed in the record was such as gave the court below jurisdiction of the case. And,

Whether William Yerger and Warren P. Anderson had such a lien, by equitable assignment, upon the fund in controversy as warranted the decree appealed from.

The solution of these questions requires a brief statement of the case as it appears in the record.

Richard Christmas held three notes of Lyons payable to himself, all dated November 30, 1859, each for the sum of $16,666.50, and payable respectively, one, two, and three years from date. Richard Christmas assigned and delivered them to his son, H. H. Christmas. H. H. Christmas made a compromise with Lyons whereby these notes were delivered up to the maker, and he executed to H. H. Christmas, in their stead, two notes, each for $8,339.90, one payable December 1, 1866, the other February 1, 1868. Both were secured by a mortgage upon real estate. H. H. Christmas hypothecated one of the notes to Payne, Huntington & Co. of New Orleans, to secure a debt which he owed them. *Suits [*79 upon the notes were instituted in the court where this bill was filed. The suit upon one of the notes was in the name of H. H. Christmas for his own use. The other was in his name for the use of Payne, Huntington & Co. A bill was also filed in the same court to foreclose the mortgage. It set out the rights of H. H. Christmas and of Payne, Huntington, & Co. touching the notes. On the 1st of May, 1868, H. H. Christmas entered into an agreement with Mary Christmas, whereby in consideration of her assuming the payment of the debt due to Payne, Huntington, & Co., he transferred to her the note hypothecated to them. Payment to them was made out of her means, and they delivered up the note. The foreclosure bill was amended by the substitution

NOTE.—*Assignment of fund, etc., by order, draft, or check on it, and in other manner*—see note to Tiernan v. Jackson, 8 L. ed. U. S. 224.

of her name for that of Payne, Huntington, & Co., and an application, which is still pending, was made for the like substitution in the suit at law upon the note transferred to her. A judgment was recovered upon the other note.

In this condition of things the complainants filed their bill. It alleges the following state of facts: Russell, now deceased, for himself and the use of the complainants other than his executors, recovered a judgment against Richard Christmas, which was taken to the Supreme Court of the United States by a writ of error. William Yerger and Warren P. Anderson became his sureties in the error bond. The judgment was affirmed by this court, and the sureties thus became liable on their bond. The sureties executed the bond upon a promise of indemnity by their principal. He subsequently gave them a lien for this purpose upon one of the original notes of Lyons. It is claimed that this lien attaches to the notes taken in substitution for them. Richard Christmas is hopelessly insolvent, and has gone into bankruptcy. The complainants seek to be subrogated to the rights of the sureties and to enforce the alleged lien for the satisfaction of the judgment. The bill alleges that the complainants are all residents of the state of Kentucky; that the defendants, Richard, H. H. and Mary Christmas, are all residents of the same state, and that the 80*] defendants, Yerger *and the legal representatives of Anderson and Lyons, are residents of the state of Mississippi.

No party to the original suits has had any connection with the filing of this bill. Lyons, the defendant in these suits, asks no protection against them. He did not answer the bill, but allowed a decree *pro confesso* to go against him. The case which the bill makes is wholly outside of the litigation in the suits at law. It is alien to everything involved in those proceedings. It alleges a lien upon the liability of Lyons, prior and paramount to the right of H. H. Christmas as plaintiff for his own benefit in one of the suits at law, and to that of Mary E. Christmas as *cestui que use* in the other. The controversy is wholly between them and the complainants. The bill is essentially an original one. In no sense can it be held to be auxiliary or ancillary to the action at law. Can such a bill be maintained?

The Constitution, article 3, limits the judicial power of the United States to "controversies between citizens of different states." There are exceptions which do not affect this case, and need not, therefore, be more particularly adverted to. The act of 1789, § 11, 1 Stat. at L. 78, declares that "no civil suit shall be brought . . . against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ." The act of 1839, 5 Stat. at L. 321, authorizes the voluntary appearance of parties in regard to whom there is no inherent and insuperable jurisdictional objection, in suits elsewhere than in the district in which they reside or in which they may be found.

In the light of these provisions it is clear that this bill cannot be maintained as an original one; and we think it equally clear that it cannot be maintained as an auxiliary or supplementary bill, because it is not one of that character. The case falls clearly within the rules laid down by this court, upon the subject of parties, in *Shields* v. *Barrow*, 17 How. 130, 15 L. ed. 158. *The several adjudications of [*81 this court upon the point under consideration have been referred to by the counsel on both sides. *Logan* v. *Patrick*, 5 Cranch, 288; *Simms* v. *Guthrie*, 9 Cranch, 19; *Dunn* v. *Clarke*, 8 Pet. 1; *Clark* v. *Mathewson*, 12 Pet. 170; *Dunlap* v. *Stetson*, 4 Mas. 349; *Freeman* v. *Howe*, 24 How. 450, 16 L. ed. 749; *Jones* v. *Andrews*, 10 Wall. 331, 19 L. ed. 936. Those cases call for a few remarks. In the five earliest cases the defendants in the suits at law were complainants in the suits in equity. In one of them, *Dunn* v. *Clarke*, a judgment had been recovered against Dunn and others in the circuit court for the district of Ohio. The plaintiff, who was a citizen of Virginia, had died. The defendants filed their bill in the same court, praying for an injunction and a conveyance of the premises. All the complainants and all the defendants in the chancery suit were citizens of Ohio. This court said: "The injunction bill is not considered an original bill between the same parties as at law, but if other parties are made in the bill and different interests involved, it must be considered to that extent at least an original bill, and the jurisdiction of the circuit court must depend upon the citizenship of the parties." It was further said that as there appeared to be matters of equity in the case which could be investigated by a state court it would be reasonable and just to stay all proceedings on the judgment until the complainants should have time to seek relief from a state tribunal. The decree of the circuit court was modified accordingly. See, also, *Williams* v. *Byrne*, Hemp. 473.

In *Freeman* v. *Howe*, it appears that White had sued in the circuit court of the United States for Massachusetts and attached certain property of the defendant. The property was taken from the possession of the marshal by a writ of replevin issued from a state court. The marshal appeared in that court and set up as a defense that he held the property when it was taken from him, by virtue of process issued from the circuit court. This defense was overruled and the judgment against him was affirmed by the supreme court of the state. That judgment was reversed by this *court [*82 upon the ground that the circuit court, having first acquired possession of the *res*, could not be deprived of that possession until the litigation there was brought to a close. This was the only point involved in the case and the only one decided. The learned judge who delivered the opinion remarked that the marshal's possession might have been protected by a proceeding in equity. In that connection he made certain remarks which were entirely proper as regards the facts of the case before him, but it is a misapprehension to suppose they are of universal application or that they can affect a case of the character of the one under consideration. *Buck* v. *Colbath*, 3 Wall. 334, 18 L. ed. 257.

The last of this series of cases is *Jones* v. *Andrews*, *supra*. Andrews, a citizen of New York, recovered a judgment in the Circuit court of the United States for the western district of

Tennessee against Reed & Bryson, by default. For the satisfaction of that judgment he sued out a writ of garnishment to seize in the hands of the judgment debtors the notes to them of Jones, a citizen of Georgia. Thereupon Jones filed a bill in equity in the same court, wherein he alleged that Reed & Bryson had transferred the notes to Andrews in payment of their debt to him; that they owed Andrews nothing when he sued them; that the judgment was obtained by collusion, and that the writ of garnishment was a contrivance to enable Andrews to avoid the necessity of a direct suit against Jones, and to deprive Jones of a valid defense which he had against the notes. Andrews appeared in the case voluntarily. This court held that the bill was well brought as an original one under the act of 1839, and also as one incidental and auxiliary to the garnishment proceeding. On both points the judgment was correctly given. According to the face of the bill Jones was to be as much affected by the garnishment proceeding, and a bill was as necessary for his protection and to the due administration of justice as if he had been a party to the record in the garnishment case.

The course indicated in *Dunn* v. *Clarke* 83*] should have been *pursued in this case. The bill should have been filed in the proper state court and an application should have been made to the circuit court to hold the proceeds of the suits at law under its control until the right to them should have been settled by an adjudication of the state court between the conflicting claimants. There would be no more inconsistency or embarrassment in these different proceedings than there is where a mortgagor resorts in different courts to the several remedies which he is entitled to pursue at the same time. He may file a bill to foreclose in one court, sue at law to recover his debt in another, and bring an action of ejectment to recover possession of the mortgaged premises in a third. Each of such courts will see in the end that its process is not abused and that no wrong is done to the debtor.

The evidence relied upon to support the alleged lien, consists, so far as it is necessary to consider it, of letters from Richard Christmas to Yerger, written before Richard transferred to H. H. Christmas the notes originally given to Richard by Lyons. In a letter of the 25th of October, 1865, Richard said: "I feel great uneasiness about your liability on the bond in suit of Russell against me. I have ever held the Lyons note as sacred for the payment of this debt, and have it now in New York, endeavoring to sell it with the mortgage, to pay this debt; I expect to hear from it daily. If not sold I will send it to you as soon as I return." On the 14th of February, 1866, he wrote: "I could not safely send you the Lyons note by mail as it is payable to me or bearer—hence if lost might put me to much trouble." On the 21st of the same month he said: "You may rest assured I will protect you with the Lyons note." In the next letter, of the 12th of May following, he announced the transfer of the notes to H. H. Christmas, and said: "In this I hope I have not lost sight of my purpose to protect you." These letters contain no words of transfer, and nothing which by construction or otherwise can have any effect in that way. At most they are only evidence of a promise to pay the *judgment, if affirmed, out of the [*84 proceeds of one of the notes, and to send the note, if not sold, to Yerger.

An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. The phraseology employed is not material provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund—any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund-holder can safely pay, and is compellable to do so, though forbidden by the assignor. Where the transfer is of the character described, the fund-holder is bound from the time of notice. *Rogers* v. *Hosack*, 18 Wend. 334; *Hoyt* v. *Story*, 3 Barb. 263; *Dickenson* v. *Phillips*, 1 Barb. 461; *Clayton* v. *Fawcet*, 2 Leigh, 19; *Hopkins* v. *Beebe*, 26 Pa. 85; *Hall* v. *Jackson*, 20 Pick. 194. A bill of exchange or check is not an equitable assignment *pro tanto* of the funds of the drawer in the hands of the drawee. *Cowperthwaite* v. *Sheffield*, 3 N. Y. 243. But an order to pay out of a specified fund has always been held to be a valid assignment in equity and to fulfil all the requirements of the law. *Knapp* v. *Alvord*, 10 Paige, 205; *Yeates* v. *Groves*, 1 Ves. Jr. 280; *Row* v. *Dawson*, 1 Ves. 331; *Morton* v. *Naylor*, 1 Hill, 585. These views are fatal to the claim asserted by the complainants in behalf of the sureties on the bond.

Upon both the grounds which have been considered, the decree of the Circuit Court must be reversed, and the bill dismissed. The cause will be remanded with directions to proceed accordingly.

ELIZA J. MAHAN *et al.*, *Appts.*,
v.
UNITED STATES.

(See S. C. 14 Wall. 109-112.)

Appeals from court of claims—findings of fact —refusal to find.

1. The rules regulating appeals from the court of claims allow nothing to be brought to this court for review but questions of law, leaving the court of claims to find the facts.
2. If the court does not find the fact to be as a party claims it, he cannot, for that reason, bring the whole testimony here to show that he was right.
3. If the court of claims refuses to find as prayed, the prayer and refusal must be made part of the record, so that this court may be able to determine whether the question is one so necessarily to the decision of the case that it will send it back for such finding.

[No. 491.]

Argued Dec. 22, 1871. Decided Jan. 22, 1872.

APPEAL from the Court of Claims.

The case is sufficiently stated in the opinion.

Mr. **R. M. Corwine** for appellants.

Mr. **B. H. Bristow,** *Solicitor Gen.*, in opposition to motion.

Mr. Justice **Miller** delivered the opinion of the court:

The appellant, Eliza J. Mahan, alleges that she filed a written request to the court of claims before its decree was rendered, that it would find, as a matter of fact, that the title and ownership of the property in question was in her, and that she was entitled to recover the proceeds thereof, now in the Treasury; and that the court refused to do this, but found, to the contrary, that she was not the owner of the captured property, and was not entitled to the proceeds of it in the Treasury.

Her counsel here claim that under rule five, regulating appeals from the court of claims, she is not entitled to have all the evidence which was before the court of claims brought here, and have this court decide the question which she propounded to that court.

And it is argued that these rules, by which is probably meant the fourth and fifth rules regulating appeals from the court of claims, were adopted in order and to the end that disputed questions of fact might be brought here for review.

This is a total misconception of their spirit if not of their letter. It is not possible to look at the first three rules adopted when the appellate jurisdiction of this court was first exercised, without seeing that the purpose was to bring nothing here for review but questions of law, leaving the court of claims to exercise **112*]** *the functions of a jury in finding facts, equivalent to a special verdict, and with like effect.

In practice it was found that the court of claims did not, in many cases, make the necessary finding of facts until after they had rendered their decree, and complaints were made here that the findings were often insufficient to present the law points on which parties relied, and of which they desired a review in this court.

To remedy these evils the fourth and fifth rules were adopted at the December term, A. D. 1869.

The fourth requires the court of claims to make and file their finding of facts in all cases where an appeal can be taken, in open court, at or before the time of entering their judgment. The fifth rule enables a party to obtain a finding of that court on any question of fact arising in the case and deemed by him essential to its decision. He has only to file a written request that, as to that point, the court will make a finding. But it was never supposed that the party would ask or the court must find the fact to be as the party claimed it, and if they did not, that he could, for that reason, bring the whole testimony here to show that he was right. To do this would be to render useless all the rules adopted by this court, and to reverse the system on which we have proceeded from the first.

The rule does say that if the court of claims refuses to find as prayed, the prayer and refusal must be made part of the record. The remedial purpose of this rule is that when a party has, in writing, indicated a specific question of fact on which he desires the court of claims to make a finding, and the court has neglected or refused to do so, this court may be able to determine whether the question is one so necessary to the decision of the case that it will send it back for such finding.

In the present case the court of claims did make a very explicit finding on the question of fact presented by the request of plaintiff, and this is all the rule required, though the finding is contrary to her averment.

The motion is overruled.

JAMES ARMSTRONG *et al., Plffs. in Err.,*
v.
LOTT M. MORRILL.

(See S. C. 14 Wall. 120-151.)

Judgment in ejectment—acceptance of trust—further instructions to jury—land excepted from patent—no time runs against the government—adverse possession—continuity of possession.

1. A judgment for plaintiff in ejectment is good, although it does not find for or against all the parties mentioned in the different counts of the declaration, if the finding conforms to two of the counts, and no motion in arrest of judgment was made in the court below.
2. The mere making of a trust deed, without any acceptance, expressed or implied, by the trustees, is not sufficient to vest in the trustee the title to the land, and parol proof is admissible to show that the trust was never accepted.
3. Where the instructions given were in all respects sufficient to dispose of the controversy, it is not error to refuse to give further instructions.
4. Under the Virginia act of June 2, 1788, the governor may issue grants of land, with reservations of claims to lands included in the survey, which grants pass no legal title to the lands excepted from the grants.
5. No laches is to be imputed to the government and no time runs against it, so as to bar the public rights.
6. Possession, in order that it may bar a recovery, must be continuous and uninterrupted, as well as open, notorious, actual, exclusive and adverse.
7. Forfeiture to the state within the period necessary to give effect to the statute, has the effect to break the continuity of adverse possession, and prevents the operation of the statute bar.

[No. 10.]

Argued Dec. 5, 6, 1871. Decided Jan. 22, 1872.

IN ERROR to the District Court of the United States for the District of West Virginia.

This was an action of ejectment brought in the court below (originally in the western district of Virginia, and after the formation of the state of West Virginia, prosecuted in the district of West Virginia) for the recovery of a trust of fifteen hundred acres of land, by Lott M. Morrill and others, plaintiffs, against James Armstrong and others, defendants.

The defendants requested the court to give the following instructions to the jury, which were refused:

First. That the reservation in the patent to Samuel M. Hopkins, dated July 1, 1796, was of lands the titles to which were inchoate, and not of lands which had been granted by patent previous to the date of Samuel M. Hopkins' survey and entry.

Second. That said patent to Samuel M. Hopkins covered all lands lying within the *exterior boundaries of his survey, for [***127** which patents had issued previous to his entry, survey and patent, and became a junior grant

NOTE.—*Adverse possession, what necessary to constitute; requisites of*—see notes, 5 L. ed. U. S. 398; 40 L. ed. U. S. 215.

Occupancy necessary to constitute adverse possession—see note, 9 L. ed. U. S. 624.

to that issued to Albert Gallatin, and under which the plaintiffs in this suit claim.

Third. That, if the jury shall believe from the evidence that James T. Watson was the owner of the land described in the patent to Samuel M. Hopkins at the time the land in controversy became forfeited to the commonwealth as aforesaid; that he was, Feb. 27, 1835, and up to the time of the forfeiture, in the actual bona fide possession, by himself or tenant, of the land in controversy or any part thereof, under the Hopkins' patent aforesaid; and that said Watson had, at the date of such forfeiture, discharged all taxes and damages duly assessed and charged against him on said lands, and all such taxes and damages as ought to have been charged thereon against him,—then the title of those under whom the plaintiffs claim the land in controversy inured to and vested in the said Watson, and the plaintiffs cannot maintain this action.

Fourth. If the jury are satisfied from the evidence that adversary possession commenced before Nov. 1, 1836, and the same possession continued during the time of the forfeiture, as well as from May 8, 1845, the time of redemption up to the time of the institution of this suit, and by adding the time of adverse possession before forfeiture to the adverse possession after redemption, makes a period of fourteen years; then they must find for the defendants, or such of the defendants as make out the fourteen years as aforesaid.

Fifth. That the act of 1844, which authorized Dundas & Kugler to redeem the lands therein specified, did not so operate as to relieve them from effect of the statute of limitations, which had commenced running for defendants before the forfeiture, for the time the land in controversy was so forfeited, if the jury believe that the defendants continued their possession without interruption during the forfeiture, and up to the time of redemption; and that the defendants continued the possession to the time of the institution of this suit.

The instructions given by the court and excepted to by the defendants are as follows:

(*a*) The plaintiffs having offered in evidence the certificate of the auditor of public accounts of Virginia, dated Feb. 22, 1869, for the purpose of showing that the tract of fifteen hundred acres of land patented to Albert Gallatin Apr. 10, 1786, had been entered on the commissioner's books in the names of Dundas and Kugler, and that the taxes had been assessed thereon and paid by the said Dundas and Kugler, so as to entitle them to the benefits of an act passed Feb. 12, 1844, by the general assembly of Virginia. Upon this state of facts, the plaintiff moved the court to instruct the jury that the certificate must be held as conclusive respecting the entry of said lands, assessment of taxes and payment thereof, unless disproved by evidence in the cause; which was given.

(*b*) To defeat a recovery in this cause, under the statute of limitations, the defendant must have held unbroken and uninterrupted adverse possession of the premises in controversy, for a period of fourteen years prior to the institution of this suit. To constitute such adverse possession, the defendant must have held possession of the premises by residence, improvement, cultivation, or other open, notorious and habitual acts of ownership, for fourteen years previous to the institution of this suit. If the jury believe from the evidence that the defendant Armstrong was a resident and owner of the lot in the town of Ripley, and in the immediate vicinity thereof he owned a tract of woodland, being part of the land in controversy, from which land, claiming it as his own, he, from the beginning of the year 1833, openly, notoriously, and habitually cut and hauled his necessary supply of fuel, and also the timber necessary for the construction of various houses on his lot aforesaid; and also did cut and carry away saw-logs and all the tan bark which he used in his tanyard on his lot aforesaid; and after three or four years' use of it, in that way inclosed portions of said land, such acts and use are equivalent to adversary possession from the time such use commenced.

(*c*) If the defendant, Carney, claimed title to the tract of land described in the declaration, or any part thereof, at the time of the institution of this suit, and the plaintiffs or either of them had the right to the possession thereof, this action may be maintained against them.

(*d*) The grant to Hopkins, embracing within its exterior boundaries 227,460 acres of land, which is reserved and excepted to prior claimants, does not operate to devest them of their title, unless they fail to show themselves entitled to the land under said reservation; nor does the said grant pass any legal title to the grantee of lands so reserved and excepted by it, where the same had been previously appropriated and granted by the commonwealth, inasmuch as it appears that the patentee gets *all the [*128 lands he paid for, or for which he is chargeable with taxes.

(*e*) To secure to the defendants or those who claim under the Watson title, the benefit of the forfeiture of the Gallatin title, the jury must be satisfied that the Hopkins grant is the younger, and covers and includes the land in controversy; and that Watson and those claiming under him were in the actual possession of the said land, claiming the same in good faith, having discharged all the taxes due to the state, duly assessed and charged against said land, as well as all taxes that should have been assessed and charged against the same from the date of the deed from Hopkins to Watson; otherwise, the forfeiture of the Gallatin title would not, under the act of the general assembly passed in 1833, be transferred to the said Watson or those claiming under him.

(*f*) If the jury believe from the evidence that Watson, or those claiming under him, entered upon the fifteen hundred acres claimed by the plaintiffs in 1832, 1833, 1834, 1835, or 1836, and that the same became forfeited by the failure of the owners to enter the same on the books of the commissioner of the revenue, of the proper county, and pay the taxes properly chargeable thereon, the same became vested in the commonwealth by operation of law, November 1, 1836, and the possession of the defendants upon the said November 1, 1836, terminated, and the possession of the land passed to and remained in the commonwealth until the same was transferred to James Dundas and Benjamin Kugler by the act of February 12, 1844; and the adverse possession acquired by the said defendants be-

fore November 1, 1836, cannot be connected with the adverse possession acquired by the defendants after Dundas and Kugler became revested with the title of the commonwealth, under the act passed for their relief February 12, 1844.

The verdict of the jury was given for the plaintiff, Lott M. Morrill, for the lands claimed, with the exception of a parcel of about forty acres. Judgment having been entered, the defendants brought the case to this court by writ of error.

A further statement of the case appears in the opinion.

Messrs. **Benjamin H. Smith,** *S. A. Miller,* and **William M. Evarts,** for the plaintiffs in error:

As relates to the construction of the patent to Samuel M. Hopkins, dated July 1, 1796, we maintain:

That the patent by its terms covers all land lying within its exterior boundaries, except such as come within the reservation contained therein, and that the burden was on the appellee to show himself within the reservation, which he failed to do.

Hopkins v. *Ward,* 6 Munf. 38.

That only lands held by inchoate equitable titles not carried into grant when Hopkins' entries and surveys were made, come within the reservation; and if the terms of the reservation had authorized the inclusion of any lands previously patented, which we deny, in order to make up the quantity purporting to be reserved, *viz.,* 227,460 acres, there was no evidence showing that the land in controversy was part of it, but all the evidence tended to show the reverse.

That land lying within the exterior boundaries of the Hopkins grant, which had been patented prior to Hopkins' entry, survey, and grant, would, upon becoming forfeited to the state of Virginia, inure to and vest in the owner of the Hopkins patent, provided such owner had complied with the other conditions mentioned in said act.

See *Wild* v. *Serpell,* 10 Gratt. 406; *Staats* v. *Board,* 10 Gratt. 400; *Atkins* v. *Lewis,* 14 Gratt. 30.

The proof shows that Watson did all that the statute required to entitle him to the benefit of the forfeited title.

Hale v. *Branscum,* 10 Gratt. 418; *Levasser* v. *Washburn,* 11 Gratt. 572.

It follows that the three instructions asked for by the plaintiffs in error and refused by the court below, should have been given.

Instruction given by the court marked *b,* was wrong, because it assumed, as matter of law, that 227,460 acres were reserved absolutely by the patent to Hopkins, irrespective of the actual quantity then in fact held by inchoate equitable titles coming within the terms of the reservation, and because it is assumed that the reservation did include lands appropriated and granted by the commonwealth prior to Hopkins' entry, survey, and patent; that the patentee, Hopkins, and his assigns had already gotten all the land they were entitled to, or paid taxes on; and by necessary implication, that such reservation included the land in controversy. This instruction was confused, foreign to the issue, and misled the jury.

Graham, New Trials, 271; *Harris* v. *Wilson,* 7 Wend. 57; *Hollister* v. *Johnson,* 4 Wend. 639; *Levingsworth* v. *Fox,* 2 Bay, 520.

The instruction marked *e* is erroneous.

1. Because it submits to the determination of the jury the question, whether or not the patent to Hopkins covered and included in its terms the land in question, which determination involved an interpretation of the language of the patent, which is purely a matter of law.

2. Because it makes bona fide possession of the whole land in controversy indispensable to receiving the benefit of the forfeiture; whereas, such possession of "any part thereof" satisfies the requirement of the act of February 27, 1835.

3. Because it expressly excludes the defendants, claiming under Watson, from the benefit of the forfeiture of the Gallatin title, unless the patent to Hopkins actually covered and included the land in controversy, when the proviso in the act of 1844, permitting Dundas and Kugler to redeem, secured such benefit to the holders, if they otherwise held by equitable title under the state. Such equitable title to the land in controversy, the purchase and payment of the purchase money to the state by Hopkins and payment of taxes and continued occupancy by him and his assigns since, would give to the appellants, unless shown that Hopkins and those claiming under him had gotten their 200,000 acres without it.

Levy v. *Gadsby,* 3 Cranch, 180; *Fowle* v. *Bigelow,* 10 Mass. 384; *McCoy* v. *Lightner,* 2 Watts, 347; *Welch* v. *Dusar,* 3 Binn. 337; *Denison* v. *Wirts,* 7 Serg. & R. 372; *Roth* v. *Miller,* 15 Serg. & R. 100, 4 Serg. & R. 270; *Adams* v. *Betz,* 1 Watts, 425; *Doe* v. *Paine,* 4 Hawks, 64; *Cockrell* v. *McQuinn,* 4 Mon. 61; *Hurley* v. *Morgan,* 1 Dev. & B. 425; *Waterman* v. *Johnson,* 13 Pick. 261; *Payton* v. *Dixon,* Peck, 148; *Hart* v. *Johnson,* 6 Ohio, 87; *Etting* v. *Bank,* 11 Wheat. 59; *Cherry* v. *Slade,* 3 Mur. 82; *Carroll* v. *Norwood,* 5 Har. & J. 163; *Pennington* v. *Bordley,* 4 Har. & J. 458.

The plaintiffs in error further insist that the court erred in not giving the fourth and fifth instructions asked for.

The fourth instruction asks the court to unite the adverse possession which occurred before forfeiture, with the possession after redemption. It is thought that this falls short of the legal rights of the defendants. When time commences to run, there is no law that stops it. But suppose it stops for the state, it does not follow that it stops for the defaulter. So far as it has run, it is valid. After the redemption, the time run is also valid. Is it not just, then, to unite them? By the instruction the plaintiff gains the time of forfeiture. But that gain, obtained by sheltering under the state, has no such merit as to avoid the valid time which precedes the forfeiture.

As to the fifth instruction, it is claimed to be good. If this was a suit with the state or a purchaser from the state, the statute might not be a bar. But it is a suit between individuals, one of whom for a time had lost his estate by neglect of duty; yet, by the leniency of the government, he is allowed to be remitted to his former estate without prejudice to his rights by the state. He pays taxes and redeems. He does not hold under the state, but under his own title, which he has redeemed. He pays no consideration to the state. He pays a debt for which the state held a lien on the land. He cannot and ought not to be permitted to thrust the state between him and the defendants.

Mr. **Gideon D. Camden** for defendant in error.

Mr. Justice **Clifford** delivered the opinion of the court:

Absolute title and the right of possession are claimed by the plaintiff to the tract of land in controversy, and the actual possession of the same being in the four defendants named in the declaration, he brought an action of ejectment against them to recover possession of the tract. He alleges in the first count of the original declaration that on the day therein named he was possessed in fee simple of the tract; that, on the 8th of October following, the defendants entered into the premises, and that they unlawfully withhold from him the described tract. Quite unlike that, the second count alleges that the primary possession of the tract was in one James Dundas and one Benjamin Kugler, and that the defendants unlawfully withhold the possession from those parties. Process was **132***] served and the defendants appeared *and demurred to the declaration, and the court sustained the demurrer as to the second count but overruled it as to the first. Leave to amend was granted, and an amended declaration was filed, containing three counts, of which the first is in the name of the plaintiff and the other two persons named in the second count of the original declaration. All three sue in that count as joint plaintiffs, but the second count corresponds in all respects with the first count in the original declaration, which renders it unnecessary to describe the third, except to say that the other two persons are alleged to have been the primary possessors of the tract, and that the claim to recover possession is made in their names, as well as the claim for damages. Both parties acquiesced in the decision of the court overruling the demurrer to the first count and sustaining it as to the second of the original declaration, and the defendants pleaded to the merits that they were not guilty of withholding the premises as alleged in the new counts filed by leave of court. Issue was tendered and joined, but the plaintiffs, before trial, obtained leave to file a fourth count, in which it is alleged that one William M. Tilghman was the primary possessor of the tract; and the charge, in that count, is that the defendants unlawfully withhold from him the actual possession of the same described tract of land. Subsequently the parties went to trial and the verdict was for the plaintiff, as described in the first count of the original declaration, and also in the second count of the amended declaration.

By the verdict the jury found that the plaintiff, Lott M. Morrill, had an estate in fee simple in the premises, except as to a small parcel therein described, and they also assessed nominal damages for the plaintiff. Judgment was duly rendered against the first three defendants, the death of the other having been suggested before the trial, and the survivors sued out a writ of error and removed the record into this court.

To sustain the issue on their part the plaintiffs gave in evidence: (1) A copy of a survey made by the surveyor of the proper county of the **133***] state for Albert Gallatin, assignee *of Stephen Lacoste, of fifteen hundred acres of land, part of a land office warrant of five thousand acres, dated June 27, 1770, bounded as therein described. (2) Copy of the patent to Albert Gallatin, dated February 10, 1786, for the tract of land described in the survey. (3) Also a copy of a deed from Albert Gallatin, dated May 7, 1794, to Robert Morris, conveying the same land. (4) Deed from Robert Morris and others to Thomas Willing, John Nixon, and John Barclay, dated March 5, 1795, conveying the premises to them and the survivor and survivors of them, and the heirs of the survivor in trust, as more fully set forth in the deed exhibited in the record. (5) Certificate of William F. Taylor, auditor of public accounts for the state, showing that James Dundas and Benjamin Kugler, trustees as aforesaid, on the 8th of May, 1845, redeemed the lands in question by the payment of the required sum into the treasury, in manner and form as more fully set forth in that certificate, and certain others also introduced by the plaintiff and exhibited in the bill of exceptions. (6) Disclaimer of Thomas Willing, dated December 19, 1806, in which he states that he did positively refuse to accept or act under the trust, and that he has not at any time since accepted the said trust, or acted in anywise as trustee, under that deed. (7) Also deed dated June 17, 1845, from John M. Barclay and others to James Dundas and Benjamin Kugler, conveying to them all the right, title, and interest of the two trustees who did accept the trust created by the preceding deed. (8) Deed dated December 1, 1854, from James Dundas and Benjamin Kugler, trustees of the North American Land Company, to the plaintiff, in whose favor the judgment was rendered.

Evidence was also introduced by the plaintiffs showing that the land in controversy, on the first day of November, 1836, became forfeited to the state by virtue of the 2d section of the statute of the state passed on the 27th of February, 1835, as construed by the supreme court or court of appeals of that state. Sess. Acts, 1835, p. 12; *Staats* v. *Board*, 10 Gratt. 400. Forfeiture in such a case became *absolute and [***134** complete by the failure to enter and pay the taxes on the land and the damages, in the manner therein prescribed, and no inquisition or judicial proceeding or inquest or finding of any kind was required to consummate such a forfeiture. *Wilde* v. *Serpell*, 10 Gratt. 405; *Hale* v. *Branscum*, 10 Gratt. 418. Owners or proprietors of any tract of land lying west of the Alleghany mountains, granted by the state before the first day of April, 1831, were required by the act of the 27th of February, 1835, to enter or cause to be entered, on or before the first day of July of the succeeding year, on the books of the commissioners of the revenue for the county wherein any such tract or parcel of land may lie, all such lands as he or they owned or claimed, through title derived, mediately or immediately, from the state, and have the same charged with all taxes and damages in arrear or properly chargeable thereon. They were also required to pay and satisfy all such taxes and damages which would not have been relinquished and exonerated by the 2d section of the act of the 10th of March, 1832, had they been returned for their delinquency prior to the passage of that act, and the provision was that if they failed to comply with those requirements "all such lands or parcels thereof not then in

the actual possession of such owner or proprietor, by himself or his tenant in possession, shall become forfeited to the commonwealth after the first day of July, eighteen hundred and thirty-six, except only as hereinafter excepted."

Provision is also made by the 3d section of the act that all right, title, and interest vested in the state by the preceding section of the act shall be transferred and absolutely vested in any and every person or persons, other than those for whose default the same have been forfeited, their heirs or devisees, now in actual possession of said lands, or any part or parcel of the same, for so much thereof as such person or persons have just title or claim to, legal or equitable, bona fide claimed, held, or derived from or under any grant of the state bearing **135*]** date previous to the period of time* mentioned in the preamble to the 2d section, who shall have discharged all taxes duly assessed and charged against him or them upon such lands, and all taxes that ought to have been assessed and charged thereon from the time he or they acquired title thereto, whether legal or equitable. Appended to that section, however, is a proviso that nothing therein contained shall be so construed as to impair the right or title of any person or persons who have obtained grants from the state for the same land and have regularly paid the taxes thereon.

Section 4 provides, among other things, that the proprietors of such lands, their attorney or agent, of the land returned delinquent for nonpayment of taxes for the years 1832 and the succeeding year, may pay the taxes and charges upon said lands for each of those years to the sheriff of the county where the lands lie, and take his receipt therefor and deliver the same, on or before the first day of November, 1836, to the clerk of the county court of said county. Sess. Acts, 1835, pp. 12, 13.

Beyond all doubt the lands described in the deed of Robert Morris and others to the grantors of the plaintiff, became forfeited to the state by reason of the failure to enter the same on the books of the commissioners of the revenue, as recited in the preamble to the act of the 12th of February, 1844, in which it is also stated that the grantors of the plaintiff petitioned "the general assembly, for permission to redeem the said lands upon the payment of all the taxes and damages due thereon." Sess. Acts, 1843-4, p. 108. By the 1st section of that act they were empowered "to redeem the whole or any part of the aforesaid lands by having the same entered upon the books of the commissioners of the revenue of the county wherein the land may lie, and assessed with all taxes due thereon, to be ascertained in the same manner that the back taxes on omitted lands are now ascertained by the several commissioners of delinquent and forfeited lands, and paying into the treasury of the state, on or before the **136*]** first day of *June" of the succeeding year, "the amount of the taxes so assessed, together with six per centum per annum damages thereon." They complied with those conditions, and the 2d section of the act provided, "that upon the payment of the taxes and damages aforesaid, all the right, title, and interest which may have vested in the president and directors of the literary fund, by the said forfeiture, to such part or parts of the said lands as may be redeemed as aforesaid, shall be and the same are hereby released unto the said James Dundas and Benjamin Kugler, . . . for the use and benefit of the shareholders of the said North American Land Company." Annexed to that, however, is a proviso that "nothing herein contained shall be construed to deprive any person or persons having a legal or equitable title to any of these lands by virtue of a subsequent grant from the state or otherwise, of his or their right, title, or interest, but the rights of such claimants shall remain the same as if this act had never been passed."

Documentary evidences of title were also introduced by the defendants, as follows: (1) The plat and certificate of a survey made for Samuel M. Hopkins for 200,000 acres of land in the county of Kanawha, dated the 10th of December, 1795, as more fully set forth in the record, which contains the following certificate: "Surveyed for Samuel M. Hopkins two hundred thousand acres of land in the county of Kanawha, by virtue of two land office treasury warrants, each for one hundred thousand acres;" and then follows the boundaries, at the close of which is the following statement: "An allowance of two hundred and twenty-seven thousand four hundred and sixty acres is made in the calculation of the area of this plat for prior claims contained in (the) boundary thereof." (2) The patent, dated July 1, 1796, issued on that survey to Samuel M. Hopkins for 200,000 acres by the governor of the state. Founded, as the patent is, upon the certificate of survey, it contains the same boundaries and concludes as follows: "But it is always to be understood that the survey upon *which this grant is [***137** founded, includes two hundred and twenty-seven thousand four hundred and sixty acres," exclusive of the above quantity of 200,000 acres, "all of which having a preference by law to the warrants and rights upon which this grant is founded, liberty is reserved that the same shall be firm and valid, and may be carried into grant or grants," and this grant shall be no bar in either law or equity to the confirmation of the title or titles to the same, as before mentioned and reserved, with the appurtenances. (3) Deed from Oliver Wolcott and others to James T. Watson, dated June 22, 1808, conveying to him, among other things, the lands embraced in the patent to Samuel M. Hopkins. (4) Evidence tending to show that the patent to Samuel M. Hopkins embraced within its exterior boundaries the entire tract claimed by the plaintiff, as shown by certain plats which were also introduced. (5) Parol evidence was also introduced by the defendants tending to prove that James T. Watson, claiming under the patent to Samuel M. Hopkins and the deed to himself, took actual and bona fide possession in the year 1827, of the lands in controversy, as well as of the coterminous surveys of Savary and Gallatin, previously introduced in evidence; and that he, as early as the month of September, 1834, discharged all taxes and damages rendered against him upon said 200,000 acres of land, and all that ought to have been charged against him up to the year 1840, as the same became due. (6) Other evidence was also introduced by the defendants, deraigning the title from the last

named grantee to them or one of them, which it is not important to notice, as it is not the subject of controversy.

First objection to the judgment has respect to the form of the verdict, because it does not find for or against all the parties mentioned in the different counts of the declaration, but the court is of the opinion that the objection is without merit, as the finding conforms to the first count in the original declaration and to the 138*] second count in the amended *declaration. No motion in arrest of judgment was made, and as no such question was raised in the court below, and as the finding is fully justified by two of the counts and by the evidence reported, the objection is overruled.

Adopting the order of events at the trial, the next question arises from the exception of the defendants to the ruling of the court in admitting in evidence the paper writing called the disclaimer of Thomas Willing, in which he states, under date of the 19th of December, 1806, to the effect that he positively refused to accept the trust intended to be created by the before-mentioned deed to John Nixon, John Barclay, and himself, and that he never did accept the same or in anywise act as trustee under that instrument. Before offering that paper the plaintiff introduced the deed to which it relates, and having proved the signature of the signer, the plaintiff offered the paper as tending to show that the signer never accepted the trust described in that deed. Two objections were made to the admissibility of the paper: (1) That it was insufficient as a disclaimer as it was not under seal; but the paper was offered merely as evidence to show that the signer never accepted the trust, and not as an instrument releasing a vested right, which is all that need be said in reply to that objection. (2) That it was not admissible as evidence that he never accepted the trust, because it was not under oath. Appended to that paper are the affidavits of three witnesses proving that the signature of the signer is genuine. Annexed to that is the certificate of an examiner of the supreme court of the state of Pennsylvania, dated the 3d of March, 1844, that the signature of the signer of the paper was proved before him in due form of law, and also the certificate of the clerk of Cabell county court, Virginia, under date of the 29th of March, 1856, that the instrument, together with the certificates of proof, was admitted to record.

Authorities are hardly necessary to show that the mere making of a trust deed, like the one in question, without any acceptance, express or 139*] implied, by the trustee is not *sufficient to vest in the trustee the title to the land mentioned in the deed, and that parol proof is admissible in such a case to show that the trust was never accepted. On the other hand, it is equally clear that if the trust is accepted, though but for a moment, parol proof to show a release of the title to the trust estate cannot be admitted. Lewin, Trusts (4th ed.), 150; *Robinson* v. *Pett*, 3 P. W. 251; *Doe* v. *Harris*, 16 Mees. & W. 517; *Doyle* v. *Blake*, 2 Sch. & L. 239; *Stacy* v. *Elph*, 1 M. & K. 195; Tiff. & Bull. Trusts, 532. Offered as the paper writing was, not as the release of a vested right, but merely as evidence tending to prove that the signer never accepted the trust created by the deed, no doubt is entertained that the evidence was properly admitted as it is well settled law that every conveyance which depends upon the act of the parties is imperfect for vesting the title, without the assent of the parties to the same, either express or implied. *Smith* v. *Wheeler*, 1 Vent. 128. Two of the trustees accepted the trust and proceeded to execute it, but it does not appear that the signer of the certificate ever joined with them in any act, either in managing or disposing of the estate. Obviously the weight of the evidence was for the jury, nor does it appear that other testimony to the same point was not introduced, as only so much is reported in the bill of exceptions as was necessary to raise the question of law. Admitted as it was, as a verbal act tending to show that the trust was not accepted, no doubt is entertained that the ruling was correct.

Exceptions were also taken by the defendants to the refusal of the court to instruct the jury as requested, and also to the instructions given in respect to the merits of the controversy. Very great doubts are entertained whether the evidence introduced by the defendants was such that the court would have been warranted in giving the first, second, or third instructions as requested; but the judgment of the court will not be placed upon that ground, as it is clear that the instructions given, if correct, were in all respects sufficient *to dispose of the [*140 controversy, and as the verdict was for the plaintiff the only material inquiry remaining is whether the law was correctly given to the jury in those instructions.

Two hundred and twenty-seven thousand four hundred and sixty acres of land were embraced in the patent to Samuel M. Hopkins which was reserved and excepted to prior claimants, and the court, in its fourth instruction, told the jury that the patent did not operate to devest such prior claimants of their title unless they failed to show themselves entitled to the land under the said reservation; that the patent did not pass any legal title to the patentee of said lands, so reserved and excepted by it, where the same had been previously appropriated and granted by the state, inasmuch as it appeared that the patentee got all the lands he paid for or for which he was charged with taxes. What the defendants claimed was that the title under the Gallatin patent was forfeited and merged in the Watson claim under the act of the 27th of February, 1835, but the jury were instructed that the defendants could not derive any benefit from the supposed forfeiture unless the jury were satisfied that the patent of Hopkins, which was the junior patent, covered and included the land in controversy, and that Watson and those claiming under him were in the actual possession of the said land, claiming the same in good faith, having discharged all the taxes due to the state, duly assessed and charged against the same, from the date of the deed from Hopkins to Watson.

Apart from the merits the defendants set up the statute of limitations, and insisted that the action could not be maintained because, as they alleged, they had "held unbroken and uninterrupted adverse possession of the premises in controversy for a period of fourteen years prior to the institution of the suit." Pursuant to that claim the jury were instructed, in the first

place, that the defendants, to sustain that defense, "must have held possession of the premises by residence, improvement, cultivation, or other open, notorious, and habitual acts of own-
141*] ership, for fourteen years" before *the commencement of the action; but if the jury find that the defendant, Armstrong, resided there and was the owner of a lot in the town of Ripley, and in the immediate vicinity thereof he owned a tract of woodland, part of the land in controversy, from which land, claiming it as his own, he, for the time mentioned, openly cut and hauled his necessary supply of fuel, and also the timber necessary for the construction of various houses on the lot, and also inclosed certain portions of the land, such acts and use are equivalent to adversary possession from the time such acts and use were commenced.

But the evidence showed that the land, on the first day of November, 1836, became forfeited to the state, as matter of law, by the failure of the owners to enter the same upon the books of the commissioners of the revenue of the proper county and pay the taxes properly chargeable thereon; and the court upon that subject instructed the jury that if they so found from the evidence, and that the possession passed into and remained in the state until the title was transferred to the grantors of the plaintiff, the defense under the statute of limitations was not sustained, as the adverse possession acquired by the defendants before the first day of November, 1836, cannot be connected with the adverse possession acquired by them after the grantors of the plaintiff became vested with the title of the state, under the before-mentioned act of the assembly passed for their relief.

Two principal errors are alleged in the instructions: (1) That the court did not instruct the jury that the land, when it became forfeited for nonentry on the books of the commissioners of the revenue, and for nonpayment of taxes and damages, was transferred to and became vested in the owners of the Hopkins patent, under the 3d section of the act declaring the forfeiture. (2) That the court erred in the instruction to the jury that the statute of limitations ceased to run when the land became forfeited to the state, and that the period of adverse possession before the forfeiture took place could not be added to the period which elapsed before the suit was commenced, subsequent to the time the title
142*] *under the act of the assembly was conveyed to the plaintiff's grantors, to make the required term of fourteen years to bar the title.

Such a construction of the act of assembly as the one first claimed certainly could not have been adopted unless it can be held that the proviso embraced in the Hopkins patent does not afford any protection to the owners of lands included in that survey, where the patents had been previously issued, which is the construction assumed by the defendants. They contend that the proviso only excludes from the operation of the grant, the "lands within its exterior boundaries, the titles to which were inchoate, and not lands which had been granted by patents previous to the date of that survey and entry," which is a construction not be sustained if another, consistent with the language employed, can be adopted better calculated to promote justice and to carry into effect the plain intent of the lawgiver.

On the other hand, the plaintiff contends that the reservation excludes from the operation of the patent all lands held by them at the date of the survey, within the exterior boundary of the patent, whether the title was only inchoate or had been perfected by grants, which seems to be the more reasonable construction, and not inconsistent with the language employed.

By the terms of the reservation it is stated that the survey includes 227,460 acres beyond the quantity granted to the patentee, in respect to all of which "liberty is reserved that the same shall be firm and valid, and may be carried into grant or grants," which means that all shall be firm and valid, whether held by complete or incomplete titles, but that such parts as are held by incomplete titles may be carried into grant, and that the patent founded on that survey shall be no bar, in either law or equity, to the confirmation of the titles to the reserved lands included within the exterior bounds of that survey.

Surveys had been made in different parts of the state, subsequent to the Treaty of Peace, that included smaller *tracts of prior [*143
claimants within their exterior boundaries, and which were reserved to such claimants in the certificates granted by the surveyors. Doubts arose as to the authority of the governor to grant patents in such cases, and to remove those doubts the general assembly, June 2, 1778, enacted that it shall and may be lawful for the governor to issue grants with reservation of claims to lands included in such surveys, anything in any law to the contrary notwithstanding. 2 Rev. Code, Va., 434. Prior to the passage of that law the authority to issue such grants was at least doubtful, even if the power existed at all, and it is clear that the assembly never intended that any such grant should cover any prior title, whether complete or incomplete, within the exterior boundaries of the survey. 2 Rev. Code, Va., 350, 483; 2 Rev. Code, Va., 365. supported as the proposition is by repeated decisions of the state court, it is adopted without hesitation, as any other rule would work very great injustice. *Hopkins* v. *Ward*, 6 Munf., 38. Where the exterior boundaries of a survey under that law upon which a patent is founded includes tracts belonging to prior claimants, the patentee cannot in such a case recover in ejectment without showing that the tract claimed by the defendant is not within the bounds of the excluded claims, which is a direct authority that the reserved lands in a case like the present did not pass to the patentee. *Madison* v. *Owens*, 6 Litt. Sel. Cas., 281. Even more decisive, also, is the case of *Nichols* v. *Covey*, 4 Rand. 365, in which it is determined that where a patent is issued in pursuance of the act of the 2d of June, 1788, which includes in its general courses a prior claim, it does not pass to the patentee the title of the state to the lands covered by such prior claim. On the contrary, the title of the patentee in respect to such a tract is not only subject to the title of the prior claimant, but if that title is only a prior entry and it becomes vacated by neglect to procure a survey and return the plat, any one may lay a warrant on the same, as in other cases of vacant and unappropriated lands. Exactly the same *rule is laid down by this court in the [*144
case of *Scott* v. *Ratliffe*, 5 Pet. 86, in which the opinion was given by the Chief Justice. He

said such patents have been always held valid, so far as respects the land not excluded, but to pass no legal title to the land excepted from the grant, as the lands are in this case in the *habendum* of the patent; and not a doubt is entertained that the rule there laid down is the correct rule upon the subject. *Kenna* v. *Quarrier*, 3 W. Va. 212; *Hardman* v. *Boardman*, 4 Leigh (Va.), 382.

2. Sufficient evidence was introduced by the defendants to show that they or some of them took adversary possession of the premises in controversy, prior to the forfeiture of the same to the state, and that they continued to occupy the same throughout the period that the title was vested in the state, and after the state conveyed the tract to the grantors of the plaintiff to the time when the suit was instituted; but it is conceded that such adversary possession before the forfeiture was not for the period of fourteen years, the time then required by law to bar a recovery, nor did such adversary possession subsequent to the date of the conveyance by the state to the grantors of the plaintiff and before the service of process, continue long enough to bar a recovery. Both combined would maintain the defense, and, of course, if the statute continued to run during the period the title was vested in the state by the forfeiture, the instruction given to the jury was erroneous and the judgment must be reversed. Adverse possession was the defence in the case of *Stoughton* v. *Baker*, 4 Mass. 526, where the question arose in respect to the right of the defendant to an ancient grant which was subject to an implied limitation, and it was contended that he had been so long possessed of the premises that the state had no right to interfere in any form of legal remedy. Possession and uninterrupted enjoyment for a very long period was proved in that case, but the court held that the limitation could not be extinguished by any inatten- **145*]** tion or neglect *in compelling the owner to comply with it, for no laches is to be imputed to the government and against it no time runs so as to bar the public rights, which is no more nor less than another form of words for expressing the ancient rule of the common law, that time does not run against the state. *United States* v. *Hoar*, 2 Mass. 312; *Lindsey* v. *Miller*, 6 Pet. 673.

Argument to show that the statute of limitations ceased to run when the forfeiture attached and the title became vested in the state can hardly be necessary, as the rule that time does not run against the state has been settled for centuries, and is supported by all courts in all civilized countries. Ang. Lim., 5th ed., 28. Suppose that is so, still it is insisted that the two periods, that is, the period of adverse possession before the forfeiture and the period subsequent to the conveyance by the state to the plaintiff or those under whom he claims, may be added together and considered as one entire period, for the purpose of maintaining the defense; it is clear if that proposition is correct the instruction given was erroneous. But the proposition cannot be admitted, as it is well settled law that the possession, in order that it may bar the recovery, must be continuous and uninterrupted as well as open, notorious, actual, exclusive, and adverse. *Cook* v. *Babcock*, 11 Cush. 210. Such a possession, it is conceded, "if continued without interruption for the whole period which is prescribed by the statute for the enforcement of the right of entry, is evidence of a fee" and bars the right of recovery. Independently of positive statute law, such a possession affords a presumption that all the claimants to the land acquiesce in the claim so evidenced and enforced, or that they forbear for some substantial reason to controvert the claim of the possessor or to disturb him in the enjoyment of the premises. Secret possession will not do, as publicity and notoriety are necessary as evidence of notice and to put those claiming an adverse *interest upon inquiry. [***146** *Bradstreet* v. *Huntington*, 5 Pet. 402; *Blood* v. *Wood*, 1 Met. 528; *Ewing* v. *Burnet*, 11 Pet. 53. Mere occupation is not sufficient, but the possession must be adverse, as seisin and possession are supposed to be coextensive with the right, and that the possession continues till the party is ousted thereof by an actual possession in another under a claim of right. Ang. Lim. 377; *Clarke* v. *Courtney*, 5 Pet. 354; *McIver* v. *Ragan*, 2 Wheat. 29; *Kirk* v. *Smith*, 9 Wheat. 288.

Continuity of possession is also one of the essential requisites to constitute such an adverse possession as will be of efficacy under the statute of limitations. Whenever a party quits the possession, the seisin of the true owner is restored, and a subsequent wrongful entry by another constitutes a new disseisin, and it is equally well settled that if the continuity of possession is broken before the expiration of the period of time prescribed by the statute of limitations, an entry within that time destroys the efficacy of all prior possession, so that to gain a title under the statute, a new adverse possession for the time limited must be taken for that purpose. *Brinsfield* v. *Carter*, 2 Kelly (Ga.), 143; *Ringgold* v. *Malott*, 1 H. & Johns. 316; *Hall* v. *Gittings*, 2 H. & Johns. 112.

Beyond all question, the case last cited presented the same question as that involved in the case before the court, and the decision was that the forfeiture to the state within the period necessary to give effect to the statute did have the effect to break the continuity of adverse possession, and prevented the operation of the statute bar. *Taylor* v. *Burnsides*, 1 Gratt. 190.

Viewed in any light, the court is of the opinion that there is no error in the record.

Judgment affirmed.

Mr. Justice **Strong** dissenting:

In the view which a majority of my brethren take of one branch of this case, I am unable to concur.

The plaintiff in the court below claimed title to the land *in controversy under a pat- **[*147** ent of the state of Virginia, granted to Albert Gallatin on the 10th day of February, 1786. It does not appear that any possession was ever taken under this patent, but on the 1st of November, 1836, the lands were forfeited to the state for failure, by the owners, to make entry thereof upon the commissioner's books for taxation. On the 12th of February, 1844, however, an act of the legislature was passed for the relief of Dundas and Kugler, who had become the grantees of the Gallatin right, by which they were allowed to redeem the lands on the payment of all taxes and damages due thereon, and

on the 8th day of May, 1845, the redemption was made. The plaintiff has no other title.

The defendants claim as grantees by sundry mesne conveyances through James T. Watson from Samuel M. Hopkins, who also obtained a patent from the state, dated July 1, 1796.

I agree that neither this patent to Hopkins, nor any legislation of the state affecting it, presents any sufficient defense to the claim of the plaintiff under the earlier patent to Albert Gallatin. But the defendants set up in the court below another defense. It was that they were protected by the statute of limitations. They submitted evidence tending to prove that they, or those through whom they claim, took actual and adversary possession of the lands in 1827, and that such possession had been continued until the institution of this suit. Relying upon this, they presented to the court the following two points (among others) and requested that they might be given as instructions to the jury.

"Fourth. If the jury are satisfied from the evidence that adversary possession commenced before the 1st of November, 1836, and the same possession continued during the time of the forfeiture, as well as from the 8th of May, 1845, the time of redemption, up to the time of the institution of this suit, and by adding the time of adversary possession before forfeiture to the adversary possession after redemption makes a period of fourteen years, then they must find for the defendants, or such of the defendants as make out the fourteen years as aforesaid.

148*] *"Fifth. That the act of 1844, which authorized Dundas and Kugler to redeem the lands therein specified, did not so operate as to relieve them from the effect of the statute of limitations, which had commenced running for the defendants before the forfeiture, if the jury believed the defendants continued their possession without interruption during the forfeiture, and up to the time of redemption, and that the defendants continued the possession up to the time of the institution of this suit."

Both these points the court refused to affirm, and, on the contrary, charged the jury that on the 1st of November, 1836, the possession of the defendants terminated and passed into and remained in the commonwealth until the same was transferred to Dundas and Kugler by the act of February 12th, 1844, and that the adverse possession acquired by the defendants before November 1, 1836, could not be connected with the adverse possession acquired by the defendants after Dundas and Kugler became revested with the title of the commonwealth. Herein, I think, was clear error. Plainly, had there been no forfeiture, the adversary possession of the defendants, kept up continuously during fourteen years, would have protected them against any right of entry by the plaintiff. The forfeiture did not disturb their actual possession, nor their possession under claim of exclusive right in themselves, which is what is meant by adversary. I agree that their possession between the forfeiture and the redemption gave them no right as against the state. This is not because their possession was not adversary, nor because the actual possession was transferred by law to the commonwealth, but because adversary possession is unavailing to bar any rights of the state, it not being subject to statutes of limitation, unless expressly named. The defendants here are not asserting their adversary possession against the state. The controversy is between them and one claiming under the Gallatin title, which, though at one time forfeited to the state, was allowed to be redeemed. They claim nothing against the state on account of their possession from November 1, 1836, to May 8, 1845, though it was *adversary and uninterrupted, either by [***149** abandonment or by the entry of the state or of the plaintiff.

But why is not that possession operative against the plaintiff? I think it is. As between him and the defendants, nothing but an entry or an action brought was sufficient to change the character of their possession or break its continuity. It is not, however, necessary to discuss this. It is sufficient for this case that the defendants held actual and continuous possession of the lands from 1827 until 1857, when this suit was brought; that the possession was always adversary to the plaintiff; that he never took any steps to disturb it, and that he has had more than fourteen years within which he might have asserted his right.

Concede that the plaintiff's right of entry was suspended by the forfeiture, still it revived when the lands were redeemed, and if the defendants' possession was adverse to his right and continuous during fourteen years in which he might have entered or asserted his right by action, I am unable to perceive why he is not barred.

The fact that an owner's right of entry has been suspended, after the statute has commenced running against him, can be of no importance, if he has had the statutory period within which to bring his action against the disseisor in adverse possession. If this is not so, then war might not only suspend the running of the statute, but render of no effect all adverse possession held before the war commenced. This has never been asserted. It is the uninterrupted adverse possession alone which creates the bar. It is not essential to it that the right to enter or to bring suit should have suffered no interruption.

Every reason for applying the statute, which would have existed had there been no forfeiture and, consequently, no suspension of the plaintiff's right to enter, exists in full force now. Statutes of limitation are dictated mainly by two considerations: one, that it is public policy to discourage stale claims, and the other, that it is not to be presumed that one having a right would delay asserting it for a long period in full view of another's wrongful interference with *it. Hence, the period was fixed [***150** at fourteen years, in Virginia and West Virginia, within which a party out of possession may bring his action of ejectment against one in possession holding adversely. Assuming that the jury would have found the facts as stated in the points proposed, the plaintiff has had that entire period; and the public policy, as well as the presumptions arising from his laches, which gave birth to the statute, apply, in all their potency, to his case. And the statute is not only a bar to the assertion of a right of entry upon one in adverse possession after the expiration of the period fixed, but it gives a title to the disseisor. The law casts title upon him, and as-

sures to him the privilege of asserting it, either aggressively or defensively. For the acquisition of this right the defendants have done all that the law contemplates. They entered under a claim of exclusive right, that is, adversarily, and they held that adversary possession continuously until this suit was brought. That the Gallatin title was forfeited during their occupancy was no fault of theirs. It was due to the wrongful neglect of the plaintiff, or those under whom he claims, to enter the lands upon the commissioners' books, and to pay the taxes. Can he now make use of a forfeiture, caused by his own neglect, to obtain or preserve rights which, confessedly, would have no existence but for his neglect? Yet this was, in substance, the instruction given to the jury. His laches, resulting in a forfeiture, is to have the same effect as an entry would have had, or as action brought. Thus he is allowed to secure an advantage through his own default. Thus he is allowed to make use of his own unlawful nonfeasance to break the continuity of the defendants' hostile possession. I cannot assent to such a view of the law.

Had the commonwealth, after the forfeiture of the Gallatin title, granted the land to some other grantee, I agree that such grantee would not be affected by any adverse possession of the defendants held by them before the forfeiture, of less duration than fourteen years. But such was not the case. The holders of the Gallatin title were allowed to redeem. The nature of the transaction by which they became rein-
151*] *vested with the title is plainly seen in the act of February 12, 1844, passed for their relief. Its preamble recited that the lands had become forfeited by reason of failure to enter the same on the books of the Commissioners of the Revenue for taxation, and that Dundas and Kugler, the trustees of the North American Land Company, for whose use the title had been held, had petitioned for permission to "redeem" said lands on payment of the taxes assessed, together with six per centum per annum damages thereon. The 1st section authorized them to "redeem" on those terms, on or before June 1, 1845. The 2d section "released" unto them, for the benefit of the shareholders of the company, all the right, title and interest which had been forfeited upon the payment of said taxes and damages. The 3d section authorized a judgment against the lands for the amount of costs incurred, and for reasonable compensation to any commissioner of delinquent and forfeited lands by reason of his having prepared the redeemed lands for sale; and the 4th section directed all proceedings by such commissioners to be suspended until after June 1, 1845. It thus appears that the redemption was not the acquisition of a new title. It was the common case of a waiver of a forfeiture. Dundas and Kugler, after the redemption, held, by their old right, the Gallatin patent, and it was this right which the plaintiff gave in evidence and asserted in the present action. No new patent was issued to Dundas and Kugler. The act of 1844 contains no words of grant to them, and its avowed purpose was to place them in the same position, as holders of the title and trustees of the company, which they occupied before the forfeiture.

I am, therefore, of the opinion that the circuit court erred in refusing to affirm the defendants' fourth and fifth points, and also in the instruction which was given to the jury respecting the effect of the statute of limitations. For this reason I think the judgment should be reversed, and that a *venire de novo* should be awarded.

I am authorized to say that my brethren, Mr. Justice **Davis** and Mr. Justice **Bradley**, concur in this opinion.

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*THE STEAMER WILLIAM H. WEBB, [*406
her Tackle, etc., Ogden Haggerty *et al.*, *Claimants, Appts.*,

v.

HENRY H. BARLING and Abner H. Davis, Exrs. of Edward Mott Robinson, Deceased, *et al.*

(See S. C. *"The Steamer Webb,"* 14 Wall. 406-418.)

Agreement to tow a ship, effect of—burden of proof—excuse for collision—new trial—extent of judgment—modification of damages.

1. An engagement to tow a ship does not impose either an obligation to insure or the liability of common carriers.
2. Such contract only requires in its fulfilment, that degree of caution and skill which prudent navigators usually employ in similar services.
3. The burden is always upon him who alleges the breach of such a contract, to show either that there has been no attempt at performance, or that there has been negligence or unskilfulness to his injury in the performance.
4. Mistakes in judgment in the management of the ship while attempting to escape from the peril into which she was brought by the tug cannot excuse the tug.
5. A deposition which was read before the commissioner appointed to ascertain the damages, which related only to the amount of damages, will not cause the case to be sent back for a new trial.
6. Where the steamer was discharged from arrest, on stipulation, the stipulators are bound only to the extent of their stipulation.
7. Where the decree was largely in excess of the stipulation, while it is affirmed upon its merits, it must be modified in regard to the amount of damages recoverable from the stipulators.

[No. 30.]

Argued Dec. 14, 1871. Decided Jan. 22, 1872.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The owners of the steamship Shooting Star, libeled the tug William H. Webb, Apr. 28, 1859, for $17,500 damages for negligently towing the ship. The owners bonded the steamer in the sum of $18,000 for the damages, and $250 for costs.

The owners of the William H. Webb also libeled the Shooting Star, Aug. 2, 1859, to recover the agreed price for towing her, and for extra services and for the wages of the pilot, and for a hawser and expenses, amounting to $2,025.

The causes were heard together as cross-actions.

In each case the district court made a decree for the libelants, with a reference to a commissioner to compute the damages. The commissioner reported against the Shooting Star, $1,008.15 damages. The report was excepted to and confirmed, and final decree entered for $1,667.24, Jan. 14, 1867.

It was appealed to the circuit court and affirmed.

The commissioner reported against the William H. Webb, $20,378.50.

The report was excepted to and confirmed, and final decree entered for $24,590.10, Apr. 16, 1867. It was appealed to the circuit court and affirmed, with final decree, for $28,092.21, Dec. 2, 1868, from which an appeal was taken to this court.

The facts are stated by the court.

Messrs. **E. C. Benedict** and *Chas. Jones* for appellants.

Mr. **D. D. Lord** for appellees.

Mr. Justice **Strong** delivered the opinion of the court:

This was a libel filed by the owners of the ship Shooting Star against the steamer William H. Webb, for the breach of a contract to tow the ship from Portsmouth, New Hampshire, to the Port of New York. The libel charged negligence and mismanagement in the towage, whereby the ship was stranded and sustained serious injury. From the evidence it shows that the ship was taken in tow by the steamer on the morning of the 22d of March, 1859, and that they arrived safely off Handkerchief shoal in the Vineyard sound early in the next following morning, passing about one hundred yards from Handkerchief light. Here they were in their proper position. From Handkerchief light, the correct route for vessels bound for New York is by a single straight course west, three quarters south to Cross Rip light, distant about eleven nautical miles, or less than thirteen statute miles, as appears by the chart and by the evidence of the master of the steamer. The steamer with her tow passed Handkerchief light about two o'clock in the morning of March 23. It could not have been at an earlier hour; it was probably later. Sherwood, the steamer's pilot, testifies that they were off Pollock Rip about one to one and a half o'clock, and off Shovel Full light a half hour later. If this is correct, as the steamer was running at the rate of some ten or twelve knots per hour, she could not have come opposite Handkerchief shoal earlier than from two to half past two. Hazard, the master of the steamer, also testifies that it was about one as they were approaching Pollock Rip, and Newcomb, the wheelman of the steamer, states it could not have been far from three o'clock when they were off the Handkerchief light. It may then safely be assumed, that when the steamer and tow left Handkerchief shoal for Cross Rip light, it was at least two o'clock in the morning, and probably later. From Handkerchief light the steamer ran with her full speed for some time, and then, shutting off her steam, ran with a less rate of speed until between three and four o'clock, when the ship took the ground on the Tuckernuck shoal, fully three miles and one third south of the correct course to Cross Rip light, where, after some vain endeavors to drag her off, the steamer left her and cast anchor in the neighborhood. When daylight returned, a faint effort was made to reach the ship, and this proving unsuccessful, the steamer left for Edgertown to obtain assistance. It is to recover the damages sustained by the ship in consequence of *this careless [*414 and unskilful towage, that the libel has been filed, and the first question is, whether the towage was either unskilful or negligent.

It must be conceded that an engagement to tow does not impose either an obligation to insure, or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negligence or unskilfulness to his injury in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that decree of caution and skill which prudent navigators usually employ in similar services. But there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it. Had the ship in this case been towed upon a shoal ten miles north or ten miles east of Handkerchief shoal, after leaving that shoal for Cross Rip, it cannot be doubted that the fact of the stranding at such a place, would, in the absence of explanation, be almost conclusive evidence of unskilfulness or carelessness in the navigation of the tug. The place where the injury occurred would be considered in connection with the injury itself, and together, they would very satisfactorily show a breach of the contract, if no excuse were given. At least they would be sufficient to cast upon the claimants of the tug the burden of establishing some excuse for the deviation from the usual and proper course.

In the present case the departure from the true course was not so great, but it was enough to devolve upon the tug the duty of explanation. The ship was, as we have noticed, towed upon a shoal more than three miles south of the proper course to Cross Rip light. Had the course been a long one the deviation would not have been so remarkable. But as the entire distance from Handkerchief shoal to Cross Rip is less than thirteen statute miles, and as the ship was stranded when only about three quarters of this distance was *passed, it is [*415 apparent there must have been either bad management of the tug, or some unusual cause must have operated to produce the disaster; a cause against which ordinary prudence was not bound to guard. Certainly this is enough to impose upon the tug the necessity of explaining how she came to be so far off her course in running so short a distance. We do not say that in order to excuse her it must be shown the accident was inevitable, but it ought to appear that so remarkable a deviation from her correct course, made so soon after leaving Handkerchief light, was consistent with cautious and skilful management.

The weight of the evidence is that the ship was run upon the shoal in a little more than an hour; manifestly not more than an hour and a half, after she had passed Handkerchief light. All the witnesses agree that it was between three and four o'clock when she took ground. Captain Hazard, of the steamer, testifies, that when they first struck the shoal it was between three and four, and he thinks about a quarter before four. It was probably earlier; for he

adds it was a little after four when the steamer came to anchor, and Sherwood, the pilot, states the steamer came to anchor a quarter before four. Yet, after the ship struck, the steamer headed toward the east and pulled upon the ship fifteen or twenty minutes, to drag her off. She then headed south, and finding herself in shoal water, slipped the end of the hawser, and ten or fifteen minutes afterwards let go her anchor. It is hardly probable, therefore, that it was later than half past three when the ship went upon the shoals. It follows that the entire departure from the true course was made within this period of an hour, or, at most, an hour and a half.

The excuses set up in behalf of the steamer are that the night was foggy and dark, and that the currents were variable, conflicting and imperceptible. There is no evidence that there was any wind which could have caused embarrassment until some time after the ship had stranded. It blew lightly from the south and east, and its tendency, therefore, was to keep the steamer up to the northward of her true course. It was raining, but there was no fog until after Handkerchief light had been passed. Soon afterwards the weather began to grow misty and thick, and Captain Hazard states that when they had got about half way from the Handkerchief to Cross Rip, it became so very thick they could barely see the ship astern of them, six hundred feet off. But he says that after passing the Handkerchief three miles, they could see the light astern, and also, he thinks, the light on the northeast corner of Nantucket (six miles distant); but that after that it shut down so thick they could not see the lights astern or that of Nantucket. Sherwood, the pilot, says that after they had got about a mile past Handkerchief, it shut down a dense fog, and they could not see the lights of the Shooting Star. Newcomb, who was at the wheel of the steamer, testifies that "after passing Handkerchief, in fifteen or twenty minutes (when the steamer must have gone three or four miles) it began to close in thick. In not to exceed half an hour it shut in very close; could not see any light at all. When it shut in so dark we could not see light, we then rang the bell to shut off." The testimony of the pilot is that they ran thirty-two minutes in the fog before the steam was shut off. The clear preponderance of the testimony is, that it was not until they had passed over about half the distance to Cross Rip, that the fog became so dense that the light could not be seen. If this is so, there was no difficulty in determining the position of the steamer. It is not perceived, however, that this is very material. The fog, whether dense or thin, was itself no embarrassment to the steamer's taking and keeping the right course, a course marked on the chart, and well known by the pilot and by the captain.

Though the currents were variable in the di-
416*] rection of *their flow, yet both their direction and their force were well known. All that was needed was to give them careful attention, and to make allowances for their operation. So much prudent navigation required. There is no evidence that they were of unusual strength on the night of the disaster, or that they ran in an unusual direction, and there was nothing in the state of the weather to cause a difference from what was common. Ordinary skill was quite sufficient to enable the pilot of the tug to counteract their force, and to keep both the tug and the tow on the proper course. It was during the first third of the tide that the passage was made over the first third of the course from Handkerchief light to Cross Rip, as stated by the pilot. During this time the current or tide was setting northwest, bearing the steamer northward, and on the last half of the course, on which she entered before the steam was shut off, the ebb tide was setting southwest. Such is the evidence, as also that, after the steam was shut off, the motion of the steamer through the water was at the rate of two or three knots an hour, and that she was thus moving about forty-five minutes before the ship struck. If this is so, she was constantly making westing during that three quarters of an hour, if headed right; and, if she was in the right position when the steam was shut off, the calculation is easy that shows a southwest current could not have carried her on to Tuckernuck shoal. It is plain, therefore, the stranding of the ship was not the fault of the currents. They do not account for it, even if nothing was done to counteract their known tendency.

There is nothing else in the case that tends to show that the disaster was not due to the negligence of the tug. On the contrary, there is very considerable evidence that her compasses were untrue, and so deranged as on a westerly course to head her too much to the south. This, of itself, would account for the deviation, and this of course would be the steamer's fault.

It has been strenuously argued that the great injury to the ship was caused by her own mismanagement after she *had struck the [*417
shoal and cast her port anchor. After daylight, when the steamer was about to back down in order to attach herself again to the ship, which had then got off the shoal and was riding at anchor, the ship's crew commenced heaving on the anchor; and it is alleged they hove short, so that the anchor was picked up, and, a gale coming on to blow suddenly, she went again upon the shoal. The anchor, however, instead of being picked up, was lost, and it was proper to heave upon it in order to bring the ship nearer the stern of the steamer, and thus aid in the effort to renew attachment to the steamer. We do not discover in this any negligence on the part of the ship. What was done was rendered prudent, if not necessary, by the prior misconduct of the tug. Nor was casting the starboard anchor, after the ship broke adrift, negligence under the circumstances, though it proved unfortunate, and though the ship afterwards swung upon it and bilged. The port anchor had been lost, and the wind was then blowing a gale. Probably the bilging was what saved the ship from total destruction; and, if casting the starboard anchor was an act of mistaken judgment, it cannot excuse the tug, which negligently brought the ship into the peril from which she sought thus to escape.

The attempt to escape responsibility under the allegation that the wrong, if any, was that of the pilot, and that the pilot was the employee of the ship, and not of the steamer, wholly fails. Neither the written contract for towage nor the antecedent negotiation establishes any such thing. Under the engagements of the steamer,

assumed before the contract of towage was made, it was impossible to have any other pilot than Sherwood, who was the pilot of the steamer, and there is nothing to show that the ship undertook to run the risk of pilotage.

It is finally objected that the deposition of Levi Hotchkiss was allowed to be read, though he was incompetent when it was taken. It does not appear to have been used in either the district or the circuit court, though it was read before the commissioner appointed to ascertain 418*] the damages. Objection *was made to it there, and it must be conceded the deposition should not have been received, but its reception can hardly justify us in sending the case back for a new trial. When the commissioner received it, if it was intended to insist upon the objection, application should have been made to the court for an order to exclude it. This was not done. Conceding, however, that the error was not thus cured, still the evidence before the commissioner related only to the amount of damages, and without the testimony of Hotchkiss, the damages were plainly more than the libelants are entitled to recover in this proceeding. The libel was *in rem* against the steamer, and the decree cannot be for more than is within the jurisdiction of the court. The steamer was discharged from arrest, on stipulation in the sum of $18,000 for value, and $250 for costs. The stipulators, to the extent of their stipulation, have been substituted for the steamer, and thus nothing but the $18,000 value and $250 for costs is within the control of the court. To that extent and no greater, the stipulators have subjected themselves to the judgment of the court, and they cannot be made liable as stipulators beyond it. This was determined in the case of *The Ann Caroline*, 2 Wall. 538, 17 L. ed. 833, and we need not repeat what was then said. The decree in this case was largely in excess of the stipulation, and while it is affirmed upon its merits, it must be modified in regard to the amount of damages recoverable from the stipulators.

The decree of the Circuit Court is affirmed, with the modification that it be reduced to the sum of $18,000 damages and $250 costs; and it is further ordered that each party pay his own costs in this court.

THE NICHOLSON PAVEMENT COMPANY,
Plff. in Err.,
v.
CHARLES E. JENKINS.

(See S. C. 14 Wall. 452–457.)

Construction of assignment of patent—extension of patent.

1. An assignment of an interest in an invention secured by letters patent is a contract, and is to be construed so as to carry out the intention of the parties to it.

2. The words, "to the full end of the term for which the said letters patent are or may be granted in such assignment, necessarily import an intention to convey both a present and a future interest, including a renewal and extension of the patent.

[No. 63.]

Argued Jan. 12, 1872. Decided Jan. 29, 1872.

IN ERROR to the Circuit Court of the United States for the District of California.

This was an action commenced in the court below by Jenkins, to recover the royalty established by the patentee, for license to lay down the pavement known as the Nicholson pavement. In 1854, Samuel Nicholson obtained letters patent for an improvement in wooden pavement. In Dec., 1863, he obtained a re-issue of the letters patent. In Dec., 1864, said Samuel Nicholson executed the following assignment of an interest in said invention and letters patent, to Jonathan Taylor, *viz.:*

"Whereas, I, Samuel Nicholson, of Boston, in the state of Massachusetts, invented a certain new and useful improvement in wooden pavements, for which letters patent of the United States of America (numbered 1584 of re-issued patents, and bearing date the 1st day of December, in the year 1863) have been granted to me, giving to me and my legal representatives the exclusive right of making, using, and vending the same invention throughout the said United States, the original patent being dated Aug. 8, 1853, and given for the term of fourteen years.

"And whereas, Jonathan Taylor, of Milwaukee, in the state of Wisconsin, has agreed to purchase from me all the right, title, and interest which I have in and to the said invention, for and in the city of San Francisco in the state of California, as secured by the said letters patent, and has paid to me the sum of $1, the receipt whereof is hereby acknowledged. Now, therefore, this indenture witnesseth, that, for and in consideration of the said sum to me paid, I have assigned, sold, and set over, and do hereby assign, sell, and set over, unto the said Jonathan Taylor, all the right, title, and interest which I have in said invention and letters patent, for and in the said city of San Francisco, but in no other place; the same to be held and enjoyed by the said Taylor for the use and behoof of him and his legal representatives, to the full end of the term for which the said letters patent are or may be granted, as fully and effectively as the same would have been held and enjoyed by me had this assignment never been made. In testimony whereof I have hereunto set my signature and affixed my seal, this 1st day of December, A. D. 1864.

"Samuel Nicholson."

The patent referred to in said assignment is the same patent issued to Nicholson in 1854, erroneously referred to as issued in 1853, and re-issued in 1863. Taylor, prior to Aug., 1868, assigned all his interest in said patent acquired under said assignment to the Nicholson Pavement Company, original defendant in this suit, and the said interest was held by defendant at the time of the commencement of this suit.

In August, 1867, said Nicholson obtained another re-issue of the said letters patent, on an amended specification. Nicholson having subsequently died, in January, 1868, and George T. Bigelow having been appointed his administrator, said Bigelow, in his character of administrator, in July, 1868, procured from the Com-

NOTE.—*Assignment before issuing and re-issuing patent; when assignment transfers extended term* see note to Gayler v. Wilder, 13 L. ed. U. S. 504.

missioner of Patents a renewal or extension of said letters patent for seven years, from Aug. 8, 1868, in pursuance of the 18th section of the act of Congress of July 4, 1836, and of May 27, 1848. Afterward, the plaintiff below acquired through assignment from said Bigelow as administrator made Aug. 14, 1868, all his right, title, and interest in said invention and patents for the state of California. Since said Aug. 14, 1868, the defendant below, without leave or license of plaintiff, has constructed and laid down in the city of San Francisco a large amount of pavement, employing in its construction the invention for which said letters patent were issued.

The question in this case is whether the assignment from Nicholson to Jonathan Taylor, of Dec. 1, 1864, set out in the statement of facts, vested any estate, right, title, or interest in the assignee, in or to the extended or renewed term, which was acquired by Bigelow as administrator, under the act of Congress subsequent to the date of said assignment.

Messrs. R. J. Brent and **T. T. Crittenden,** for plaintiff in error:

1. The Commissioner of Patents was authorized to grant extensions for seven years, and the original letters patent then became virtually a patent for twenty-one years.

5 Stat. at L. p. 124, § 18; *Gibson* v. *Harris*, 1 Blatchf. 169; *Woodworth* v. *Edwards*, 3 Woodb. & M. 125.

2. The inchoate right of the inventor to the exclusive privileges under an extension of letters patent, is the subject of a sale.

Wilson v. *Rousseau*, 4 How. 646; *Wilson* v. *Turner*, Taney, C. C. 278; affirmed, 4 How. 712; *Clum* v. *Brewer*, 2 Curt. 506; *Day* v. *Candee*, 3 Fish. 9; *Aiken* v. *Dolan*, 3 Fish. 197; *Hartshorn* v. *Day*, 19 How. 220, 15 L. ed. 610.

3. The words of the assignment are applicable only to a design to convey both a present and future interest.

Phelps v. *Comstock*, 4 McLean, 354; *Case* v. *Redfield*, 4 McLean, 528; *Nesmith* v. *Calvert*, 1 W. & M. 34; *Clum* v. *Brewer*, 2 Curt. 507; *Woodworth* v. *Sherman*, 3 Story, 174; *Mitchell* v. *Winslow*, 2 Story, 639; *Chase* v. *Walker*, 3 Fish. 123; *Bloomer* v. *Millinger*, 1 Wall. 340, 17 L. ed. 581; *Comrs.* v. *Whitely*, 4 Wall. 522, 18 L. ed. 335; *Brooks* v. *Bicknell*, 4 McLean, 64; Act of July 4, 1836, 5 Stat. at L. 117.

4. The assignment is to be construed in the sense in which both parties understood and intended it at the time it was made and to secure to the purchaser the right which he intended to buy, and supposed he had bought, and which the patentee must have intended to sell, and at the time of the contract must have supposed he had sold.

Messrs. J. R. Sharpstein and **Matt. H. Carpenter,** for defendant in error:

The assignment to the defendant in error is of the extended or renewed term, and it is conceded that it vests in him the right to it, unless the assignment of Nicholson to Taylor under the former term, embraced the extended as well as the original term. So that it is only important now to ascertain whether the assignment of Nicholson to Taylor contains any provision looking to an interest beyond that which the patentee had then already secured. If not, we may safely assume that those claiming under Taylor take nothing under the extension.

Wilson v. *Rousseau*, 4 How. 682; *Bloomer* v. *McQuewan*, 14 How. 549; Curt. Pat. § 203.

The conclusion, therefore, to which the cases, as well as sound principle, lead, is this: that the only presumption applicable to such instruments is, that the parties dealt for the existing term, unless a provision was inserted in the grant or assignment looking to a further interest. Curt. Pat. § 209; *Gibson* v. *Cook*, 2 Blatchf. 144; *Bloomer* v. *McQuewan, supra; Clum* v. *Brewer*, 2 Curt. 520.

In the assignment of Nicholson to Taylor, no allusion is made to an extension or renewal of the patent for a further term, and the interest assigned is clearly that, and that alone, which the patentee had already acquired.

Mr. Justice **Davis** delivered the opinion of the court:

The controversy in this case rose out of the different views taken by the parties to the record, of their rights under the deed of assignment of the 1st of December, 1864, from Nicholson to Taylor, through whom the plaintiff in error claims. The learned court below held that Taylor and his assigns took by it no interest in the renewed or extended term of the patent, but only such interest as was covered by the original patent and the re-issues of the original term.

An assignment of an interest in an invention secured by letters patent, is a contract and, like all other contracts, is to be construed so as to carry out the intention of the parties to it. It is well settled that the title of an inventor to obtain an extension may be the subject of a contract of sale, and the inquiry is, whether the instrument of sale employed in this case did secure to the purchaser an interest not merely in the original letters patent, but in any subsequent extension of them. It recites the invention and the agreement of Taylor to purchase the right to use it in the city of San Francisco, and then conveys to him all the title and interest which Nicholson had in the invention and letters patent for and in the said city; to be enjoyed by Taylor and his legal representatives to the full end of the term for which the said letters patent are or may be granted. There is no artificial rule in construing a contract, and effect, if possible, is to be given to every part of it, in order to ascertain the meaning of the parties to it. Taking this whole deed together, it is quite clear that it was intended to secure to Taylor and his assigns the right to use the invention in San Francisco, as long as Nicholson and his representatives had the right to use it anywhere else. Manifestly something more was intended to be assigned than the interest then secured by letters patent. The words "to the full end of the term for which the said letters patent are or may be granted" necessarily import an intention to convey both a present and a future interest, and it would be a narrow rule of construction to say that they were designed to apply to a re-issue *merely, when the [*457 invention itself, by the very words of the assignment, is transferred. It was easy to have restricted the right to use the invention to the end of the term of the original letters and re-issues,

but this was not done; and in view of the right of the inventor in certain contingencies to a renewal—which must have been well known to both buyer and seller of this kind of property—we are led to the conclusion that both parties contracted with reference to it. The case of *R. Co.* v. *Trimble*, decided by this court at its last term, 10 Wall. 367, 19 L. ed. 948, is not different in principle from this, although in that case the language used is somewhat broader.

Judgment reversed, and a venire de novo awarded.

579*] *THE BARK DELAWARE, etc., Nicholas Birchard, *Claimant, Appt.*,

v.

OREGON IRON COMPANY.

(See S. C. *"The Delaware,"* 14 Wall. 579-606.)

Goods, when not lost by act of God or perils of the sea—bill of lading—how far may be contradicted—when cannot be varied.

1. Goods, though lost by perils of the sea, if they were stowed on deck without the consent of the shipper, are not regarded as goods lost by the act of God, nor by perils of the sea so as to excuse the carrier from delivering the goods shipped.
2. A bill of lading, in the usual form, is a receipt for the quantity of goods shipped, and a promise to transport and deliver the same as therein stipulated.
3. So far as it is a receipt, it may be contradicted by oral testimony; so far as it is evidence of a contract between the parties, it stands on the footing of all other contracts in writing, and cannot be contradicted nor varied by parol evidence.
4. If the bill of lading is silent as to the mode of stowing the goods, it imports that the goods are to be carried under deck, and parol evidence that the shipper agreed that the goods should be stowed on deck, cannot be received.

[No. 21.]

Argued Dec. 11, 1871. Decided Jan. 29, 1872.

APPEAL from the Circuit Court of the United States for the District of California.

The libel in this cause was filed in the district court by the appellees, for the recovery of $5,000 damages, for the non-delivery of seventy-five tons of pig-iron, laden on board of the bark Delaware at Portland, to be carried to San Francisco, at a freight of $4.50 per ton. The bill of lading is in the usual form.

The answer admits the shipment of the iron as alleged, at Portland for San Francisco, and the bill of lading. As a defense to the non-delivery, it sets up that, by agreement made between the libelant and the master of the vessel before the shipment of the iron or the signing of the bills of lading, the iron was stowed on deck; that, being so stowed with all proper care, the greater part of it, in fact all of it but 13,910 pounds, was thrown overboard by way of jettison during the voyage to San Francisco, by reason of a peril of the sea.

By the action and decision of the district court the whole controversy finally resolved itself into the question of whether, under a clean bill of lading, the parol proof offered by the ship to show a previous agreement to stow on deck, was admissible. The district court ruled it all out.

The district judge held the proof to be that of the seventy-five tons of iron shipped, but six tons ninety pounds were delivered, and that the other sixty-eight tons and 2,150 pounds were worth $50 a ton, and that the libelants were entitled to a decree for that amount, less the freight, $4.50 per ton, on the whole seventy-five tons.

On the appeal in the circuit court, the case was argued and submitted on the pleadings and proofs in the district court, and the decree of that court was in all respects affirmed.

A further statement appears in the opinion.

Messrs. **E. Casserly** and *Milton Andros*, for appellant:

The parol evidence offered on the part of the vessel in the district court, to prove a consent by the libelant that the iron might be stowed on deck, was admissible, although the bill of lading was in the usual form; and the court erred in rejecting it.

The rule as to admitting parol evidence where there is a written contract, is exactly stated as the result of the authorities, by our leading text writer who holds it with all due strictness.

"Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument."

1 Greenl. Ev. § 275, and see n. 3; see, also, 1 Stark, Ev., by Sharswood, 648, 713; 1 Duer, Ins., 176, § 27; 276, § 70; 2 Duer, 668, § 17; 669, 671, § 18.

How, then, did the proposed parol evidence contradict or vary the terms of the written instrument, in this case the bill of lading?

Like all other bills of lading in the usual form, its terms are these, and these only: (1) That the master acknowledges the receipt of seventy-five tons of pig-iron marked as described; (2) which he agrees to carry on the voyage stated from Portland to San Francisco; (3) there to deliver to the persons stated in like good order, etc., danger of the seas, etc., excepted; (4) upon payment of the freight specified.

By its terms, the bill of lading makes no provision whatever for stowage of the iron shipped, still less for stowage of it in any particular place, whether below or upon deck.

As the bill of lading by its terms provides nothing as to stowage; and as the law allows the parties to make what contract they choose as to that subject, and in what manner they choose, by writing or by word; it is obviously incorrect to say that parol proof of the contract, or consent by the shipper to stow on deck, is within any rule against parol proof, either as contradicting or varying "the terms" of the writing, or as substituting words, when the law demands a writing.

It is said, however, that though by its terms the common or "clean" bill of lading is wholly silent as to the stowage, yet that it imports that the goods are to be safely stowed under deck; that this is a condition tacitly annexed to the contract by operation of law; and that this implied contract is so conclusive, that the law will not admit parol evidence to show that the parties contracted for a stowage on deck. Such is, substantially, the doctrine of the two principal cases relied upon against us.

Creery v. *Holly*, 14 Wend. 26; *The Waldo*, Daveis, 167.

Though the learned district judge, Ware, on another branch of the case, goes fully into the parol proof of the contract to stow on deck, and holds the contract not fulfilled (Daveis, 169).

is it in any sense correct to say that the common bill of lading "imports a stowage safely under deck," or that such is "the condition tacitly annexed to the contract by operation of law?"

On the contrary, we confidently submit that what the instrument imports or implies is not a stowage in any particular place in the ship, on or under the deck, nor in any particular manner more or less safe; but simply a stowage such as is authorized by the custom or usage of trade, whether in respect to the particular article of freight, or to the particular voyage which the ship is to make.

Prima facie, this and this only is the obligation of the carrier on the bill of lading. It would be the same on a verbal contract, in the same general words.

The whole question of delivery, time, mode, place, is a question of the custom of business.

1 Sm. Lead. Cas. 319, and cases cited.

As to where the point was as to the duty of the ferryman to carry goods up a slip, see,

Sm. Lead. Cas. 304.

The express contract in the bill of lading here is for a voyage from Portland to San Francisco. This calls for a direct voyage and without deviation; yet it may be controlled by proof of a custom or usage to make the deviation complained of.

Lowry v. *Russell*, 8 Pick. 360, held, that proof of a usage to make the deviation, or of the shipper's knowledge of the intent to make it, was admissible.

The Mary Hawes, U. S Dist. Ct. Mass. Lowell, J., cited in 1 Pars. Ship. & Adm. 191, n. 1.

Such is the power of usage in modifying or controlling the implied, and even the expressed contract of the common bill of lading. From the nature of stowage, the power of usage over the subject is at least as great.

Stowage is completely the creature of usage. Hence it is, doubtless, that the common bill of lading is silent as to stowage. Under such a bill of lading, whatever usage authorizes, as to either the place or manner of stowage, whether as respects the particular goods to be carried or other goods in the same ship, or the particular voyage in which they are to be carried, may lawfully be done by the carrier.

Da Costa v. *Edmunds*, 4 Camp. 142; *Brown* v. *Cornwell*, 1 Root, 60; *Milward* v. *Hibbert*, 3 Ad. & El. (N. S.) 120; *Gould* v. *Cliver*, 4 Bing. (N. C.) 134; 2 Man. & Gr. 208.

The usage to carry deck loads is more favored in the case of a steamer plying coastwise than in that of a sailing vessel.

Harris v. *Moody*, 4 Bosw. 210; and affirmed, 30 N. Y. 266.

What goods shall be carried in the same ship, and how and where they shall be stowed in reference to each other, is controlled by usage, rather than by the greater or less safety of the goods.

Rich v. *Lambert*, 12 How. 356; *Clark* v. *Barnwell*, 12 How. 281; *Baxter* v. *Leland*, 1 Blatchf. 526; see n. to Am. ed. 5 C. B. (N. S.) 164 and cases cited; Abb. Ship. 287, Lond. ed. 1854.

In the case then of the common bill of lading, which is silent as to stowage, there is no invariable practice as to the stowage of goods.

Hence it is not quite correct to say that such a bill of lading imports that the goods are to be stowed safely under deck; or that such is the condition tacitly annexed to the contract by operation of law.

The common bill of lading, such as that in this case, being silent on the subject of stowage, neither imports nor implies any particular place of stowage of goods. That depends wholly upon the custom of the trade in regard to such goods, on such a voyage.

When goods are shipped under a bill of lading, such as that in this case, the presumption prima facie is, that they are to have such place of stowage as is according to the custom of the trade; which it is conceded, in view of the circumstances of this case, would have been under deck, in the absence of an agreement for a deck stowage.

That the effect of such a bill of lading is simply to raise a presumption of the nature just described, is abundantly clear on principle and authority.

1 Stark, Ev., by Sharswood, 75, 710; 1 Greenl. Ev. § 292; Best, Pres. 132; 1 Duer, Ins. Lect. 2, pt. 2, p. 244; 1 Arn. Ins. 278 (Lond. 1866); *Clark* v. *Ins. Co.* 7 Mass. 369; *Yeats* v. *Pim*, Holt, N. P. 95; *Vernard* v. *Hudson*, 3 Sumn. 405; *The Waldo*, Daveis, 161.

As a bill of lading expresses nothing as to stowage, and for its construction as to that subject requires the extrinsic fact of a general custom to stow under deck in this case, out of which to raise the presumption of an agreement in accordance with the custom, such a presumption may be rebutted by parol proof of a different agreement, namely: to stow under deck.

Undoubtedly, it might be rebutted by proof of a usage to carry on deck. This proof would necessarily be by parol. Every usage is matter of proof. 1 Duer, Ins. 182.

The most general usages are, or may be, established by that mode of proof known as judicial knowledge. Those less general are proved by the ordinary testimony in the courts.

Most of the cases, *pro* and *con*, already cited in this case show this. *Clark* v. *Barnwell*, 12 How. 281; *Rich* v. *Lambert*, 12 How. 357, as to a general usage; *Baxter* v. *Leland*, 1 Blatchf. 527; *Da Costa* v. *Edmunds*, 4 Camp. 142; *Convoy's Wheat*, 3 Wall. 230, 18 L. ed. 197; *Broadwell* v. *Butler*, 6 McLean, 296; 2 Redf. Rw. 60, 65.

The usages there mentioned are necessarily matters of express proof or admitted fact.

Lowery v. *Russell*, 8 Pick. 362; *The Mary Hawes*, per Lowell, J., in 1 Pars. Ship. & Adm. 191, n. 1; 2 Pars. Ins. 81; notes 1, 2; 2 Pars. Ins. 6, n. 2; *Planche* v. *Fletcher*, 1 Doug. 253; *De Peyster* v. *Ins. Co.* 19 N. Y. 274; *Renner* v. *Bk.* 9 Wheat. 582.

Where a usage to carry on deck is relied upon, express proof is always made. When made, its effect is simply to raise a presumption that the goods in question are so to be carried. This proof must, of course, be by parol. To make it, does not vitiate the rules against parol evidence in contradiction of a written instrument. Why not rebut it by parol?

Upon what principle can it be said that a presumption, being as it is but a form of proof, inferential proof, which is raised by parol, may not be cut down by parol? Once the door is open to parol proof, how is it to be closed against parol proof in rebuttal? Especially as

the presumption raised on proof of the usage is but indirect proof, while the express agreement to rebut is direct proof.

In support of our position that the parol proof should have been admitted, besides the ground already urged, we have a strong body of authorities more or less direct to the point.

Vernard v. *Hudson*, 3 Sumn. 405; 1 Blatchf. 527; *Sayward* v. *Stevens*, 3 Gray, 97; *Atty. Gen.* v. *Proprietors, etc.*, 3 Gray, 1; *Garrison* v. *Ins. Co.* 19 How. 312, 15 L. ed. 656; *The Ninetta*, Crabbe, 534; *Knox* v. *The Ninetta*, Crabbe. 541; *Lawrence* v. *Minturn*, 17 How. 100, 15 L. ed. 58; *Gould* v. *Oliver*, 2 Man. & Gr. 208; *Baxter* v. *Leland*, 1 Blatchf. 526.

Messrs. John E. Ward and **Charles E. Whitehead**, for appellee:

The loss of the iron in this case having been caused by its having been stowed on deck, instead of in the hold, and this having been the act of the master, the ship is liable for all loss occasioned thereby.

The Portsmouth, 9 Wall. 684, 19 L. ed. 755; *Lawrence* v. *Minturn*, 17 How. 112, 15 L. ed. 63.

A master is bound to stow goods under deck. If he carries goods on deck without consent, he does it at his risk.

The Paragon, 1 Ware, 329; *The Waldo*, Daveis, 161; *Vernard* v. *Hudson*, 3 Sumn. 405.

The effect of a bill of lading in usual form, is to oblige the master to carry goods under deck.

The Peytona, 2 Curt. 23.

The burden of proof is on the ship-owner, to prove that shipper agreed that goods should be carried on deck.

2 Curt. 21; *Lawrence* v. *Minturn*, *supra*.

A bill of lading is a contract and a receipt. So far as it is a contract, it cannot be varied by parol evidence.

Goodrich v. *Norris*, 1 Abb. Adm. 196; *Creery* v. *Holly*, 14 Wend. 26; *Barrett* v. *Rogers*, 7 Mass. 297; Phil. Ev. 3 Cow. & H. 1439.

Parol evidence cannot be admitted to vary bill of lading by establishing a custom.

The Reeside, 2 Sumn. 567.

Parol evidence cannot be permitted to vary the terms or legal import of a bill of lading, to show that goods might be stowed on deck.

Creery v. *Holly*, 14 Wend. 26; *The Waldo*, Daveis, 167.

596*] *Mr. Justice **Clifford** delivered the opinion of the court:

Ship-owners, as carriers of merchandise, contract for the safe custody, due transport and right delivery of the goods; and the shipper, consignee or owner of the cargo contracts to pay the freight and charges; and by the maritime law, as expounded by the decisions of this court, the obligations of the ship-owner and the shipper are reciprocal, and it is equally well settled that the maritime law creates reciprocal liens for the enforcement of those obligations, unless the lien is waived by some express stipulation, or is displaced by some inconsistent and irreconcilable provision in the charter-party or bill of lading. *The Eddy*, 5 Wall. 494, 18 L. ed. 488; *The Bird of Paradise*, 5 Wall. 555, 18 L. ed. 664; *Bags of Linseed*, 1 Black, 112, 17 L. ed. 37. Shippers should in all cases require a bill of lading, which is to be signed by the master, whether the contract of affreightment is by charter-party or without any such customary written instrument. Where the goods of a consignment are not all sent on board at the same time, it is usual for the master, mate, or other person in charge of the deck, and acting for the carrier, to give a receipt for the parcels as they are received, and when the whole consignment is delivered, the master, upon those receipts being given up, will sign two or three, or, if requested, even four bills of lading in the usual form, one being for the ship and the others for the shipper. More than one is required by the shipper, as he usually sends one by mail to the consignee or vendee, and if four are signed he sends one to his agent or factor, and he should always retain one for his own use. Such an instrument acknowledges the bailment of the goods, and is evidence of a contract for the safe custody, due transport and right delivery of the same, upon the terms as to freight, therein described, the extent of the obligation being specified in the instrument. Where no exceptions are made in the bill of lading, and in the absence of any legislative provisions prescribing a different rule, the carrier is bound to keep and transport the goods safely, and to make right delivery of the same at the port of destination *unless he can prove that the loss [*597 happened from the act of God or the public enemy, or by the act of the shipper or owner of the goods. Stipulations in the nature of exceptions may be made limiting the extent of the obligation of the carrier, and in that event the bill of lading is evidence of the ordinary contract of affreightment, subject, of course, to the exceptions specified in the instrument; and in view of that fact the better description of the obligation of such a carrier is that, in the absence of any congressional legislation upon the subject, he is in the nature of an insurer, and liable, in all events and for every loss or damage, however occasioned, unless it happened by the act of God or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading. *The Cordes*, 21 How. 23, 16 L. ed. 46; *Clark* v. *Barnwell*, 12 How. 272; *Elliott* v. *Rossell*, 10 Johns. 7.

Seventy-five tons of pig-iron were shipped by the libelants, on the 8th of May, 1868, on board the barque Delaware, then lying in the port of Portland, Oregon, to be transported from that port to the port of San Francisco, for the freight of $4.50 per ton, to be delivered to the shippers or their assigns at the port of destination, they paying freight as therein stipulated, before delivery if required, with five per cent primage and average accustomed. Dangers of the seas, fire and collision were excepted in the bill of lading, and the statement at the close of the instrument was, "vessel not accountable for breakage, leakage or rust."

Process was served and the claimant appeared and filed an answer, in which he admits the shipment of the iron and the execution of the bill of lading exhibited in the record. Sufficient also appears in the record to show that the voyage was performed and that but a small portion of the iron shipped, to wit, some thirteen or fourteen thousand pounds, was ever delivered to the consignees, and that all the residue of the

shipment was thrown overboard as a jettiso
598*] *during the voyage, which became nece
sary by a peril of the sea, for the safety of th
other associated interests and for the preserva
tion of the lives of those on board. Sacrifice
as all that portion of the shipment was as a jet
tison in consequence of a peril of the sea, ex
cepted in the bill of lading, the claimant insist
that the libelants have no claim against the
ship, and that the libelants as the shippers of
the iron must bear their own loss.

Evidence was exhibited by the claimant sufficient to show that the allegations of the answer that the iron, not delivered, was sacrificed during the voyage as a jettison, in consequence of a peril of the sea are true, but the libelants allege that the iron was improperly stowed upon the deck of the vessel, and that the necessity of sacrificing it as a jettison arose solely from that fact, and that no such necessity would have arisen if it had been properly stowed under deck, as it should have been by the terms of the contract specified in the bill of lading. That the iron not delivered was stowed on deck is admitted, and it is also conceded that where goods are stowed in that way without the consent of the shipper, the carrier is liable in all events if the goods are not delivered, unless he can show that the goods were of that description, which, by the usage of the particular trade, are properly stowed in that way, or that the delivery was prevented by the act of God or the public enemy; or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading.

Goods, though lost by perils of the sea, if they were stowed on deck without the consent of the shipper, are not regarded as goods lost by the act of God within the meaning of the maritime law, nor are such losses regarded as losses by perils of the sea which will excuse the carrier from delivering the goods shipped to the consignee unless it appears that the manner in which the goods were stowed is sanctioned by commercial usage, or unless it affirmatively appears that the manner of stowage did not, in any degree, contribute to the disaster; that the 599*] loss happened without *any fault or negligence on the part of the carrier, and that it could not have been prevented by human skill and prudence, even if the goods had been stowed under deck, as required by the general rules of the maritime law. *Laurence* v. *Minturn*, 17 How. 114, 15 L. ed. 64; *The Peytona*, 2 Curt. 23.

Enough appears in the record to show that all the iron not delivered to the consignees was stowed on deck, and there is no proof in the case to show that the usage of the trade sanctioned such a stowage in this case, or that the manner in which it was stowed did not contribute both to the disaster and to the loss of the goods. *Gould* v. *Oliver*, 4 Bing. N. C. 142; Story, Bail. § 531.

None of these principles are controverted by the claimant, but he insists that the iron not delivered was stowed on deck by the consent of the shippers and in pursuance of an oral agreement between the carrier and the shippers consummated before the iron was sent on board, and before the bill of lading was executed by the master. Pursuant to that theory testimony

lading will operate on those goods as between the shipper and the carrier by way of relation and estoppel, and that the rights and obligations of all concerned are the same as if the goods had been actually shipped before the bill of lading had been signed. *Rowley* v. *Bigelow*, 12 Pick. 307; *The Eddy*, 5 Wall. 495, 18 L. ed. 489. Such an instrument is twofold in its character; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument. Macl. Ship. 338, 339; Smith's Mer. Law (6th ed) 308. Beyond all doubt a bill of lading, in the usual form, is a receipt for the quantity of goods shipped and a promise to transport and deliver the same as therein stipulated. *Bates* v. *Todd*, 1 Moo. & Rob. 106; *Berkley* v. *Watling*, 7 Ad. & E. 29; *Wayland* v. *Mosely*, 5 Ala. 430; *Brown* v. *Byrne*, 3 E. & B. 714; *Blaikie* v. *Stembridge*, 6 C. B. (N. S.) 907. Receipts may be either a mere acknowledgment of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it, the receipt, is merely prima facie evidence of the fact, and not conclusive, and therefore the fact, which it recites may be contradicted by oral testimony, but in so far as it is evidence of a contract between the parties, it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol evidence. 1 Greenl. Ev. (12th ed.) § 305; *Bradley* v. *Dunipace*, 1 Hurls. & Colt, 525. Text writers mention the bill of lading as an example of an instrument which partakes of a twofold character, and such commentators agree that the instrument may, as between the carrier and the shipper, be contradicted and explained in its recital that the goods were in good order and well conditioned, by showing that their internal state and condition was bad or not such as is represented in the instrument, and in like manner, in respect to any other fact which it erroneously **602*]** *recites, but in all other respects it is to be treated like other written contracts. *Hastings* v. *Pepper*, 11 Pick. 42 *Clark* v. *Barnwell*, 12 How. 272; *Ellis* v. *Willard*, 9 N. Y. 529; *Babcock* v. *May*, 4 Ohio. 346; *Adams* v. *Packet Co.* 5 C. B. (N. S.) 492; *Sack* v. *Ford*, 13 C. B. (N. S.) 100.

Bills of lading, when signed by the master, duly executed in the usual course of business, bind the owners of the vessel if the goods were laden on board or were actually delivered into the custody of the master, but it is well-settled law that the owners are not liable, if the party to whom the bill of lading was given had no goods, or the goods described in the bill of lading were never put on board or delivered into the custody of the carrier or his agent. *The Freeman*, 18 How. 187, 15 L. ed. 343; Maude & P. Ship. 233; *Grant* v. *Norway*, 10 C. B. 665; *Zipsy* v. *Hill*, Fost. & Fin. 573; *Meyer* v. *Dresser*, 16 C. B. (N. S.) 657. Proof of fraud is certainly a good defense to an action claiming damages for the non-delivery of the goods, but it is settled law in this court that a clean bill of lading imports that the goods are to be safely and properly stowed under deck, and that it is the duty of the master to see that the cargo is so stowed and arranged that the different goods may not be injured by each other or by the motion or leakage of the vessel, unless by agreement that service is to be performed by the shipper. *The Cordes*, 21 How. 23, 16 L. ed. 46; *Sandeman* v. *Scurr*, Law. Rep. 2 Q. B. 98; *Swainston* v. *Garrick*, 2 Law Jour. N. S. Ex. 355; *African Co.* v. *Lamzed*, Law Rep. 1 C. P. 229; *Alston* v. *Herring*, 11 Exch. 822. Express contracts may be made in writing which will define the obligations and duties of the parties, but where those obligations and duties are evidenced by a clean bill of lading, that is, if the bill of lading is silent as to the mode of stowing the goods, and it contains no exceptions as to the liability of the master, except the usual one of the dangers of the sea, the law provides that the goods are to be carried under deck, unless it be shown that the usage of the particular trade takes the case out of the general rule applied in such controversies. Abb. Ship. (7th Am. ed.) 345; *Smith* v. *Wright*, 1 Cai. 43; *Gould* v. *Oliver*, 2 M. & G. 208; *Waring* v. *Morse*, 7 Ala. 343; *Falkner* v. *Earle*, 3 Best & Sm. 363. Evidence of usage is admissible in *mercantile contracts to prove that the [***603** words in which the contract is expressed, in the particular trade to which the contract refers, are used in a particular sense and different from the sense which they ordinarily import; and it is also admissible in certain cases, for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but it is never admitted to make a contract or to add a new element to the terms of a contract previously made by the parties. Such evidence may be introduced to explain what is ambiguous, but it is never admissible to vary or contradict what is plain. Evidence of the kind may be admitted for the purpose of defining what is uncertain, but it is never properly admitted to alter a general rule of law, nor to make the legal rights or liabilities of the parties other or different from what they are by the common law. *Oelricks* v. *Ford*, 23 How. 63, 16 L. ed. 538; *Barnard* v. *Kellogg*, 10 Wall. 383, 19 L. ed. 987; *Simmons* v. *Law*, 3 Keyes, 219; *Spartali* v. *Benecke*, 10 C. B. 222. Cases may arise where such evidence may be admissible and material, but as none such was offered in this case it is not necessary to pursue that inquiry. Exceptions also exist to the rule that parol evidence is not admissible to vary or contradict the terms of a written instrument where it appears that the instrument was not within the statute of frauds nor under seal, as where the evidence offered tends to prove a subsequent agreement upon a new consideration. Subsequent oral agreements in respect to a prior written agreement, not falling within the statute of frauds, may have the effect to enlarge the time of performance, or may vary any other of its terms; or, if founded upon a new consideration, may waive and discharge it altogether. *Emerson* v. *Slater*, 22 How. 41, 16 L. ed. 417; *Goss* v. *Nugent*, 5 Barn. & Ad. 65; *Nelson* v. *Boynton*, 3 Met. 402; 1 Greenl. Ev. 303; *Harvey* v. *Grabham*, 5 Ad. & E. 61. Verbal agreements, however, between the parties to a written contract, made before or at the time

of the execution of the contract, are, in gen
inadmissible to contradict or vary its te
604*] *or to affect its construction, as
such verbal agreements are considered
merged in the written contract. *Ruse* v.
Co. 23 N. Y. 519; *Wheelton* v. *Hardisty*, 8
& Bl. 296; 2 Sm. L. Cas. 758; Ang. Car. (
ed.) § 229.

Apply that rule to the case before the co
and it is clear that the ruling of the court
low was correct, as all the evidence offered c
sisted of conversations between the shipp
and the master before or at the time the bill
lading was executed. Unless the bill of ladi
contains a special stipulation to that effect t
master is not authorized to stow the goods se
on board as cargo on deck, as when he signs t
bill of lading, if in common form, he contract
to convey the merchandise safely, in the usu
mode of conveyance, which, in the absence o
proof of a contrary usage in the particula
trade, requires that the goods shall be safel
stowed under deck; and when the master de
parts from that rule and stows them on deck
he cannot exempt either himself or the vesse
from liability, in case of loss, by virtue of th
exception of dangers of the seas, unless the
dangers were such as would have occasioned the
loss even if the goods had been stowed as re-
quired by the contract of affreightment. *The*
Rebecca, Ware, 210; *Dodge* v. *Bartol*, 5 Greenl.
R. 286; *Wolcott* v. *Ins. Co.* 4 Pick. 429; *Copper*
Co. v. *Ins. Co.* 22 Pick. 108; *Adams* v. *Ins.* Co.
22 Pick. 63. Contracts of the master, within
the scope of his authority as such, bind the ves-
sel and give the creditor a lien upon it for his
security, except for repairs and supplies pur-
chased in the home port, and the master is re-
sponsible for the safe stowage of the cargo
under deck, and if he fails to fulfil that duty
he is responsible for the safety of the goods and
if they are sacrificed for the common safety, the
goods stowed under deck do not contribute to
the loss. *The Paragon*, Ware, 329, 331; 2
Phil. Ins. § 704; *Brooks* v. *Ins. Co.* 7 Pick. 259.
Ship-owners, in a contract by a bill of lading
for the transportation of merchandise, take
upon themselves the responsibilities of common
carriers, and the master, as the agent of such
owners, is bound to have the cargo safely se-
cured under deck, unless he is authorized to
605*] carry the goods on *deck by the usage
of the particular trade or by the consent of the
shipper, and if he would rely upon the latter he
must take care to require that the consent shall
be expressed in a form to be available as evi-
dence under the general rules of law. *The*
Waldo, 2 Ware, 162; *Blackett* v. *Exchange Co.*
2 Cromp. & J. 250; 1 Arn. Ins. 69; *Lenox* v. *In-
surance Co.* 3 Johns. Cas. 178.

Where goods are stowed under deck the car-
rier is bound to prove the casualty or *vis major*
which occasioned the loss or deterioration of the
property which he undertook to transport and
deliver in good condition to the consignee, and
if he fails to do so, the shipper or consignee,
as a general rule, is entitled to his remedy for
the non-delivery of the goods. No such conse-
quences, however, follow if the goods were
stowed on deck by the consent of the shipper, as
in that event neither the master nor the owner

as the correct rule of law, subject to the qualifications herein expressed.

Decree affirmed.

113*] *P. B. FOULKE, Admr. of James B. Taylor, Deceased, *et al., Plffs. in Err.*,

v.

W. H. ZIMMERMAN and E. E. Norton, Assignee, etc.;

and

P. H. FOULKE, Admr. of James B. Taylor, Deceased, *et al., Plffs. in Err.*,

v.

LOUIS HUBERT and E. E. Norton, Assignee, etc.

(See S. C. 14 Wall. 113-116.)

Probate of foreign will in Louisiana, when valid—purchaser from devisee, when protected—order setting aside will, when does not affect purchaser.

*1. A probate in Louisiana, of the will of a person who died domiciled in New York, is valid until set aside in the Louisiana court; though the order of the surrogate in New York has been reversed in the supreme court of that state, on which the Louisiana probate was founded.

2. A purchaser from the devisee of such will of real estate in Louisiana, while the order of the Louisiana court establishing the will remains in force, is an innocent purchaser, and is not affected by a subsequent order setting aside the will, to which he is not a party.

3. Such an order, founded on a verdict and judgment in New York declaring the will void, obtained by collusion between the devisee under the will and the heirs at law, cannot affect the purchaser from the devisee, made in good faith before such verdict and judgment.

[Nos. 331, 332.]

Submitted Dec. 12, 1871. Decided Feb. 5, 1872.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Messrs. Wallace, Field, and **Handlin,** for *plaintiffs in error:*

John F. Clew could convey no greater title than he himself had, and he acted in bad faith. Civ. Code. 2010.

A judgment duly authenticated from another state imports full faith here, in relation to the matters embraced.

Hen. Dig. 748.

The whole succession being in litigation, a sale of the property by J. F. Clew before it was decided, could give no title, and the purchaser cannot plead good faith or want of notice; no notice is required in such a case.

Civ. Code, art. 2428.

"A vendee or mortgagee, though for a valuable consideration and without notice, express or implied, of a pending litigation touching the property, is bound by the judgment against his vendor or mortgagor."

Hen. Dig. 754, No. 11.

"Pending a revocatory action to subject property to plaintiff's claim, no alienation can be made to his prejudice. The alienee is protected neither by his good faith nor want of notice."

Hen. Dig. 1326, 12; 3 La. Ann. 249; 9 La. Ann. 257.

But there was full notice in the proceedings, and in the certificate of the surrogate to the copy of the will, that there was an appeal in New York.

A title founded on a will falls if there was no will, and the law of the domicil rules.

Civ. Code, arts. 1589, 1681-2; *Robert* v. *Alliers,* 17 La. Ann. 4, 2 Rob. 427.

The pretended will was no will according to the law of Louisiana, being neither olographic, nuncupative nor mystic, and *ex parte* probate orders are not binding on those not parties to them.

C. P. arts. 935, 939; 2 La. Ann. 724.

To prescribe with good faith under a title valid in form only, it is necessary to possess as owner (Clew was executor up to 1866) and for ten years.

Civ. Code, 3399, 3404, 3409, 3453, 3455, 3476; *Ib.* 3414, 3416, 3437, 495.

The seisin vested in the heirs at the death, and their title to the property, in the succession of Elizabeth Clew, has never been devested.

Ware v. *Jones,* 19 La. Ann. 428.

Messrs. Albert Voorhies and **Eli Billings,** for defendants in error contended:

I. That the purchasers acquired in good faith from the universal legatee, who had regularly administered as executor of the succession of Elizabeth Clew, deceased, and who, after his final discharge as such, had been placed in possession; that this constitutes a valid title unto them; and that the subsequent proceedings had in that court, at plaintiff's instance, can have no retroactive effect upon the validity of such titles—more especially as these defendants were not parties to these late proceedings.

11 La. R. 9; 3 R. R. 119; 18 La. Ann. R. 408.

II. That, by virtue of said compromise, the matter of the validity of the will as affecting the real estate, had ceased to be a matter of litigation; and that, to that extent, the will was and is now in full force in the second district court of Louisiana. Civ. Code, arts. 3071, 3038.

Such compromise or transaction has the force of *res judicata.* Civ. Code, arts. 3078, 3045.

III. That, by the compromise of 1864, the plaintiffs became the successors by particular title of John F. Clew, under whom defendants hold by virtue of sales with prior registry; and they are estopped from questioning defendants' titles.

Civ. Code, arts. 2235-2239 (2232-2235).

IV. That in no event can the litigation in the *mortuaria* of a succession in another state control the *mortuaria* of Louisiana estate, as both of said successions are distinct from and independent of each other.

V. John F. Clew, not being a resident of New Orleans, having died abroad, and having no property in New Orleans, the second district court had no jurisdiction whatever to open his succession and compel the public administrator to appear as a figurant in these proceedings.

Johnson v. *Brown,* 3 Mart. (N. S.) 601; 5 R. R. 9; 6 R. R. 508; 10 R. R. 18.

VI. It was further incumbent on the plaintiffs, since the executor had actually administered under the orders of the second district court, to have themselves recognized as heirs contradictorily with him; and the executor's death did not authorize the plaintiffs to proceed

*Headnotes by Mr. Justice MILLER.

against this executor's administrator, in ord
to have themselves recognized as heirs.
C. P. art. 1000; Civ. Code, art. 1193 (1181

Mr. Justice **Miller** delivered the opinion
the court:

The plaintiffs bring their petitions in the ci
cuit court for the district of Louisiana, in t
nature of actions of ejectment, to recover ce
tain lots in New Orleans, and also rents a
profits.

They claim as heirs at law of Elizabeth Cle
who died in New York in the year 1859, a
there seems to be no question that they are h
next of kin, or purchasers from them, and th
she died seised of the property.

The defendants claim as purchasers fro
John F. Clew, husband of said Elizabeth, und
a will of said Elizabeth, probated in the prop
court of New Orleans in January, 1861, whic
will declared him to be her sole heir and un
versal legatee.

This will was admitted to probate in Louis
ana on the strength of an order of the surroga
of New York admitting it there, as her la
will and testament, and the record of the su
rogate court of New York, on which the wi
114*] was probated *in New Orleans, showe
that an appeal had been taken from the ord
establishing the will. This appeal was pros
cuted to success, so that in February, 1861, ve
soon after the probate in New Orleans, the s
preme court of New York reversed the order
the surrogate and made up certain issues
fact to be tried by a jury. The case in Ne
York seems to have remained in this conditi
until November, 1866, when the trial was h
and verdict and judgment rendered that t
supposed will had been revoked and that Eliz
beth Clew died intestate.

In the meantime John F. Clew had admini
tered upon the estate in Louisiana and
August, 1864, filed his final account, and on t
29th March, 1866, received from the proba
court an order of final discharge, placing him
possession of the property as universal legat
of Elizabeth Clew. On that day, and on t
11th day of April, 1866, just after this orde
John F. Clew sold at public auction the lots no
claimed, by two separate sales, to Phelps, a
to Laymond, under whom defendants clai
and the deeds were duly recorded in the prop
office, one on the 11th and the other on the 13
day of April. All this was before the verdi
and judgment declaring the will void in Ne
York.

It also appears that in the year 1864, thr
years after the issues of fact had been order
by the supreme court of New York, and tw
years before those issues were tried, the plai
tiffs, or the heirs of Elizabeth Clew, und
whom they claim, made a compromise wi
John F. Clew, and for the consideration of $3
000 he made them a quitclaim deed of all h
interest in the estate of Elizabeth Clew,
which compromise and deed the New Orlea
purchasers had no notice, and which was not r
corded in Louisiana until after their purcha
and after their deeds had been recorded. N
does it appear that they were parties or h
notice of the proceedings in New York by whi
the will of Mrs. Clew was held void.

These facts are all found by the court as t

tion under the 25th section of the judiciary act was made and decided, of which this court has cognizance by writ of error or appeal.

2. If it does not appear from the record that any such question was either made or decided, the case will be dismissed.

[No. 354.]

Argued Feb. 16, 1872. Decided Feb. 19, 1872.

IN ERROR to the Supreme Court of the State of Iowa.

Motion to dismiss.

Mr. **Geo. G. Wright,** for defendant in error, in support of motion.

The counsel for the plaintiff in error, *Messrs. Lander & Merriman* and **J. W. Moore,** in opposition to the motion to dismiss, stated their case as follows:

This is a writ of error to the supreme court of the state of Iowa, and allowed upon the ground that in said action the right claimed by the plaintiff, under a patent issued by the United States, and the validity of an authority exercised under the said state of Iowa, repugnant to the Constitution of the United States, was drawn in question, and the decision of the said supreme court of said state was adverse to the right so claimed, and in favor of the validity of said statute of said state.

This was an action to try titles, the plaintiff claiming under an entry of the land dated May 10, 1854, in favor of Frank street, judge of the county court of Pottowotamie county, Iowa, and mesne conveyance to plaintiff. The defendant claimed title under a deed issued under a sale for taxes, made under the revenue acts of the state of Iowa, the 74th section of which provides that such deed should be conclusive evidence of the following facts:

1. That the property had been listed and assessed at the time and in the manner required by law.

2. That the taxes were levied according to law.

3. That the property was advertised for sale, in the manner and for the length of time required by law.

4. That the property was sold for taxes, as stated in said deed.

5. That the grantee named in the deed was the purchaser.

6. That the sale was conducted in the manner required by law.

7. That all the prerequisites of the law were complied with by all the officers who had, or whose duty it was to have had, any part or action in any transaction relating to or affecting the title conveyed, or purporting to be conveyed, by the deed, from the listing and valuation of the property up to the execution of the deed, both inclusive, and that all things whatsoever required by law to make a good and valid sale, and to vest the title in the purchaser were done, except in regard to the three points named in this section, wherein the deed should be prima facie evidence only.

To the plea of defendant setting up this title, the plaintiff interposed a demurrer, the 5th point of which was: "The law authorizing the sale of real property for delinquent taxes, and under which the deed was made by which defendant claims title, is unconstitutional and void." This demurrer was overruled by the court and this title admitted to prevail, and the supreme court, upon revision thereof, held this title valid, and as showing an outstanding legal title.

This act contravenes the 5th article of the Amendment to the Constitution of the United States.

The title of the plaintiff, derived from the United States, was devested by the courts of Iowa, under a law in direct violation of the clause of the Federal Constitution above cited.

It may, however, be contended that the plaintiff did not bring this question specially to the notice of the court below, and that, therefore, no such decision was rendered as is required by the judiciary acts of Congress. The record is silent upon the subject, except in the pleadings where the objection is made to this title, on account of its unconstitutionality. Could the title set up by the defendant have been sustained under the pleadings, without its being held by the court that the law authorizing said deed was constitutional? Clearly not; for upon that deed rested the entire defense, and upon that deed the court declared the legal title to this land to be not in the defendant, but that the title of the defendant had been devested by law, and that the legal title was in the grantee under the tax deed.

This brings the case within the purview of the decisions of the supreme court.

The Bridge Proprs. v. *Hoboken Co.* 1 Wall. 116, 17 L. ed. 571; *Furman* v. *Nichol,* 8 Wall. 44, 19 L. ed 370; *Armstrong* v. *Treasurer, etc.* 16 Pet. 281; *Crowell* v. *Randell,* 10 Pet. 368.

Mr. Chief Justice **Chase** delivered the opinion of the court:

To give jurisdiction to this court upon error to the highest court of the state in which a judgment or decree has been rendered, it is necessary to show that some question under the 25th section of the judiciary act was made and decided, of which this court has cognizance by writ of error on appeal. This has been frequently ruled. *Crowell* v. *Randell,* 10 Pet. 368; *Armstrong* v. *Treasurer,* 16 Pet. 281; Phillip's Practice, 108.

It does not appear from the record that any such question was either made or decided.

Much expense to suitors would be spared if counsel would attend to the principle above stated, and as we have said, frequently laid down, before advising their clients to resort *to the appellate jurisdiction of this [*87 court from the decisions of the state courts.

The writ of error must be dismissed.

THE STEAMBOAT BRIDGEPORT, her Tackle, etc., Charles Weeks and Robert Haydock, *Claimants, Appts.,*

v.

GEORGE SHAW *et al.*

(See 14 Wall. *"The Bridgeport,"* 116-120.)

Lights on vessels—steamer, when held in fault.

1. When a boat is anchored at night in the path

NOTE.—*Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting*—see notes, 13 L. ed. U. S. 537; 25 L. ed. U. S. 168; 28 C. C. A. 532; 29 C. C. A. 368.

Rules for avoiding collision; steamer meeting steamer—see notes, 14 L. ed. U. S. 68; 35 L. ed. U. S. 453; 30 C. C. A. 630; 60 C. C. A. 254.

of vessels, a light is indispensable; but it is not required where the boat is fastened to the shore, especially at a place set apart for such boats.

2. Where the question of fault in a collision lies between a vessel at a wharf, out of the track of other vessels, and a steamer navigating a channel of sufficient width for her to move and stop at pleasure, the fault generally will be held to be with the steamer.

[No. 85.]

Submitted Jan. 24, 1872. Decided Feb. 19, 1872.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

This was a libel in the district court of the United States for the eastern district of New York, filed by the appellees in a case of collision. The district court decreed in favor of the libelants, and the decree was affirmed by the circuit court.

The facts are stated in the opinion.

Mr. **E. H. Owen** *&* ***Nash*** for appellants.

Mr. **D. D. Lord** for appellees.

Mr. Justice **Bradley** delivered the opinion of the court:

On the night of the 3d of September, 1865, the ship Margaret Evans, belonging to the appellees, lay at a wharf at Corlaer's hook, in New York in a rectangular recess outside of the track of vessels passing along East river. The river here nearly makes a right angle. Vessels from Long Island sound come down on a southerly course to this point, and having rounded the hook, they then pursue a westerly and southwesterly course, to gain the lower part of the city.

On the night in question, the steamer Bridgeport was running her regular trip from Bridgeport, Connecticut, to the city of New York, bound for her berth at Peck slip. She arrived off the Houston street ferry in East river, half a mile above Corlaer's hook, about three o'clock in the morning. The night was sufficiently clear for the persons in charge of the steamer to see their location and to maintain their usual speed. But at this point they struck a fog bank which, as they entered it, shut out the view of the shore. They could discern the nearest lights and hear the bells at the ferry slips. The steam was shut down, and the vessel proceeded slowly on her course. The tide being flood and pretty strong, she had to work against it; but this gave her sufficient steerage way without necessitating much absolute speed. Her captain says, he supposes that she was making three or four miles an hour when she passed the Grand street ferry, only three or four feet from Corlaer's hook. The ferry lights on the New York side were observed, and the bell was distinctly heard. Neither lights nor bells on the Williamsburg side were noticed. This made manifest what her master and crew admit, that she was nearer to the New York than to the other shore; and it would seem to indicate that she was hugging the New York shore very closely, for such a dark night, in such a crowded place. When they saw the lights on the Grand street ferry, Nolan, the wheelman, says they commenced turning for the purpose of rounding the point. "We indeed ourselves well enough off, to make our way; pretty close in, but far enough to [illegible]." Unfortunately, they shaved the

usual stress of weather or superior force to drive the latter out of her course—it was held in the case just cited that the fault, under almost any circumstances, would be held to be with the steamer. In this case we see no fault at all in the Margaret Evans. She had a competent night watchman on board, and was entitled to be considered as safe from any collision from vessels navigating the East river.

The decree is affirmed, with interest and costs.

WILLIAM W. PUGH, *Plff. in Err.*,
v.
JAMES L. McCORMICK.

(See S. C. 14 Wall. 361-375.)

Omission of stamp on indorsement—remission of penalty—immaterial error.

1. The stamp act of July 14, 1870, empowers the collector to remit the penalty for omitting to stamp a note, although such omission occurred prior to the passage of the act.
2. This court will not reverse a judgment, where it appears that the error has become immaterial, and that the same party will be entitled to judgment if a new trial is granted.
3. A stamp is not required to an indorsement of a note, nor to a certificate waiving demand, notice and protest.
4. Satisfactory proof of such waiver is in all respects equivalent in law to compliance with the requirement.

[No. 98.]

Argued Feb. 7, 1872. Decided Feb. 19, 1872.

IN ERROR to the Supreme Court of the State of Louisiana.

The case is stated by the court.

Mr. **Miles Taylor** for plaintiff in error.

Mr. **Thomas J. Durant** for defendant in error.

Mr. Justice **Clifford** delivered the opinion of the court:

Reference will be made to the parties as they existed in the state court where the suit was commenced.

Martin, on the 12th of April, 1863, by his promissory note of that date promised to pay, twelve months after date, to the order of the defendant, at the place mentioned in the note, $7,000 with eight per cent interest, and the note is indorsed by the defendant without date.

On the 7th of December of that year the defendant paid $2,000, which is indorsed on the note, and on the 17th of May following he made another payment of $3,000, for which a receipt was given by the plaintiff. Prior to that, however, to wit, on the 16th of October of the preceding year, the following waiver of protest was signed by the defendant, to wit, "Notice of protest, demand, and protest waived, and all legal responsibilities assumed."

When the note was executed no internal revenue stamps were affixed to it, and it remained without any such stamps until the 7th of Oc- **367*]** tober, 1869, when such stamps, to *the amount of $3.50, were, at the request of the plaintiff, affixed to it, and canceled by the collector of internal revenue for the district, the interest being collected and the penalty remitted as more fully appears by the certificate of the collector set forth in the record.

Payment being refused, the plaintiff, as the holder and indorsee of the note in good faith and for value, on the 25th of March, 1868, instituted the present action of assumpsit to recover the balance due on the note. Service was made and the defendant appeared and pleaded that the plaintiff acquired the note directly from the maker of the same; that no consideration ever passed between the defendant and the plaintiff or between the defendant and the maker of the instrument in regard to the note, and the defendant also denied that he was ever legally bound by the instrument or that he ever at any time rendered himself liable to pay the amount. Neither party demanding a jury the cause was heard and determined by the court, and judgment was rendered for the plaintiff in conformity with the declaration.

Exceptions were filed by the defendant, and by the exceptions it appears that the defendant, when the plaintiff offered the note in evidence, objected to its admissibility upon three grounds: (1) Because the face of the instrument was not legally stamped with the internal revenue stamps, as required by law; (2) because the indorsement on the note was not legally stamped; (3) because the certificate waiving demand, notice and protest was never stamped, and he insisted that the note for the want of such stamps could not be admitted in evidence. All three objections were overruled, and judgment having been rendered for the plaintiff the defendant appealed to the supreme court of the state, where the judgment was affirmed. Whereupon the defendant sued out a writ of error to the state court, and removed the cause into this court for re-examination.

Two principal questions are presented by the assignment of errors: (1) Whether the stamps affixed to the note were legally affixed; (2) whether the certificate waiving demand, *notice, and protest was an instrument [***368** which the internal revenue laws required should be stamped. Evidently a satisfactory response to these questions cannot be given without a careful examination of the several provisions in the acts of Congress imposing such revenue duties, and the modifications of the same as enacted by Congress prior to the time when the note and the certificate of waiver were offered and admitted in evidence.

Promissory notes, except bank-notes issued for circulation, where the note was given for a sum exceeding $20 and not exceeding $100, were by the act of the 1st of July, 1862, subjected to a stamp duty of five cents. Nine other gradations were prescribed in the same schedule by which the rate per cent of the duty was somewhat diminished as the amount of the note was increased. Where the note exceeded $5,000, the amount of the stamp duty imposed by that schedule was $1.50, and $1 in addition for every $2,500 or part of $2,500 in excess of $5,000, which shows that the note given in evidence in this case was subject under that act to a stamp duty of $3.50. 12 Stat. at L. 480.

Persons who made, signed, or issued, or caused to be made, signed, or issued any instrument, document, or paper of any kind, without the same being duly stamped, were declared by the 95th section to be subject to a penalty of $50, and the further provision in the same section was that such instrument, document, or paper should be deemed invalid and of no ef-

fect. Section 100 also provided that if a son made, signed, or issued, or caused made, signed, or issued, or accepted, or or caused to be accepted or paid, with de evade the payment of any such stamp dut bill of exchange, draft, or order, or prom note for the payment of money and liable t such duty, he should, for every such bill, order, or note, forfeit the sum of $200. Stat. at L. 475, 477.

369*] *Instruments, documents, and pa made, signed, or issued without being c stamped were, by the 95th section of that declared to be invalid and of no effect, but 24th section of the act of the 14th of July in t same year provided that no instrument, doc ment, or paper made, signed, or issued prior to tl first day of January then next should be deeme invalid or of no effect because it was made signed, or issued without being duly stamped Provision, however, was made in the same section that no such instrument, document or paper should be admitted or used as evidence in any court until it was duly stamped nor until the holder proved to the satisfaction of the court that he had paid $5 to the collector for the use of the United States. 12 Stat. at L. 561.

Exemption from such declared invalidity and nullity was further extended to such instruments, documents, and papers made, signed, or issued prior to the first day of June, 1863, by the 16th section of the act of the 3d of March, passed in the same year, but the same section also provided that no such instrument, document, or paper, or any copy thereof, should be admitted or used as evidence in any court until the required stamps were affixed, together with the initials of the person affixing the stamps and the date when the same were so affixed. 12 Stat. at L. 725.

All laws in force in relation to stamp duties when the act of the 30th of June, 1864, was passed were by that act continued in force until the 1st day of August of that year, and the same act adopted a new schedule of stamp duties, which took effect from and after that day. By that schedule persons making, signing or issuing promissory notes not exceeding $100 were required to stamp the same with a five cent stamp, and to add another of the same amount for every additional hundred dollars or fractional part of $100. 13 Stat. at L. 291, 298.

Neither deeds, instruments, documents, or papers, nor any copy thereof, not stamped, as 370*] required by previous laws *could be recorded or admitted or used as evidence under that act until the same was stamped as therein required, but the act provided that no instrument, document, or paper made, signed, or issued prior to the passage of that act, without being stamped, should be deemed invalid or of no effect for that cause if the stamp or stamps required should be subsequently affixed, and the act gave authority to the person desiring to use or to record any such deed, instrument, document, writing, or paper as evidence to affix the stamp or stamps thereon required in the presence of the court, register or recorder. 13 Stat. at L. 295.

But persons making, signing or issuing any instrument, document, or paper of any kind, or

372*] *Errors or omissions of the kind which occurred or happened before the first day of August, 1866, might be remedied under that act at any time within twelve calendar months from that date, and subsequent errors and omissions of the kind might also be remedied in the same way at any time within twelve calendar months from the time the instrument, document, or paper was made, signed, or issued without being stamped as required by law, but it is quite clear that the case before the court does not fall within that proviso, as the application to the collector was not made in season to bring the case within either of those regulations.

Had legislation stopped there the ruling admitting the note in evidence would certainly be erroneous, but the act of the 14th of July, 1870, amends the preceding act by striking out the words "sixty-six" in the third proviso, and inserting in lieu thereof the words "seventy-one," whereby the collector of the proper district is still empowered to remit penalties of the kind occurring or happening under the circumstances described in the third proviso of the prior act.

Since the passage of that act it is conceded that the collector may remit the forfeiture therein imposed if it occurred "by reason of accident, mistake, inadvertence, or urgent necessity, and without any wilful design to defraud the United States of the stamp or to evade or delay the payment thereof;" but it is insisted that the new provision does not operate retrospectively; that it does not empower the collector to remit the penalty for any such omission if it occurred prior to the passage of the act; but the court here is of a different opinion for several reasons.

Special attention is called in the first place to the peculiar phraseology of the new provision, which is that section 158 of the act of the 30th of June, 1864, as amended by the 9th section of the act of the 13th of July, 1866, be, and is hereby amended as therein provided. Three amendments are then made in the last-named act, as follows: (1) By striking out the words "fifty dollars" in the second proviso and inserting in lieu thereof the following: Double the amount of the tax remaining unpaid, 373*] *but in no case less than $50. (2) By striking out the words "sixty-six" in the third proviso and inserting in lieu thereof the words "seventy-one." (3) By striking out the words "sixty-seven" in the last proviso and inserting in lieu thereof the words "seventy-two." 16 Stat. at L. 257.

Section 158 of the act first named provided that the forfeiture, where the omission to affix the stamp was with the intent to evade the duty, should be $200, but the succeeding act passed the next year reduced the forfeiture to $50. 13 Stat. at L. 293; 13 Stat. at L. 481.

Such an omission subjected the party to a penalty of $50, also under the act of the 13th of July, 1866, but the penalty under the present act cannot exceed a sum which is double the amount of the tax unless that sum is less than $5.

Legislation in respect to the amount of the forfeiture in the earlier acts of Congress upon the subject would have been unnecessary if it had not been intended to extend the jurisdiction of the collector or some other officer to delinquencies of the kind which arose under the acts of Congress therein mentioned. All agree that the collector might, within the period of time designated in those acts, remit such forfeitures or penalties for past delinquencies if the application, as before explained, was seasonably made, and the court is unanimously of the opinion that the better construction of the act under consideration is, that Congress intended to give such delinquent party a further opportunity to remedy such errors and omissions on the terms and conditions prescribed in the new provision.

Extended argument in support of the conclusion does not seem to be necessary, as the reasons to support it are apparent from its statement. Grant all that and still it may be suggested that the ruling in this case was made before the present act was passed, and it must be admitted that the suggestion is correct, but the new act shows to a demonstration that the ruling in question has become immaterial, having *ceased to be prejudicial to the de- [*374 fendant, as the collector now possesses the power to do what he then did, that is, to affix the stamps to the note, remit the penalty, and make the proper memorandum of his doings; and it is so clear that the plaintiff would have a right to require those acts to be done if a new trial were ordered that the court is unhesitatingly of the opinion that the judgment ought not to be reversed for that cause, as the proper stamps were affixed to the instrument and the amount of the required duty was deposited in the Treasury before the note was used as evidence. *Campbell* v. *Wilcox*, 10 Wall. 422, 19 L. ed. 974; *Toby* v. *Chipman*, 13 Allen, 124; *Corbin* v. *Tracy*, 34 Conn. 326; *United States* v. *Anderson*, 9 Wall. 68, 19 L. ed. 618.

Where the case is brought here by a writ of error to a state court for re-examination, the court is not inclined to reverse the judgment unless there is some substantial error to the prejudice of the complaining party, and especially not where it appears that the error has become immaterial and that the same party will be entitled to judgment if a new trial is granted. Payment of the stamp duty was made to the collector at the time he affixed the stamps to the note, and inasmuch as the government makes no complaint, and the whole transaction is characterized by good faith, the court is of the opinion that the judgment of the state court may be sustained.

II. Objection is also made that the note was not admissible as evidence because the indorsement was not stamped, but the court is of the opinion that the objection is without merit, as a stamp is not required to such a writing. Tils. Stamp. 172; *Richards* v. *Frankum*, 9 C. & P. 221; *Penny* v. *Innes*, 1 Cromp., Mees. & R. 439; *Bacon* v. *Simpson*, 3 Mees. & W. 78; Edw. Stamp (2d ed.), 140; Tils. Dig. 28.

III. Whenever a party in a suit upon a bill of exchange or promissory note is required to prove demand and notice or protest, he may comply with those conditions by proving that the opposite party waived the requirement.

*Proof to that effect was offered in [*375 this case, which consisted of the usual memorandum signed by the party and written on the back of the note, and the statement in the bill of exceptions is that the defendant, when the

note was offered, objected to the admissibility of that writing, but the court admitted it and the defendant excepted.

Satisfactory proof of waiver in such a case is in all respects equivalent in law to a compliance with the requirement. *Taunton Bank* v. *Richardson*, 5 Pick. 444; 2 Stark. Ev. 274; *Woodman* v. *Thurston*, 8 Cush. 157; *Marshall* v. *Mitchell*, 35 Me. 221; Coll. Stamps, 30.

Such a waiver need not be in writing, as an oral declaration to that effect would be equally effectual, and it does not appear that any one of the internal revenue acts contains any requirement if it is in writing that it should be stamped, nor is any authority referred to as a support to the objection taken to the ruling of the court. On the contrary, the supreme court of California has decided the other way and this court is of the same opinion. *Pacific Bank* v. *DeRo*, 37 Cal. 542; Chit. Stamps, 192–2[illegible]

Judgment affirmed.

F. BARTEMEYER, Sr., *Plff. in Error*,

v.

STATE OF IOWA.

(See S. C. 14 Wall. 26–29.)

Jurisdiction, when examined [illegible] to state court—what [illegible].

1. Where the case is submitted [illegible] printed argument, the court [illegible] record to see if it has [illegible] the question is raised by counsel [illegible]

2. Where the supreme court [illegible] dered the judgment [illegible] a chief justice and [illegible] the writ of error is allowed [illegible] tices, the writ will be dismissed.

3. When the court [illegible] only be allowed by [illegible] or by a justice of the Supreme Court of the United States.

4. In case of a writ of error [illegible] of a single judge or chancellor, [illegible] by that judge or chancellor, [illegible] of the Supreme Court of the United States.

[No. 194.]

Submitted Feb. 1, 1872. Decided Feb. 26, 1872.

IN ERROR to the Supreme Court of the State of Iowa.

The case is sufficiently [illegible] the court.

Messrs. **Wm. T. Dittoe** and **C. Whitaker** for plaintiff in error.

Mr. **Henry O'Connor**, Attorney of Iowa, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This case, which is a writ of error to the supreme court of Iowa, is submitted to us on printed argument.

In this class of cases the court has been in the habit of examining the record to see if it has jurisdiction whether the question is raised by counsel or not, and the case before us we find ourselves compelled to dismiss, because there is no proper allowance of the writ of error.

Writs of error to the circuit court, under the 22d section of the judiciary act, issue as a matter of course, and can be obtained from the clerk of the circuit court, and, when filed in his office by the party, are duly served. But writs of error [illegible] courts can only issue when

Written pro[illegible] posal—er[illegible] no proof—[illegible] posal.

*1. When [illegible] part of his cas[illegible] erty to insist [illegible] suspicion that [illegible] from the one [illegible]

*Headnotes

NOTE.—*Cons[illegible] far a question* [illegible]

The construc[illegible] signification an[illegible] the court. Bro[illegible] 305; Estes v. B[illegible] Co. v. Farquar, [illegible] Eng. L. & Eq. 4[illegible]

of the execution of the contract, are, in general, inadmissible to contradict or vary its terms 604*] *or to affect its construction, as all such verbal agreements are considered as merged in the written contract. *Ruse* v. *Ins. Co.* 23 N. Y. 519; *Wheelton* v. *Hardisty*, 8 Ell. & Bl. 296; 2 Sm. L. Cas. 758; Ang. Car. (4th ed.) § 229.

Apply that rule to the case before the court and it is clear that the ruling of the court below was correct, as all the evidence offered consisted of conversations between the shippers and the master before or at the time the bill of lading was executed. Unless the bill of lading contains a special stipulation to that effect the master is not authorized to stow the goods sent on board as cargo on deck, as when he signs the bill of lading, if in common form, he contracts to convey the merchandise safely, in the usual mode of conveyance, which, in the absence of proof of a contrary usage in the particular trade, requires that the goods shall be safely stowed under deck; and when the master departs from that rule and stows them on deck, he cannot exempt either himself or the vessel from liability, in case of loss, by virtue of the exception of dangers of the seas, unless the dangers were such as would have occasioned the loss even if the goods had been stowed as required by the contract of affreightment. *The Rebecca*, Ware, 210; *Dodge* v. *Bartol*, 5 Greenl. R. 286; *Wolcott* v. *Ins. Co.* 4 Pick. 429; *Copper Co.* v. *Ins. Co.* 22 Pick. 108; *Adams* v. *Ins. Co.* 22 Pick. 63. Contracts of the master, within the scope of his authority as such, bind the vessel and give the creditor a lien upon it for his security, except for repairs and supplies purchased in the home port, and the master is responsible for the safe stowage of the cargo under deck, and if he fails to fulfil that duty he is responsible for the safety of the goods and if they are sacrificed for the common safety, the goods stowed under deck do not contribute to the loss. *The Paragon*, Ware, 329, 331; 2 Phil. Ins. § 704; *Brooks* v. *Ins. Co.* 7 Pick. 259. Ship-owners, in a contract by a bill of lading for the transportation of merchandise, take upon themselves the responsibilities of common carriers, and the master, as the agent of such owners, is bound to have the cargo safely secured under deck, unless he is authorized to 605*] carry the goods on *deck by the usage of the particular trade or by the consent of the shipper, and if he would rely upon the latter he must take care to require that the consent shall be expressed in a form to be available as evidence under the general rules of law. *The Waldo*, 2 Ware, 162; *Blackett* v. *Exchange Co.* 2 Cromp. & J. 250; 1 Arn. Ins. 69; *Lenox* v. *Insurance Co.* 3 Johns. Cas. 178.

Where goods are stowed under deck the carrier is bound to prove the casualty or *vis major* which occasioned the loss or deterioration of the property which he undertook to transport and deliver in good condition to the consignee, and if he fails to do so, the shipper or consignee, as a general rule, is entitled to his remedy for the non-delivery of the goods. No such consequences, however, follow if the goods were stowed on deck by the consent of the shipper, as in that event neither the master nor the owner is liable for any damage done to the goods by the perils of the sea or from the necessary exposure of the property, but the burden to prove such consent is upon the carrier, and he must take care that he has competent evidence to prove the fact. *Shackleford* v. *Wilcox*, 9 La. 38. Parol evidence said Mr. Justice Nelson, in the case of *Creery* v. *Holly*, 14 Wend. 28, is inadmissible to vary the terms or legal import of a bill of lading free of ambiguity, and it was accordingly held in that case that a clean bill of lading imports that the goods are stowed under deck, and that parol evidence that the vendor agreed that the goods should be stowed on deck could not legally be received even in an action by the vendor against the purchaser for the price of the goods which were lost in consequence of the stowage of the goods in that manner by the carrier. Even where it appeared that the shipper, or his agent who delivered the goods to the carrier, repeatedly saw them as they were stowed in that way and made no objection to their being so stowed, the supreme court of Maine held that the evidence of those facts was not admissible to vary the legal import of the contract of shipment; that the bill of lading being what is called a clean bill of lading, it bound the owners of the vessel to carry the goods *under deck, but the [*606 court admitted that where there is a well known usage in reference to a particular trade to carry the goods as convenience may require, either upon or under deck, the bill of lading may import no more than that the cargo shall be carried in the usual manner. *Sproat* v. *Donnell*, 26 Me. 187; 2 Tay. Ev. §§ 1062, 1067; *Hope* v. *State Bank*, 4 La. 212; 1 Arn. Ins. 70; *Lapham* v. *Ins. Co.* 24 Pick. 1. Testimony to prove a verbal agreement that the goods might be stowed on deck was offered by the defense in the case of *Barber* v. *Brace*, 3 Conn. 14, but the court rejected the testimony, holding that the whole conversation, both before and at the time the writing was given, was merged in the written instrument, which, undoubtedly, is the correct rule upon the subject. Written instruments cannot be contradicted or varied by evidence of oral conversations between the parties which took place before or at the time the written instrument was executed; but in the case of a bill of lading or a charter-party, evidence of usage in a particular trade is admissible to show that certain goods in that trade may be stowed on deck, as was distinctly decided in that case. *Barber* v. *Brace*, 3 Conn. 13; 1 Sm. L. Cas. 6th Am. ed. 837. But evidence of usage cannot be admitted to control or vary the positive stipulations of a bill of lading, or to substitute for the express terms of the instrument an implied agreement or usage that the carrier shall not be bound to keep, transport and deliver the goods in good order and condition. *The Reeside*, 2 Sumn. 570; 1 Duer, Ins. sec. 17.

Remarks, it must be admitted, are found in the opinion of the court, in the case of *Vernard* v. *Hudson*, 3 Sumn. 406, and also in the case of *Sayward* v. *Stevens*, 3 Gray, 101, which favor the views of the appellant, but the weight of authority and all the analogies of the rules of evidence support the conclusion of the court below, and the court here adopts that conclusion

as the correct rule of law, subject to the qualifications herein expressed.

Decree affirmed.

113*] *P. B. FOULKE, Admr. of James B. Taylor, Deceased, *et al.*, *Plffs. in Err.*,

v.

W. H. ZIMMERMAN and E. E. Norton, Assignee, etc.;

and

P. H. FOULKE, Admr. of James B. Taylor, Deceased, *et al.*, *Plffs. in Err.*,

v.

LOUIS HUBERT and E. E. Norton, Assignee, etc.

(See S. C. 14 Wall. 113-116.)

Probate of foreign will in Louisiana, when valid —purchaser from devisee, when protected—order setting aside will, when does not affect purchaser.

*1. A probate in Louisiana, of the will of a person who died domiciled in New York, is valid until set aside in the Louisiana court; though the order of the surrogate in New York has been reversed in the supreme court of that state, on which the Louisiana probate was founded.

2. A purchaser from the devisee of such will of real estate in Louisiana, while the order of the Louisiana court establishing the will remains in force, is an innocent purchaser, and is not affected by a subsequent order setting aside the will, to which he is not a party.

3. Such an order, founded on a verdict and judgment in New York declaring the will void, obtained by collusion between the devisee under the will and the heirs at law, cannot affect the purchaser from the devisee, made in good faith before such verdict and judgment.

[Nos. 331, 332.]

Submitted Dec. 12, 1871. Decided Feb. 5, 1872.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Messrs. Wallace, Field, and **Handlin,** for plaintiffs in error:

John F. Clew could convey no greater title than he himself had, and he acted in bad faith. Civ. Code. 2010.

A judgment duly authenticated from another state imports full faith here, in relation to the matters embraced.

Hen. Dig. 748.

The whole succession being in litigation, a sale of the property by J. F. Clew before it was decided, could give no title, and the purchaser cannot plead good faith or want of notice; no notice is required in such a case.

Civ. Code, art. 2428.

"A vendee or mortgagee, though for a valuable consideration and without notice, express or implied, of a pending litigation touching the property, is bound by the judgment against his vendor or mortgagor."

Hen. Dig. 754, No. 11.

"Pending a revocatory action to subject property to plaintiff's claim, no alienation can be made to his prejudice. The alienee is protected neither by his good faith nor want of notice."

Hen. Dig. 1326, 12; 3 La. Ann. 249; 9 La. Ann. 257.

But there was full notice in the proceedings, and in the certificate of the surrogate to the copy of the will, that there was an appeal in New York.

A title founded on a will falls if there was no will, and the law of the domicil rules.

Civ. Code, arts. 1589, 1681-2; *Robert* v. *Alliers*, 17 La. Ann. 4, 2 Rob. 427.

The pretended will was no will according to the law of Louisiana, being neither olographic, nuncupative nor mystic, and *ex parte* probate orders are not binding on those not parties to them.

C. P. arts. 935, 939; 2 La. Ann. 724.

To prescribe with good faith under a title valid in form only, it is necessary to possess as owner (Clew was executor up to 1866) and for ten years.

Civ. Code, 3399, 3404, 3409, 3453, 3455, 3476; *Ib.* 3414, 3416, 3437, 495.

The seisin vested in the heirs at the death, and their title to the property, in the succession of Elizabeth Clew, has never been devested.

Ware v. *Jones*, 19 La. Ann. 428.

Messrs. Albert Voorhies and **Eli Billings,** for defendants in error contended:

I. That the purchasers acquired in good faith from the universal legatee, who had regularly administered as executor of the succession of Elizabeth Clew, deceased, and who, after his final discharge as such, had been placed in possession; that this constitutes a valid title unto them; and that the subsequent proceedings had in that court, at plaintiff's instance, can have no retroactive effect upon the validity of such titles—more especially as these defendants were not parties to these late proceedings.

11 La. R. 9; 3 R. R. 119; 18 La. Ann. R. 408.

II. That, by virtue of said compromise, the matter of the validity of the will as affecting the real estate, had ceased to be a matter of litigation; and that, to that extent, the will was and is now in full force in the second district court of Louisiana. Civ. Code, arts. 3071; 3038.

Such compromise or transaction has the force of *res judicata*. Civ. Code, arts. 3078, 3045.

III. That, by the compromise of 1864, the plaintiffs became the successors by particular title of John F. Clew, under whom defendants hold by virtue of sales with prior registry; and they are estopped from questioning defendants' titles.

Civ. Code, arts. 2235-2239 (2232-2235).

IV. That in no event can the litigation in the *mortuaria* of a succession in another state control the *mortuaria* of Louisiana estate, as both of said successions are distinct from and independent of each other.

V. John F. Clew, not being a resident of New Orleans, having died abroad, and having no property in New Orleans, the second district court had no jurisdiction whatever to open his succession and compel the public administrator to appear as a figurant in these proceedings.

Johnson v. *Brown*, 3 Mart. (N. S.) 601; 5 R. R. 9; 6 R. R. 508; 10 R. R. 18.

VI. It was further incumbent on the plaintiffs, since the executor had actually administered under the orders of the second district court, to have themselves recognized as heirs contradictorily with him; and the executor's death did not authorize the plaintiffs to proceed

*Headnotes by Mr. Justice MILLER.

against this executor's administrator, in order to have themselves recognized as heirs.

C. P. art. 1000; Civ. Code, art. 1193 (1181).

Mr. Justice **Miller** delivered the opinion of the court:

The plaintiffs bring their petitions in the circuit court for the district of Louisiana, in the nature of actions of ejectment, to recover certain lots in New Orleans, and also rents and profits.

They claim as heirs at law of Elizabeth Clew, who died in New York in the year 1859, and there seems to be no question that they are her next of kin, or purchasers from them, and that she died seised of the property.

The defendants claim as purchasers from John F. Clew, husband of said Elizabeth, under a will of said Elizabeth, probated in the proper court of New Orleans in January, 1861, which will declared him to be her sole heir and universal legatee.

This will was admitted to probate in Louisiana on the strength of an order of the surrogate of New York admitting it there, as her last will and testament, and the record of the surrogate court of New York, on which the will **114*]** was probated *in New Orleans, showed that an appeal had been taken from the order establishing the will. This appeal was prosecuted to success, so that in February, 1861, very soon after the probate in New Orleans, the supreme court of New York reversed the order of the surrogate and made up certain issues of fact to be tried by a jury. The case in New York seems to have remained in this condition until November, 1866, when the trial was had and verdict and judgment rendered that the supposed will had been revoked and that Elizabeth Clew died intestate.

In the meantime John F. Clew had administered upon the estate in Louisiana and in August, 1864, filed his final account, and on the 29th March, 1866, received from the probate court an order of final discharge, placing him in possession of the property as universal legatee of Elizabeth Clew. On that day, and on the 11th day of April, 1866, just after this order, John F. Clew sold at public auction the lots now claimed, by two separate sales, to Phelps, and to Laymond, under whom defendants claim, and the deeds were duly recorded in the proper office, one on the 11th and the other on the 13th day of April. All this was before the verdict and judgment declaring the will void in New York.

It also appears that in the year 1864, three years after the issues of fact had been ordered by the supreme court of New York, and two years before those issues were tried, the plaintiffs, or the heirs of Elizabeth Clew, under whom they claim, made a compromise with John F. Clew, and for the consideration of $30,000 he made them a quitclaim deed of all his interest in the estate of Elizabeth Clew, of which compromise and deed the New Orleans purchasers had no notice, and which was not recorded in Louisiana until after their purchase and after their deeds had been recorded. Nor does it appear that they were parties or had notice of the proceedings in New York by which the will of Mrs. Clew was held void.

These facts are all found by the court as the foundation of its judgment, with others which we do not deem material. For instance, it is found that proceedings were taken by the *heirs to have the probate of Elizabeth [*115 Clew's will in New Orleans set aside, but as this was after the purchase under which the defendants claim and without notice to them, we think they cannot be bound by it.

Nor do we think that the collusive trial in New York between John F. Clew and the heirs of Mrs. Clew can have any effect on the rights of the defendants derived under the probate of the will in New Orleans.

The facts found by the court show beyond doubt that this trial was had two years after Clew had sold out the subject of litigation to the other parties to the suit, and eight months after the defendants had, in ignorance of this sale, bought of him, as the rightful owner, so established by the New Orleans court. There can be but little doubt that Clew defrauded both parties, and that the defendants were innocent purchasers from him, and that plaintiffs might have protected both themselves and the defendants by recording their quitclaim deed, which they had withheld from record for two years, and that their failure to do this enabled him to commit the fraud. Finding that they had thus lost the lots in controversy, so far as any claim through that deed was concerned, they revive the suit in New York which had slumbered for five years on the issues ordered for a jury, and now having both sides of the litigation in their own hands, they procure a verdict setting aside the will, to enable them to claim the land as heirs of Elizabeth Clew, instead of purchasers under John F. Clew.

We think that this cannot prevail, though supported by an *ex parte* proceeding in the New Orleans court by which the former orders probating Mrs. Clew's will and recognizing John F. Clew as sole heir and legatee were set aside. The defendants were innocent purchasers without notice of anything wrong, being justified by the judgment of the probate court in the assumption that they purchased the legal title; and if, by making them parties to a proper proceeding, this probate and sale could, under any circumstances, be set aside, we are of opinion that the proceedings in New *York, on [*116 which the Louisiana court revoked its former action, were collusive and fraudulent as against the defendants, who, under the facts found by the court, are entitled to be protected in their possession.

As this was the conclusion of the Circuit Court, its judgment is affirmed in both cases.

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*MICHAEL HURLEY, *Plff. in Err.*, [*85

v.

FRANK STREET.

(See S. C. 14 Wall. 85-87.)

Jurisdiction over state judgment—when case dismissed.

1. To give jurisdiction to this court over state judgments, it is necessary to show some ques-

NOTE.—*Jurisdiction of U. S. Supreme Court, where Federal question arises, or where is drawn in question statute, treaty or Constitution of U. S.*—see note to Matthews v. Zane, 2 L. ed. U. S. 654; note to Martin v. Hunter, 4 L. ed. U. S. 97; and note to Williams v. Norris, 6 L. ed. U. S. 571.

tion under the 25th section of the judiciary act was made and decided, of which this court has cognizance by writ of error or appeal.

2. If it does not appear from the record that any such question was either made or decided, the case will be dismissed.

[No. 354.]

Argued Feb. 16, 1872. Decided Feb. 19, 1872.

IN ERROR to the Supreme Court of the State of Iowa.

Motion to dismiss.

Mr. **Geo. G. Wright,** for defendant in error, in support of motion.

The counsel for the plaintiff in error, *Messrs. Lander & Merriman* and **J. W. Moore,** in opposition to the motion to dismiss, stated their case as follows:

This is a writ of error to the supreme court of the state of Iowa, and allowed upon the ground that in said action the right claimed by the plaintiff, under a patent issued by the United States, and the validity of an authority exercised under the said state of Iowa, repugnant to the Constitution of the United States, was drawn in question, and the decision of the said supreme court of said state was adverse to the right so claimed, and in favor of the validity of said statute of said state.

This was an action to try titles, the plaintiff claiming under an entry of the land dated May 10, 1854, in favor of Frank street, judge of the county court of Pottowotamie county, Iowa, and mesne conveyance to plaintiff. The defendant claimed title under a deed issued under a sale for taxes, made under the revenue acts of the state of Iowa, the 74th section of which provides that such deed should be conclusive evidence of the following facts:

1. That the property had been listed and assessed at the time and in the manner required by law.

2. That the taxes were levied according to law.

3. That the property was advertised for sale, in the manner and for the length of time required by law.

4. That the property was sold for taxes, as stated in said deed.

5. That the grantee named in the deed was the purchaser.

6. That the sale was conducted in the manner required by law.

7. That all the prerequisites of the law were complied with by all the officers who had, or whose duty it was to have had, any part or action in any transaction relating to or affecting the title conveyed, or purporting to be conveyed, by the deed, from the listing and valuation of the property up to the execution of the deed, both inclusive, and that all things whatsoever required by law to make a good and valid sale, and to vest the title in the purchaser were done, except in regard to the three points named in this section, wherein the deed should be prima facie evidence only.

To the plea of defendant setting up this title, the plaintiff interposed a demurrer, the 5th point of which was: "The law authorizing the sale of real property for delinquent taxes, and under which the deed was made by which defendant claims title, is unconstitutional and void." This demurrer was overruled by the court and this title admitted to prevail, and the supreme court, upon revision thereof, held this title valid, and as showing an outstanding legal title.

This act contravenes the 5th article of the Amendment to the Constitution of the United States.

The title of the plaintiff, derived from the United States, was devested by the courts of Iowa, under a law in direct violation of the clause of the Federal Constitution above cited.

It may, however, be contended that the plaintiff did not bring this question specially to the notice of the court below, and that, therefore, no such decision was rendered as is required by the judiciary acts of Congress. The record is silent upon the subject, except in the pleadings where the objection is made to this title, on account of its unconstitutionality. Could the title set up by the defendant have been sustained under the pleadings, without its being held by the court that the law authorizing said deed was constitutional? Clearly not; for upon that deed rested the entire defense, and upon that deed the court declared the legal title to this land to be not in the defendant, but that the title of the defendant had been devested by law, and that the legal title was in the grantee under the tax deed.

This brings the case within the purview of the decisions of the supreme court.

The Bridge Proprs. v. *Hoboken Co.* 1 Wall. 116, 17 L. ed. 571; *Furman* v. *Nichol,* 8 Wall. 44, 19 L. ed 370; *Armstrong* v. *Treasurer, etc.* 16 Pet. 281; *Crowell* v. *Randell,* 10 Pet. 368.

Mr. Chief Justice **Chase** delivered the opinion of the court:

To give jurisdiction to this court upon error to the highest court of the state in which a judgment or decree has been rendered, it is necessary to show that some question under the 25th section of the judiciary act was made and decided, of which this court has cognizance by writ of error on appeal. This has been frequently ruled. *Crowell* v. *Randell,* 10 Pet. 368; *Armstrong* v. *Treasurer,* 16 Pet. 281; Phillip's Practice, 108.

It does not appear from the record that any such question was either made or decided.

Much expense to suitors would be spared if counsel would attend to the principle above stated, and as we have said, frequently laid down, before advising their clients to resort *to the appellate jurisdiction of this [*87 court from the decisions of the state courts.

The writ of error must be dismissed.

THE STEAMBOAT BRIDGEPORT, her Tackle, etc., Charles Weeks and Robert Haydock, *Claimants, Appts.,*

v.

GEORGE SHAW *et al.*

(See 14 Wall. *"The Bridgeport,"* 116-120.)

Lights on vessels—steamer, when held in fault.

1. When a boat is anchored at night in the path

NOTE.—*Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting*—see notes, 13 L. ed. U. S. 537; 25 L. ed. U. S. 168; 28 C. C. A. 532; 29 C. C. A. 368.

Rules for avoiding collision; steamer meeting steamer—see notes, 14 L. ed. U. S. 68; 35 L. ed. U. S. 453; 30 C. C. A. 630; 60 C. C. A. 254.

of vessels, a light is indispensable; but it is not required where the boat is fastened to the shore, especially at a place set apart for such boats.

2. Where the question of fault in a collision lies between a vessel at a wharf, out of the track of other vessels, and a steamer navigating a channel of sufficient width for her to move and stop at pleasure, the fault generally will be held to be with the steamer.

[No. 85.]

Submitted Jan. 24, 1872. Decided Feb. 19, 1872.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

This was a libel in the district court of the United States for the eastern district of New York, filed by the appellees in a case of collision. The district court decreed in favor of the libelants, and the decree was affirmed by the circuit court.

The facts are stated in the opinion.

Mr. **E. H. Owen** *& Nash* for appellants.

Mr. **D. D. Lord** for appellees.

Mr. Justice **Bradley** delivered the opinion of the court:

On the night of the 3d of September, 1865, the ship Margaret Evans, belonging to the appellees, lay at a wharf at Corlaer's hook, in New York in a rectangular recess outside of the track of vessels passing along East river. The river here nearly makes a right angle. Vessels from Long Island sound come down on a southerly course to this point, and having rounded the hook, they then pursue a westerly and southwesterly course, to gain the lower part of the city.

On the night in question, the steamer Bridgeport was running her regular trip from Bridgeport, Connecticut, to the city of New York, bound for her berth at Peck slip. She arrived off the Houston street ferry in East river, half a mile above Corlaer's hook, about three o'clock in the morning. The night was sufficiently clear for the persons in charge of the steamer to see their location and to maintain their usual speed. But at this point they struck a fog-bank which, as they entered it, shut out the view of the shore. They could discern the nearest lights and hear the bells at the ferry slips. The steam was shut down, and the vessel proceeded slowly on her course. The tide being flood and pretty strong, she had to work against it; but this gave her sufficient steerage way without necessitating much absolute speed. Her captain says, he supposes that she was making three or four miles an hour when she passed the Grand street ferry, only three or four feet from Corlaer's hook. The ferry lights on the New York side were observed, and the bell was distinctly heard. Neither lights nor bells on the Williamsburg side were noticed. This made manifest what her master and crew admit, that she was nearer to the New York than to the other shore; and it would seem to indicate that she was hugging the New York shore very closely, for such a dark night, in such a crowded place. When they saw the lights on the Grand street ferry, Smith, the wheelman, says they commenced turning for the purpose of rounding the point. "We judged ourselves well enough off, to make our way; pretty close in, but far enough to clear her." Unfortunately, they shaved the point a little too closely. In less than two minutes after passing the ferry light, and about a minute and a half (as the wheelman thinks) after he began to hold up for change of course, the bow of the steamer struck the ship Margaret *Evans on her starboard side, just abaft [*118 the forerigging. She was not lying at the front of the wharf in the open stream, but at the end or return thereof, as if she were inside the pier, the wharf projecting some thirty or forty feet beyond her into the river, and a large sloop of war lying outside of that; so that the point where the Margaret Evans was struck by the steamer was over two hundred feet outside of the open *channel or passageway for ves- [*119 sels, and three or four hundred feet from the track which the steamer ought to have pursued. The latter had got that much out of her way in one and a half or two minutes, whilst running not more than five or six hundred feet. It seems almost impossible that she could have gone so far astray in so short a time, with points of observation so near at hand, without great want of skill, or great inattention to the compass and other *indicia* of course and position. When off the Grand street ferry her officers must have known nearly her precise position in the river. Her deviation from the channel seems utterly inexcusable. The only excuse which her officers proffer is, that it was so dark they could not see, and they supposed they were far enough off from shore, and far enough advanced, to change their course for rounding the hook.

An attempt is made, indeed, to throw the blame on the Margaret Evans herself, because she did not have a light, and because she had no anchor watch. The fact is she had a night watchman on board, and as to a light, we think it is hardly necessary for a vessel lying at a wharf, more than two hundred feet outside of the channel, to anticipate the visit of stray steamboats in the nighttime and to make provision for such an exigency. In *Culbertson* v. *Shaw*, 18 How. 584, 15 L. ed. 493, Mr. Justice McLean states the law to be: "When a boat is anchored in the path of vessels, a light is indispensable; but it is not required where the boat is fastened to the shore, especially at a place set apart for such boats." If it were shown that the local harbor regulations required it, the case might be different. But there is no proof that the harbor regulations of New York required vessels moored at a wharf, out of the track of other vessels, to carry a light; and without an express regulation to that effect the law does make it incumbent on them to do so. In the case of *The Granite State*, 3 Wall. 310, 18 L. ed. 179, it was shown that the harbor regulations of New York did not make it obligatory on barges moored at a wharf to have either a light or a watch; and the colliding *steamer in that case was [*120 held liable, though it was so dark that the barge could not be seen till close to her, and though at the time the steamer was seeking to avoid contact with other vessels coming out of their docks. Where the question of fault in a collision lies between a vessel at anchor, or at a wharf, out of the track of other vessels, and not derelict in duty, and a steamer navigating a channel of sufficient width for her to move and stop at pleasure—there being no un-

usual stress of weather or superior force to drive the latter out of her course—it was held in the case just cited that the fault, under almost any circumstances, would be held to be with the steamer. In this case we see no fault at all in the Margaret Evans. She had a competent night watchman on board, and was entitled to be considered as safe from any collision from vessels navigating the East river.

The decree is affirmed, with interest and costs.

WILLIAM W. PUGH, *Plff. in Err.*,
v.
JAMES L. McCORMICK.

(See S. C. 14 Wall. 361-375.)

Omission of stamp on indorsement—remission of penalty—immaterial error.

1. The stamp act of July 14, 1870, empowers the collector to remit the penalty for omitting to stamp a note, although such omission occurred prior to the passage of the act.
2. This court will not reverse a judgment, where it appears that the error has become immaterial, and that the same party will be entitled to judgment if a new trial is granted.
3. A stamp is not required to an indorsement of a note, nor to a certificate waiving demand, notice and protest.
4. Satisfactory proof of such waiver is in all respects equivalent in law to compliance with the requirement.

[No. 98.]

Argued Feb. 7, 1872. Decided Feb. 19, 1872.

IN ERROR to the Supreme Court of the State of Louisiana.

The case is stated by the court.

Mr. **Miles Taylor** for plaintiff in error.

Mr. **Thomas J. Durant** for defendant in error.

Mr. Justice **Clifford** delivered the opinion of the court:

Reference will be made to the parties as they existed in the state court where the suit was commenced.

Martin, on the 12th of April, 1863, by his promissory note of that date promised to pay, twelve months after date, to the order of the defendant, at the place mentioned in the note, $7,000 with eight per cent interest, and the note is indorsed by the defendant without date.

On the 7th of December of that year the defendant paid $2,000, which is indorsed on the note, and on the 17th of May following he made another payment of $3,000, for which a receipt was given by the plaintiff. Prior to that, however, to wit, on the 16th of October of the preceding year, the following waiver of protest was signed by the defendant, to wit, "Notice of protest, demand, and protest waived, and all legal responsibilities assumed."

When the note was executed no internal revenue stamps were affixed to it, and it remained without any such stamps until the 7th of Oc- **367*]** tober, 1869, when such stamps, to *the amount of $3.50, were, at the request of the plaintiff, affixed to it, and canceled by the collector of internal revenue for the district, the interest being collected and the penalty remitted as more fully appears by the certificate of the collector set forth in the record.

Payment being refused, the plaintiff, as the holder and indorsee of the note in good faith and for value, on the 25th of March, 1868, instituted the present action of assumpsit to recover the balance due on the note. Service was made and the defendant appeared and pleaded that the plaintiff acquired the note directly from the maker of the same; that no consideration ever passed between the defendant and the plaintiff or between the defendant and the maker of the instrument in regard to the note, and the defendant also denied that he was ever legally bound by the instrument or that he ever at any time rendered himself liable to pay the amount. Neither party demanding a jury the cause was heard and determined by the court, and judgment was rendered for the plaintiff in conformity with the declaration.

Exceptions were filed by the defendant, and by the exceptions it appears that the defendant, when the plaintiff offered the note in evidence, objected to its admissibility upon three grounds: (1) Because the face of the instrument was not legally stamped with the internal revenue stamps, as required by law; (2) because the indorsement on the note was not legally stamped; (3) because the certificate waiving demand, notice and protest was never stamped, and he insisted that the note for the want of such stamps could not be admitted in evidence. All three objections were overruled, and judgment having been rendered for the plaintiff the defendant appealed to the supreme court of the state, where the judgment was affirmed. Whereupon the defendant sued out a writ of error to the state court, and removed the cause into this court for re-examination.

Two principal questions are presented by the assignment of errors: (1) Whether the stamps affixed to the note were legally affixed; (2) whether the certificate waiving demand, *notice, and protest was an instrument [***368** which the internal revenue laws required should be stamped. Evidently a satisfactory response to these questions cannot be given without a careful examination of the several provisions in the acts of Congress imposing such revenue duties, and the modifications of the same as enacted by Congress prior to the time when the note and the certificate of waiver were offered and admitted in evidence.

Promissory notes, except bank-notes issued for circulation, where the note was given for a sum exceeding $20 and not exceeding $100, were by the act of the 1st of July, 1862, subjected to a stamp duty of five cents. Nine other gradations were prescribed in the same schedule by which the rate per cent of the duty was somewhat diminished as the amount of the note was increased. Where the note exceeded $5,000, the amount of the stamp duty imposed by that schedule was $1.50, and $1 in addition for every $2,500 or part of $2,500 in excess of $5,000, which shows that the note given in evidence in this case was subject under that act to a stamp duty of $3.50. 12 Stat. at L. 480.

Persons who made, signed, or issued, or caused to be made, signed, or issued any instrument, document, or paper of any kind, without the same being duly stamped, were declared by the 95th section to be subject to a penalty of $50, and the further provision in the same section was that such instrument, document, or paper should be deemed invalid and of no ef-

fect. Section 100 also provided that if any person made, signed, or issued, or caused to be made, signed, or issued, or accepted, or paid, or caused to be accepted or paid, with design to evade the payment of any such stamp duty, any bill of exchange, draft, or order, or promissory note for the payment of money and liable to any such duty, he should, for every such bill, draft, order, or note, forfeit the sum of $200. 12 Stat. at L. 475, 477.

369*] *Instruments, documents, and papers made, signed, or issued without being duly stamped were, by the 95th section of that act, declared to be invalid and of no effect, but the 24th section of the act of the 14th of July in the same year provided that no instrument, document, or paper made, signed, or issued prior to the first day of January then next should be deemed invalid or of no effect because it was made, signed, or issued without being duly stamped. Provision, however, was made in the same section that no such instrument, document or paper should be admitted or used as evidence in any court until it was duly stamped nor until the holder proved to the satisfaction of the court that he had paid $5 to the collector for the use of the United States. 12 Stat. at L. 561.

Exemption from such declared invalidity and nullity was further extended to such instruments, documents, and papers made, signed, or issued prior to the first day of June, 1863, by the 16th section of the act of the 3d of March, passed in the same year, but the same section also provided that no such instrument, document, or paper, or any copy thereof, should be admitted or used as evidence in any court until the required stamps were affixed, together with the initials of the person affixing the stamps and the date when the same were so affixed. 12 Stat. at L. 725.

All laws in force in relation to stamp duties when the act of the 30th of June, 1864, was passed were by that act continued in force until the 1st day of August of that year, and the same act adopted a new schedule of stamp duties, which took effect from and after that day. By that schedule persons making, signing or issuing promissory notes not exceeding $100 were required to stamp the same with a five cent stamp, and to add another of the same amount for every additional hundred dollars or fractional part of $100. 13 Stat. at L. 291, 298.

Neither deeds, instruments, documents, or papers, nor any copy thereof, not stamped, as 370*] required by previous laws *could be recorded or admitted or used as evidence under that act until the same was stamped as therein required, but the act provided that no instrument, document, or paper made, signed, or issued prior to the passage of that act, without being stamped, should be deemed invalid or of no effect for that cause if the stamp or stamps required should be subsequently affixed, and the act gave authority to the person desiring to use or to record any such deed, instrument, document, writing, or paper as evidence to affix the stamp or stamps thereon required in the presence of the court, register or recorder. 13 Stat. at L. 295.

But persons making, signing or issuing any instrument, document, or paper of any kind, or who caused the same to be made, signed, or issued, or who accepted or paid, or caused to be accepted or paid, any bill of exchange, draft, order, or promissory note without the same being stamped, were by that act subjected to a forfeiture of $200, and the further provision was that such instrument, document, or paper, bill, draft, order, or note, should be deemed invalid and of no effect. 13 Stat. at L. 294.

Stamps were also required by the act of the 31st of March, 1865, where bills of exchange and promissory notes were negotiated as well as where they were accepted and paid, but the forfeiture created by the preceding act for the intentional evasion of the requirements was reduced to $50 instead of $200, as provided in the prior law. 13 Stat. at L. 481.

Provision was also made that persons desirous of affixing stamps to instruments, not stamped as required by prior laws, might appear before the collector of the proper district and affix the same upon paying the price of the proper stamp and the penalty of $50, with interest on the stamp duty if it exceeded the amount of the penalty. Such acts being done, that is, the proper stamp being affixed, the penalty paid, and a note of those acts and the date thereof made in the margin of the instrument, the section provides *that the instrument [*371 "shall thereupon be deemed and held to be as valid to all intents and purposes as if stamped when made or issued." 13 Stat. at L. 481, 482.

Fifty dollars forfeiture for making, signing, or issuing such an instrument, or for causing the same to be made, signed, or issued, or for accepting, negotiating, or paying, or causing to be accepted, negotiated, or paid, any bill of exchange, draft, or order or promissory note, without the same being duly stamped, was also imposed by the act of the 13th of July, 1866, in cases where the act was done with intent to evade the provisions of that act, but the collector was empowered by that act to remit the penalty and to cause the instrument to be duly stamped in all cases where it appeared to his satisfaction that the omission to affix the stamp happened by reason of accident, mistake, inadvertence, or urgent necessity, and without any wilful design to defraud the revenue, or to evade or delay the payment of the duty. Twelve calendar months from the first day of August then next were allowed to the delinquent party by that act, to avail himself of that provision, and the section specifically points out the acts to be done by the party and the collector to render the instrument as valid as if it had been stamped at the time it was made, signed, or issued.

Original instruments, or a certified or duly proved copy thereof, duly stamped so as to entitle the same to be recorded, may under that act be presented to the clerk, register, or recorder, or other officer having charge of the original record, and such officer may, upon the payment of the lawful fee, make a new record thereof, and note upon the original record the fact that the error or omission in the stamping of the original instrument has been corrected pursuant to law, and the provision is that the original instrument, or such certified copy thereof, or the record thereof, may in that event be used in all courts and places, in the same manner and with like effect as if the instrument had been originally stamped. 14 Stat. at L. 143.

372*] *Errors or omissions of the kind which occurred or happened before the first day of August, 1866, might be remedied under that act at any time within twelve calendar months from that date, and subsequent errors and omissions of the kind might also be remedied in the same way at any time within twelve calendar months from the time the instrument, document, or paper was made, signed, or issued without being stamped as required by law, but it is quite clear that the case before the court does not fall within that proviso, as the application to the collector was not made in season to bring the case within either of those regulations.

Had legislation stopped there the ruling admitting the note in evidence would certainly be erroneous, but the act of the 14th of July, 1870, amends the preceding act by striking out the words "sixty-six" in the third proviso, and inserting in lieu thereof the words "seventy-one," whereby the collector of the proper district is still empowered to remit penalties of the kind occurring or happening under the circumstances described in the third proviso of the prior act.

Since the passage of that act it is conceded that the collector may remit the forfeiture therein imposed if it occurred "by reason of accident, mistake, inadvertence, or urgent necessity, and without any wilful design to defraud the United States of the stamp or to evade or delay the payment thereof;" but it is insisted that the new provision does not operate retrospectively; that it does not empower the collector to remit the penalty for any such omission if it occurred prior to the passage of the act; but the court here is of a different opinion for several reasons.

Special attention is called in the first place to the peculiar phraseology of the new provision, which is that section 158 of the act of the 30th of June, 1864, as amended by the 9th section of the act of the 13th of July, 1866, be, and is hereby amended as therein provided. Three amendments are then made in the last-named act, as follows: (1) By striking out the words "fifty dollars" in the second proviso and inserting in lieu thereof the following: Double the amount of the tax remaining unpaid, 373*] *but in no case less than $50. (2) By striking out the words "sixty-six" in the third proviso and inserting in lieu thereof the words "seventy-one." (3) By striking out the words "sixty-seven" in the last proviso and inserting in lieu thereof the words "seventy-two." 16 Stat. at L. 257.

Section 158 of the act first named provided that the forfeiture, where the omission to affix the stamp was with the intent to evade the duty, should be $200, but the succeeding act passed the next year reduced the forfeiture to $50. 13 Stat. at L. 293; 13 Stat. at L. 481.

Such an omission subjected the party to a penalty of $50, also under the act of the 13th of July, 1866, but the penalty under the present act cannot exceed a sum which is double the amount of the tax unless that sum is less than $5.

Legislation in respect to the amount of the forfeiture in the earlier acts of Congress upon the subject would have been unnecessary if it had not been intended to extend the jurisdiction of the collector or some other officer to delinquencies of the kind which arose under the acts of Congress therein mentioned. All agree that the collector might, within the period of time designated in those acts, remit such forfeitures or penalties for past delinquencies if the application, as before explained, was seasonably made, and the court is unanimously of the opinion that the better construction of the act under consideration is, that Congress intended to give such delinquent party a further opportunity to remedy such errors and omissions on the terms and conditions prescribed in the new provision.

Extended argument in support of the conclusion does not seem to be necessary, as the reasons to support it are apparent from its statement. Grant all that and still it may be suggested that the ruling in this case was made before the present act was passed, and it must be admitted that the suggestion is correct, but the new act shows to a demonstration that the ruling in question has become immaterial, having *ceased to be prejudicial to the de- [*374 fendant, as the collector now possesses the power to do what he then did, that is, to affix the stamps to the note, remit the penalty, and make the proper memorandum of his doings; and it is so clear that the plaintiff would have a right to require those acts to be done if a new trial were ordered that the court is unhesitatingly of the opinion that the judgment ought not to be reversed for that cause, as the proper stamps were affixed to the instrument and the amount of the required duty was deposited in the Treasury before the note was used as evidence. *Campbell* v. *Wilcox*, 10 Wall. 422, 19 L. ed. 974; *Toby* v. *Chipman*, 13 Allen, 124; *Corbin* v. *Tracy*, 34 Conn. 326; *United States* v. *Anderson*, 9 Wall. 68, 19 L. ed. 618.

Where the case is brought here by a writ of error to a state court for re-examination, the court is not inclined to reverse the judgment unless there is some substantial error to the prejudice of the complaining party, and especially not where it appears that the error has become immaterial and that the same party will be entitled to judgment if a new trial is granted. Payment of the stamp duty was made to the collector at the time he affixed the stamps to the note, and inasmuch as the government makes no complaint, and the whole transaction is characterized by good faith, the court is of the opinion that the judgment of the state court may be sustained.

II. Objection is also made that the note was not admissible as evidence because the indorsement was not stamped, but the court is of the opinion that the objection is without merit, as a stamp is not required to such a writing. Tils. Stamp. 172; *Richards* v. *Frankum*, 9 C. & P. 221; *Penny* v. *Innes*, 1 Cromp., Mees. & R. 439; *Bacon* v. *Simpson*, 3 Mees. & W. 78; Edw. Stamp (2d ed.), 140; Tils. Dig. 28.

III. Whenever a party in a suit upon a bill of exchange or promissory note is required to prove demand and notice or protest, he may comply with those conditions by proving that the opposite party waived the requirement.

*Proof to that effect was offered in [*375 this case, which consisted of the usual memorandum signed by the party and written on the back of the note, and the statement in the bill of exceptions is that the defendant, when the

note was offered, objected to the admissibility of that writing, but the court admitted it and the defendant excepted.

Satisfactory proof of waiver in such a case is in all respects equivalent in law to a compliance with the requirement. *Taunton Bank* v. *Richardson*, 5 Pick. 444; 2 Stark. Ev. 274; *Woodman* v. *Thurston*, 8 Cush. 157; *Marshall* v. *Mitchell*, 35 Me. 221; Coll. Stamps, 30.

Such a waiver need not be in writing, as an oral declaration to that effect would be equally effectual, and it does not appear that any one of the internal revenue acts contains any requirement if it is in writing that it should be stamped, nor is any authority referred to as a support to the objection taken to the ruling of the court. On the contrary, the supreme court of California has decided the other way and this court is of the same opinion. *Pacific Bank* v. *DeRo*, 37 Cal. 542; Chit. Stamps, 192-200.

Judgment affirmed.

F. BARTEMEYER, SR., *Plff. in Err.*,
v.
STATE OF IOWA.

(See S. C. 14 Wall. 26-28.)

Jurisdiction, when examined into—writ of error to state court—who may allow.

1. Where the case is submitted to this court on printed argument, the court usually examines the record to see if it has jurisdiction, whether the question is raised by counsel or not.
2. Where the supreme court of a state which rendered the judgment complained of, is composed of a chief justice and three associate justices, and the writ of error is allowed by one of the associate justices, the writ will be dismissed.
3. When the court is so composed, the writ can only be allowed by the chief justice of that court, or by a justice of the Supreme Court of the United States.
4. In case of a writ to a court composed of a single judge or chancellor, the writ may be allowed by that judge or chancellor, or by a justice of the Supreme Court of the United States.

[No. 394.]

Submitted Feb. 1, 1872. Decided Feb. 26, 1872.

IN ERROR to the Supreme Court of the State of Iowa.

The case is sufficiently stated by the court.

Messrs. **Wm. T. Dittoe** and *C. Whitaker* for plaintiff in error.

Mr. **Henry O'Connor**, *Atty-Gen.*, of Iowa, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This case, which is a writ of error to the supreme court of Iowa, is submitted to us on printed argument.

In this class of cases the court has been in the habit of examining the record to see if it has jurisdiction whether the question is raised by counsel or not; and the case before us we find ourselves compelled to dismiss, because there is no proper allowance of the writ of error.

Writs of error to the circuit court, under the 22d section of the judiciary act, issue as a matter of course, and can be obtained from the clerk of the circuit court, and, when filed in his office by the party, are duly served. But writs of error to the state courts can only issue when one of the questions mentioned in the 25th section of that act was decided by the court to which the writ is directed, and in order that there may be some security that such a question was decided in the case, the statute requires that the citation must be signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States. It has been the settled doctrine of this court that a writ of error to a state court must be allowed by one of the judges above mentioned, or it will be dismissed for want of jurisdiction, and the case before us raises the question *whether the writ has [*28 been allowed by a judge authorized to do so.

The supreme court of Iowa, which rendered the judgment complained of, is composed of a chief justice and three associate justices, and this writ is allowed by one of the associate justices.

We are of opinion that the act of Congress requires that, when there is a court so composed, the writ can only be allowed by the chief justice of that court, or by a justice of the Supreme Court of the United States. In case of a writ to a court composed of a single judge or chancellor, the writ may be allowed by that judge or chancellor, or by a justice of the Supreme Court of the United States.

The result of this construction of the statute is that the associate justice of the supreme court of Iowa who allowed the present writ had no authority to do so, and it is accordingly dismissed.

Mr. Justice **Swayne**, dissenting:

I dissent from the opinion just read. The objection was not taken by the counsel for the defendant in error. The writ of error was allowed by an associate justice of the supreme court of the state—the court by which the alleged error was committed. This, I think, was sufficient. In my judgment the construction given to the provision in question, of the statute, is unwarrantably narrow.

I am authorized to say that the chief justice and Mr. Justice **Bradley** concur in this view of the subject.

EBER B. WARD, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. 14 Wall. 28-44.)

Written proposal—when no proof of verbal proposal—error to charge fact of which there is no proof—court must construe written proposal.

*1. When a plaintiff presents, as an important part of his case, a written proposal, he is not at liberty to insist on a recovery, on the ground of mere suspicion that there was a verbal proposal differing from the one in writing introduced by plaintiff.

*Headnotes by Mr. Justice MILLER.

NOTE.—*Construction of written contracts, how far a question for the court.*

The construction of written instruments, their signification and legal effect, are matters of law for the court. Brown v. Huger, 62 U. S. (21 How.) 305; Estes v. Boothe, 20 Ark. 583; Richmond, etc. Co. v. Farquar, 8 Blackf. 89; Bovill v. Pimm, 36 Eng. L. & Eq. 441; Holman v. Crane, 6 Ala. 570;

2. If there is no evidence at all of a different verbal proposal it is the duty of the court to tell the jury there is none when requested.
3. It is error in the court in such case to charge the jury that they may find such a verbal proposition when there is nothing but mere suspicion on which they can do so.
4. Where there is such a written proposal it is the duty of the court at the request of either party to construe it, and in doing so the admitted facts concerning the relations of the parties to the transaction are to be considered.

[No. 68.]

Argued Jan. 18, 22, 1872. Decided Feb. 26, 1872.

IN ERROR to the Circuit Court of the United States for the District of Michigan.

The case is stated by the court.

Messrs. **C. I. Walker** and **Geo. F. Edmunds**, for plaintiff in error:

There is no evidence tending in the least degree to prove that the $80,000 was paid to defendant, under any other proposition or arrangement than the written one of May 14, 1863.

The refusal to charge as requested, and the charge as given, could hardly fail to mislead and confuse. It permitted them (the jury) to substitute conjecture for deduction, and opened a field beyond the sphere of the case, where the means of error were abundant.

Blackburn v. *Crawfords*, 3 Wall. 194, 18 L. ed. 194; *Chandler* v. *Van Roeder*, 24 How. 226, 16 L. ed. 634.

But whatever may have been the character of the verbal proposition made before the money was paid over, there is no evidence tending to show that it was actually paid over to defendant upon any other proposition than that of May 14th, or for any other purpose than that mentioned therein.

The court erred in refusing to give the construction to the written proposition or contract of May 14th, requested, and in refusing to give any construction thereto.

According to the very theory of the charge of the court, the jury were at liberty to and might well have found that the proposition or arrangement under which the defendant received the $80,000 was the written one of May 14th. On that hypothesis, it was clearly the duty of the court to give construction to this written instrument. 2 Pars. Cont. 49, note.

The defendant was entitled to the charge requested in relation to this instrument.

(*a*) That it did not, as was claimed by plaintiff constitute defendant the agent of the railroad company, to pay over to the plaintiff any given sum, but he was at liberty to make any arrangement he saw fit with plaintiff, for a settlement and cancelation of bonds held by it.

(*b*) That if the jury found that the $80,000 was paid to the defendant under said proposition, the plaintiff was not entitled to recover, as it was not paid to him for the use of the plaintiff but to pay him in full for his own services and claims, and for procuring the settlement and cancelation of the bonds held by the plaintiff, and for the delivery of the same to the railroad company.

This instrument is, like any other, to be read in the light of surrounding circumstances. 1 Greenl. Ev., § 275; 2 Pars. Cont. 549; *Nash* v. *Towne*, 5 Wall. 689, 18 L. ed. 527; Leake Cont. 123.

The railroad company stood in precisely the same relation to the claim of the defendant as it did to that of the plaintiff, except as to the one particular of entering it upon its books.

The defendant held this claim, and was urging the directors to do something in relation to it. His name was upon nineteen of these bonds held by the plaintiff, and while he denied his liability, he was anxious to have this claim as well as his own arranged, so that no further claim, valid or invalid, could be made upon him in relation thereto.

Each party was in a position where a compromise was desirable and, under these circumstances, the defendant obtained the proposition, and it is to be read in the light which they furnish. The light thus furnished is in perfect harmony with the language of the instrument itself, which seems too clear to require construction.

A compromise was contemplated, not of one but of both these claims, and to effect this compromise of both claims, the railroad company was willing to pay $80,000, and proposed to defendant that if he would discharge his own claim and procure a settlement and cancelation of that of the plaintiff, it would pay him that amount.

He was entirely at liberty to make the best bargain with the plaintiff that he could; to pay it in cash or to get time, or to pay in anything else that the plaintiff would receive.

Kidd v. Cromwell, 17 Ala. 648; Rogers v. Carey, 47 Mo. 235; Woodman v. Chesley, 39 Me. 45; Bank v. Inloes, 7 Md. 380; Carpentier v. Thiston, 24 Cal. 268; Shepherd v. White, 11 Tex. 346; Addington v. Etheridge, 12 Gratt. 436; Cox v. Freedley, 33 Pa. 124.

Where the construction and meaning are doubtful and depend on extrinsic evidence, it is a question of fact for the jury under instructions from the court as to the effect of the language as explained by the evidence. Guptill v. Damon, 42 Me. 271; Edelman v. Yeakel, 27 Pa. 26; Morse v. Weymouth, 28 Vt. 824; Bradford v. R. Co. 7 Rich. 201; Yeaton v. Yeaton, 36 Me. 248.

The weight of papers as evidence and the inferences to be drawn from them are for the jury. McKean v. Wagenblast, 2 Grant, 462; Primm v. Haren, 27 Mo. 205; Reynolds v. Richards, 14 Pa. St. 205.

The construction of a statute, and whether it is directory or imperative, are questions for the court Charlotte v. Chouteau, 25 Mo. 465; Board v. Heenan, 2 Minn. 330; Clarke v. Marriott, 9 Gill. 331.

Where there are terms of art or science requiring evidence to explain, or where the terms are not familiar or definite, and evidence is required as to their import, the jury must of necessity pass upon the meaning of these words. Brown v. Brown, 8 Met. 576; Voorhis v. McGinnis, 48 N. Y. 278; Pollen v. LeRoy, 30 N. Y. 549; Griffiths v. Rigby, 37 Eng. L. & Eq. 519; Grand Lodge v. Knox, 27 Mo. 315; Curry v. Schmidt, 54 Mo. 515; Silverthorne v. Towle, 4 Jones. L. 362; Darling v. Dodge, 36 Me. 370; Berry v. Billings, 47 Me. 328; Russell v. Dyer, 4 N. H. 173; Byrne v. Byrne, 3 Tex. 336; Savignac v. Garrison, 59 U. S. (18 How.) 136; Ewing v. Ingram, 4 Zab. 520; Martin v. Cope, 28 N. Y. 180.

It is for the judge to decide whether an alteration is material or immaterial; also, whether an instrument is a mortgage or not. Burnham v. Ayer, 35 N. H. 351; Smith v. Jones, 13 Ired. 442.

How far a subsequent contract alters or affects a former one is for the jury. Edwards v. Goldsmith, 16 Pa. 47; Cobb v. Wallace, 5 Coldw. 540; Martin v. Angell, 8 Barb. 407; Coleman v. Johnson, 65 N. C. 104; Coleman v. Clements, 23 Cal. 245.

The validity of a contract is a question of law. Whether a contract is void because against public policy for being made on Sunday, in violation of statute, or for want of consideration, are also questions of law. Culver v. Banning, 19 Minn. 303; Chapin v. Potter, 1 Hilt. 366; Fowler v. Scully, 72 Pa. St. 456; Pierce v. Randolph, 12 Tex. 290; Heller v. Crawford, 37 Ind. 279.

The money was not to be and was not paid over to the defendant to pay to the United States, but to liquidate these two claims, so that they should be no longer outstanding.

But upon the plaintiff's own theory as to what the arrangement between the defendant and the railroad company was, under which defendant received the $80,000, the plaintiff was not entitled to a verdict.

That theory was that he received it and the whole of it, to be paid to the plaintiff for a settlement of these bonds; and the court charged that if the jury so found, the plaintiff was entitled to recover the whole sum of $80,000, less the $35,000 already paid.

This, we submit, is clearly erroneous.

Upon this theory the money belonged to the railroad company when it was paid over to the defendant. He received it to pay to the plaintiff but his undertaking to do so was solely with the railroad company. He made no promise, express or implied, to the plaintiff. On the contrary, it agreed with him to give up the bonds on payment of $35,000, and this rebuts any possible implication of a promise to pay a further sum.

It is, therefore, a case where one man receives money of another to pay to a third, and where there is no privity between the bearer of the money and the third person to whom it is to be paid.

Undoubtedly, in such case, if he failed to pay it over, the one who paid it to him may recover the money. It is the common case of money put into the hands of an agent for a special purpose and not used for that purpose. If the agent lose it or squander it, or is insolvent, the loss is his and not that of the third person to whom it was to be paid. He has assumed no responsibility in relation to it, and may not even know of the transaction. If sent to pay a claim or debt against the sender, that debt still exists, and until the money is paid over, the principal may revoke the agency.

Upon what principle, then, can the third person bring an action against the bearer of the money? Where is the privity of contract?

It is admitted that, in violation of all principle, and as an exception to the general rule, there are many *dicta* and some decisions that authorize an action in just such cases. But the clear weight of modern authority is the other way.

Chit. Cont. 684; *Williams* v. *Everett*, 14 East, 582; *Barron* v. *Husband*, 4 B. & Adol. 613; *Malcolm* v. *Scott*, 5 Exch. 601; *Brind* v. *Hamsphire*, 1 Mees. & W. 365; *Barlow* v. *Brown*, 16 Mees. & W. 126; *Seaman* v. *Whitney*, 24 Wend. 260; *Crampton* v. *Ballard*, 10 Vt. 251.

These cases approved in *Cary* v. *Curtis*, 3 How. 248.

If there has been a promise made to the third person to pay over the money, it is otherwise. The privity then exists.

Wyman v. *Smith*, 2 Sandf. 331.

Messrs. **Geo. H. Williams,** *Atty-Gen.*, and **B. H. Bristow,** *Solicitor Gen.*, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This action of assumpsit was brought by the United States against the plaintiff in error, to recover the sum of $45,000, for so much money had and received by the defendant to the use of the plaintiff; and at a trial by jury, verdict and judgment were rendered for that sum, with interest.

The whole of the testimony is embraced in a bill of exceptions, not long, and the questions to be decided here arise out of the charge of the court to the jury and its refusal to give instructions asked by the defendant.

A summary of the facts out of which this implied promise is supposed to arise, is necessary to an understanding of the legal proposition involved in the case. In the years 1856 and 1857, the Detroit & Milwaukee Railway Company were building their road, and were in an embarrassed condition in which it became important for them to obtain the delivery of their iron rails by giving re-warehousing bonds, with sureties. To obtain acceptable sureties, they offered to pay a large compensation for the use of the names of responsible parties, and in that way defendant became surety on numerous bonds of the company given to plaintiffs at various times, amounting to over $90,000. This railway company, while these bonds were unpaid, was sold out with all its property and franchises, and was purchased by a new organization under the laws of Michigan, which took the name of the Detroit & Milwaukee Railroad Company; and this latter company, in the process of transmutation, made or recognized a lien upon the road and other property in favor of the United States for the whole or a part of the debt evidenced by these bonds, but denied any liability on the part of the corporation for those bonds; and it seems probable that both defendant and the agents of the United States were ignorant of the existence of this lien, until after the compromise of the bonds hereafter to be mentioned. At this stage of the proceedings, defendant was the only solvent *surety, [*30 and he insisted that he was discharged by the dealing of the plaintiff with the principal.

The bonds were placed in the hands of the district attorney for suit, and Ward began to stir himself to get the new railroad company to pay something upon them, and to get the United States to accept less than the amount due, as a compromise. Accordingly, after an interview with the directors of the company, he had a conference with the district attorney, in which, while denying his liability, he offered to pay $35,000 in full for the delivery of the bonds on his own account, whether the company did or did not furnish the money, as he hoped they would. This offer was afterwards accepted, and the $35,000 was paid and the bonds delivered to defendant.

All this appears from an agreed statement of facts offered in evidence by plaintiff, and from that it further appears that, at the interview with the directors first spoken of, they agreed to pay $80,000 if defendant would get those bonds settled and canceled, and would release his claim for compensation for becoming surety for the old company.

This proposition was reduced to writing May 14, 1863.

It is conceded that the agent of the United States had no knowledge of this offer when Ward made his proposition, nor until after the bonds were delivered and the $35,000 paid and

accepted as a compromise; and it is further conceded that Ward received the $80,000, and had part or all of it in his hands when the compromise was finally accepted.

It is upon this statement of facts mainly that the United States asserts that the entire $80,000 was money had and received by Ward to its use, and sue for the $45,000 not paid over.

The defendant's counsel requested the court to instruct the jury that there was no evidence from which they could infer any other contract between defendant and the railroad company, concerning this $80,000, than the one found in the written proposition. The court refused this request, and charged the jury that there was evidence tending to show that the written proposition of May 14, 1863, did not fully evidence the terms made to defendant by the railroad company, when he made the proposition to compromise to the district attorney and added: "I do not deem it necessary or expedient to say what the legal effect of that proposition is, as if, in the opinion, it is but a partial expression of the arrangement, or is different from the oral arrangement of April, a construction would only tend to complicate your inquiries."

Again: The jury were told that it was for them to find what the arrangement or proposition was between the railroad company and the defendant in reference to a compromise of the bonds, and whether there was any other different proposition than that reduced to writing May 14, 1863, or whether that evidences the precise terms of the arrangement between the company and the defendant when the latter opened negotiations with the district attorney. And they were told that upon their findings, in that respect, would depend their verdict.

It is quite clear that the court charged the jury that there was evidence of a verbal contract differing from the one in writing; that they might infer that the verbal contract was such that defendant would be held in law to be a bailee for the United States as to the whole $80,000, and designedly left the impression that this was so clear that it was unnecessary for him to instruct them as to the legal effect of the written contract on the rights of the parties.

Now, as all the testimony is in the bill of exceptions, and as the plaintiffs read this written contract as part of their case, we should be able to discern some evidence on which the jury could find not only that there was a verbal contract but that it differed from the written one, and that it showed that the defendant received the entire $80,000 to the use of the United States; for if this was not so the verbal contract was insufficient to authorize the verdict. We have not been able to find in the bill of exceptions anything which justified this charge of the court.

Plaintiffs offered in evidence a paper which commences as follows: "It is stipulated by counsel for defendant that the following statements are facts, and that the same may be admitted in evidence upon the trial of this cause on the part of the plaintiffs."

Among these statements was this:

"That in April, 1863, the board of directors of said railroad company was applied to by the defendant verbally to make a proposition of compromise of said bonds, which was put in writing by the president, on the 14th day of May, as follows:

"Detroit & Milwaukee R. Co.
"Detroit, May 14, 1863.

"Captain E. B. Ward:

"My Dear Sir.—Referring to the conversation we have had on the subject of the duty bonds due the United States, I am authorized to say that if you can procure the settlement and canceling of them for a sum not exceeding $80,000 currency, that sum to include your services and any claim you may have against the company on account of those bonds, this company is ready to pay, and will pay that sum; one half on your making the arrangement with the government, and the other half within thirty days thereafter. This offer, however, not to be considered as waiving any defense the company has to said bonds and claims.

"Yours truly,
"C. C. Trowbridge,
"President."

"And that, subsequently, in April, said board did verbally make the said defendant the said proposition."

From this it is clear that plaintiffs themselves have shown by their own testimony that the proposition which the defendant asked the railroad company to make and which they did make verbally in April is the proposition and the same proposition which was reduced to writing by Trowbridge, the president, on the 14th May thereafter. The writing refers to the previous conversation, and there is no attempt to conceal the fact that the proposition was made at a previous time verbally.

Plaintiffs also introduced Trowbridge as a witness, and he testified that, though he had not heard the first conversation between the board and defendant, he afterwards heard of it from Mr. Brydges, managing director, or from Mr. Summers, counsel for the company, and that after this and upon reducing it to writing in answer to the question of the defendant, as to what the board had decided as to the proposition, he repeated it orally to defendant as he understood it, and has so stated; and as he understood it, it was fully expressed in the letter of May 14th. Trowbridge had become president of the company during these transactions.

Now, the plaintiffs not only introduced the statement above alluded to, but they proved by Trowbridge, their own witness, as part of their case, that the verbal proposition of April was identical with the written proposition which they had introduced.

How can they be permitted to contradict their own witness and discredit their own written testimony, consistently with the rules of evidence?

But if they could, we have searched in vain for any evidence which varies in the slightest degree that which we have cited. It is, in fact, all that there is on that subject. It has been argued here, as it probably was before the jury, that the written proposition was gotten up after the fact to cover up a fraud; that in fact Ward was given the $80,000 for payment to the United States alone without reference to his own claim on the company, and having conceded this fact and made a better compromise than was expected, he had this paper made out to include his own claim to give color to a fraud.

But of this there is nothing but the merest suspicion of counsel. No witness has testified that the agreement of April was such as is here supposed, or that it differed from the writing of May 14th. The plaintiffs themselves have proved that they were identical. It would be a total disregard of all rules of evidence to allow them to go to the jury with an argument founded on mere suspicion, a suspicion contradicted by their own evidence, and then have the court charge that there was in the testimony a foundation 39*] *for this suspicion, a foundation so strong as to render a construction of the only real proposition which was proved, useless and embarrassing to them.

And if it could for any reason be conjectured that the verbal proposal differed from the one made in writing, there is nothing to show what that difference was, and whether it might not have been even more favorable to the defendant that the one produced in writing. The jury were left by the court, and in fact told to disregard the facts which were proved, and indulge in the vagaries of their imagination, in this the turning point of the case.

Now, it is undeniable that Ward made a very enormous profit in the transaction, and that he availed himself of a knowledge of facts unknown to the officers of the government, in a manner which was well calculated to prejudice the jury against his case, but this was no reason why the court should authorize them to indulge this prejudice by a disregard of the established principles of the law of evidence.

We are, therefore, of opinion that the circuit court erred in refusing to instruct the jury that there was no such evidence, and, in charging them that there was.

There were several other prayers for instruction asked by the defendant's counsel and refused by the court, on which error is assigned and which we do not deem necessary to notice further than this: That some of the prayers seem to require a construction of the written proposition found in the record.

Whether the specific prayers of the defendant's counsel were such as should have been given or refused, we are of opinion that it was the duty of the court to have given the jury a construction of that instrument, and as this duty will probably arise, and the interpretation of the writing become an important element of a new trial, we will consider it now.

The evidence makes it pretty clear that the original corporation, the principal in the warehouse bonds, was also indebted to the defendant in a considerable amount, which appears to have never been liquidated. The corporation whose 40*] *directors made the proposition to Ward, while it denied a direct liability either to him or to the United States, found a lien on their property which made them desire the settlement of both these claims. These facts are undisputed, and in view of them, and of the other fact that Ward was probably liable to the government for the full amount unpaid on the bonds, we are to determine what those directors meant.

The first and important element of their proposals is that "we will pay $80,000 on account of these bonds if you can procure a settlement and canceling of them for a sum not exceeding that amount." The second branch of it is that this sum must include "your services in making this settlement, and any claim you may have against the company on account of the bonds. When this arrangement is made the company is ready to pay half that sum, and the other half in thirty days thereafter."

Is this a proposition to pay Ward $80,000 if he procures a settlement of both demands, leaving him at liberty to keep as much or as little of it as he chose, provided he effected either purpose? Or is it a proposal to pay generally the $80,000 on the two demands, provided it be accepted in full satisfaction of both?

The language of the proposition is that they will pay that sum for a settlement of both claims. It does not say that they will pay it to Ward, but will pay that sum on account of these two demands. Ward had first called on them to do something in the matter. This was their response. Without entering into any further verbal criticism of the language of the instrument, but looking to the relations of Ward to the government, and to the railroad company which made the proposal, we think that its true construction is, that the $80,000 was to be paid in settlement of the claims of the government on the bonds, and of Ward's claim for becoming surety, and a fair compensation for his services in obtaining the compromise with the government.

With this construction of the instrument—the only evidence before the jury of the terms on which defendant received the money—it should have been left to them to *ascer- [*41 tain how much was due the plaintiffs on account of the bonds when the proposition was made, how much was due the defendant for becoming surety for the railroad company, and what was a fair compensation for his services in effecting the compromise with the United States.

These facts being ascertained, they should have been directed to apportion the $80,000 between the plaintiffs and the defendant, according to the amounts thus ascertained as due to each, and make this the foundation of their verdict, deducting from the proportion of the $80,000 falling to the United States the $35,000 paid them by the defendant.

The judgment of the Circuit Court is reversed, and a new trial awarded.

Mr. Justice **Bradley**, dissenting:

I dissent from the opinion of the court in this case. It seems to me that the charge of the judge to the jury was correct. The defendant was surety for the Detroit & Milwaukee Railroad Company on their re-warehousing bonds, given to secure duties on railroad iron, for an amount admitted to be $76,000, besides interest. The property of the company was sold under mortgages, and a new company was formed by the purchasers, who purchased under a stipulation to recognize and pay all sums due the Federal government for duties upon railroad iron which, it was admitted, then amounted to $94,000. The purchasers, after organization, gave a mortgage in November, 1860, to secure the payment, amongst other things, of the duties owing to the government of the United States, so that the new company assumed the payment of the duties in question. But their assumption was not communicated to the officers of the government, and was not known by them.

In April, 1863, Ward, the plaintiff in error, urged upon the new company to settle this claim, and also a claim which he had, by way of compensation for becoming surety. The board of directors verbally made him a proposition, afterwards put in writing, to the effect that if he could procure the settlement and cancelation of the bonds for a sum not exceeding 42*] $80,000 *currency (that sum to include his services and any claim he had), they would pay that sum—one half on his making the arrangement, the other half within thirty days. Thereupon Ward had an interview with the district attorney, and after dilating upon the difficulties which would be met with in collecting the money, the defenses which the company had against the claim, etc., said that he had been urging the directors to do something in relation to the bonds; that he thought they were going to have some money that could be applied to this purpose, and that they would do something in relation thereto. He then offered $35,000 in full for the bonds, saying that whether the company did or did not furnish any money, as he expected they would, he would pay that sum out of his own funds, and that the company was apt to be behind when money was to be paid out. He never said one word about the offer of the company to pay the $80,000, and yet he was the surety, and was seeking to get up obligations that were his own as well as the company's. Under these representations and this suppression of the facts, the district attorney was induced to recommend the offer to the acceptance of the department, and on the 24th of July, 1863, Ward paid the $35,000, got possession of the bonds, and the next day delivered them to the company and received from it the $80,000 which had been offered. Afterwards, in February, 1864, when the district attorney had discovered the deception, and demanded the balance of $45,000, Ward offered him a check for $22,000, on the plea that when the compromise was made he did not know that the company had provided for the government claim in their mortgage of November, 1860.

Upon this state of facts the government claimed that the whole $80,000 was received for their use.

A singular feature of the case is that the offer of the company, made to Ward in April, was not put into writing until the 14th of May, 1863, and was then written out at the request of Ward, by Trowbridge, an officer of the railroad company, who was not present when the verbal 43*] proposition *was made, but only heard of it from others. He wrote it out in a formal letter to Ward, dated May 14th, 1863, and this letter and the evidence of Trowbridge as to what he learned about it from others, is all the evidence we have of its precise terms.

The judge left it to the jury to say whether the letter contained the precise oral arrangement or not, with liberty to take into consideration all the facts and circumstances of the case. The plaintiff in error complains of this feature of the charge. He insists that there was no evidence that the oral agreement was anything different from what the letter stated it to be.

It seems to me that the judge went quite as far as he was bound to go, in favor of the plaintiff in error. The great controlling facts of the case were that the company agreed to pay this $80,000 to get clear of the bonds and of all claims in regard to them; that Ward never informed the government officials of this offer, but made representations which entirely ignored any such state of things — representations, to say the least, that were disingenuous, considering the relation in which he stood to the parties as surety on the bonds. Upon these representations he got a compromise, and afterwards had the offer of the railroad company put in writing in the shape in which it now stands in Trowbridge's letter. He finally received the money and pocketed it all, except $35,000, which he paid to the government.

His conduct was surely an estoppel against himself, so far as the government was concerned. He was under an obligation to disclose the offer which had been made to him. He admits he received the $80,000 on account of the bonds. He cannot be permitted to say that he received part of the money for himself. If that was the arrangement why did he not tell the district attorney so? As between him and the government, the latter had the prior right to be paid out of the fund. Ward was surety to the government for the payment of its whole claim. He must be deemed in law, under the circumstances, to have received the money for the use of the government. Hence the judge was right in declining *to say what the true con- [*44 struction of Trowbridge's letter was.

I think the judgment should be affirmed; and I am authorized to say that Mr. Justice **Clifford** and Mr. Justice **Davis** agree with me in this opinion.

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*DAVID GIBSON, for Himself and [*244 Thomas G. Gaylord *et al.*, Partners, as Gaylord, Son, & Company, *Appts.*,

v.

AMERICUS WARDEN *et al.*

(See S. C. 14 Wall. 244-252.)

Chattel mortgage need not be sealed — on partnership property — assignee in bankruptcy, not a creditor, purchaser, nor mortgagee — mortgage as to whom valid from its delivery — lien of, follows fund.

1. It is not necessary to the validity of a chattel mortgage that it should be sealed, unless a seal is required by the statute of the state.

2. A chattel mortgage on partnership property executed by one of the partners, is good, if the other partners authorized its execution, and after its execution, with full knowledge, acquiesced in what he had done.

3. The assignee in bankruptcy is not a creditor, subsequent purchaser, nor mortgagee in good faith, and a chattel mortgage is not void as to such assignee by the statute of Ohio, which was executed before, but filed within four months before filing the petition in bankruptcy.

4. As between the mortgagor and the mortgagee and subsequent mortgagees and purchasers with

NOTE.—*Power of partner, as agent, to bind the firm as party to negotiable instruments and otherwise*—see note to LeRoy v. Johnson, 7 L. ed. U. S. 391.

Partnership realty, conveyance of; rights of partners to convey.

One partner cannot execute a deed in the firm name so as to bind his co-partner. Gerard v. Basse, 1 U. S. (1 Dall.) 119; 1 Am. Dec. 226; Robinson v. Crowder, 4 McCord, 519, 17 Am. Dec. 762.

A partner has no power to bind his copartner by an instrument under seal without special authority. Trimble v. Coons, 2 A. K. Marsh. 375, 11 Am. Dec. 411; Morgan v. Scott, Minor, 81, 22 Am. Dec.

notice, the mortgage was valid and took effect from the time of its delivery, which was more than six months before the filing of the petition in bankruptcy.

5. Where the mortgaged premises have been converted into money, the lien of the mortgage follows the fund into the hands of the assignee, and binds it there.

[No. 101.]

Argued Feb. 8, 1872. Decided Feb. 26, 1872.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The case is stated by the court.

Messrs. **Aaron F. Perry**, *Rufus King*, and *T. J. Henderson*, for appellants:

1. Bona fide chattel mortgages in Ohio, although leaving the possession of the property in the mortgagor, were valid, even as against execution creditors, and bona fide purchasers without notice, before the statute relating to chattel mortgages.

Hombeck v. *Van Metre*, 9 Ohio, 153; *Collins* v. *Myers*, 16 Ohio, 552; *Brown* v. *Webb*, 20 Ohio, 389; *Webb* v. *Brown*, 3 Ohio St. 246.

2. The statute requiring such mortgages to be filed, does not make the filing a part of the execution of the instrument, nor necessary to its validity against the mortgagor and subsequent mortgagees and purchasers with notice.

See Statute, 1 S. & C. 475; *Wilson* v. *Leslie*, 20 Ohio, 161; *Sidle* v. *Maxwell*, 4 Ohio St. 236; *Kendall* v. *Mason*, 7 Ohio St. 198; *Gregory* v. *Thomas*, 20 Wend. 17; *Day* v. *Munson*, 14 Ohio St. 488; *Seaman* v. *Eager*, 16 Ohio St. 209.

3. The mortgage, when filed, gives a prior lien as against all creditors and others who had not by execution levied, attachment or otherwise, before the filing obtained a lien.

Webb v. *Brown*, 3 Ohio St. 253; *Swift* v. *Holdridge*, 10 Ohio, 232; *Wilson* v. *Leslie*, 20 Ohio, 166; *Hallowell* v. *Bayless*, 10 Ohio St. 537; *Clarke* v. *Strong*, 16 Ohio, 322; *Barr* v. *Hatch*, 3 Ohio, 530; *Freeman* v. *Rawson*, 5 Ohio St. 1.

4. The mortgage to Gaylord, Son & Co., made on January 27, 1868, though not filed according to the statute, was valid as against everybody, in the condition of the liabilities as they stood, from the time it was made, to the filing of the second mortgage, on March 18, 1868. If the first mortgage had been then filed, it would have held a prior lien against everybody, with the possible exception of David Gibson.

5. The new mortgage executed and filed March 18, 1868, was substituted for the other and covered exactly the same property, with the exception of stock in trade, omitted from the last mortgage, but included in the first. There was no provision in the first mortgage giving power of sale to the mortgagor over the stock in trade, and there is no proof *aliunde* of an understanding that the mortgagor retained the right to sell "stock in trade." But if such understanding had been shown, it would not invalidate the mortgage as to the property covered by the last mortgage.

The new mortgage was filed more than four months, and only three days less than six months, before the petition in bankruptcy. It made no change in the situation as to the parties or creditors. No new consideration was necessary, but ample new consideration was given in the surrender of the first mortgage, the indorsement for $10,000 given, and in forbearance.

The second mortgage is to be treated in law as if made when the agreement for it was made, preparatory to indorsement, *viz.*, January 23, 1868, nearly nine months before the petition in bankruptcy.

In re Colemere, L. R. 1 Ch. App. 128; *Mercer* v. *Peterson*, L. R. 2 Exch. 304; *Hutton* v. *Crittwell*, 17 Jur. 392; 72 Eng. Com. L. 15; *Ex parte Tempest*, Br. L. R. Eq. Pl. Jan. 1, 1871, p. 70.

The transaction was not, either as to the first or second mortgage, in the sense of the bank-

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35; Williams v. Hodgson, 2 Har. & J. 474. 3 Am. Dec. 563; Overton v. Tozier, 7 Watts, 333.

Such authority may be given by parol. Skinner v. Dayton, 19 Johns. 513, 10 Am. Dec. 286.

One partner can convey no more than his own interest in houses or other real estate, even where they are held for purposes of the partnership. Coles v. Coles, 15 Johns. 159, 8 Am. Dec. 231.

Property conveyed to a partnership vests in the company—not in the individual partners; and the transfer of such property by one of the partners passes only a contingent right to a part after the debts are paid and the copartnership ended. Donaldson v. Bank of Cape Fear, 1 Dev. Eq. 103, 18 Am. Dec. 577.

Authority cannot be given to a partner by parol to bind his copartners by deed. Hart v. Withers, 1 Penr. & W. 285; 21 Am. Dec. 382.

But a thing done in another's presence and at his request is his immediate act, and a partner is bound by a sealed instrument executed by a partner in his presence with his assent in the firm name. Hart v. Withers, 1 Penr. & W. 285, 21 Am. Dec. 382; Fichthorn v. Boyer, 5 Watts, 159, 30 Am. Dec. 300; Hunt v. Kline, 2 Miles, 344.

Partner may bind his copartner by contract under seal made in the name and for the use of the firm in the course of partnership business, provided the copartner assents previous to its execution, or afterward ratifies and adopts it. Cady v. Shepherd, 11 Pick. 400, 22 Am. Dec. 379; Russell v. Annable, 109 Mass. 74; Holbrook v. Chamberlain, 116 Mass. 161; McIntyre v. Park, 11 Gray, 106; Tapley v. Butterfield, 1 Met. 517; Swan v. Stedman, 4 Met. 552; Van Deusen v. Blum, 18 Pick. 231; Kendall v. Garland, 5 Cush. 79; Peine v. Weber, 47 Ill. 45; McDonald v. Eggleston, 26 Vt. 154; Drumwright v. Philpot, 16 Ga. 424; Bond v. Aitkin, 6 W. & S. 165, 40 Am. Dec. 550.

It seems to be the rule that other partners may ratify by parol an unauthorized signature of a sealed instrument by a copartner. Story, Part. § 121, *et seq.*; Haynes v. Seachrist, 13 Ia. 455; Smith v. Kerr, 3 N. Y. 150; Worrall v. Munn, 5 N. Y. 240; Wilson v. Hunter, 14 Wis. 683; Pike v. Bacon, 21 Me. 280; Lowery v. Drew, 18 Tex. 786; Mackay v. Bloodgood, 9 Johns. 285; Skinner v. Dayton, 19 Johns. 513; Johns v. Battin, 30 Pa. St. 84; McNaughton v. Partridge, 11 Ohio, 223; Bond v. Aitkin, 6 W. & S. 165, 40 Am. Dec. 550; Gwinn v. Rocker, 24 Mo. 291; Anderson v. Thompkins, 1 Brock. 462.

Partnership realty on the death of a partner is not distributed as personal stock, but descends to the heirs, certainly after all debts of firm are paid, as in case of any other tenancy in common. Yeatman v. Woods, 6 Yerg. 20, 27 Am. Dec. 452; McAllister v. Montgomery, 3 Hayw. 94; Barcroft v. Snodgrass, 1 Coldw. 445; Piper v. Smith, 1 Head, 93; Collins v. Warren, 29 Miss. 236; Scruggs v. Blair, 44 Miss. 406; Holland v. Fuller, 13 Ind. 195; Summer v. Hampson, 8 Ohio, 358; Shearer v. Shearer, 98 Mass. 111; Gray v. Palmer, 9 Cal. 639; Goodburn v. Stevens, 5 Gill, 1; Wilcox v. Wilcox, 13 Allen, 552; Rice v. Barnard, 20 Vt. 479; Lang v. Waring, 25 Ala. 625; Platt v. Oliver, 3 McLean, 27; Tillinghast v. Chaplain, 4 R. I. 137; Hauff v. Howard, 3 Jones, Eq. 440.

One partner cannot bind his copartner by deed unless he is expressly empowered by deed to do so. This power cannot be proved by parol. Mosly v. Arkansas, 4 Sneed, 327; Napier v. Catron, 2 Humph. 536; Boyd v. Dodson, 5 Humph. 37; Smith v. Dickinson, 6 Humph. 262; McNutt v. McMahan, 1 Head, 98; Cain v. Heard, 1 Coldw. 166.

Rights of partners inter se in partnership real estate—see note, 28 L. R. A. 86.

rupt act, a voluntary preference or in violation of the act.

Authorities cited to last proposition; also *Pennell* v. *Reynolds*, 103 Eng. Com. L. 708; *Yates* v. *Hoppe*, 9 C. B. 541; *Bittlestone* v. *Cooke*, 6 E. & B. 296; *Green* v. *White*, 3 Bing. (N. C.) 59; *Baxter* v. *Pritchard*, 1 A. & E. 456; *Young* v. *Waud*, 8 Exch. 221; *Thompson* v. *Freeman*, 1 T. R. 156; *Smith* v. *Payne*, 6 Term, 152.

The six months' clause of the 35th section of the bankrupt act does not apply to this class of cases. *Bean* v. *Brookmier*, 10 Am. Law Reg. N. S. 181.

The mortgage to Gibson was executed by Robert Moore & Son, and was a voluntary preference contrary to the bankrupt act.

Messrs. George Hoadley and **E. M. Johnson**, for David Gibson, appellant:

First. A chattel mortgage executed by one partner in his individual name, but sealed with the seal of the partnership, will bind the firm at law, where the instrument itself shows conclusively that it was intended to be executed in the name and as the act of the partnership, and the testimony proves that all the partners consented to the execution and delivery of the instrument, and that the signing of the same by the partner in his individual name instead of that of the partnership, was simply a clerical error upon his part.

Montgomery v. *Dorion*, 7 N. H. 475; *Magill* v. *Hinsdale*, 6 Conn. 464; *Love* v. *S. N. L. W. & M. Co.* 32 Cal. 639; *Tenant* v. *Blacker*, 27 Ga. 418; *Zouch* v. *Woolston*, 2 Burr. 1147; *Rogers* v. *Frost*, 14 Tex. 267.

Second. A seal not being required to the valid execution of a chattel mortgage in Ohio, where one is affixed to such an instrument, it may be entirely disregarded.

Purviance v. *Sutherland*, 2 Ohio St. 478; *Webster* v. *Harris*, 16 Ohio, 490; *Milton* v. *Mosher*, 7 Metc. 244; *Tapley* v. *Butterfield*, 1 Metc. 515; *Eureka Co.* v. *Bailey Co. ante*, 209, 11 Tex. 376, 40 Mo. 69, 12 N. H. 206, 7 M. & W. 323.

Third. If a chattel mortgage be executed by one partner under the circumstances as set forth in point first, the seal may be disregarded, and the instrument will be deemed and held as binding on the partnership.

Sherman v. *Fitch*, 98 Mass. 59; *Haskell* v. *Cornish*, 13 Cal. 45; *McDonald* v. *B. R. & A. W. & M. Co.* 13 Cal. 221; *Dispatch Line* v. *Bellamy Mfg. Co.* 12 N. H. 206.

Fourth. A chattel mortgage, executed under the circumstances as set forth in point first, if it does not bind the partnership at law, does so in equity; and a court of equity will decree its reformation, in order to effect the obvious intention of the parties.

Tebb v. *Hodge*, L. R. 5 C. P. 73; *Webster* v. *Harris*, 16 Ohio, 490; *McNaughten* v. *Partridge*, 11 Ohio, 223; *Evants* v. *Strode*, 11 Ohio. 480; *Hunt* v. *Freeman*, 1 Ohio, 491; *Hunt* v. *Rhodes*, 1 Pet. 1.

Fifth. An equitable chattel mortgage in Ohio is binding upon subsequent purchasers and creditors, chargeable with actual notice of its existence.

Paine v. *Mason*, 7 Ohio St. 199; *Day* v. *Munson*. 14 Ohio St. 488.

Sixth. By the provisions of the 35th section of the bankrupt act, a chattel mortgage securing one who is under liability for a failing debtor, can only be attacked in bankruptcy on the ground of illegal purpose, within four months from its delivery and record.

Bean v. *Brookmier*, 10 Am. Law Reg. N. S. 181.

Seventh. After the lapse of four months, the preferences an insolvent debtor may have made, so far as the preferred creditor is concerned, are valid as against all the world and cannot be questioned.

Bump, Bankruptcy, 3d ed., 401; *Potter* v. *Coggeshall*, 4 B. R. 19; *In re Wynne*, 4 B. R. 5; *In re Fuller*, 4 B. R. 29; *Bean* v. *Brookmier*, *supra*.

Eighth. The validity of a mortgage cannot be questioned under the bankrupt act, on the ground of illegal preference, if more than six months have elapsed since its execution, though placed on record within that period. *In re Wynne*, 4 B. R. 5.

Mr. **R. B. Warden** for defendants.

Mr. Justice **Swayne** delivered the opinion of the court:

This is an appeal in equity from the decree of the circuit court of the United States for the southern district of Ohio.

The appellees are the assignees in bankruptcy of Robert *Moore & Sons, and [*246 filed this bill to compel such of the defendants as claimed to have liens upon certain effects of the bankrupt firm to have their respective rights touching the property in question ascertained and adjusted by the decree of the court. The decree rendered, disposed of the several cases litigated under the bill. All the defendants acquiesced in the decisions made, except David Gibson and Gaylord, Son, & Co. They have brought the decree of the circuit court, so far as it affects them, here for review by this appeal. Our examination of the case will be confined to their respective claims.

On the 8th of March, 1868, Moore & Sons executed to Gibson a chattel mortgage. It was conditioned that if the mortgagors should pay to Gibson their promissory note to him of the same date with the mortgage, for $6,000, payable sixty days from date at the Central National Bank of Cincinnati, the instrument should be void. The *testatum* clause set forth that Robert Moore & Sons, by Robert Moore, one of the firm, had thereto set their hands and seals. Robert Moore alone affixed his name and seal to the document. The amount claimed by Gibson under the mortgage was indorsed and sworn to by him, and the instrument was filed with the proper officer on the 18th of the same month. On the 21st of that month Moore & Co. failed in business, and made a general assignment of all their effects for the benefit of their creditors. On the 15th of September, 1868, a petition in bankruptcy was filed against them, under which they were subsequently adjudged bankrupts, and the appellees were appointed their assignees in that proceeding.

The note mentioned in the mortgage was indorsed by Gibson for the accommodation of the makers. They procured it to be discounted, and the proceeds went to their benefit. Gibson was compelled to pay it. The amount thus paid,

with interest, constitutes his claim under the mortgage.

No statute of Ohio directs how a chattel mortgage shall be executed. The statutes regulating such instruments are silent upon the subject. Our attention has been called to 247*] *no local adjudication touching the point. In an elementary work prepared by an eminent jurist of that state, the form given purports a sealed instrument, and has a seal affixed to it. Swan's Treatise, 692.

Such instruments in Ohio are usually under seal. But the term "mortgage" used in the statute does not import or imply that a seal is necessary. In regard to chattels, it is a mortgage, and not a deed of mortgage, that is required. The distinction between real and personal property and between the means which are necessary to affect them is well settled. Personal property, according to the common law, could always be transferred or incumbered without the use of a deed for that purpose. A seal has never been held necessary to the validity of a bill of sale. A chattel mortgage is only a bill of sale with a defeasance incorporated in it. The presence or absence of that formality is wholly immaterial. In the case before us it may be regarded as surplusage. *Milton* v. *Mosher*, 7 Met. 244; *Tapley* v. *Butterfield*, 1 Met. 515; *Dispatch Line* v. *Bellamy Mfg. Co.* 12 N. H. 234.

There is another view of the subject that must not be overlooked. There is proof in the record that the partners, other than Robert Moore, authorized him in advance to execute the mortgage, and after its execution, with full knowledge, acquiesced in what he had done. If the law had required a seal, these circumstances would have made the instrument the deed of the firm—as much so as if all the members had been personally present and assented to its execution in that form. Story, Part. p. 212, § 122; *Purviance* v. *Sutherland*, 2 Ohio St. 479; *Cady* v. *Shepherd*, 11 Pick. 405; *Gram* v. *Seton*, 1 Hall, 262. This is not inconsistent with the principle, which seems to be too deep-rooted in the law to be wholly eradicated by judicial authority, that a sealed instrument executed in the name of a firm by one of its members, without the proper authority, where a seal is necessary, is the deed of such member only, and that he alone is bound by it.

248*] *The statute provides that every mortgage of goods and chattels, where there is no change in the possession of the things mortgaged, "shall be absolutely void," as against subsequent purchasers and mortgagees in good faith, "unless the mortgage, or a true copy thereof, shall be forthwith deposited" with the proper officer. The supreme court of the state has held that the omission to deposit forthwith as directed, does not avoid the mortgage *in toto*, but that, whenever deposited, it becomes effective from that time. *Wilson* v. *Leslie*, 20 Ohio, 161. That court has also held that actual notice to a subsequent mortgagee, before his mortgage is taken, is conclusive evidence of *mala fides* on his part. *Kendall* v. *Mason*, 7 Ohio St. 199.

In cases like this the assignees stand in the place of the bankrupt; his rights are their rights; and theirs, like the liens of judgments at law, are subordinate to all the prior liens, legal and equitable, upon the property in question. *Lempriere* v. *Pasley*, 2 T. R. 485; *Belcher* v. *Oldfield*, 6 Bing. N. C. 102; *Doremus* v. *Walker*, 8 Ala. 194; *Peck* v. *Jenness*, 7 How. 612; *Fletcher* v. *Morey*, 2 Story, 555; Archb. Bank, 314.

This mortgage was deposited three days less than six months before the filing of the petition in bankruptcy.

This raises a question under the bankrupt statute which it is necessary to consider.

The first clause of the 35th section avoids certain acts of the bankrupt touching his effects, if done within four months before the filing of the petition in bankruptcy. The second clause imposes the like result, if the transaction be within six months of that time.

To bring a case within the first clause the act must have been done by a person insolvent, or in contemplation of insolvency, with a view to give a preference to a creditor or person having a claim against, or who is under a liability for, the bankrupt, and such person must have reason to believe that the transaction is in fraud of the statute.

The category of the second clause contains the same requirement *of insolvency, or con- [*249 templation of insolvency, on the part of the person doing the act. The recipient may be anyone who has reason to believe him insolvent or acting in contemplation of insolvency, and that the act was done by him to prevent the property from coming into the hands of his assignee in bankruptcy, and from being distributed under the bankrupt law.

Upon comparing the two clauses carefully together we are satisfied that the first clause was intended to refer to the past and the second to the present. The language employed in the first clause imports clearly that the consideration must be one growing out of a former transaction, and that the recipient must stand in the relation thus created to the other party. It is equally clear that the second clause, enlightened by this construction of the first one, must be limited to cases where the transaction in question was original and complete in itself at the time it occurred, and had no reference for its consideration to anything between the parties which had gone before it. It is only by this construction that the two clauses can be made to harmonize and full and distinct effect be given to each. Any other construction would make them cover the same ground and obliterate everything by which one is differenced from the other, except the limitation of time which they respectively prescribe. It is not to be supposed that such was the intention of the law making power. This view of the subject was taken by the circuit court for the district of Missouri, and subsequently there by one of the justices of this court. We can see no answer to the conclusion at which they arrived. *Bean* v. *Brookmeir*, 10 Am. L. Reg. (N. S.) 181. According to this construction the mortgage to Gibson falls within the second category, as to the time within which its validity could be challenged. Is it, therefore, void? To this there is a conclusive answer in the negative.

The statute of Ohio deprived the mortgage of effect until "deposited"—as to creditors, subsequent purchasers, and mortgagees in good faith. These assignees are neither. As be-

250*] tween *the mortgagor and the mortgagee and subsequent mortgagees and purchasers with notice, the mortgage was valid and took effect from the time of its delivery to Gibson, which was the 8th of March, more than six months before the filing of the petition in bankruptcy.

The mortgaged premises have been converted into money. But this does not affect the rights of the parties. The lien of the mortgage followed the fund into the hands of the assignees, and binds it there in all respects as it bound, before conversion, the property which the fund represents. *Astor* v. *Miller*, 2 Paige, 68–78; *Sweet* v. *Jacocks*, 6 Paige, 355.

Gaylord, Son, & Co. indorsed for Moore & Sons to the extent of $10,000, as early as May, 1867, which was repeated from time to time. In May, 1868, Moore & Sons applied to them for a definite arrangement for indorsements to the extent of $20,000, to be secured by a chattel mortgage. After inquiry, they agreed to indorse for $15,000, and possibly $20,000, their liability to be secured as proposed. In pursuance of this arrangement, on the 23d of January, 1868, they indorsed for $5,000, and afterwards made other indorsements, amounting in all to $17,000. The first mortgage was made on the 27th of January, 1868. It was held by Gaylord, Son, & Co., and not filed. Later—probably in March—Moore & Sons pressed for further indorsements, which were refused. Shortly afterwards Moore & Sons advised Gaylord that judgments were about to be taken against them, but insisted they were solvent. The mortgage was shown to counsel, who objected to it, but upon what ground does not appear. He advised that another should be taken. This was done on the 18th of March, and the mortgage was deposited on the same day with the proper officer, but some hours later than the deposit of the mortgage to Gibson. It appears by the face of the instrument that the signature and seal of the firm were affixed by one of the firm in the absence of the others. There was the same prior authority and subsequent acquiescence as in the case of the Gibson mortgage. It recited that 251*] Gaylord, Son, & Co. were liable, *as indorsers and otherwise, for certain debts of Moore & Sons; that Moore & Sons were indebted to Gaylord, Son, & Co.; and that Moore & Sons were desirous to renew their paper with the indorsement of Gaylord, Son, & Co., and was conditioned that if Moore & Sons should save Gaylord, Son, & Co. from loss by reason of said indorsements and debt—Gaylord, Son, & Co. agreeing to renew for eighteen months—then the mortgage was to be void.

After the failure of Moore & Sons, Gaylord, Son, & Co. took up notes which they had indorsed for the mortgagors, amounting to $17,000. The mortgagees also held a note of the mortgagors for iron sold by the former to the latter, amounting to $400, making the aggregate of the indebtedness of Moore & Sons to Gaylord, Son, & Co., exclusive of interest, $17,400.

We hold this mortgage also to be valid under the laws of Ohio. The views we have expressed as to the Gibson mortgage, considered with reference to the statutes of Ohio, apply equally to the one here under consideration, and render it needless to say anything further upon the subject.

Being founded upon a past consideration, it falls within the first clause of the 35th section of the bankrupt law, which limits the right of attack upon such instruments to those executed within four months prior to the filing of the petition in bankruptcy. In respect to this statute also it must, therefore, be held valid. It was upon the same property as the mortgage to Gibson. Like that mortgage, its force and effect reach and bind the fund into which the property has been converted.

It was contended with great ability by the counsel of Gaylord, Son, & Co., that as regards the limitations of time under the 35th section of the bankrupt law this mortgage must be regarded as if it had been executed at the date of the prior one for which it was substituted, and numerous authorities were cited to sustain the proposition. The view we have taken of the case has rendered it unnecessary to consider this point.

*The counsel representing both mort- [*252 gages, in the argument in this court, advised us that we need not decide the question of priority as between the two instruments, they having made an agreement which fixes their respective rights. We have not, therefore, considered the question. If there be any surplus after satisfying these claims it must be distributed to the general creditors.

So much of the decree of the Circuit Court as is brought before us by this appeal, is reversed, and the cause will be remanded to that court, with directions to enter a decree in conformity to this opinion.

THE NEW HAVEN STEAM TRANSPORTATION COMPANY, *Libt., Appt.*,

v.

THE STEAMBOAT CONTINENTAL, the New Haven Steamboat Company, *Claimant.*

(See S. C. *"The Continental,"* 14 Wall. 345–361.)

Lights on vessel—defense to collision.

1. Lights on vessels at night are now required, but the omission of one vessel to comply with the requirement will not excuse the other from the exercise of all due and reasonable care to prevent a collision.
2. When those in charge of the other vessel did not exercise due care and vigilance to ascertain the character of the approaching vessel, and if they had done so, they would have been enabled to adopt reasonable precautions to prevent the collision, both vessels were held in fault, and the damages were equally apportioned between them.
3. The defense that one of the steamers mistook the other for a sail vessel, cannot be admitted as valid, unless it is established by full proof.

[No. 105.]

Argued Feb. 1, 1872. Decided Feb. 26, 1872.

APPEAL from the Circuit Court of the United States for the District of Connecticut.

This was a libel *in rem*, filed in the district court of the United States for the district of Connecticut, by the appellants to recover damages for a collision between the propeller North Hampton, of the libelant, and the steamer Continental, owned by the appellee.

The district court dismissed the libel, and the

circuit court, on appeal, affirmed this decree. The libelant appealed to this court.

The case is stated in the opinion.

Messrs. **C. Donohue,** *J. S. Beach,* and **C. R. Ingersoll** for appellant.

Messrs. **E. H. Owen** and *T. C. Doolittle,* for appellee.

Mr. Justice **Clifford** delivered the opinion of the court:

Ships and vessels are held liable for damage occasioned by collision, either on account of the culpable neglect or complicity, direct or indirect, of their owners, or on account of the negligence, unskilfulness or carelessness of those employed in their control and navigation. **355*]** When employed in *navigation, ships and vessels should be kept seaworthy and be well manned and equipped for the voyage, and in cases where they are not seaworthy or not well manned or equipped, and a collision ensues between such a vessel and one without fault in that respect, the owners of the vessel not seaworthy or not well manned and equipped cannot escape responsibility, if it appears that the unseaworthiness of the vessel or the want of a competent master or of a sufficient crew or of suitable tackle, sails, or other motive power, as the case may be, caused or contributed to the disaster; and as the owners of the vessel appoint the master, and employ the crew, they are also held responsible for their conduct in the control and navigation of the vessel.

Controversies growing out of collisions are cognizable in the admiralty, and when prosecuted in that jurisdiction, the rules of decision are different in several respects from those which prevail even in similar controversies when prosecuted in the courts of common law. Where the collision occurs exclusively from natural causes and without any fault on the part of the owners of either vessel or those intrusted with their control and management, the maritime rule, as defined by the Federal Courts is, that the loss shall rest where it falls, on the principle that no one is responsible for such a disaster when produced by causes over which human skill and prudence could exercise no control. *Union S. S. Co.* v. *N. Y. & Va. S. S. Co.* 24 How. 313, 16 L. ed. 701. Admiralty courts everywhere have now adopted that rule, but it cannot be applied where both or either of the vessels are in fault—as where the vessel of the respondent is alone in fault the libelant is entitled to a decree for his damages; and the converse of the proposition is equally true, that if the vessel of the libelant is alone in fault, proof of that fact is a sufficient defense to the libel, but if both vessels are in fault, then the damages must be equally apportioned between the offending vessels. Much uncertainty often attends the inquiry by which of those rules a given controversy should be determined, and where the evidence is conflicting, the issue presented is frequently one of doubt and difficulty.

356*] *Full damages are claimed by the libelants in this case, upon the ground that the steamboat of the respondents was alone in fault, or if that theory cannot be sustained, then they contend that both steamers were in fault and that the damages should be divided. On the other hand, the respondents contend that the vessel of the libelants, the propeller, was wholly in fault, and that the decree of the circuit court dismissing the libel should be affirmed.

Daily trips were run by the propeller between the ports of New Haven and New York, carrying passengers and freight, and she was on her return trip from the latter port and near the entrance to the harbor of her home port when she was struck by the Continental, the steamboat of the respondents, on her port side, abaft her midships, and damaged to such an extent that she sunk in half an hour. Corresponding trips were run by the steamboat of the respondents between the same ports, the Continental, however, usually leaving the port of New Haven on the same day that the propeller, the North Hampton, left New York on her return trip to the port where both steamers belonged. Accustomed as they were to start on their respective trips at stated hours, each knew pretty nearly when they would meet and where they would pass each other on the route, except when one or the other was detained by stress of weather or other special circumstances, and the proofs exhibited furnish no reason to suppose that either of the steamers met with any detention during this trip. Testimony was taken on both sides, and both parties having been heard, the district court entered a decree for the respondents. Prompt appeal was taken by the libelants to the circuit court, but the circuit court affirmed the decree of the district court, and the libelants appealed to this court.

Before the Continental came out of the lower harbor her lights were seen by those on board the propeller when the two steamers were four or five miles apart. Distant from each other as they then were, the better opinion is that they were not at that time on courses which involved any risk of collision; but the Continental, shortly after she came out of *the lower [*357 harbor, hauled up as usual on her sound course, heading more directly towards her ultimate destination, and from that moment the course of the two steamers was such that the rules of navigation as well as the dictates of common prudence made it the duty of each to adopt proper precautions to prevent a collision. Beyond doubt they were approaching each other nearly end on, within the maritime meaning of that phrase, and under such circumstances all must admit that the rules of navigation require that "the helms of both shall be put to port, so that each may pass on the port side of the other." 13 Stat. at L. 60.

Extended argument to establish that theory of fact does not appear to be necessary, as it agrees with the first finding of the district judge, and is supported by all the attending circumstances, as well as by the weight of the direct testimony. Evidently the two steamers were far enough apart at that time to have adopted whatever precautions were necessary to have prevented a collision, and it is clear that if each had obeyed the rules of navigation they would have passed each other in safety. Fault is imputed to the steamboat Continental, because she did not port her helm as required by the rules of navigation established by the act of Congress, but the respondents contend that they were deceived and misled as to the character of the approaching vessel and consequent nature of their duty by the failure of those on board of the propeller to display proper lights,

as they also were required to do by the same Congressional regulations, as amended by a subsequent act. 14 Stat. at L. 228.

Evidence to that effect was given by one of the witnesses called by the libelants. He testified that he was at the wheel prior to the collision; that he saw the Continental coming down the harbor and spoke to another seaman to take his place; that the seaman spoken to did as requested; that he went and called the master and the mates; that he looked at the lights; that the bow light and both the side lights were burning brightly, but that the stern light, which 358*] *consisted of two lanterns and showed as one light, he found was "burning dim;" that he went aft and took down both lanterns and went forward in the passageway on the starboard side, and having picked up the wicks carried the lanterns back and put them in the box where they belonged; that he stepped forward into the passageway to get out of the draft, so that the wind might not blow the lights out, and he further states that he heard the propeller give one whistle just as he was stepping into the passageway with the lanterns; that he also heard two whistles from the Continental in reply just as he was returning to replace the lights in the box; that the propeller, just as he was hoisting the lanterns, again blew one whistle; that after he replaced the lights he saw the Continental approaching the propeller, when he ran forward part way and was knocked down by the concussion.

Such a disaster could not have occurred without fault on the part of one or both vessels, as they had an open sea and good weather, and the night, though cloudy, was not very dark, as fully appears from the fact that those on board the propeller saw the lights of the Continental when she was at least four miles distant.

Coasting steamers are required to carry a central range of two white lights as well as the red and green lights prescribed for ocean going steamers, the after light to be carried at least fifteen feet above the light at the head of the vessel, and the requirement of the Act of Congress in respect to it is that it shall "show all around the horizon." 14 Stat. at L. 228, 229. Signal lights are required by the acts of Congress in order that they may be seen by an approaching vessel in season to enable those in charge of the vessel to adopt the necessary precautions to prevent a collision with the vessel whose lights are so displayed, and when it appears that they were burning so dimly as not to fulfil the purpose and object for which they are required, they cannot be regarded as constituting a compliance with the prescribed requirement. *Chamberlain* v. *Ward*, 21 How. 566, 16 L. ed. 217. Apply that rule to the present case and it is quite clear that the propeller 359*] *was in fault, and it appears that the district and circuit courts both came to the conclusion that she was solely in fault and denied to the libelants all claim for damages, either as owners of the propeller or as bailees of the cargo. Whether that decision is correct or not must depend upon the evidence, as it is clear that the absence of one or more of the lights required by the act of Congress will not necessarily cast upon the delinquent party the entire consequences of such a disaster. Absence of lights in a case falling within the acts of Congress renders the owners of the vessel liable for the consequences resulting from the omission, but it does not confer any right upon the other vessel to disregard or violate any rule of navigation or to neglect any reasonable or practicable precaution to avoid a collision which the circumstances afford the means and opportunity to adopt.

Steamers displaying proper signal lights are in that respect without fault, but they have other duties to perform to prevent collision besides complying with that requirement, and if they neglect to perform such other duties they will not be held blameless because they displayed proper lights as required by the act of Congress upon that subject. *The Gray Eagle*, 9 Wall. 510, 19 L. ed. 743.

Some conflict undoubtedly exists in the testimony as to the precise manner in which the two steamers were approaching each other after the Continental came out of the harbor and hauled up upon her sound course; but the better opinion, we all think, is that they were approaching each other nearly end on, or substantially in that manner as found by the district court. Inquiry as to what their respective courses were before that time would be useless, as the respondents do not claim that either the lookout or master of the steamboat saw the propeller or her lights before the steamboat was put upon her sound course. Unquestionably, the lights of the propeller might have been seen earlier, but it is clear that they were not, if the witnesses are to be believed.

Lookouts are required to be vigilant, and it is not doubted *if the proper vigilance [*360 had been exercised in this case those on board the steamboat might have ascertained the character of the approaching vessel in season to have adopted every necessary precaution to have avoided a collision. They must have expected to meet the propeller about that time, and under the circumstances they had no right to assume without a closer scrutiny that the approaching vessel was a sail vessel because she did not show a stern light. She did show a bow light, which might well have satisfied them that the vessel was not a sail vessel, as it is more reasonable to suppose that the stern light of a steamer has become dim or extinguished than that a sail vessel will show a light not required nor authorized by the prescribed regulations. Proper scrutiny as to the character of the approaching vessel would or should have induced greater caution on the part of the master of the Continental, and if any doubt remained after such scrutiny was made the steamboat should have slackened her speed or have stopped until every reasonable degree of uncertainty was overcome. Navigators have no right arbitrarily to assume under all circumstances that every vessel approaching which does not show both the signal lights and the central range of two white lights is a sail vessel which is bound to keep her course, and that if she does not, she may be run down and sunk.

Prior to the enactment of the sailing rules neither steamers nor sail vessels, except on the lakes, were required to carry lights of any kind, and yet the rules of navigation were substantially the same as those prescribed in the existing acts of Congress. Lights are now required, but the omission of one vessel to com-

ply with the requirement will not excuse the other from the exercise of all due and reasonable care to prevent a collision. 13 Stat. at L. 58; 9 Stat. at L. 382; 14 Stat. at L. 227; *S. S. Co.* v. *Rumball*, 21 How. 384, 16 L. ed. 148.

Viewed in the light of these suggestions, as the case must be, the court. is fully satisfied that those in charge of the steamboat did not exercise due care and vigilance to ascertain the character of the approaching vessel, and that if **361*]** *they had done so they would have been enabled to have adopted reasonable precautions to have prevented the collision. Consequently the court is of the opinion that both vessels were in fault, and that the damages should be equally apportioned between the offending vessels. *Catharine* v. *Dickinson*, 17 How. 170, 15 L. ed. 233; 1 Pars. Ship. 527; *The Morning Light*, 2 Wall. 557, 17 L. ed. 863.

Where two steamers are approaching each other in an open sea on a night when the lights of a vessel may be seen five miles, the defense that one of the steamers mistook the other for a sail vessel cannot be admitted as valid, unless it is established by full proof; and where, as in this case, it appears that the approaching steamer showed a bow light in addition to the red and green lights, the court will be still less inclined to give credence to the theory as a valid defense.

Decree reversed, and the cause remanded for further proceedings in conformity to the opinion of this court.

THE STEAMSHIP THAMES, her Tackle, etc., Russell Sturgis *et al.*, *Claimants, Appts.*,
v.
BILLOP SEAMAN.

(See S. C. *"The Thames,"* 14 Wall. 98-109.)

Bill of lading—effect of—excuse for non-delivery—where consignee not found—delivery to stranger.

1. The contract between the ship and the shipper is that which is contained in the bill of lading delivered.
2. The ship's bill is designed only for its information and convenience; not for evidence as between the parties of what their agreement was. If it differs from the one delivered, the latter must be considered as the true and only evidence of the contract.
3. By issuing a bill of lading stipulating for a delivery to order, the ship becomes bound to deliver to no one who had not the order of the shipper.
4. It is no excuse for a delivery to the wrong persons that the indorsee of the bill of lading was unknown or is absent or cannot be found after diligent search.
5. If, after inquiry, the consignee or indorsee of a bill of lading for delivery to order cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them on account of their owner.
6. He has no right under any circumstances to deliver to a stranger.
7. The agent of the absent owners may libel in admiralty, either in his own name or that of his principals.

[No. 94.]

Argued Feb. 5, 1872. Decided Mar. 4, 1872.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

This cause comes up on appeal from a decree of the circuit court of the United States for the southern district of New York, affirming a decree of the district court, entered June 7, 1869, in favor of the libelant for $9,263.86.

The libelant filed his libel against the steamship Thames, Mar. 19, 1868, claiming damages in the sum of $8,000 for non-delivery to him, at New York, of 111 bales of cotton shipped by Gilbert S. Van Pelt, at Savannah, Jan. 28, 1868, by the Thames, the bill of lading for which had been assigned to libelant for a valuable consideration.

The answer of the claimants, Russell Sturgis and others, owners of the steamship Thames, put in issue the material allegations of the libel, and averred that the 111 bales of cotton mentioned in the libel were shipped by G. S. Van Pelt, by the Thames, for and to be delivered to Bennett, Van Pelt, & Co., of New York, and were so delivered in due course and without notice of the claim of the libelant, and that no claim for the said cotton was ever made by the libelant until long after such delivery; that the alleged assignment of the bill of lading to libelant was by way of security for personal obligations of Bennett, Van Pelt, & Co., who were solvent merchants, and to whom libelant looked for payment of such obligations; and that he gave no notice, and did no act as assignee of the bill of lading on the arrival of the vessel, nor upon the delivery of the cotton, nor until after Bennett, Van Pelt, & Co. had become insolvent; and that by his delay and laches he waived and lost all claim against the vessel and her owners.

The case further appears in the opinion.

Messrs. **Wm. Allen Butler** and **Barney, Butler, & Parsons,** for appellants:

I. The court below erred in holding, upon the evidence, that the delivery of the bills of lading for the 111 bales of cotton in question was intended to, and did, transfer the cotton therein specified to the libelant as security for the payment of the draft of G. S. Van Pelt for $8,300 on Bennett, Van Pelt, & Co.

II. If the bills of lading were, in fact, transferred to Brady & Moses as security for the acceptance of the draft, the libelant cannot claim any greater interest in the property or any higher rights under the bills of lading than Brady & Moses acquired by such transfer. The Atlanta National Bank, the real party in interest, had full knowledge of the facts, Brady & Moses being their agents and the sole actors on their behalf. The title to the property described in the bills of lading, and the right to its possession depends upon, not the mere indorsement and delivery of the bills of lading, but upon the facts of the transaction and the acts of the parties.

Hibbert v. *Carter*, 1 D. & E. 745; *Coxe* v. *Harden*, 4 East, 211; *Gurney* v. *Behrend*, 3 El. & B. 622.

III. Even if the transfer of the bills of lading was intended as claimed by the libelant and held by the court below, to secure the payment of the draft of G. S. Van Pelt on Bennett, Van Pelt, & Co., the libelant was not entitled to hold the vessel and owners for the non-delivery of

NOTE.—*Delivery by common carrier by water*—see note, 16 L. ed. U. S. 412.
To whom may delivery be made under bill of lading—see note, 38 L. R. A. 358.

the goods, inasmuch as, by his own laches, he suffered the cotton to go into the possession of Bennett, Van Pelt, & Co., and to remain in their possession until after their insolvency.

A consignee, by refusing or failing to accept the consignment and look after the property, disclaims and loses the position of consignee.

Du Peirat v. *Wolfe*, 29 N. Y. 436; *Grant* v. *Shaw*, 16 Mass. 341.

IV. The court below erred in holding that the libelant was entitled to maintain this action.

He is not the real party in interest, nor had he such title to or interest in the case as to entitle him to sue in admiralty.

See *Houseman* v. *The North Carolina*, 15 Pet. 40; *McKinlay* v. *Morrish*, 21 How. 355, 16 L. ed. 104.

The indorsement of commercial paper to and by a bank cashier, is the act of his bank and not his individual act; and the libelant, having no individual property or interest, did not stand in any such relation to the transaction as to enable him to maintain this action.

Bk. of Genesee v. *Patchin Bk.* 19 N. Y. 312; *Folger* v. *Chase*, 18 Pick. 63; *Bk.* v. *White*, 1 Den. 608.

Mr. **B. F. Lee, Jr.**, for appellee:

I. The indorsement and delivery of the bill of lading passes all the property in the goods. Taney, Ch. J., in *Gibson* v. *Stevens*, 8 How. 399, says: "It is hardly necessary to refer to adjudged cases to prove a doctrine so familiar to the courts."

If the bill of lading be deliverable to the order of the shipper, or if he is the consignee, then, by the indorsement of the bill of lading, he passes the legal title to the property. Ang. Carr. 423, § 508, and cases cited.

By his indorsement of the bill of lading to a bona fide purchaser for valuable consideration, without notice of any adverse interest, the latter becomes, as against all the world, the owner of the goods.

Ang. Carr. 422, § 508; *Conard* v. *Ins. Co.* 1 Pet. 386, 445.

By such indorsement the property is transferred to the indorsee.

Abb. Ship. 389; *Haille* v. *Smith*, 1 Bos. & P. 563; *Walter* v. *Ross*, 2 Wash. (S. C.) 283; *Summeril* v. *Elder*, 1 Binn. 106; *Conard* v. *Ins. Co. supra;* see, also, *Dows* v. *Perrin*, 16 N. Y. 334; *Dows* v. *Greene*, 24 N. Y. 641; *Fitzhugh* v. *Wiman*, 5 Seld. 565; *Meyer* v. *Peck*, 28 N. Y. 598.

II. Where bills of lading are to the order of the shipper, or to "or order or assigns," it is the master's duty in such cases to retain, and he cannot safely deliver the goods until they are claimed of him by the holder of a bill of lading indorsed by the shipper to whose order he has engaged to deliver them: 1 Conkl. Adm. 248, 2d ed. n.

If the master cannot find the proper person to whom he can deliver the goods, his duty is plainly laid down in 1 Conkl. Adm. 196, 2d ed.: "The master may discharge himself and his employer from further responsibility by placing the goods in store at the place of destination, with some responsible person engaged in the kind of business to which the goods relate, for and on account of their owner; in which case the depositary will become the agent or bailee of the owner."

Fisk v. *Newton*, 1 Den. 45; see, also, *Ostrander* v. *Brown*, 15 Johns. 39; 2 Kent, Com. 3d ed. 605; Ang. Carr. 264, § 298, and cases cited.

III. The suit was properly brought in the name of the libelant.

See, *Bk. of Genesee* v. *Patchin Bk.* 19 N. Y. 312 and cases there cited; *Considerant* v. *Brisbane*, 22 N. Y. 389; *Kane* v. *Paul*, 14 Pet. 33.

It is well settled in admiralty proceedings that the agent of absent owners may libel either in his own name as agent or in the name of his principals, as he thinks best.

McKinlay v. *Morrish*, 21 How. 355, 16 L. ed. 104; *Houseman* v. *The North Carolina*, 15 Pet. 49.

Mr. Justice **Strong** delivered the opinion of the court:

The engagement of the ship with the shipper was to deliver the cotton in New York to order. In regard to this there is no doubt. Such was the express stipulation of the bills of lading which were given on the 28th of January, 1868, when the cotton was received on shipboard. On that day Gilbert Van Pelt purchased the cotton in Savannah from Brady & Moses, and settled for it by giving in payment his draft upon the firm of Bennett, Van Pelt, & Co., in New York, of which firm he was a member. The draft was drawn at fifteen days' sight in favor of the libelant, Billop Seaman, cashier, or order, and it was discounted by Brady & Moses with money of the Atlanta National Bank, which they had in hand for the purpose of purchasing bills on New York on the bank's account. The price of the cotton was *thus, in sub- [*105 stance, paid by money which Van Pelt obtained from the bank, as the proceeds of his draft. At the time when he drew the draft he also indorsed upon the bills of lading which the ship had given for the cotton, an order directing its delivery to Billop Seaman, cashier, in whose favor the draft was drawn, and delivered them with the draft to Brady & Moses. They were made out in triplicate, as is usual, and, by them all, the ship undertook to deliver the cotton shipped to order. Two of them had been delivered to Van Pelt, the shipper, and the third was retained by the ship. That retained by the ship, it is true, when produced at the trial in the court below, was found to have at its foot, the memorandum, "for Bennett, Van Pelt, & Co.," which is not upon those delivered to the shipper. How that memorandum came there is not explained. No witness has testified in whose handwriting it is, but it is proved not to have been in that of any of the ship's agents at Savannah who signed the bills of lading and who made the contract for carriage. This, however, is of little importance. The contract between the ship and the shipper is that which is contained in the bills of lading delivered. The ship's bill was designed only for its information and convenience, not for evidence, as between the parties, of what their agreement was. If it differs from the others, they must be considered as the true and only evidence of the contract.

The proofs in the case leave no reasonable doubt that the bills of lading were indorsed to the libelant in order to transfer to him the cotton as a security for the payment of the draft at its maturity. Gilbert S. Van Pelt alone asserts the contrary. His testimony, it must be

admitted, tends to show that they were indorsed and received as security for the acceptance only of the draft. But he is directly contradicted by Moses, by Brady, and by Bruen, neither of whom has any interest in this controversy, and all of whom state that the bills of lading were indorsed to secure to Seaman the payment of the draft and not merely its acceptance. Besides, their testimony is in harmony with all the probabilities of the case. It is absurd to **106*]** talk of security for the acceptance *of the draft. No such security was needed. It might have been accepted before it was discounted. Gilbert S. Van Pelt was a member of the firm upon which it was drawn, and he was at hand when it was discounted. He might then have accepted it. In addition to this it is significant that the invoice of the sale from Brady & Moses to Van Pelt was made out and receipted as if paid in cash (the draft having been turned into cash by a deduction of discount and exchange), and the advances made upon the draft were at once charged to the Atlanta National Bank. In view of all this it is incredible that the bills of lading were indorsed to Seaman merely to secure what the maker of the draft could have given on the instant. Nor ought the position of Gilbert S. Van Pelt to be overlooked. If the bills of lading were indorsed as security for payment of this draft, his firm has obtained from the ship delivery of the cotton through a fraudulent representation that they were the consignees, or entitled to the delivery of possession, and they sold it for cash on the day when it was thus wrongfully obtained. He is not, therefore, an unbiased witness. His testimony was given while he was under the influence of a temptation, not unnatural, to vindicate his firm from the guilt of fraudulently abstracting a large amount of property from its rightful owner. Standing as he does, in such a position, his statements are not to be credited when in conflict with the positive testimony of Brady, of Moses, and of Bruen, and when inconsistent with the strong probabilities of the case.

It must be considered, then, that by the indorsement of the bills of lading the libelant became the owner of the cotton, and that by force of the contract with the ship it was deliverable at New York only to him, or to his order. Reference to authorities to show that the effect of the indorsement was to vest such ownership in Seaman is quite unnecessary. We may, however, refer to a few.

Conard v. *Ins. Co.* 1 Pet. 445; *Gibson* v. *Stevens*, 8 How. 384; *Thompson* v. *Dominy*, 14 Mees. & W. 403; *Caldwell* v. *Ball*, 1 D. & E. 205; *Wright* v. *Campbell*. 4 Burr. 2051; *Evans* v. *Marlett*. 1 Ld. Raym. 271; *Walter* v. *Ross*, 2 Wash. C. C. 283.

107*] *The ship arrived with the cotton at the port of New York on Sunday, the 2d day of February, 1868, late in the afternoon, and on the morning of the 3d delivered it to Bennett, Van Pelt, & Co. on their demand, without the production of either of the bills of lading which had been given to the shipper, and without any order from Billop Seaman, who was the indorsee of the bills, and to whom alone, or to whose order, it could rightfully be delivered. It does not appear that any notice of the ship's arrival was given to Seaman, or that the ship made any inquiry to ascertain to whom the cotton was deliverable. It would seem that, assuming the mysterious memorandum on the bill of lading retained by the ship was equivalent to an order to deliver to Bennett, Van Pelt, & Co., no demand was made for the presentation of such an order, and no further inquiry for the consignee was set on foot. The consequence was that Bennett, Van Pelt, & Co., having obtained the property without any right to it, sold it for cash on the day it was delivered to them, and failed within a few days afterwards.

No argument is needed to show, what is most manifest, that the delivery which was thus made was a breach of the ship's contract. By issuing bills of lading for the cotton, stipulating for a delivery to order, the ship became bound to deliver to no one who had not the order of the shipper, and this obligation was disregarded instantly on the arrival of the ship. And it is no excuse for a delivery to the wrong persons that the indorsee of the bills of lading was unknown, if indeed he was, and that notice of the arrival of the cotton could not be given. Diligent inquiry for the consignee, at least, was a duty, and no inquiry was made. Want of notice is excused when a consignee is unknown, or is absent, or cannot be found after diligent search. *Fisk* v. *Newton*, 1 Denio, 45; *The Peytona*, 2 Curtis, 21. And if, after inquiry, the consignee or the indorsees of a bill of lading for delivery to order cannot be found, the duty of the carrier is to retain the goods until they are claimed or to store them prudently for and on account of their owner. He may thus relieve himself from a carrier's responsi- [***108** bility. *Galloway* v. *Hughes*, 1 Bai. 553; 1 Conkl. Adm. 196; *Fisk* v. *Newton*, *supra*. He has no right under any circumstances to deliver to a stranger.

It is said, however, that the libelant delayed presenting the bills of lading which had been indorsed to him, and delayed making any demand for the cotton until after the 19th of February, when the draft had fallen due, and when it had been dishonored. But that delay cannot justify the ship's delivery of the cotton, on the day after its arrival, to persons who had no bill of lading and no authority whatever to receive it. Had the delay been instrumental in causing such a wrongful delivery; had it been active interposition to mislead the ship, a different case might possibly have been presented. But at most the laches of the libelant was mere inaction, and the wrong delivery was, in no degree due to it. The delivery was, as we have stated, made on the morning after the ship's arrival in port, and the ship's order for delivery to Bennett, Van Pelt, & Co. was issued before the libelant could have known of its arrival. We say this, notwithstanding the testimony of James Van Pelt, which is plainly in conflict with the proved and conceded facts of the case. And as the cotton was sold for cash on the 3d of February, the very day of its delivery, the failure of the libelant to claim it until some weeks afterwards, wrought no injury or loss to the carrier, so far as it appears. We are, therefore, of opinion that the ship is clearly liable for the cotton to the libelant.

And we think that the libel was rightly filed in the name of Billop Seaman. By the indorse-

ment of the bills of lading the legal ownership of the cotton passed to him, as well as the right to control its delivery. It is a matter of no importance that the beneficial interest may have been in the bank of which he was cashier. *Fairfield* v. *Adams*, 16 Pick. 381. The holder of a legal right may always assert it by suit, though he may be accountable to another for what he may recover. A judgment in his favor may always be pleaded in bar against a suit by the **109*]** *beneficial owner. Besides, it is settled that the agent of absent owners may libel in admiralty, either in his own name or in that of his principals. *Houseman* v. *The N. Car.* 15 Pet. 49; *McKinlay* v. *Morrish*, 21 How. 355, 16 L. ed. 104; *Lawrence* v. *Minturn*, 17 How. 100, 15 L. ed. 58.

The decree of the Circuit Court will, therefore, be affirmed.

258*] *THE STEAMSHIP TELEGRAPH, her Tackle, etc., Frederick A. Potts, *Claimant, Appt.*,

v.

JOHN GORDON *et al.*,

and

THE PROPELLER MARY J. VAUGHAN, her Tackle, etc., Thomas J. Vaughan, *Claimant, Appt.*,

v.

SAME.

(See S. C. *"The Vaughan and Telegraph,"* 14 Wall. 258-270.)

Error, when waived—effect of transfer of bill of lading—libel by consignee—both vessels in fault for collision—rule of damages—decree in currency—seal to chattel mortgage—mortgage of partnership property—when valid—who is creditor—lien follows fund.

1. Where an appeal to this court is wholly silent as to exceptions taken to a libel in the district court, and it does not appear that they were brought to the attention of the circuit court, or that it acted upon them, they will be held to have been waived.
2. The transfer of a bill of lading carries with it the legal title to the property described in it.
3. A consignee may file a libel in a court of admiralty of the United States for injuries to the cargo, caused by a collision.
4. Both vessels held in fault for the collision where, without the grossest negligence or mismanagement, there could be neither peril nor disaster.
5. The proper rule of damages where a cargo is lost *in transitu* by a collision or other tort, is the value of the goods at the time and place of shipment.
6. Where a decree was right when rendered, it will not be disturbed although the currency in which it was rendered has lessened in value since its rendition.

[Nos. 86, 87.]

Argued Jan. 24, 1872. Decided Mar. 4, 1872.

APPEALS from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Messrs. **T. J. Fithian** and **C. Van Santvoord** for appellants.

Messrs. **Samuel E. Lyon** and *Alex. Hamilton, Jr.*, for appellees.

Mr. Justice **Swayne** delivered the opinion of the court:

These are appeals in admiralty from the decree of the circuit court of the United States for the southern district of New York.

On the 25th of October, 1864, the steam propeller Mary Vaughan, left the city of Troy for a voyage on the Hudson river to the city of New York. She had in tow two canal boats laden with cargoes of barley under the deck and hoop-poles upon the deck. The boats were lashed, one on each side of the propeller. The canal-boat R. M. Adams was fastened to the starboard side, and the canal-boat Sherman Lewis upon the port side. They were attached to the propeller by towing lines. The propeller was about sixty tons burden, and ninety feet in length by seventeen wide.

The steamboat Telegraph left her dock at the city of New York about five o'clock in the afternoon of the same day on a voyage up the river to Newburg, having in tow three large heavy freight barges, to wit: The Minnesink lashed to her port side, the Dutchess to her starboard side, and the Insurance lashed to the stern of the starboard barge, Dutchess.

On the morning of the next day, between two and four o'clock, A. M., just below Butter Hill, the barge Minnesink, on the larboard side of the Telegraph, and the canal-boat Sherman Lewis, on the port side of The Vaughan, came in collision, whereby the Sherman Lewis was torn from her fastenings to the propeller, swung round crosswise of the river, and across the bow of the Telegraph and her barges, and was so much injured that shortly afterwards she filled and sunk in water from one to two hundred feet deep, carrying down her under-deck cargo with her.

The barley belonged to J. & O. Lynch, of Buharnois, Canada, and was shipped by them from St. Timothy, Canada, in the boat in which it was lost. The boat was bound to Albany or New York. The bill of lading was given to the owners, and by them indorsed as follows: "Deliver to the order of Gordon, Bruce, & McAuliffe. O. & J. Lynch." *Gordon, Bruce, [***265** & McAuliffe were a firm of the city of New York. The bill of lading was then placed in the hands of Gordon & Co., and by them at the request of the shippers, forwarded to the consignees. Upon receiving it Gordon & Co., as the agents of the consignees, advanced upon it $29.50 for the premium of insurance upon the barley; the entire arrangement with the shippers was made by Gordon & Co. as such agents. They had special authority to advance upon this particular barley by drafts at thirty days upon the consignees, and so advised the shippers before the bill of lading was forwarded.

This libel was filed by the consignees. It alleged that the disaster was caused "by the negligence, want of proper skill, and improper conduct of the persons navigating the said propeller, or by the negligence, want of proper skill, and improper conduct of the persons navigating said steamboat, or by their joint negligence, fault and improper conduct."

NOTE.—*How far consignment of goods vests the property in consignee, and to whom the carrier is responsible for loss or injury*—see note, 12 L. ed. U. S. 1142.

Negotiability and transfer of a bill of lading—see note, 25 L. ed. U. S. 802.

In the district court both the claimants excepted to the libel; the claimant of the Vaughan upon the grounds that the particular facts upon which the imputation of fault was founded were not set forth, and that the allegations were not sufficient to entitle the libelants to a decree; the claimant of the Telegraph upon the same grounds, and the further ground that a libel against both vessels jointly could not be maintained. The exceptions were overruled. The court decreed against both vessels, and the claimants of both appealed to the circuit court.

The appeals found in the record are wholly silent as to these exceptions. It does not appear that they were brought to the attention of the circuit court, or that it took any action whatever upon the subject. The appeals from the circuit court to this court are confined to the merits of the case. Neither of them contains any reference expressly, or by implication, to the exceptions. Under these circumstances they must be held to have been conclusively waived by the respondents. To consider them here would be to exercise the appellate power of this tribunal in reviewing the ac- **266*]** *tion, not of the circuit, but of the district court. This we have no power to do. The exceptions must, therefore, be laid out of view.

It was insisted in the argument here by the counsel for the Vaughan that the consignees had no title to the barley, and hence cannot maintain this libel for its loss. The converse of this proposition is too clear to require discussion. The transfer of the bill of lading carried the legal title with it. The authority of Gordon & Co. to draw on the consignees for advances upon receiving the bill of lading, and the actual payment by them as such agents of the premium for insurance, show such to have been the intention of the parties.

The presumption of title in the transferee of a bill of lading which the law raises upon the transfer is, in this case, fully sustained by the facts developed in the proofs. *Grove* v. *Brien*, 8 How. 439; *Lawrence* v. *Minturn*, 17 How. 107, 15 L. ed. 61. But aside from the special circumstances referred to, we have no doubt of the right of the consignees as such to maintain this proceeding. The question is not an open one in this court. In *Houseman* v. *The North Carolina*, 15 Pet. 49. Chief Justice Taney, delivering the opinion of the court, said: "We consider it well settled in admiralty proceedings that the agent of absent owners may libel either in his own name as an agent, or in the name of his principals, as he thinks best. . . . And that the consignees had such an interest in the whole cargo that they may lawfully proceed in this case, not only for what belonged to them, and was shipped on their account, but for that portion also which was shipped by Porter as his own and consigned to them." In *McKinlay* v. *Morrish*, 21 How. 355, 16 L. ed. 104, it was said: "Whatever may be the uncertainty concerning the consignee's right to sue in a court of law, from the conflicting decisions to be found on that right, there is none that he may sue in a court of admiralty in the United States."

This brings us to the consideration of the merits of the case.

267*] *The district court held that both vessels were in fault. The circuit court came to the same conclusion, and affirmed this part of the decree of the district court. These concurring judgments are prima facie to be deemed correct. Our examination of the evidence apart from this consideration has led our minds to the same results. Where the collision occurred the channel was straight, wide and deep. The night was calm and clear. It was near the end of the ebb tide. No disturbing element was present. The circumstances were as favorable as possible for each vessel to pass the other with its tows in safety. Without the grossest negligence or mismanagement there could be neither peril nor disaster. Yet there was a disaster; and the colliding vessels came together with such violence that the canal-boat was wrecked and sunk. Neither vessel had a lookout. The pilot and engineer of the Vaughan were inexperienced and incompetent. There was at the time no one on the deck of the Telegraph but the captain. The pilot had gone below. The engine was in charge of a fireman. Other special faults in the conduct of each vessel are imputed, and we think the evidence establishes them. The vessels are antagonists, and one remarkable feature of the case is the zeal and ability with which the counsel of each has attacked the other and labored to defend his own. In the former both have been successful; in the latter neither. The evidence is, to a large extent, confused and contradictory. It could serve no useful purpose to analyze and discuss it. It is sufficient to remark that we could add nothing to the clear and able opinion of the judge of the district court, by whom this part of the case was there disposed of. We concur in the views which he expressed.

In the district court it was held that the proper rule of damages where a cargo is lost *in transitu* by a collision, or other tort, is the value of the goods at the time and place of shipment. It was conceded that upon the breach of a contract for the delivery of goods at a particular place, the measure of damages is the full value of the goods at such place. Both propositions are correct and are well settled in *our jurisprudence. The place of ship- [***268** ment was a port in Canada, and the value of the barley there when shipped was found to have been 70 cents per bushel, amounting in the aggregate, with interest, to $2,436. The estimate was made in the currency of Canada, which was equivalent in value to the gold coin of the United States. It was admitted that the decree was solvable in legal tender notes, which were then largely depreciated, but it was held that this was an incident of the suit in the forum where it was brought, and that the result was unavoidable. In the circuit court the same rule of damages was applied, but the decree gave the value of the Canada currency in legal tender notes. These notes have since largely appreciated, so that while the libelants would, under the decree of the district court, if it had been paid when rendered, have received much less than the estimated value of the barley, they will now, if the decree of the circuit court be affirmed, receive much more.

It is clear that if the decree of the circuit court had been paid when it was rendered, the result to the respondents would have been the same as if the decree of the district court had

been then affirmed and paid in specie. Upon the rule of damages applied by both courts as respects the kind of currency in which the value of the barley was estimated, the libelants were entitled, upon the plainest principles of justice, to be paid in specie or its equivalent. The hardship arising from the decree before us is due entirely to the delay in its payment which has since occurred, and the change which time and circumstances have wrought in the value of the legal tender currency. The decree was right when rendered and, being so, cannot now be disturbed. It is unnecessary to pursue the subject further. The decree, in the particular under consideration, presents the same question which was decided by this court in the case of *Knox* v. *Lee*, *ante*, 782. There the court instructed the jury that in assessing the plaintiff's damages they might take into account the fact that the judgment could be **269*]** paid in legal tender notes. This *court upon error affirmed the correctness of that instruction. The authority of that case is conclusive of the question here under consideration.

The decree of the Circuit Court is affirmed.

Mr. Chief Justice **Chase**, dissenting:

I dissent, and am authorized to say that my brothers **Clifford** and **Field** also dissent, from so much of the opinion just read as relates to the measure of indemnity for the loss of the barley.

The barley was shipped from St. Timothy, Canada East, on the 7th of October, 1864, and was lost on the 26th of the same month.

We agree that the loss was through the fault of both boats, and that the libelants were entitled to indemnity; and we agree further that the measure of this indemnity was the value of the barley at the time and place of shipment; and that this value was $2,436 in gold. The decree of the district court, rendered on the 21st day of February, 1868, was for this sum, with interest, making the whole amount of the decree $2,924.20.

On appeal, the circuit court held that in order to give full indemnity to the libelants, the value in gold must be converted into its equivalent in legal tender notes on the day of shipment. At that time this currency was so much depreciated that $100 in gold were worth $201 in notes. The $2,436 in gold were, therefore, converted into their equivalent in note dollars, making the sum of $4,896.36. The decree of the district court was accordingly reversed, and a decree was entered, on the 26th of March, 1870, for the last named sum and interest, in all $6,515, with costs.

This was much more than indemnity at the date of the decree, and the injustice is still more apparent at this time, when the value of the notes has so much appreciated that the affirmance of the decree of the circuit court gives the libelants almost double indemnity.

This case strikingly illustrates the evil consequences of rendering judgments payable in legal tender currency. Hardly anything fluctuates in value more than such judgments. Every day witnesses a change. The judgment debtor gains by depreciation and loses by appreciation.

Doubtless, if the legal tender clauses of the currency acts *are constitutional, such [*270 judgments may be rendered; but there is nothing in those acts which requires that judgments for damages estimated in coin shall be entered otherwise than for coin. On the contrary, we have decided in several cases (*Cheang-Kee* v. *U. S.* 3 Wall. 320, 18 L. ed. 72; *Bronson* v. *Rodes*, 7 Wall. 245, 19 L. ed. 145; *Butler* v. *Horwitz*, 7 Wall. 259, 19 L. ed. 150; *Trebilcock* v. *Wilson*, *ante*, 460) that judgments for coin debts may be rendered payable in coin. In the present case the amount of indemnity was ascertained in gold and, in our judgment, the decree should have been for that amount payable in coin. This would have done exact justice between the parties, and would have been in harmony with the principles of the cases referred to. It would have given indemnity, and not double indemnity.

CITY OF LEXINGTON, *Plff. in Err.*, *v.* JOSEPH C. BUTLER.

(See S. C. 14 Wall. 282-297.)

Municipal bonds and coupons—presumption on purchase—coupons are negotiable paper—prior equities—presumption of validity—statute of limitations as to coupons.

1. Neither municipal bonds nor the coupons annexed, where they are made payable to bearer, or are indorsed to bearer by the original obligees or payees, fall within the prohibition of the 11th section of the judiciary act, as they pass from one holder to another, by delivery, without any formal assignment.
2. The restriction incorporated in the 11th section of the judiciary act, has no application to cases removed into the circuit court from a state court.
3. Where the plaintiff purchased municipal bonds in market overt, the prima facie presumption is that he acquired the bonds before they were due; that he paid a valuable consideration for the same; and that he took them without notice of any defect which would render them invalid.
4. Coupons attached as interest warrants to bonds for the payment of money, lawfully issued by municipal corporations, as well as the bonds to which they are attached, when payable to order and indorsed in blank or made payable to bearer, are transferable by delivery and are subject to the same rules and regulations, so far as respects the title and rights of the holder, as negotiable bills of exchange and promissory notes.
5. Holders of such instruments are protected from the defense of prior equities between the original parties, to the same extent as the holders of any other class of negotiable instruments.
6. When a corporation has power, under any circumstances, to issue negotiable securities, the bona fide holder has a right to presume that they were issued under the circumstances which give the requisite authority.
7. Such bonds are specialties not falling within the statute of limitations respecting simple contracts.
8. A suit upon a coupon is not barred by the statute of limitations, unless the lapse of time is sufficient to also bar a suit upon the bond.

[No. 107.]

Argued Feb. 15, 1872. Decided Mar. 4, 1872.

IN ERROR to the Circuit Court of the United States for the District of Kentucky.

The case is stated by the court.

Mr. **John F. Fisk**, for plaintiff in error:

It appears in the declaration that the City of Lexington and the Lexington & Big Sandy

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NOTE.—*Rights of bona fide purchasers of municipal bonds*—see notes, 37 L. ed. U. S. 145; 41 C. C. A. 6.

Railroad Company were both incorporated by the legislature of Kentucky, and that the bonds sued on were made payable to the order of the company. Therefore, the circuit court would not have had jurisdiction in an action on the bonds by the company against the city.

Section 11, judiciary act, 1789; *Sheldon* v. *Sill*, 8 How. 448; *Bibson* v. *Chew*, 16 Pet. 315.

The want of jurisdiction appears in the declaration and, therefore, it was not necessary to demur or to plead to the jurisdiction.

Wallen v. *Williams*, 7 Cranch, 602; see, *Bk.* v. *Smith*, 11 Wheat. 171.

The court erred in overruling the demurrer to the replication to the first plea, and in giving judgment for Butler.

The bonds were transferred to Butler after process was served in the action of the city against the company, and after the injunction had been granted and the order made that the company deposit the bonds with the receiver of the court, and after the judgment in the action of the company had been reversed and the case redocketed in the court below and the order made that the bonds be redelivered for cancelment; the appellate court, having held that the city had no authority to issue the bonds.

I argue that the facts alleged in the plea, other than that of notice to Butler, which was alone traversed by the replication, were sufficient to bar the action, and that the allegation of notice of the proceedings in court were not necessary.

Murray v. *Ballou*, 1 Johns. Ch. 579; *Watson* v. *Wilson*, 2 Dana, 408; *Debell* v. *Foxworthy*, 9 B. Mon. 230; *Bullet* v. *Stewart*, 3 B. Mon. 115.

If the bonds be negotiable, the coupons partake of the same character. The limitation to actions on bills of exchange, indorsements thereof, or promissory notes placed on the footing of bills of exchange, is five years.

2 R. S. Ky. ch. 63, art. 3, § 2, p. 127.

Messrs. **Stevenson** *&* *Myers*, for defendant in error:

As to the demurrer of the city to the replication:

The plea to which this replication was filed, set forth a state of facts from which it was plain that the bonds were issued without authority of law.

In the face of bonds which recite that they were issued by authority of law, such a plea would be bad unless it also showed that Butler was not an innocent holder for value. The law presumes in favor of the holder: (1) That he took the bonds before they were due; (2) that he paid a valuable consideration for them; and (3) that he took them without notice of any latent defect which would render them invalid.

Bronson v. *R. Co.* 2 Wall. 283, 17 L. ed. 725; *Woods* v. *Lawrence Co.* 1 Black, 386, 17 L. ed. 122; *Alexander* v. *Bank*, 2 Met. (Ky.) 534; *Nelson* v. *Cowing*, 6 Hill (N. Y.), 339.

The plea did not dispute the first two points, to wit: That Butler took the bonds before they were due, and paid a valuable consideration for them. Hence these two presumptions stood in his favor, notwithstanding the plea. It did, however, aver that, at the time he took the bonds, he had notice of the facts set forth in the plea and relied upon as rendering the bonds invalid. It was this averment of notice alone that rendered the plea good.

The replication traversed the averment of notice, and denied all knowledge or notice of any of the facts set out in the plea, at the time the plaintiff took the bonds.

By demurring to the replication, the city confessed Butler's denial of notice to be true, and thereby confessed away an allegation in its plea, which was absolutely necessary to render it good.

As to Butler's demurrer to second plea:

This second plea is an attempt to rely upon the statute of limitations of five years, in force in Kentucky, in actions on simple contracts.

But the obligation to pay this interest is embodied in the bond itself, which is a specialty under seal, and of a higher nature than simple contracts. Therefore, no lapse of time short of fifteen years would bar an action on the bond, that being the period of limitation to actions upon specialties by the Statute of Kentucky.

See, § 1, 2, of art. 3, ch. 63, R. S. of Ky., from which it will appear that actions upon specialties are limited to fifteen years, and actions upon simple contracts to five years. 2 Stant. R. S. of Ky. 126.

That bonds of this character are specialties, and that the coupons attached to them partake of their character and are governed by the same period of limitation as governs the bond itself, was ruled by this court in a recent case.

City v. *Lamson*, 9 Wall. 477, 19 L. ed. 725.

Mr. Justice **Clifford** delivered the opinion of the court:

Subscription to the stock of the Lexington & Big Sandy Railroad Company was made by the corporation defendants to the amount of $150,000, and on the 15th of October, 1853, they, as the municipal corporation of Lexington, issued one hundred and fifty bonds, each for $1,000, sealed with the corporate seal and signed by the mayor and clerk of the corporation. By the terms of the bonds they are payable to the railroad company or order, at the Bank of America, in thirty years from date, with interest semi-annually at the rate of six per centum per annum, also payable at the same bank in the city of New York. Interest warrants were annexed to each bond, whereby the municipal corporation undertook and promised to pay to bearer the several instalments of interest provided in the bonds, as the same matured and became payable.

Pursuant to that arrangement the railroad company became the lawful owners and holders of the whole of those bonds, and they, as such holders and owners, indorsed the bonds in blank and transferred the same to divers persons or corporations as the means of borrowing money to construct their railroad, and the plaintiff in that way, as he alleges, became the purchaser and owner of four of those bonds with the unpaid interest warrants annexed. Payment of the interest being refused, the plaintiff instituted the present suit in the state court to recover the amount of the interest overdue, as more fully appears in the petition or declaration filed in the state court where the suit was commenced. Service was

made and the defendants appeared, and on their motion the cause was continued. Subse- [290*] quently *the plaintiff filed a petition and affidavit for the removal of the cause into the circuit court of the United States, for trial, alleging as the ground of the application that he had reason to believe and did believe that from prejudice and local influence he would not be able to obtain justice in the state court, and the applicant having given bond as required by law the cause was removed into the circuit court of the United States for that district. 14 Stat. at L. 559.

Two special pleas were filed by the defendants in bar of the action:

I. That they were not liable to pay either the bonds or the interest on the same because the conditions precedent to the right of the corporation to subscribe for the stock of the railroad company and to issue the bonds were never fulfilled; that the conditions annexed to the right, as enacted by the legislature, were that the proposition to subscribe should be submitted to the qualified voters of the corporation, and that it should be approved by a majority of the persons voting on the question; that three conditions were embodied in the proposition as submitted to the voters, as specifically set forth in the plea; that the proposition as submitted did not authorize a subscription unless a million of dollars were previously subscribed by other parties; that other parties not having subscribed that amount the authorities of the corporation refused to make the subscription, and that the state court on the application of the railroad company issued a mandamus and compelled the authorities of the corporation to make the subscription and issue the bonds; that the defendants appealed to the court of appeals, where the judgment of the subordinate court was reversed, the court of appeals holding that the corporation had no authority to subscribe for the stock or to issue the bonds until $1,000,000 had been subscribed by other parties; that the action was thereupon redocketed and a rule laid upon the railroad company to redeliver the bonds to the defendants to be canceled; that the railroad [291*] company in the meantime *deposited forty-eight of the bonds with an agent with directions to sell the same for their benefit; that before the bonds were negotiated or transferred they, the defendants, obtained an injunction and an order of court that the same should be deposited with a receiver of the court to be sold, and that the proceeds should be applied under the order of the court, and the defendants allege that the action is still pending and that the order of the court was never obeyed; that the bonds described in the declaration are a portion of those bonds, and that the plaintiff, when the bonds in suit were transferred to him, well knew of the pendency of said actions and of the judgments and orders therein, and that the bonds had been issued under and by virtue of said writ of mandamus.

II. That the cause of action did not accrue to the plaintiff within five years next before the action was commenced.

To the first special plea of the defendant the plaintiff filed a replication, in which he denied that he had any knowledge, notice, or information whatever, before or at the time the bonds were transferred to him, of the pendency of said supposed actions, or any or either of them, or of the supposed judgments or orders in those actions, or that said bonds had been issued under or by virtue of the said writ of mandamus, in manner and form as the defendants have alleged and tendered an issue, and the defendants demurred to the replication and the plaintiffs joined in demurrer.

On the other hand, the plaintiffs demurred to the second plea of the defendants and the defendants joined in demurrer, so that both pleas terminated in an issue of law for the decision of the court; and the court overruled the demurrer of the defendants to the replication of the plaintiff and sustained the demurrer of the plaintiff to the second plea of the defendants, and gave judgment for the plaintiff in the sum of $3,630.06, being the amount of the debt demanded in the declaration. Dissatisfied with the judgment of the court, the defendants sued out a writ of error and removed the cause into this court.

Three errors are assigned by the or- [292 iginal defendants: (1) That the court erred in rendering judgment for the plaintiffs, as the court had no jurisdiction of the case; (2) that the court erred in overruling the demurrer of the defendants to the replication of the plaintiff filed to their first special plea; (3) that the court erred in sustaining the demurrer of the plaintiff to the second plea of the defendants.

Jurisdiction of the case is denied by the defendants, because, as they insist, the suit is founded on a cause of action which could not properly be removed from the state court into the circuit court, where the judgment was rendered, but the objection is not well founded, as will be seen by reference to the 12th section of the judiciary act and the amendatory act under which the removal in this case was made. Where a suit is commenced in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, and the matter in dispute exceeds the sum of $500, exclusive of costs, such citizen of another state, whether he be plaintiff or defendant, if he will make and file in such state court an affidavit stating that he has reason to and does believe that from prejudice or local influence he will not be able to obtain justice in such state court, may, at any time before the final hearing or trial of the suit, file a petition in such state court for the removal of the suit into the next circuit court of the United States, to be held in the district where the suit is pending. Authority to remove such a suit is given by that act to the plaintiff as well as to the defendant, but the further provision is that the party desiring to exercise the privilege, must offer good and sufficient surety that he will enter in such court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and that he will do such other appropriate acts as are required by law to be done for the removal of a suit from a state court into a Federal court. 14 Stat. at L. 559.

*Evidence that the plaintiff com- [*293

plied with those conditions, it is conceded, is exhibited in the record, but the precise objection is that the cause of action is not one cognizable in the circuit court under any circumstances, and the reference is made to the 11th section of the judiciary act to support that proposition. By that section it is provided that no district or circuit court shall have cognizance of any suit to recover the contents of any promissory note, or other chose in action in favor of an assignee, unless such suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange.

All of the bonds were made payable to the order of the railroad company, and each was assigned by a writing on the back of the instrument to bearer by the company, and the payment of principal and interest was guaranteed by the obligees in the bond. Neither bonds of the kind nor the coupons annexed, where they are made payable to bearer or are indorsed to bearer by the original obligees or payees, are regarded as falling within the prohibition of the 11th section of the judiciary act, as they pass from one holder to another by delivery without any formal assignment, as has been held by this court in several cases, to which reference is made for the reasons upon which the rule is founded. *White* v. *Railroad*, 21 How. 576, 16 L. ed. 222; *Thomson* v. *Lee County*, 3 Wall. 331, 18 L. ed. 178.

Suppose, however, the rule is otherwise, still the objection must be overruled, as the suit was not originally commenced in the circuit court. Suits may properly be removed from a state court into the circuit court in cases where the jurisdiction of the circuit court, if the suit had been originally commenced there, could not have been sustained, as the 12th section of the judiciary act does not contain any such restriction as that contained in the 11th section of the act defining the original jurisdiction of the circuit courts. Since the decision in the case of *Bushnell* v. *Kennedy*, 9 Wall. 387, 19 L. ed. 736, all **294*]** *doubt upon the subject is removed, as it is there expressly determined that the restriction incorporated in the 11th section of the judiciary act has no application to cases removed into the circuit court from a state court, and it is quite clear that the same rule must be applied in the construction of the subsequent acts of Congress extending that privilege to other suitors not embraced in the 12th section of the judiciary act. 1 Stat. at L. 79. Such a privilege was extended by the 12th section of the judiciary act only to an alien defendant, and to a defendant, citizen of another state, when sued by a citizen of the state in which the suit is brought, but the privilege was much enlarged by subsequent acts, and the act in question extends it to a plaintiff as well as to a defendant, where the controversy is between a citizen of the state where the suit is brought and a citizen of another state, if the matter in dispute exceeds the sum of $500, exclusive of costs, which shows that the jurisdiction of the circuit court in this case was beyond controversy.

III. Express authority to subscribe for the stock of the railroad company, and to issue the bonds in payment for the same, was conferred upon the corporation defendants by the 28th section of the act incorporating the railroad company, subject to the conditions therein prescribed, that the proposition to subscribe for the stock should be submitted to the qualified voters of the corporation, and the same section points out the steps to be pursued by the proper authorities to take the sense of the voters upon the subject. Authority was conferred by the legislative act upon the corporation defendants to issue bonds to the amount of $150,000, and the plea alleges that, by virtue thereof, they issued one hundred and fifty bonds, each of $1,000, payable in thirty years from date, with coupons or interest warrants annexed providing for the payment of the interest semi-annually at the rate of six per centum per annum. They bear the corporate seal *of the city and are [*295 signed by the mayor, and are countersigned by the clerk, each bond containing on its face a certificate that it was issued in part payment of the subscription of $150,000, by the city of Lexington, to the capital stock of the railroad company, by order of the mayor and council of said city, as authorized by a vote of the people taken in pursuance of the before-mentioned act of the general assembly of the state. Sess. Acts (Ky.), 1852, p. 786. Issued by authority of law, as the bonds purport to have been, and being, by the regular indorsement thereof, made payable to bearer, they lawfully circulated from holder to holder by delivery, and the plaintiff having purchased four of the number in market overt, became the lawful indorsee and holder of the same, together with the coupons annexed, and the interest secured by the coupons being unpaid he instituted the present suit to recover the amount. Evidently, the *prima facie* presumption in such a case is that the holder acquired the bonds before they were due, that he paid a valuable consideration for the same, and that he took them without notice of any defect which would render the instruments invalid. Impliedly the plea admits that the bonds were purchased before they were due, and that the plaintiff paid a valuable consideration for the same; but the defendants allege that he took the same with notice of the irregularities in issuing the same, as set forth in the plea, and they rely on those allegations as a complete defense to the action, but the replication traversed the averment of the notice and tendered an issue to the country, and the defendants, by demurring to the replication, confessed that the allegations of the plea in that behalf were untrue, and that the plaintiff was the bona fide holder of the bonds without notice of the alleged defects in the inception of the instruments.

Coupons attached as interest warrants to bonds for the payment of money, lawfully issued by municipal corporations, as well as the bonds to which they are attached, when they are payable to order and are indorsed in blank or are *made payable to bearer, are [*296 transferable by delivery and are subject to the same rules and regulations, so far as respects the title and rights of the holder, as negotiable bills of exchange and promissory notes. Holders of such instruments, if the same are indorsed in blank or are payable to bearer, are as effectually shielded from the defense of

prior equities between the original parties, if unknown to them at the time of the transfer, as the holders of any other class of negotiable instruments. *Moran* v. *Miami Co.* 2 Black, 722, 17 L. ed. 342; *Mercer Co.* v. *Hackett*, 1 Wall. 83, 17 L. ed. 548.

Admitted, as it is, that the corporation defendants possessed the power to subscribe for the stock and to issue the bonds, it is clear that the plaintiff is entitled to recover upon the merits, as the repeated decisions of this court have established the rule that when a corporation has power under any circumstances to issue negotiable securities the bona fide holder has a right to presume that they were issued under the circumstances which give the requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper. *Gelpcke* v. *Dubuque*, 1 Wall. 203, 17 L. ed. 525; *Knox Co.* v. *Aspinwall*, 21 How. 539, 16 L. ed. 208; *Supervisors* v. *Schenck*, 5 Wall. 784, 18 L. ed. 559; *Bissell* v. *Jeffersonville*, 24 How. 299, 16 L. ed. 671.

IV. Actions on simple contracts are barred by the limitation law of that state unless commenced within five years next after the cause of action accrued, and the second plea was filed as a bar to the action under that section of the statute of limitations, but the bonds described in the declaration are specialties not falling within that section of the statute. On the contrary, suits upon bonds may be maintained if commenced at any time within fifteen years next after the cause of action accrued, and it is well-settled law that a suit upon a coupon is not barred by the statute of limitations unless the lapse of time is sufficient to bar also a suit upon the bond, as the coupon, if in the usual form, is but a repetition of the contract in respect to **297***] the interest, for *the period of time therein mentioned, which the bond makes upon the same subject, being given for interest thereafter to become due upon the bond, which interest is parcel of the bond and partakes of its nature and is not barred by lapse of time except for the same period as would bar a suit on the bond to which it was attached. 2 R. S. (Ky.) 126, 127; *The City* v. *Lamson*, 9 Wall. 483, 19 L. ed. 729. Coupons are substantially but copies of the stipulation in the body of the bond in respect to the interest, and are so attached to the bond that they may be cut off by the holder as matter of convenience in collecting the interest, or to enable him to realize the interest due or to become due by negotiating the same to bearer in business transactions without the trouble of presenting the bond every time an instalment of interest falls due.

For these reasons, we are of the opinion that the ruling of the circuit court was correct.

Judgment affirmed.

336*] *A. W. NORCROSS, F. W. Perkins, and R. F. Hersey, *Libelants, Appts.*,

v.

THE STEAMBOAT LAURA, her Tackle, etc., Louis Frigerio *et al.*, *Claimants.*

(See S. C. *"The Laura,"* 14 Wall. 336-345.)

Vessel, when derelict — lost in attempting to save her.

1. Where a master and crew abandoned the vessel for the safety of their lives, and her condition was one of great peril, another vessel had a right to interfere to save her.

2. If the imperiled vessel is lost in the attempt to save her, the vessel attempting to save her is not liable for such loss, if the master of the latter vessel acted in good faith and with reasonable judgment and skill.

[No. 120.]

Argued Feb. 15, 1872. Decided Mar. 4, 1872.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The appellants filed in the district court for the eastern district of Louisiana, a libel *in rem* against the steamboat Laura, and *in personam* against Louis Frigerio, her owner, in a cause of damage for a maritime tort, whereby the steamboat W. B. Savory and freight, the property of the libelants, became a total loss.

A claim for the vessel was filed by Louis Frigerio, who also interposed an answer to the libel.

Testimony was taken on the part of the libelants and claimants; and June 15, 1866, the district court entered a decree in favor of the libelants for the sum of $4,000, with interest and costs, against the steamer Laura and against Louis J. Frigerio, her owner, *in personam*, and rendered judgment for that amount on the stipulation substituted for the vessel.

The claimants and sureties thereupon appealed to the circuit court, when additional testimony was taken on behalf of the claimants. May 20, 1870, the circuit judge entered a decree reversing the decree of the district court and directing that the libel be dismissed, and that the libelants pay costs in both courts.

Messrs. **J. Hubley Ashton** and *E. C. Billings* for appellants.

Mr. **Thomas J. Durant** for appellees.

Mr. Justice **Miller** delivered the opinion of the court:

The appellants, who were libelants in the district court for the eastern district of Louisiana, brought their suit in admiralty against the steamboat Laura, and against her owner, Louis Frigerio. The libel alleges that they were the owners of the steamboat W. B. Savory, and that when said vessel was lying at anchor in Lake Pontchartrain, near Lake Port, and within half a mile of the shore; and when she was neither abandoned nor in need of assistance, the Laura, under the direction and at the instance of said Frigerio, did wrongfully take her from her anchorage and tow her out into the lake, and then sink her.

Frigerio answered for himself, and, as claimant of the Laura, sets up that the Savory was in a sinking condition, abandoned by her officers and crew, and that in an effort to save her by towing her to a place of safety, she capsized and sank; that this result was without fault on his part or of the officers of the Laura, but was the result of a severe gale and of the crippled condition of the Savory.

Some attempt is made to show that the Laura and the Savory were rival vessels in the same trade, and that the result was due to the wish of the owner or the master of the Laura to remove a competitor in business. But of this there is nothing but suspicion. On the contrary, there is strong evidence that the master of the Laura, who controlled her entirely in the matter, though her owner was on board, was governed by a sincere wish to afford all the relief

he could to the Savory and her passengers and crew.

It is also argued that the master showed a culpable want of skill and judgment in attempting to carry the Laura across the lake instead of trying to get her into the mouth of the old or new canal within a mile or two of where she was abandoned. But though there is some apparent conflict of testimony on this point, we are satisfied that the master of the Laura was justified in assuming that in such a gale as was then blowing, it was more dangerous to attempt to land her in either canal than to tow her across the lake to calmer water and a safe harbor on the other side.

The only question of any doubt in the case arises on his right to interfere at all to save the **343*]** vessel. The libelants *deny this right on two grounds: (1) That she was safe where she was; and (2) that the master of the Laura was distinctly informed by the master of the Savory that he was going ashore to get a tug to relieve her.

1. In regard to the condition of the vessel at the time the Laura took her in tow, we are of opinion that it justified the belief that she would sink in a short time if left alone.

The Savory was on her way on Friday night from Tangipahoa river to the railroad depot, when a severe gale came up and compelled her to anchor a mile or two from the shore and some five or six miles from the railroad landing. She had in tow some rafts of timber, from which she had to cut loose to save herself. About three o'clock on the morning of Saturday, the gale became very strong.

In this condition she was at anchor, but with such danger of sinking that the utmost anxiety prevailed among her officers, crew, and the few passengers on board, to get off her. The master had his life-boat made ready, and had driven spikes around the edges of a bale of cotton and attached ropes to these for persons in the water to hold to and swim or float to shore; and he had shown, in conversation and in various other ways, his extreme anxiety for his own personal safety and that of others on board. He had hoisted the flag, union down; and when about ten o'clock A. M. the Laura came in sight, he blew from his whistle signals of distress.

When that vessel came within hail and asked what was wanted, the master replied: "Save my passengers and crew" and jumped immediately on board, being the third or fourth person who did so, the clerk of the Savory being the first. On the way from the Savory to the landing, he was heard to remark in reference to the vessel, "there are $5,000 gone."

In the face of all this, he swears that the Savory was left by him in a condition of safety. He also swears that he also left on board the Savory five men, when the pilot and several other persons swear that not a soul was left, and that they saw every one leave the vessel.

The pilot says that the master did order him and two or three men to remain; but that none of them did so. The master also denies that he knew the union was down; but it is proved that he ordered it to be so placed. He swears he gave no orders for signals of distress; but it is proved that he did. He swore that he had a permit from the custom-house to carry passengers. It is shown that he had none. In short, he is so fully contradicted, and appears to have been so overcome with fear at the time of leaving the vessel, that but little credit can be given to any of his statements.

After the Laura had landed her own passenbers and freight at the railroad depot, and those of the Savory, which occupied some three hours from the time she left the Savory, she started on her return voyage, and the master said to Frigerio, the owner, who had now come on board, that he felt it to be his duty to go and see if he could save the Savory.

To this Frigerio replied that he was the master and should do his duty. On arriving at the vessel, they found that her wheel-house had been considerably torn by contact with the Laura in taking off the passengers and crew; that her chimneys were loosened and careened, and that, though not leaking, the waves were breaking over her decks and some of the water getting into the hold. In short, we think the master was justified in concluding that her condition was one of great peril, and that she would soon sink unless relieved.

2. It is sworn by the master of the Savory that on his way to the railroad landing he told the master of the Laura that he was going ashore to get a tug to bring his boat in. The master of the Laura swears that the master of the Savory did say that he was going to try to get a tug to bring the Savory out, to which he replied that he could not get a tug in the whole basin that would come and bring the boat in, as the weather was too rough.

This conversation evidently had reference to the tugs in the basin at the mouth of the canal, and the efforts of the master to get a tug in New Orleans were not in pursuance of this conversation, for he expressly says that he saw the Laura start with the Savory before he left the shore for New Orleans. This effort was to bring her back from such a place as the Laura might have carried her to, and shows that he did not think it probable she could be navigated without such assistance.

In the case of *Esperance*, 1 Dod. 46, the claimants received a letter from the master, who, with the crew, had left the vessel, advising them of the fact, and immediately sent proper persons to take charge of her and her cargo. But before they arrived other salvors had taken the vessel and finally brought her in and libeled her. Sir W. Scott said it was a clear case of derelict; there was, first, the chance of the party sent by *the claimants not finding her; and, sec- [*344 ondly, that if found, she would be a complete wreck.

In the case of the brig *John Gilpin*, Olcott, 78, Judge Betts, in considering a question of derelict somewhat analogous, said that "she (the vessel) was apparently abandoned, and if her crew might have been absent to procure assistance from other vessels and more force, their ability to return to the wreck, or the chance of affording any aid after the lapse of a few hours, must, in the then condition of things, have been most dubious contingencies."

In *The Coromandel*, 1 Swab. 208, Dr. Lushington, in speaking of a case very similar to this, remarks: "It may be perfectly true that the master and these fifteen men, when they had got on board the Young Frederick, and were sailing away to Yarmouth, intended, if possible, to employ steamers to go and rescue the vessel, which was at no great distance. But is not that

the case every day? A master and crew abandon a vessel for the safety of their lives; he does not contemplate returning to use his own exertions, but the master hardly ever abandons a vessel on the coast without the intention, if he can obtain assistance, to save his vessel. That does not take away from the legal character of derelict." This language applies, with a precision remarkable, to the case before us. And the casual observation of the master abandoning the vessel in great fear of his own immediate personal safety, that he designed to get a tug to bring his boat in, is of the class of intentions referred to by Dr. Lushington above, and that he made no response to the reply of the captain of the Laura, that he could get no tug to try it in such rough weather, shows the truth of Dr. Lushington's remarks.

We think that the master of the Laura was authorized to conclude that the Savory was in a condition of immediate peril, and abandoned so far as any timely effort to save her was contemplated; that he acted in good faith, and with reasonable judgment and skill, and that, there- **345*]** fore, the libel *of appellants was properly dismissed by the circuit court.

The decree is, accordingly, affirmed.

UNITED STATES, *Plff. in Err.*,
v.
ONE HUNDRED BARRELS DISTILLED SPIRITS, John Henderson, *Claimant.*

(See S. C. *"Henderson's Distilled Spirits,"* 14 Wall. 44-69.)

Jury, how waived — forfeiture — payment of duties, when no defense to sale of the property — removal to bonded warehouse — inspection of distilled spirits.

1. Parties may enter into a stipulation waiving a jury, and submit the case to the court upon an agreed statement of facts, although there is no legislative provision for waiving a jury.
2. Where a forfeiture is made absolute by statute, the decree of condemnation when entered relates back to and takes date from the time of the commission of the wrongful acts, and not from the date of the decree.
3. Subsequent payment of the duties is no defense to an information for a forfeiture founded upon antecedent wrongful acts, in cases where the forfeiture is made absolute by the act of Congress.
4. It is not in the power of the offender to defeat the forfeiture by any subsequent transfer of the property, even to a bona fide purchaser for value, without notice of the wrongful acts committed by the former owner.
5. A removal of spirits from the place where distilled, to a bonded warehouse, to defraud the United States of the tax, is illegal, and the spirits removed are forfeited.
6. All distilled spirits before being removed from the distillery are required to be inspected and gauged, and penalties are imposed in case they are removed without a compliance with those requirements.

[No. 104.]

Argued Feb. 9, 1872. Decided Mar. 18, 1872.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

The case is stated by the court.

Messrs. **B. H. Bristow,** *Solicitor Gen.*, and **C. H. Hill,** *Asst. Atty-Gen.*, for plaintiff in error.

Messrs. **J. A. Garfield** and *L. A. Sheldon* for defendant in error.

Mr. Justice **Clifford** delivered the opinion of the court:

Distilled spirits, upon which no tax had been paid according to law were, by the 32d section of the act of the 13th of July, 1866, subject to a tax of $2 on each and every proof gallon, to be paid by the distiller, owner, or any person having possession thereof, and the same section provided that the tax shall be a lien on the spirits distilled, and on the distillery used for distilling the same, with the stills, vessels, fixtures, and tools therein, etc. 14 Stat. at L. 157. Express provision is also made by the 14th section of that act, that all goods or commodities, for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities, in case they shall be removed or shall be deposited or concealed in any place with intent to defraud the United States of such tax, or any part thereof, shall be forfeited. 14 Stat. at L. 151. Certain alterations are made in each of those provisions by the 14th section of the act of the 2d of March, 1867, but the alterations are not material to the present case, as the same section provides that the new provision shall not exclude any other remedy or proceeding provided by law, which, beyond all doubt, leaves in full operation the 14th section of the prior act. 14 Stat. at L. 481.

Regular seizure of the one hundred barrels of distilled spirits in question was made on the first day of September, 1868, by *the col- [***53** lector of the district, as alleged in the information, and the record shows that the information was duly filed by the district attorney on the 7th of the same month, in the district court of the United States for the district where the seizure was made. Being a seizure on land, the claimant was entitled to a trial by jury, but he appeared and the parties entered into a stipulation waiving a jury and submitted the case to the court upon an agreed statement of facts, as they had a right to do, even before any legislative provision was enacted for waiving a jury by a written stipulation. *Suydam* v. *Williamson*, 20 How. 434, 15 L. ed. 980; *United States* v. *Eliason*, 16 Pet. 291; *Stimpson* v. *Railroad Co.* 10 How. 329; *Campbell* v. *Boyreau*, 21 How. 224, 16 L. ed. 96. Pursuant to that stipulation the parties were heard, and the district court dismissed the information and rendered judgment for the respondent. Exceptions were duly taken by the district attorney and he sued out a writ of error and removed the cause into the circuit court, where the judgment rendered by the district court was affirmed, and the United States thereupon sued out a writ of error to the circuit court and removed the cause into this court for re-examination.

Seizure of the spirits was made, as before explained, by the collector of internal revenue for the district, and it is alleged in the information that the collector still holds the same in his possession and custody as forfeited to the United States, under the provisions in the act to amend the existing laws relating to internal revenue. Six articles, each charging a forfeiture of the spirits in question, are contained in the information, but in the view of the case taken by the court it will only be necessary to

examine the fourth in the series, which is as follows:

That the said one hundred barrels of spirits were manufactured at some place within the United States to said attorney unknown, and between the first day of September, 1866, and the date of said seizure, by some person or persons to said attorney also unknown, and were then and there goods and commodities on which 54*] a tax was then and there *imposed by the provisions of law, and the same were removed from the place where distilled, with intent to defraud the United States of such tax, the same being then and there unpaid, contrary to the form of the statutes of the said United States in such case made and provided.

Seasonable claim in due form was made for the spirits by the defendant, and he appeared and filed an answer, denying all the material allegations of the information, and tendered an issue to the country, which was joined by the United States. Apart from that, he also answered each article separately, and in respect to the fourth article he denied that the spirits in question were removed from the place where distilled with intent to defraud the United States of any tax then and there imposed, as alleged in the information.

Evidently the answer was precisely equivalent to the general issue, and made it incumbent upon the United States to prove the charge as alleged, and the effect of the stipulation submitting the case to the court was to substitute the court for the jury as the tribunal to determine the issue of fact presented in the pleadings. Had the stipulation contained nothing further, it is clear that the evidence on the one side and the other must have been introduced to the court substantially as provided in the recent act of Congress upon that subject, but the parties went further and stipulated in writing as to what the facts in the case were, in which stipulation it is agreed that the fourth article in the information is true, and it is insisted by the United States that that stipulation is equivalent to a confession of guilt, and that it entitles the United States to judgment; and the court would certainly be of the same opinion if that admission was unaccompanied by what follows in the stipulation in the same connection.

Standing alone, it is an admission that the charge as contained in the 4th article of the information is true, but it must be read in connection with what follows as a part of the same stipulation, and the question is: Whether the qualification annexed to the admission that the 4th article of the information is true, changes 55*] the aspect of the evidence *and entitles the defendant to the judgment rendered in his favor by the subordinate courts.

Appended to the admission that the 4th article in the information is true, is the statement that the defendant, subsequently to the removal of the spirits from the distillery, and before their removal from the bonded warehouse, and before the seizure, "paid the tax on said spirits, and that he was a bona fide and innocent purchaser;" and the question is, whether that statement, appended as it is to the admission, qualifies the language of the admission in such a way that the admission does not establish the truth of the charge contained in the 4th article of the information.

Due weight must also be given to certain other facts stated in the stipulation in determining the question whether the judgment for the defendant was correct or incorrect. He was not the purchaser from the United States, nor have the United States ever sold the spirits in question, but the agreed statement also shows that he purchased the spirits while they were in a bonded warehouse in New Orleans, after the same had been placed therein by the owner of the distillery at which the same were distilled; that he paid the tax due on the spirits to the collector, and removed the same from the warehouse according to law, without any knowledge on his part, at any time before the seizure, of any fraud, either actual or alleged, on the part of the distiller; that the spirits were manufactured and distilled at a certain distillery in that district, in the months of May and June, prior to the seizure, by the person therein named, by the use and means of certain boilers, stills, and other vessels of which the distiller was superintendent and owner, and the parties agree to the effect that all the acts averred in the 5th and 6th articles of the information as having been done in respect to the spirits in question by some person unknown are true, when the averments are applied to the person named in the agreed statement as the manufacturer and distiller of the said spirits.

Four material ingredients are involved in the charge contained in the 4th article of the information: (1) That the *spirits were man- [*56 ufactured at some place within the United States, between the day therein named and the date of the seizure; (2) that the spirits were then and there goods and commodities on which a tax was imposed by some provision of law then in force; (3) that the spirits were removed from the place where distilled with intent to defraud the United States of such tax; (4) that the tax was unpaid at the time the spirits were so removed, with such fraudulent intent.

Beyond all doubt the admission that the 4th article is true is a conclusive admission that each and every one of the well-pleaded allegations which it contains are also true, which, standing alone, would certainly be a confession on the record that the property is subject to forfeiture, unless it can be shown that the 4th article in the information is insufficient in law to warrant a judgment in favor of the United States.

Viewed in that light, as the admission must be, the next question is whether the statement appended to the admission is sufficient to save the property from condemnation in the possession of the defendant. Properly analyzed the statement appended to the admission contains two averments in avoidance of the consequences which would otherwise follow from the admitted acts of the antecedent owner: (1) That the defendant paid the tax subsequent to the removal of the spirits from the distillery and before they were removed from the bonded warehouse and before the seizure by the collector; (2) that he was a bona fide and innocent purchaser, without notice that the spirits were forfeited as alleged in that article of the information.

Where the forfeiture is made absolute by statute the decree of condemnation when entered relates back to the time of the commission of the wrongful acts, and takes date from the wrongful acts and not from the date of the sentence or decree. *Roberts* v. *Witherall*, 1 Salk. 223; *Robert* v. *Witherhead*, 12 Mod. 92; *U. S.* v. *Bags of Coffee*, 8 Cranch, 398; *U. S.* v. *The Mars*, 8 Cranch, 417; *Gelston* v. *Hoyt*, 3 Wheat. 311; *Caldwell* v. *U. S.* 8 How. 381; *U. S.* v. *Grundy*, 3 Cranch, 338; *Wood* v. *U. S.* 16 Pet. 342; *Clifton* v. *U. S.* 4 How. 248. Subsequent payment **57*]** of the duties, therefore, is *no defense to an information for a forfeiture founded upon antecedent wrongful acts, as the effect of such wrongful acts, where the forfeiture is made absolute by statute, is to devest the owner of all property in the goods seized and to vest the title to the same in the United States, in case a prosecution ensues, and a decree of condemnation follows, as the decree of condemnation when entered by a court of competent jurisdiction relates back to the date of the wrongful acts as alleged and proved at the trial or in the hearing of the cause. *Fontaine* v. *Insurance Co.* 11 Johns. 293; *Kennedy* v. *Strong*, 14 Johns. 128. Repeated decisions of this court have established that rule in all cases where the forfeiture is made absolute by the act of Congress, and it necessarily follows that neither the subsequent payment of the duties nor the fact that the defendant is an innocent purchaser, without notice of the wrongful acts of the antecedent owner, constitutes any defense to the charge contained in the 4th article of the information. *Wilkins* v. *Despard*, 5 T. R. 112. Many such adjudged cases are to be found in the reported decisions of this court, and it must be admitted that they establish the rule beyond all doubt, that the forfeiture becomes absolute at the commission of the prohibited acts, and that the title from that moment vests in the United States in all cases where the statute in terms denounces the forfeiture of the property as a penalty for a violation of law, without giving any alternative remedy, or prescribing any substitute for the forfeiture, or allowing any exceptions to its enforcement, or employing in the enactment any language showing a different intent; and that in all such cases it is not in the power of the offender or former owner to defeat the forfeiture by any subsequent transfer of the property, even to a bona fide purchaser for value, without notice of the wrongful acts done and committed by the former owner. Established as that rule has been by the decisions of this court for more than half a century, it is insisted that it should be applied in the case before the court, and it is **58*]** *difficult to see any reason for rejecting the proposition, as the words of the act under which the 4th article of the information is drawn, denounce the forfeiture of the property in terms as absolute and unqualified as any which can be chosen in our language. *U. S.* v. *Bags of Coffee*, 8 Cranch, 398; *U. S.* v. *Grundy*, 3 Cranch, 338. Goods and commodities falling within that provision, it is enacted, shall be forfeited in case they shall be removed with intent to defraud the United States of such tax, or any part thereof, and the language denouncing the forfeiture is explicit and absolute and without any qualification whatever. Compare the language of the act of Congress with the language employed in the 4th article of the information and it will be seen that the charge against the spirits is preferred in the same language as that employed in the act of Congress denouncing the forfeiture, as the 4th article alleges that the spirits in question were then and there goods and commodities on which a tax was then and there imposed by the provisions of law, and that the same were removed from the place where distilled with intent to defraud the United States of such tax, the same being then and there unpaid; and the admission set forth in the agreed statement is that the 4th article of the information is true, which is a direct confession that the prohibited acts charged in that article were done and committed at the time and place and by the person and in the manner therein alleged.

Concede all that and it is clear that the United States are entitled to judgment, if it be true that the forfeiture relates back to the date of the wrongful acts charged in the information. Escape from that conclusion, it would seem, is impossible, if it be admitted that the 4th article of the information sets forth a good cause of forfeiture, and it is clear that the affirmative of that proposition must be admitted, unless it be affirmed that the 14th section of the act of Congress, on which it is drawn, does not provide for such a forfeiture, under the circumstances therein described. *Such a propo- [*59 sition, whether so intended or not, is precisely equivalent to a demurrer to the 4th article of the information or to a motion in arrest of judgment after verdict; and if so, then it follows, as shown by all the authorities upon the subject, that everything well pleaded in the 4th article of the information must be taken as true, which is the exact admission contained in the agreed statement. Nothing can be more certain in legal investigation than that the decree must have been for the United States if the claimant had demurred to the 4th article of the information, unless it can be held that the act of Congress denouncing the forfeiture is unconstitutional, as the article in question embodies the exact language of that provision, and it is equally certain that a motion in arrest of judgment would also have been unavailing for the same reason, and also because the validity of the act of Congress is beyond all doubt.

Congress possesses the power to levy taxes, duties, imposts, and excises, and it is as clear that Congress may enact penalties and forfeitures for the violation of such laws as it is that Congress may levy the taxes or duties or pass laws for their collection, safe keeping, and disbursement.

Section 14, it is admitted, is broad enough in its terms to embrace the removal of spirits, on which there is a tax, from the place where distilled, with intent to defraud the United States of the tax, but it is suggested that another section of the same act requires that spirits, when removed from the place where distilled, shall be deposited in a bonded warehouse, and that the penalty imposed for a violation of that requirement is different from the penalty imposed by the 14th section of the act, and it must be admitted that the suggestion is correct, but it is impossible to see in what respect the suggestion tends to support the views of the defendant in the present case.

Suggestion is also made that it is not an illegal act to remove spirits from the place where

distilled to a bonded warehouse, and that also is true, but the corollary attempted to be drawn from the two suggestions is a *non sequitur*, and 60*] *cannot be sustained, which is that the charge that the spirits were removed from the place where distilled, with intent to defraud the United States, cannot be true if it appears that the spirits were removed from the distillery to a bonded warehouse, as the removal of spirits from the place where distilled to a bonded warehouse is authorized by law. Undoubtedly such a removal of spirits from the place where distilled, to a bonded warehouse, if made to secure the payment of the tax to the government, is a lawful act, but it is equally clear, if the removal is made even to a bonded warehouse to defraud the United States of the tax, that the act of removal is illegal, and that the spirits removed are forfeited.

Both of these suggestions, however, are founded upon the assumed theory that the record shows that the only removal of the spirits alleged or proved was a removal from the place where distilled to a bonded warehouse, but that assumption is wholly unsupported either by the charge contained in the 4th article of the information or by the admission that the 4th article is true, as exhibited in the agreed statement. On the contrary, the 4th article of the information alleges that the spirits were removed from the place where distilled, with intent to defraud the United States of the tax, without any specification as to the place to which the same were removed, or where they were deposited; nor is that omission any objection to the form of the charge, as that article of the information follows substantially the language of the 14th section of the act of Congress on which it is drawn.

Tested by the charge, as made in that article, and the admission applicable to it, as exhibited in the agreed statement, as the question must be, and it is clear that the spirits may have been removed elsewhere than to a bonded warehouse before they were placed in that depository by the owner and distiller. Such certainly would be the legal conclusion if the defendant had demurred to the information, and the court is of the opinion that the same conclusion must follow from the admission that the 4th article of 61*] the *information is true, as the admission is expressed in the agreed statement.

Henderson, the claimant, purchased the spirits while they were in the bonded warehouse and after they had been deposited therein by the owner of the distillery where the spirits were manufactured, and having made the purchase without notice that any fraud had been practised by the distiller, and having paid the tax before the spirits were removed from the bonded warehouse, it is insisted by his counsel, in every possible form of argument, that his title is perfect and that the spirits are not liable to forfeiture; but the decisive answer to all that is, the one already given, that the forfeiture relates back to the unlawful or wrongful acts of the antecedent owner, and that he cannot by any subsequent transfer of the property defeat the title of the United States, as settled by a series of decisions which, if traced to their source, have their origin in the early history of the common law. 4 Bac. Abr. by Bouv. 346; Plow. 488, *b*; Co. Litt. 25; 1 Chitt. Cr. L. 727.

Rules of decision of such long standing and so necessary to protect the public revenue cannot be changed, nor can it be admitted that the charge contained in the 4th article of the information may not be sustained, even if it appears that the only removal of the spirits made by the distiller was to the bonded warehouse, as assumed in argument by the defendant. *Clark* v. *Insurance Co.* 1 Story, 109.

Unquestionably, a removal of distilled spirits from the place where distilled to such a depository, if made to secure the payment of the tax, is a lawful act, but it is equally clear that if it is made with intent to defraud the United States of the tax it is an unlawful act, and subjects the spirits to forfeiture.

Grant that the removal was rightful, as assumed by the circuit judge, and the conclusion which he adopted would follow, but it cannot be assumed in this case that the removal was *rightful, as the charge in the 4th article [*62 of the information is that it was made with intent to defraud the United States of the tax, and the admission in the agreed statement is that the 4th article of the information is true, which shows as fully as it can be shown that the United States are entitled to a decree of condemnation, unless it can be established that the fraudulent intent there charged could not under any circumstances be carried into effect by such a removal as that alleged in the 4th article of the information and admitted in the agreed statement.

Suppose it be true, as assumed in argument, that the only attempt made to execute the unlawful intent charged was the removal of the spirits from the place where distilled, to the bonded warehouse, still it would by no means necessarily follow, as is supposed, that the removal was a legal act; as the removal, though to a bonded warehouse, may, nevertheless, have been made for the express purpose to defraud the United States of the tax, and if so, then the removal was indubitably an illegal act, and the spirits are properly subject to forfeiture as charged in the information.

Cases have arisen, as the records of this court show, where the removal to the bonded warehouse was made as a part of a preconcerted arrangement with other parties to avoid the payment of the tax, and it would not be difficult to suppose other cases where the removal of the spirits from the place where distilled to the bonded warehouse would be a necessary part of a well-devised scheme to defraud the United States by delivering the spirits to purchasers without the payment of the duties. *Distilled Spirits, ante*, 170.

Inspectors of spirits are required to be appointed by the Secretary of the Treasury, and all distilled spirits, before being removed from the distillery, are required to be inspected and gauged by a general inspector, whose duty it is to mark the vessels or packages in the manner required by law, and penalties are prescribed and imposed in case the *spirits are re- [*63 moved from the place where distilled without a compliance with those requirements. 14 Stat. at L. 156; 14 Stat. at L. 481.

Persons distilling spirits, and the owners of stills used for the purpose of distilling spirits, are required to keep books and to make certain entries therein, and to render certain accounts to assessors; and if they do not comply with

those requirements, they, also, are subject to certain penalties for the neglect. 14 Stat. at L. 157.

Bonded warehouses are established for the storage of spirits to be placed therein to secure the payment of the duties imposed by law, and the provision is that if any person shall ship, transport or remove any spirits under any other than the proper mark or brand, known to the trade as designating the kind and quality of the contents of the casks or packages containing the same, or cause the same to be done, he shall forfeit the same, and shall, on conviction thereof, be subject to and pay a fine of $500. 14 Stat. at L. 156.

Cautious merchants, in consequence of those regulations, and many others equally stringent, are often disinclined to purchase spirits at the place where distilled lest they should be subject to forfeiture, if equally favorable terms are offered by other parties who have made deposits in the bonded warehouses. Distillers, therefore, intending to evade the payment of the duties may find it a most effectual way to accomplish their unlawful designs, in case they can, by bribery or otherwise, secure the co-operation of the inspector, storekeeper or collector, to remove the spirits to a bonded warehouse, as spirits placed in that depository are less subject to suspicion and sell more readily than before they were removed from the place where distilled.

Spirits placed in such a depository sell more readily than before they were removed, because they are regarded as less likely to be subject to forfeiture than while they remained in the distillery; but it is clear that the theory that an intent to defraud the United States cannot be predicated of a removal of spirits from the place where distilled to a 64*] bonded warehouse, *is an erroneous theory, as it is manifest that the dishonest distiller, if he can obtain the assistance of the inspector, storekeeper or collector, as a partner or agent, will find such a removal an essential step in almost every scheme which he may devise to accomplish his wicked designs.

Viewed in any light, therefore, the court is of the opinion that the judgment of the circuit court is erroneous.

Questions are also presented in the record under the 5th and 6th articles of the information, but the court having come to the conclusion that the United States are entitled to judgment upon the 4th article of the information, do not deem it necessary to express any opinion as to the other questions.

Judgment reversed, and the cause remanded, with instructions to render judgment for the United States.

Mr. Justice **Field**, dissenting:

I am unable to concur in the judgment of the majority of the court, and will briefly state the grounds of my dissent.

The proceeding is an information for the forfeiture of one hundred barrels of distilled spirits. The forfeiture is not decreed, on the ground that the government has not received the taxes levied on the spirits, for it is admitted that these have been paid; nor on the ground that the claimant has committed or participated in the commission of any fraud in the acquisition of the property, for it is conceded that he purchased the spirits in good faith without knowledge of any defect or taint in his vendor's title. Nor is the forfeiture inflicted for any violation of law, in act or deed, on the part of the distiller of whom the claimant purchased. He only removed the spirits from the place of their manufacture to the bonded warehouse of the United States, and that was a lawful, and not an unlawful act. The forfeiture is decreed because the former owner, in removing the spirits to the bonded warehouse, intended at the time to defraud the government *of the tax thereon— [*65 an intent, however, which he never attempted to carry into execution.

We thus have this singular and, I venture to say, unprecedented fact, in the history of judicial decisions in this country, that the property of a citizen honestly acquired, without suspicion of wrong in his vendor, is forfeited and taken from him because such vendor, at some period whilst owning the property, conceived the intent to defraud the government of the tax thereon, although such intent was never developed in action, and for the execution of which no step was ever taken.

The presumption is that the majority of the court are right in this decision, and that the minority are mistaken in their views of the law governing the case. It is, therefore, with diffidence that I venture to dissent from their judgment, a diffidence which is greatly augmented by the declaration of the majority, that it is impossible to escape the conclusion which they have reached.

But for this conclusion I should have supposed that it would have been impossible, at this day and in this age, and in our country, to obtain a decree confiscating the property of a citizen for anything which a former owner of the property may have intended to do, but never did, with respect to it. I should have said that the intentions of the mind lying dormant in the brain, had long since ceased to be subjects for which legislatures prescribed punishment. Against threatened injuries to person or property remedies are provided; and this, it is believed, is the extent to which legislation can legitimately go with respect to intentions, however fraudulent or wicked, so long as they remain undeveloped by action. Penalties and forfeitures are not inflicted at this day in any civilized and free government for the motives with which lawful acts are done.

The inability to ascertain, with certainty, the intentions of a party, except as they are exhibited in his acts, and the injustice which must necessarily follow any attempt to inflict punishment for them, except as they are thus exhibited, have hitherto, in this country, prevented any legislation of *that char- [*66 acter, unless such legislation is found in the present Revenue Act of Congress. The injustice in its operation of such legislation, assuming such legislation to exist, could not be more strikingly illustrated than in the present case. But I am not prepared to admit, notwithstanding the cogency and persuasiveness of the able and elaborate argument in the opinion of the majority, that there is any such legislation on our statute book.

The act of Congress under which this pro-

ceeding was taken provides, in its 28th section (14 Stat. at L. 155), for the establishment of bonded warehouses for the storage of spirits "to secure the payment of the internal revenue tax thereon," and, in its 45th section, prohibits "the removal of distilled spirits (14 Stat. at L. 163), from the place where the same are distilled, otherwise than into a bonded warehouse, as provided by law," imposing penalties upon parties making such removal, and declaring that "the distilled spirits so removed" shall be forfeited to the United States.

The same act declares, in its 14th section (14 Stat. at L. 151), that if any goods or commodities, upon which a tax is imposed, or the materials, utensils, or vessels, proper or intended to be used in their manufacture, are removed, deposited, or concealed in any place, with "intent to defraud the United States of such tax, or any part thereof," they shall be forfeited to the United States. And it is upon the language of this section, as applied to the facts admitted by the parties, that the majority of the court found the decree of forfeiture.

The language is undoubtedly broad enough to cover any removal of spirits, upon which a tax has been imposed, from their place of manufacture; and, if it has any reference to articles of that character, it must be construed in connection with the language of the 45th section. And the evident meaning of the two sections, if they are construed together, is that the removal, for which a forfeiture is declared, is a removal to some other place than 67*] a bonded *warehouse of the United States. Of a removal to such warehouse it is difficult to perceive how an intent to defraud the government can be, in truth, affirmed. It would be as reasonable to declare that a debtor had an intention to defraud his creditor when he placed in the hands of the latter the money to pay his demand. It is plain, in my judgment, or rather I should have said it was plain but for the opinion of the majority, that the removal of spirits forbidden by that section is a removal to some place beyond the reach of the government, or where the government would be in some way embarrassed or obstructed in the collection of its tax. It seems to me a strange application of the prohibition to make it cover a removal of spirits to a warehouse specially provided by the government for their reception, and where they are placed in the possession and custody of the officers of the United States.

But I am unable to convince myself that the 14th section has any reference whatever to the removal of distilled spirits. The previous sections of the act relate to taxes on a great variety of articles, of several hundred different kinds, and it does not include distilled spirits among them. The removal mentioned in the 14th section would seem, therefore, to apply to the removal from the place of their manufacture of the articles thus previously designated, or at least of articles mentioned in the statute, for the removal of which no different penalties are specifically prescribed.

The sections of the act, from the 21st to the 45th inclusive, relate to the tax on distilled spirits, and contain numerous provisions applicable only to them. The punishment they prescribe for the removal of the spirits from the place of their manufacture, otherwise than to a bonded warehouse, in addition to their forfeiture, is different from the penalty prescribed by the 14th section, for the like removal of other goods. This fact would seem to be conclusive, if other reasons were wanting, that the 14th section has no reference to the removal of distilled spirits. The special provisions respecting them should except *them, according to all established [*68 canons of interpretation, from the general language of that section.

"That a law," says Chief Justice Marshall, "is the best expositor of itself, that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature, and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act are among those plain rules laid down by common sense for the exposition of statutes, which have been uniformly acknowledged." *Pennington* v. *Coxe*, 2 Cranch, 52.

And it is laid down in the elementary treatises that where a general intention is expressed in one part of a statute, and a particular intention in another part, inconsistent with the general intention, the particular intention is to be regarded as an exception. Potter's Dwar. Stat. 110; Sedg. Stat. 423.

The suggestion by the counsel of the government, that a removal of distilled spirits to a bonded warehouse, although the law provides for such removal as a means for securing the payment of the tax, may be made with intent to defraud the United States of such tax, inasmuch as there may be an agreement between distillers and warehousemen to have the spirits secretly drawn out from the vessels, or to have the spirits released upon insufficient security, does not strike me as entitled to any consideration in this case. Conspiracies there, undoubtedly, may be with officers of the United States to defraud the government, but in the absence of any proof tending to establish such a conspiracy, the court would not be justified in imagining its existence for the purpose of working a forfeiture of goods in the hands of an innocent party. It would rather indulge the more rational and just presumption that all the officers of the government did their duty, until at least some evidence to the contrary was produced.

This is a case of great hardship and manifest injustice. The claimant found the spirits in a bonded warehouse of the *gov- [*69 ernment, in custody of the officers of the United States. He paid to them the tax due on the goods, and he paid to the owner their value. He had no suspicions that his vendor ever entertained any intention to defraud the government of the tax levied on them, and if he ever had such suspicions he might well have supposed that his vendor had repented of his intention, when he delivered the property to the keeping of the officers of the United States.

The government through its officers took from the innocent purchaser the duties upon the goods, thus saying to him that the goods then belonged to the distiller who placed them

in the warehouse. The government now declares through its officers that these goods all the time belonged to it by reason of the previous forfeiture, and thus the honest claimant loses both the taxes and the goods, or at least is left to the doubtful chances of obtaining the former by petition to the government, and the latter by action against his vendor.

The object of the act of Congress, under which the forfeiture is declared, is to raise revenue; and it seems to me that the severe construction in favor of forfeitures in the hands of innocent parties given by the majority of the court, must have a tendency to defeat this object; for it will scarcely be possible for any one to purchase merchandise with safety when it may be seized and forfeited in his possession for reasons such as are assigned in this case.

I am of the opinion that the judgment of the court below should be affirmed, and in this opinion I am authorized to say that the **Chief Justice** and Mr. Justice **Miller** concur.

PETER CONRAD, *Appt.*,
v.
HIRAM K. HAZLETT *et al.*

Collision—steamboat held in fault for change of course—damages.

Where a steamboat in ascending a river did not keep her proper side of the river, as her signal indicated, but changed her course, she was chargeable with negligence for a collision, of which her change of course was the proximate cause.

Where the proof is not clear that the other steamer, which was sunk, was not raised as soon as she might have been, the damages will not be diminished.

[No. 108.]

Argued Feb. 29 and Mar. 1, 1872. Decided Mar. 25, 1872.

APPEAL from the Circuit Court of the United States for the District of Missouri. The case is stated by the court.

Messrs. **John A. Wills**, *J. H. Rankin, Lander & Merriman* for appellant.

Messrs. **F. A. Dick** and *James O. Broadhead* for appellees.

Mr. Justice **Davis** delivered the opinion of the court:

This is a case of collision between the steamers Katie and Des Moines, while navigating the Ohio river on the night of the 22d of November, 1864. The Katie was descending and the Des Moines ascending the river. When near the head of Diamond island they came in contact and the Katie immediately sank and became a total loss. The district court adjudged both vessels to be in fault, and the circuit court, on appeal, affirmed this judgment. As the owners of the Katie did not appeal from this decision, the only question for investigation here is, whether the Des Moines was in fault. As is usual in cases of this character, there is a conflict of testimony between the officers and crew of the two boats, on important points; but the physical facts of the case establish the proposition that, on the disputed point of most significance, the Des Moines was blamable. The Des Moines, following the course of the channel, had crossed over from the foot of Diamond island toward the Indiana shore, and being an ascending boat, according to the well-settled rules of navigation, had the choice of position in the river. This choice was taken by blowing two whistles, which told the officers of the Katie that she intended to keep along the Indiana shore, which was to her larboard, while the Kentucky or Diamond island shore was to the larboard of the Katie. The Des Moines, instead of keeping to the larboard, as her signal indicated, was at the time of the collision turned to the starboard. This is proved by the nature of the injuries received by both boats, the injury to the Katie being on her starboard side, while the Des Moines was struck on her larboard bow. If, as is claimed for the Des Moines, she had gone to the larboard until she got close to the Indiana shore, and then, as her pilot says, he "kept her straight in the river" and while in that position the Katie came down onto her; this could not have happened, for, if the Katie struck her on the larboard, the larboard side of both boats would have been injured, and if on her starboard, then the starboard side of both boats would have been injured; but if both boats were heading toward the Kentucky shore, the one coming down and the other going up, and a collision ensued, it would have brought the starboard of the one in conact with the larboard of the other. This was what occurred in this case, and shows clearly that the Des Moines did not obey her own signals, and was therefore chargeable with negligence.

It is unnecessary to consider whether the Des Moines is not blamable in other particulars, for this change of course, being the proximate cause of the collision, is enough to condemn her.

It is insisted, on the part of the appellee, that there was not sufficient effort to raise the Katie after the accident, and that the Des Moines should not be visited with the consequences of this neglect. But there is no proof that the Katie could have been raised if an earlier effort had been made. If full effect be given to the evidence on this subject, it may tend to create a suspicion that the owners of the Katie did not engage the wrecker soon enough, but it does nothing more. Leezer, the wrecker, who had to stop work on account of the rise in the river, is unable to tell the condition of the river for the two previous weeks; nor can he say whether his business would have been interrupted had he commenced proceedings ten days before. It would seem as if an intelligent river man ought to have known these things; but in the absence of proof on these points, there is no *data* on which to base a conclusion that an earlier effort would have been successful, and there is no pretense, after the work was begun, that it was not continued long enough.

The decree of the Circuit Court is affirmed.

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*UNITED STATES, *Appt.*, [*1
v.
THOMAS G. W. CRUSELL.

(See S. C. 14 Wall. 1-5.)

Claims under the captured and abandoned property act.

Where property was in possession of the officers

of the government, under the captured and abandoned property act, it is to be presumed that they performed their duty and sold it, and placed the proceeds in the Treasury, and the claimant can recover in the court of claims for the same.

[No. 24.]

Argued Feb. 26, 1872. Decided Mar. 25, 1872.

APPEAL from the Court of Claims.

The case is stated by the court

Messrs. **B. H. Bristow,** *Solicitor Gen.*, and **C. H. Hill,** *Asst. Atty-Gen.*, for appellant.

Messrs. **Hughes,** *Denver & Peck* for appellee.

Mr. Chief Justice **Chase** delivered the opinion of the court:

This is an appeal from a judgment of the court of claims in favor of the claimant, under the abandoned and captured property act.

It appears, from the certificate of the court, that no aid or comfort was given by the claimant to the Rebellion against the United States. It appears, further, that a large quantity of cotton, including, as alleged, 73 bales belonging to the claimant, was sold and the proceeds thereof paid into the Treasury. The only question in the case is, whether these 73 bales were, in fact, so included.

They were in the possession of the quartermaster in charge of captured and abandoned property in Atlanta, in October, 1864. This quartermaster in that month shipped to the officer in charge of military railroad transportation at Nashville, 130,605 pounds of cotton; but whether the cotton of the claimant was included in the shipment, is not shown. It seems, however, that the officer in charge turned over to the Treasury agent at Nashville, 1,382 bales, and a large quantity of loose cotton, coming from Atlanta, Chattanooga, and points beyond Chattanooga, in Georgia. The cotton received by this agent was forwarded to the supervising agent at Cincinnati and sold by him and the proceeds paid into the Treasury.

It is shown that in the month of December, 1864, there was a sale of cotton at Cincinnati, and sundry bales of cotton marked with the claimant's mark were sold. Whether the person conducting the sale was the supervising agent of the Treasury Department, does not appear.

Presuming, however, that the officers of the government performed their duty, there can be no doubt that the quartermaster at Atlanta forwarded to the officer in charge of military railroad transportation, the cotton of the claimant; and that this officer turned over the cotton to the agent at Nashville, by whom it was forwarded to Cincinnati and sold by the supervising agent there. The presumption in this case is strengthened by the fact that heavy statutory penalties would be incurred by neglect of duty. There is nothing in the case to repel this presumption. If any 5*] evidence to this effect exists, *it must be contained in the books of the Treasury Department, and these are under the control of the defendant.

We think, therefore, that the conclusion of the court of claims, that the proceeds of the 73 bales of cotton belonging to the claimant were paid into the Treasury, and that the claimant was entitled to judgment, was right. *Its judgment in favor of the claimant must, therefore, be affirmed.*

Mr. Justice **Davis,** dissenting:

In my opinion, the burden of proof in this case is on the claimant to show that the money which he seeks to obtain under the captured and abandoned property act has been paid into the Treasury. The court, in its opinion, throws the burden of proof, on this point, on the United States, and on that account I am constrained to dissent from the judgment in the case.

I am authorized to say that Mr. Justice **Swayne** and Mr. Justice **Miller** concur in this dissent.

PAUL SEARS *et al., Libelants, Appts.,*
v.
THE BRITISH STEAMER SCOTIA, her Tackle, etc., The British & North American Royal Mail Steam-Packet Company, *Claimant.*

(See S. C. *"The Scotia,"* 14 Wall. 170–189.)

Duty of steamer meeting vessel—duty of vessel—fault of steamer or ship—law of the sea—rules of navigation—insufficient light.

1. A steamer meeting a sailing vessel, proceeding in such a direction as to involve risk, must keep out of the way, and nothing but inevitable accident or the conduct and movements of the ship can repel the presumption that she was negligent, arising from the fact of collision.
2. The ship must keep her course, and do nothing to mislead.
3. A steamer is not bound to take any steps to avoid a collision, until danger of collision is apprehended.
4. Where the measures taken by her to avoid a collision would have been successful if they had not been counteracted by the constant veering of the other vessel, she was not chargeable with fault.
5. A ship cannot be condemned for doing that which by the laws of its origin or ownership it was required to do, nor secure an advantage by violation of those laws, unless it is beyond their domain when upon the high seas.
6. No single nation can change the law of the sea. That law is of universal obligation. It rests upon the common consent of civilized communities.
7. Where rules of navigation are accepted as obligatory rules by more than thirty of the principal commercial states of the world, they may be regarded as laws of the sea, and of that fact this court may take judicial notice.
8. The violation of maritime law by a vessel, in carrying a white light and her carrying it on deck instead of at her mast-head, rendered her in fault, and deprived her of all remedy for a collision.

[No. 93.]

Argued Feb. 29, 1872. Decided Mar. 25, 1872.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The appellants filed their libel in the district court, as owners of the American ship Berkshire, and in behalf of the owners of the cargo, to recover damages sustained in a collision in mid-ocean with the British steamship Scotia. The district court decided in favor of the claimant of the Scotia, and this decree was affirmed by the circuit court.

The facts are stated by the court.

Mr. **James C. Carter** for appellants.

NOTE.—*Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting*—see notes, 13 L. ed. U. S. 537; 25 L. ed. U. S. 168; 28 C. C. A. 532; 29 C. C. A. 368.

Rules for avoiding collision; steamer meeting steamer—see notes, 14 L. ed. U. S. 68; 35 L. ed. U. S. 453; 30 C. C. A. 630; 60 C. C. A. 254.

Messrs. **D. D. Lord** and **E. C. Benedict** for appellees.

Mr. Justice **Strong** delivered the opinion of the court:

This case grew out of a collision on the high seas between the American ship Berkshire and the British steamer Scotia, in consequence of which the ship was sunk and totally lost. The vessels collided at night on the 8th of April, 1867, in about mid-ocean, when the Berkshire was on a voyage from New Orleans to Havre, and the Scotia was passing from Liverpool to New York. Immediately prior to their sighting each other, the ship was sailing in a course southeast by east one half east, with the wind free, blowing from about south-southwest, and the Scotia was steering west by north one half north. Thus the courses intersected at an angle of exactly one point. The Scotia was first seen from the Berkshire, bearing about one point off the ship's port bow, at a distance apparently of five or six miles. Then the steamer's white mast-head light only was seen; but immediately upon its discovery, an order was given to keep the ship luffed, the effect of which was to change her course more to the southward. How long she was kept upon this new course was not precisely attainable, but the evidence makes it manifest that it must have been at least ten minutes. The ship's mate, who gave the order, estimates the time at from ten to fifteen minutes, in which he is sustained by others, and there is nothing in the proofs to show that it was less. Assuming his estimate to be correct, during that period the vessels, moving at the speed at which it is proved they moved, must have lessened the distance between them at least three or four miles, and they could not have been more than about two miles apart, when the ship's helm was put to starboard, and when she bore away to the northward, directly across the steamer's bow.

It is plain that had the ship continued on her course after she first saw the steamer's bright light, there could have been no collision. And, still more; had she not afterwards and when near the steamer put her helm to starboard she would have been out of all danger. Even when she first sighted the Scotia she had passed the point at which her course and that of the steamer intersected.

This is a necessary sequence from the facts that the angle between the courses of the two vessels was exactly one point, and that the light of the steamer, when first seen, bore from a point to a point and a half off her port **181*]** bow. Besides, when the *ship was first seen from the steamer, her bearing, it is clearly proved, was from a point to two points off the steamer's port bow. Such a bearing was impossible unless the ship had already crossed the line of the Scotia's course, and passed the point at which the vessels could have come together unless one or the other had taken a new direction. They must have passed with a wide berth between had the ship made no change of her helm, or had she kept her luff in obedience to the mate's order. But by putting her helm hard a-starboard she was made to change her course constantly till the collision occurred. Even before she bore away, the red light of the steamer was seen by her wheelman, and probably by her lookout, if not indeed by her master, doubtless in time even then to escape harm. Had it not been, then, for the unfortunate order of the master to starboard her helm, and bear away before the wind, this case could not have arisen.

It must, however, be conceded that this, of itself, is not sufficient to excuse the Scotia, if she failed to adopt such precautions as were in her power, and were necessary to avoid a collision. Meeting a sailing vessel proceeding in such a direction as to involve risk, it was her duty to keep out of the way, and nothing but inevitable accident, or the conduct and movements of the ship, can repel the presumption that she was negligent, arising from the fact of collision. But this duty of the steamer implies a correlative obligation of the ship to keep her course, and to do nothing to mislead. Nor is a steamer called to act, except, when she is approaching a vessel in such a direction as to involve risk of collision. She is required to take no precautions when there is no apparent danger.

To determine, then, whether the Scotia is responsible for the collision of which the libelants complain, it is necessary to look more fully into the circumstances which preceded and attended the disaster. Without going through the evidence in detail, although we have carefully examined it all, we think the following are established facts:

1. The Berkshire, when she first discovered the Scotia's mast-head light, carried only a white light at her bow fastened to her anchor stock, and raised about four feet. She carried no other lights. Immediately on her sighting the steamer, which was at most from fifteen to twenty minutes before the collision, she luffed so as to head more into the wind, and thus diverge farther from the course of the steamer, and continued in this new direction ten or fifteen minutes, when she could not have been more than one or two miles from the Scotia. Her helm was then suddenly put to starboard; then steadied for a brief period; then put hard a-starboard, and kept there; thus pointing her directly across the bow of the approaching vessel. By keeping her helm hard a-starboard, she was made to change her course constantly until the collision occurred. Even before she bore away, the red light of the steamer was seen by her wheelman and probably by her lookout, if not indeed, by her master, doubtless, in time even then to escape harm. Had, therefore, the order to starboard not been given, or had it been countermanded when the red light was seen, there could have been no collision.

2. The Scotia first saw the white light on the Berkshire off her port bow, from one to two points, and very naturally supposed it at a much greater distance than it was in fact. The location of the light warranted the supposition and, if its color did not justify the belief that it was on a steamer, it certainly gave no indication that it was on a sailing vessel. Her own lights were all properly set, a white light at her mast-head, a green light on her starboard, and a red light on her port side, all burning brightly. She had her lookouts properly stationed, and there was no neglect in discovering the ship's light in due season. We think it also proved, that after

its discovery it did open on the steamer's port bow. It is immaterial how much it opened; for if it receded at all it indicated clearly that there was then no danger of collision without some change of course and, consequently, no necessity to take measures to avoid one. Whether the ship had then turned her course northward it is not indispensable to determine. The weight of the evidence is, we think, that she had not; but if she had, it is still proved that her light opened on the Scotia's port side, after it was first seen and before the steamer's course was changed. This was quite possible, in consequence of the near proximity of the vessels, the westward advance of the Scotia, and the constantly changing course of the Berkshire, and we have very little doubt that such was the fact. Soon after, and solely because of the ship's change of course, her light began to close in on the steamer's bow, and then, for the first time, was there any apparent danger of collision. Then the Scotia's helm was immediately ported, then hard ported, and observing that the ship's light still closed in, orders were given in quick succession, to half-speed, slow, reverse and back; but notwithstanding these orders, which were all promptly obeyed, the vessels came together, and the Berkshire was sunk.

Was, then, the Scotia in fault? If she was, the fault must have been either that she did not change her helm sooner, or that she ported, or that she was unjustifiably late in slackening her speed and reversing her engines. No other fault is imputed to her. We have already said that she was not bound to take any steps to avoid a collision until danger of collision should have been apprehended, 182*] and we think *there was no reason for apprehension until the ship's light was seen closing in upon her. Assuming for the present that she had no right to conclude that the light was on a steamer and to maneuver accordingly and, therefore, that it was her duty to keep out of the way, it is still true that all her duty at first was to watch the light in order to discover certainly what it was, and to observe its course and notice whether it crossed her own course. It is not the law that a steamer must change her course, or must slacken her speed the instant she comes in sight of another vessel's light, no matter in what direction it may be. With such a rule navigation cannot be conducted. Nor is such a rule necessary to safety. It is, therefore, no fault that, seeing the ship's light off her port bow, apparently at a distance of several miles, the Scotia continued on her course without slackening her speed, until that light began to close in upon her. Then she ported her helm, the obvious effect of which was to take her farther away from the approaching vessel. Then she slowed her engines, stopped and backed, until, at the time when the collision took place, she had almost, if not entirely, ceased to move through the water. Had she starboarded, instead of porting, the movement would have turned her towards the Berkshire, and apparently would have rendered collision more probable. Of the propriety of her slowing her engines, stopping and backing, there can be no doubt. If, now, it be considered that she had been misled by the nature and location of the light on the Berkshire, which indicated that the ship was at a much greater distance than she was in fact; that, consequently, the peril came upon her suddenly, leaving short time for deliberation, and if it be considered that she had been brought into this extremity, first, by the ill-judged and causeless change of the ship's course; and, second, by the persistent effort of the ship's master to cross her bow after he had seen her red light, and discovered certainly that she was a steamer,—it would be unjust to impute to her as a fault that she did what she ought to have done, had the approaching vessel been in fact a steamer, and that which at all events seemed *most likely to avoid a colli- [*183 sion. Certainly it was not her fault that she did not know the Berkshire to be a sailing vessel. And in all human probability the measures taken by her to avoid a collision would have been successful if they had not been counteracted by the constant veering of the Berkshire, with her helm kept hard a-starboard.

Independently, therefore, of any statutory regulations, and looking to the facts with reference to the old maritime law alone, as it was before any modern legislation, we think the Scotia was not chargeable with fault.

But we think the Scotia had a right to conclude that the Berkshire was a steamer rather than a sailing vessel, and that, when first seen, she was at the distance of four or five miles, instead of being near at hand. Such was the information given her by the ship's white light, fastened as it was to the anchor stock on deck, and no watchfulness could have enabled her to detect the misrepresentation until it was too late. Both vessels were moving under similar regulations. The Berkshire was an American ship, belonging to the mercantile marine, and she was required by the act of Congress of April 29, 1864, to carry green and red lights, which she did not carry, and she was forbidden to carry the white light, which she did carry. By exhibiting a white light, she, therefore, held herself forth as a steamer, and by exhibiting it from her deck, instead of from her mast-head, she misrepresented her distance from approaching vessels. It is clear the Scotia would have been justified in taking her for a steamer had she been known to be an American ship. But it is insisted on behalf of the appellants that, inasmuch as the act of Congress is a mere municipal regulation, obligatory as a statute only upon American vessels, the Scotia, a British steamer, cannot avail herself of it to fault an American ship, or to justify her own conduct. Waiving, for the moment, consideration of the question whether this position is well taken, it is yet true that the Berkshire was under the statute, although on the high seas, and that the Scotia was subject to and sailing under similar regulations (the British orders in council of January 9, 1863); that the collision *hap- [*184 pened in the known path of vessels navigating between the United States and Great Britain, and that there was a reasonable probability that vessels in that path would be either American or British, and would, therefore, carry the lights prescribed by the laws of those countries. The steamer might well, therefore, in the absence of knowledge, act upon that probability, and in the emergency into which she had been brought, might, with-

out fault, apply the rule of navigation common to the ships of both countries.

But to return to the question; we think that independently of the act of Congress, considered as a mere municipal regulation, the Berkshire was bound to show a green light on her starboard, and a red light on her port side, without exhibiting any white light; and that the Scotia may set up in defense her failure to carry such green and red lights, as also the fact that she did improperly show a white light. And we think that her breach of duty in these respects misled the officers of the steamer, and caused them to act on the assumption that she was a steamer and, therefore, under obligation to pass on the port side. If so, the collision was solely due to the fault of the ship. We rest this conclusion not solely, or mainly, upon the ground that the navigation laws of the United States control the conduct of foreign vessels, or that they have, as such, any extraterritorial authority, except over American shipping. Doubtless they are municipal regulations, yet binding upon American vessels, either in American waters or on the high seas. Nor can the British orders in council control our vessels, though they may their own. We concede also that whether an act is tortious or not must generally be determined by the laws of the place where the act was committed. But every American vessel, outside of the jurisdiction of a foreign power, is, for some purposes at least, a part of the American territory, and our laws are the rules for its guidance. Equally true is it that a British vessel is controlled by British rules of navigation. If it were that the rules of the two nations conflicted, which would the British vessel, and which would the American, be bound to obey? Undoubtedly, the rule 185*] *prescribed by the government to which it belonged. And if, in consequence, collision should ensue between an American and a British vessel, shall the latter be condemned in an American court of admiralty? If so, then our law is given an extraterritorial effect, and is held obligatory upon British ships not within our jurisdiction. Or might an American vessel be faulted in a British court of admiralty for having done what our statute required? Then Britain is truly not only mistress of the seas, but of all who traverse the great waters. It is difficult to see how a ship can be condemned for doing that which by the laws of its origin or ownership it was required to do, or how, on the other hand, it can secure an advantage by violation of those laws, unless it is beyond their domain when upon the high seas. But our navigation laws were intended to secure the safety of life and property, as well as the convenience of commerce. They are not in terms confined to the regulation of shipping in our own waters. They attempt to govern a business that is conducted on every sea. If they do not reach the conduct of mariners in its relation to the ships and people of other nations, they are, at least, designed for the security of the lives and property of our own people. For that purpose they are as useful and as necessary on the ocean as they are upon inland waters. How, then, can our courts ignore them in any case? Why should it ever be held that what is a wrong when done to an American citizen, is right if the injured party be an Englishman?

But we need not affirm that the Berkshire was under obligation to show colored lights, or to refrain from showing a white light, merely because of an act of Congress, nor need we affirm that the Scotia can protect herself by setting up the ship's violation of that act. Nor is it necessary to our conclusions that the British rules in regard to lights are the same as ours, although that is an important consideration. We are not unmindful that the English courts of admiralty have ruled that a foreigner cannot set up against a British vessel, with which his ship has collided, that the British vessel violated the British mercantile marine act, on the *high seas, for the reason, as given, [*186 that the foreigner was not bound by it, in asmuch as it is beyond the power of Parliament to make rules applicable to foreign vessels outside of British waters. This decision was made in 1856, in the case of *The Zollverein*, 1 Swab. 96. A similar rule was asserted also in *The Dumfries*, 1 Swab. 63, decided the same year; in *The Saxonia*, 1 Lush. 410, decided in the high court of admiralty in 1858, and by the Privy Council in 1862. The same doctrine was laid down in 1858, in the case of *Cope* v. *Doherty*, 4 Kay & J. 367; 2 De Gex & Jones, 626, and in *The Chancellor*, 4 Law Times (N. S.), 627, decided in 1861. All these decisions were made before the passage of the merchant shipping amendment act, which took effect on the first day of June, 1863. By that act the same rules in regard to lights and movements of steamers and sailing vessels on the high seas were adopted as those which were prescribed by the act of Congress of 1864, and by the same act it was provided that the government of any foreign state might assent to the regulations, and consent to their application to the ships of such state, and that thereupon the Queen, by order in council, might direct that such regulations should apply to ships of such foreign state when within or without British jurisdiction. The act further provided that whenever an order in council should be issued applying any regulation made under it to the ships of any foreign country, such ships should in all cases arising in British courts be deemed to be subject to such regulations, and for the purpose thereof be treated as British ships. Historically, we know that before the close of the year 1864, nearly all the commercial nations of the world had adopted the same regulations respecting lights, and that they were recognized as having adopted them. These nations were the following: Austria, the Argentine Republic, Belgium, Brazil, Bremen, Chili, Denmark, Ecuador, France, Great Britain, Greece, Hanover, Hawaii, Hayti, Italy, Lubeck, Mecklenburg-Schwerin, Morocco, *Netherlands, Norway, Olden- [*187 burg, Peru, Portugal, Prussia, Roman States, Russia, Schleswig, Spain, Sweden, Turkey, United States, and Uruguay—almost every commercial nation in existence. See Holt's Rule of the Road, page 2. Had this libel then been filed in a British court, the Berkshire must have been found solely in fault, because her white light and her neglect to exhibit colored lights signaled to the Scotia that she was a steamer, and directed the Scotia to do exactly what she did.

It must be conceded, however, that the rights and merits of a case may be governed by a different law from that which controls a court in

which a remedy may be sought. The question still remains: what was the law of the place where the collision occurred, and at the time when it occurred? Conceding that it was not the law of the United States, nor that of Great Britain, nor the concurrent regulations of the two governments, but that it was the law of the sea, was it the ancient maritime law, that which existed before the commercial nations of the world adopted the Regulations of 1863 and 1864, or the law changed after those regulations were adopted? Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation. The Rhodian Law is supposed to have been the earli- **188*]** est system of marine rules. *It was a Code for Rhodians only, but it soon became of general authority because accepted and assented to as a wise and desirable system by other maritime nations. The same may be said of the Amalfitan Table, of the ordinances of the Hanseatic League, and of parts of the marine ordinances of Louis XIV. They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such. And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of maritime nations? When, therefore, we find such rules of navigation as are mentioned in the British orders in council of January 9, 1863, and in our act of Congress of 1864, accepted as obligatory rules by more than thirty of the principal commercial states of the world, including almost all which have any shipping on the Atlantic ocean, we are constrained to regard them as in part at least, and so far as relates to these vessels, the laws of the sea, and as having been the law at the time when the collision of which the libelants complain took place.

This is not giving to the statutes of any nation extraterritorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations.

The consequences of this ruling are decisive of the case before us. The violation of maritime law by the Berkshire in carrying a white light (to say nothing of her neglect to carry colored lights) and her carrying it on deck instead of at her mast-head, were false representations to the Scotia. They proclaimed that the Berkshire was a steamer, and *such [*189 she was manifestly taken to be. The movements of the Scotia were therefore entirely proper, and she was without fault.

The decree of the Circuit Court is affirmed, with costs.

JOHN D. WORTHY, Exr. of Archibald D. Palmer, Deceased, *Plff. in Err.*,
v.
HENRY MARSTON.

(See S. C. "*Palmer* v. *Marston*," 14 Wall. 10–12.)

Jurisdiction over state judgment, when not taken.

Where in a state judgment the provision of the state Constitution was in nowise drawn in question but the decision was governed by the settled principles of the jurisprudence of the state, this court has no power to review such judgment.

[No. 112.]

Submitted Feb. 20, 1872. Decided Apr. 1, 1872.

IN ERROR to the Supreme Court of the State of Louisiana.

The case is stated by the court.

Mr. **E. T. Merrick** for plaintiff in error.

Messrs. H. Marston, J. Q. A. Fellows, **W. S. Holman,** and *J. H. Muse* for defendant in error.

Mr. Justice **Swayne** delivered the opinion of the court:

Palmer sued Marston in the district court of the parish *of East Feliciana, upon a [*11 promissory note made by Marston to J. O. Fuqua, and by him indorsed to Palmer, dated October 1st, 1863, for $1,687, and payable one day after date, with interest at the rate of eight per cent per annum from date until paid. The defendant answered that $1,000 of the note had been paid, and that $949 of it was a part of the purchase price of an African negro claimed to be a slave, and that the slave had been freed by sovereign authority, and that hence the note, to the extent of the amount last named, was null and void.

The court held that, "whilst the law remains as pronounced by the late supreme court in the case of *Wainwright* v. *Bridges*, 19 La. Ann. 234, and other cases, Fuqua, were he suing to recover the amount of the note, which is the subject of this controversy, would be defeated by this plea of failure of consideration. Therefore, the plaintiff must fail also." Judgment was given for the defendant. The case was appealed to the supreme court of the state, and that court affirmed the judgment.

In the opinion of the court, as drawn up by one of the judges, it is said:

"The balance of the note in suit in this action was clearly given in renewal of obligations arising from the sale of a slave, and is vitiated by this fact. It cannot be recovered under our jurisprudence, as settled in *Wainwright* v. *Bridges*, *supra*, and the numerous cases which have followed that decision. Under the rule established in the case of *Groves* v. *Clark*, 21 La. Ann. 567, it is immaterial whether the plaintiff became a holder before or after maturity. We have been asked by counsel to pass,

in this case, upon the validity under the Constitution of the United States of the article 128 of the Louisiana Constitution of 1868, which declares that contracts for the sale of persons are null and void, and shall not be enforced by the courts of this state. We do not feel it necessary to do this. The rule, that such contracts will not be enforced by the courts of this state, was established in our jurisprudence in the year 1867. It was firmly settled and re-**12*]** peatedly *acted upon before the adoption of the Constitution of 1868, and has been invariably adhered to ever since. The question whether this article 128 be valid or invalid as an act of legislation, and in relation to article 10 of the Constitution of the United States, may possess considerable speculative interest, but we do not perceive that it can, in this case, have a practical influence upon the result. For the reasons given it is ordered and adjudged that the judgment appealed from be affirmed with costs."

It thus appears that the provision of the state Constitution upon the subject of slave contracts was in nowise drawn in question. The decision was governed by the settled principles of the jurisprudence of the state. In such cases this court has no power of review. No right was claimed by either party under any state law or the Constitution of the state which was resisted upon the ground of repugnancy to the Constitution, or a treaty or law of the United States, the decision having been in favor of the validity of the right so asserted. There is certainly no foundation for such a complaint on the part of the plaintiff in error. In the absence of such a claim and decision we cannot take cognizance of the case. This element, which is indispensable to our jurisdiction, is wanting. Substantially the same question arose in *Bank of W. Tenn.* v. *Cit. Bank of La.*, heretofore decided, *ante*, 514. The writ of error was dismissed for want of jurisdiction. The same disposition must be made of this case.

The writ of error is dismissed accordingly.

AMBROSE H. SEVIER, Admr. of John A. Jordon, Deceased, *et al.*, *Plffs. in Err.*,

v.

LANGDON C. HASKELL, Admr. of Augustus M. Smith, Deceased.

(See S. C. 14 Wall. 12-15.)

Jurisdiction over state judgments.

1. Where the state court in its decision proceeded upon the general principles of the jurisprudence of the state, this court cannot inquire whether, in applying those principles, that tribunal reached the proper conclusions.

2. Where the record exhibits no question of which this court can take cognizance, the case will be dismissed.

[No. 325.]

Submitted Jan. 19, 1872. Decided Apr. 1, 1872.

IN ERROR to the Supreme Court of the State of Arkansas.

The case is stated by the court.

Messrs. Watkins & **Rose** for plaintiffs in error.

Messrs. Clark & **Williams** for defendants in error.

Mr. Justice **Swayne** delivered the opinion of the court:

This case was brought here by a writ of error to the supreme court of the state of Arkansas. It is before us on a motion to dismiss the writ for want of jurisdiction.

The case, so far as it is necessary to state it, was a proceeding in equity to foreclose a mortgage given by the intestate of Sevier to the intestate of Haskell, to secure the payment of four promissory notes therein described, and the accruing interest. The answer set up as a defense that the consideration of the notes was the purchase of eighty-five slaves by Jordan of Smith; that the slaves had since become emancipated and lost to the estate of Jordan, and that the consideration of the notes had thus wholly failed. The circuit court, at the May term, 1867, decreed that the bill should be dismissed and the complainant pay the costs. The case was appealed to the supreme court of the state, and that court, at the December term, 1867, reversed the decree and remanded the cause to the circuit court, with directions to enter a decree for the complainant, which was accordingly done.

The plaintiffs in error applied to the circuit court at the November term, 1868, for an order that all further proceedings upon the decree should be superseded and perpetually stayed, for the reason that, on the 11th day of February, 1868, since the decision of the supreme court of the state *in the case was made, [***14** it was ordained by the Constitution of the state then adopted, that all contracts for the sale or purchase of slaves were null and void, and that no court of the state should take cognizance of any suit founded upon such contracts, and that no amount should ever be collected or recovered on any judgment or decree which had been or should thereafter be rendered on account of any such contract or obligation. The circuit court overruled the application, and the plaintiffs in error excepted. The case was again taken to the supreme court of the state, and that court affirmed the decision of the lower court.

Where the judgment of a state court is brought into this court for review, to warrant the exercise of the jurisdiction invoked, the case must fall within one of three categories:

(1) There must have been drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision of the state court must have been against the validity of the claim which either is relied upon to maintain; (2) or there must have been drawn in question a statute of, or an authority exercised under, a state, on the ground of their being repugnant to the Constitution, a law or treaty of the United States, and the decision must have been in favor of the validity of the state law or authority in question; (3) or a right must have been claimed under the Constitution or a treaty or law of, or by virtue of a commission held or authority exercised under the United States; and the decision must have been against the right so claimed. 14 Stat. at L. 385.

The case before us is within neither of these classes. Before the state Constitution of 1868 was adopted, the supreme court must have proceeded upon the general principles of the jurisprudence of the state. Whether, in applying those principles, that tribunal reached the

NOTE.—*Questions of local or general law are not Federal*—see note, 62 L. R. A. 540.

proper conclusions, cannot be a subject of consideration by this court. We have no authority to enter upon such an inquiry. After the Con- [*15] stitution *of 1868 was adopted, the plaintiffs in error relied upon that, to annul the decree which had been rendered. The supreme court affirmed the validity of the decree, the provision in the state Constitution relied upon to the contrary notwithstanding.

Here, again, no Federal question is presented. What considerations controlled the judgment of the court is not disclosed in the record. If it were held, as it may well have been, that the provision in the Federal Constitution which forbids any state to pass a law impairing the obligation of contracts protects from the operation of the state constitution slave contracts made prior to its adoption as the contract here in question was sustained and enforced; still, no question arose of which this court can take cognizance. The record exhibiting no such question, the motion must prevail, *and the writ of error is dismissed for want of jurisdiction.*

THE STEAMER CAYUGA, etc., The Hudson River Steamboat Company, *Claimant, Appt.*,

v.

THE HOBOKEN LAND & IMPROVEMENT COMPANY.

(See S. C. 14 Wall. 270-279.)

Rules as to collision—ships following or crossing each other—owner only liable to value of his interest—damages.

1. Where two ships are running in the same direction, the ship astern, if she is sailing faster than the ship ahead, is in general bound to adopt the necessary precautions to avoid a collision.

2. But the rule does not in general apply in a case where the ships are crossing, or are running on intersecting lines: there the ship which has the other on her starboard side, shall keep out of the way of the other.

3. Owners of ships and vessels are not now liable for any loss, damage or injury, beyond the amount of their interest in the ship and her freight.

4. The damages which the owners of the injured vessel is entitled to recover in cases of collision are the same as in similar suits for injuries to personal property, and may extend to loss of freight, necessary expenses incurred in making repairs, and unavoidable detention.

[No. 84.]

Argued Jan. 24, 1872. Decided Apr. 1, 1872.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

The case is stated by the court.

Mr. **C. Van Santvoord** for appellant.

Mr. **W. J. A. Fuller** for appellee.

Mr. Justice **Clifford** delivered the opinion of the court:

Collision cases usually present difficult questions of fact, arising from conflicting testimony, and the case before the court is one of that class, but both of the subordinate courts decided in favor of the libelants, and our decision, with brief explanations, must be in the same way.

The libelants are the owners of the steam ferry-boat James Watt, employed in transporting passengers and freight between the port of New York and the city of Hoboken, in the state of New Jersey, and they filed the libel in the district court against the steam tug Cayuga, usually employed in towing vessels and other water-craft, charging that the steam tug was so improperly and unskilfully managed and navigated that she ran into and upon the James Watt, causing to the latter steamboat great injury and damage, as more fully set forth in the libel. By the pleadings and evidence it appears that the collision occurred at four o'clock in the afternoon of the 13th of June, 1866, in clear weather and under circumstances which show beyond all doubt that one or both vessels were in fault. Daily trips were made by the James Watt and, at the time, she was making her regular trip down the river to her place of destination at the foot of Barclay street, on the New York side of the river. She started from her regular slip at Hoboken, and as she proceeded on her route she was heading obliquely across the *river towards the wharf to which [*274 she was bound. Shortly after the James Watt left her wharf at Hoboken the Cayuga came out from the slip at the foot of Desbrosses street, and having rounded to, nearly opposite Hubert street, she then took a course down the river, heading for the Jersey side of the river, though less obliquely than the ferry-boat of the libelants, and they collided when the former had advanced about one third of the way across the river towards the Jersey shore. Enough appears to show that the James Watt was heading in a south by east course, and that she was running in the track she usually followed in making her daily trips, and that the Cayuga was heading nearly in a south-southwest course for the place of her ultimate destination on the opposite side of the river. Both steamers were well manned, and each was seasonably seen from the other and at about the same time, and as it was daylight and good weather, and as it was obvious that their courses intersected, it must have been known to those intrusted with their navigation that a collision might ensue unless some proper precaution was seasonably adopted to prevent such a disaster. They had plenty of sea-room, and if either had changed her helm, the collision would have been prevented, but as the Cayuga had the James Watt on her own starboard side throughout, from the time she took her course down the river to the time of the disaster, the sailing rules made it her duty to keep out of the way. Article 14 prescribes that "If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other," and the court is of the opinion that the circuit judge was correct in deciding that that rule is applicable in this case.

Suggestion is made, and perhaps it is correct, that the Cayuga was slightly ahead when she first took her course and started down the river, but the speed of the James Watt being somewhat the greater, it appears that she soon made such an advance that it became evident that unless one or the other gave way the danger of collision would become imminent. Apply that rule and it is clear that it was the *duty [*275 of the Cayuga to keep out of the way, inasmuch as she had the James Watt on her own starboard side. Every vessel overtaking another vessel, it is said, shall keep out of the way of the vessel ahead, but that rule cannot properly

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NOTE.—*Collision: rights of steam and sailing vessels with reference to each other, and in passing and meeting*—see notes, 13 L. ed. U. S. 537; 25 L. ed. U. S. 168; 28 C. C. A. 532; 29 C. C. A. 368. *Rules for avoiding, steamer meeting steamer*—see notes, 14 L. ed. U. S. 68; 35 L. ed. U. S. 453; C. A. 630; 60 C. C. A. 254.

be applied in this case, as the two steamers were crossing or running on intersecting lines, in which case the question is not in general affected by the comparative speed of the two vessels, nor by the fact that the one or the other was slightly ahead when the necessity for precaution commenced.

Undoubtedly, where two ships are running in the same direction, the ship astern, if she is sailing faster than the ship ahead, is in general bound to adopt the necessary precautions to avoid a collision, but it is clear that the rule does not in general apply in a case where the ships are crossing or are distant from each other on a right line and are running on intersecting lines, as it is expressly enacted where two steamships are crossing that the ship which has the other on her own starboard side shall keep out of the way of the other. *Whitridge* v. *Dill*, 23 How. 453, 16 L. ed. 583. Such is the express regulation enacted by Congress, and the correlative duty of the other vessel is described in the eighteenth article, which is, that where one of two ships is required to keep out of the way, the other shall keep her course, subject to the qualifications contained in the succeeding article, which is entitled a "proviso to save special cases." By that proviso it is prescribed that in obeying and construing those rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from those rules necessary in order to avoid immediate danger. 13 Stat. at L. 60, 61. Persons engaged in navigating vessels upon the seas are bound to observe the nautical rules enacted by Congress, whenever they apply, and in other cases to be governed by the rules recognized and approved by the courts. Nautical rules, however, were framed and are administered to prevent such disasters and to afford security to life **276*]** and property; but *it is a mistake to suppose that either the act of Congress, or the decisions of the courts, require the observance of any given rule in a case where it clearly appears that the rule cannot be followed without defeating the end for which it was prescribed or without producing the mischief which it was intended to avert. Qualifications of that character were sanctioned by this court years before the existing rules were enacted by Congress, and no doubt is entertained that the proviso to save special cases contained in those rules was intended to affirm, in substance and effect, the views upon that subject which this court had previously expressed. *Steamship Co.* v. *Rumball*, 21 How. 385, 16 L. ed. 148. Responsive to the charge that the Cayuga did not observe the fourteenth article of the sailing rules, the respondents attempt to show that the James Watt did not keep her course, as required by the eighteenth article—that she was running faster than the steam tug, and that having passed her on the starboard side she suddenly sheered across her bows, and that the two steamboats in a few seconds came together, the stern of the Cayuga striking against the port stern quarter of the James Watt and caused the injuries alleged in the libel. Instead of that the district court found, as matter of fact, that the Cayuga, just before she reached the point of intersection, stopped her engine, giving those in charge of the ferry-boat to understand that the latter steamer could pass in safety, which had the effect to mislead those in charge of the James Watt, as the Cayuga in a brief period put her engine in motion and started ahead, and that the collision immediately ensued.

Additional testimony was taken, subsequent to the appeal from the decree of the district court, but the circuit court, in view of the whole case, was still inclined to the opinion that the finding of the district judge was correct. Considerable conflict exists in the testimony on that point, but it is not necessary to decide it, as the same conclusion must be adopted even if it be admitted that the steam tug did not stop her engine and mislead the ferry-boat, as is supposed *by the libelants, as it is clear [***277** that the charge made against the James Watt, that she changed her course, is not sustained.

Even if the Cayuga did not do anything to mislead the James Watt, it is clear that she did not keep out of the way, as required by the fourteenth sailing rule, nor did she adopt any proper precaution to prevent a collision. Bound as she was to keep out of the way, the fact that she did not comply with that requirement, is as complete an answer to the defense set up by the claimants as the proof would be that she misled the other vessel, as charged by the libelants. Having done nothing to prevent the collision she must abide the consequences, unless she can show some good reason for her failure to perform her duty in that regard. All the excuse or the principal one offered, is the one before mentioned: that she was ahead and that it was the duty of the James Watt to have adopted the necessary precautions.

Where a steamer astern, in an open sea and in good weather, is pursuing the same general course as the one ahead, and at greater speed, the steamer astern, as a general rule, is required to give way or to adopt the necessary precautions to prevent a collision, as the steamer ahead is entitled to the road, but the court here concurs with the circuit court that that rule did not apply in this case, even if it be conceded that the Cayuga, after she rounded to, and when she first took her course down the river, was slightly ahead, as the relative situation of the two steamers, even at that time, was that described in the fourteenth article of the sailing rules, and not described in the seventeenth article, as is supposed by the respondents. Precautions at that time were not necessary, as the distance between the two steamers, measuring east and west, was very considerable, but they were running on converging lines, and as they advanced that distance was fast reduced, which soon created the necessity for precautions to prevent a collision, and the testimony entirely satisfies the court that at the time the necessity for precaution commenced, the two steamers were nearly abreast, and that the circuit court was right in holding that the fourteenth sailing rule is applicable to the case, *and that it was the duty of the Cayuga [***278** to keep out of the way.

Reference was made to a commissioner in the district court, to ascertain the amount of the damages, and he reported the whole amount to be $2,672.30, as more fully shown in the record. Exceptions were duly taken by the re-

spondents to various items of the report, but the court overruled the exceptions and confirmed the report. Included in the report of the commissioner was an allowance of $75 per day for the seventeen days the steamer was detained while the repairs were being made, and to that allowance the respondents still object. Other exceptions to the commissioner's report were taken at the time, but they have not been much pressed in argument and are overruled as not well founded. Reasonable demurrage is certainly a proper charge, as the leading maxim is *restitutio in integram* in all suits for damages occasioned to vessels by collision. *The Baltimore*, 8 Wall. 385, 19 L. ed. 465. Subject to the provision that owners of ships and vessels are not now liable for any such loss, damage or injury, beyond the amount of their interest in the ship and her freight then pending, it is settled law that the damages which the owner of the injured vessel is entitled to recover in cases of collision are to be estimated in the same manner as in other suits of like nature for injuries to personal property, and the owner, as the suffering party, is not limited to compensation for the immediate effects of the injury inflicted, but the claim for compensation may extend to loss of freight, necessary expenses incurred in making repairs, and unavoidable detention. *The Cayuga*, 2 Ben. 125, 7 Blatchf. 389, 1 Ben. 171. Tested by that rule, it is quite clear that the explanations given by the respective judges in the subordinate courts are sufficient to show that the report of the commissioner was correct. Many other authorities might be referred to in support of the rule here 279*] laid down, *but inasmuch as the subject was fully considered in the case of *The Baltimore*, the court does not deem it necessary to give it much additional consideration.

Decree affirmed.

SAMUEL DOLTON, *Plff. in Err.*,
v.
AARON CAIN *et al.*

(See S. C. 14 Wall. 472–479.)

Adverse possession under equitable title—when a defense to ejectment—right of dower.

1. A person having the equitable title to land, in Illinois, under a contract to purchase, the price of which he has paid or offered to pay, may avail himself of the statute of limitations of that state, by pleading his possession of seven years in bar of an action of ejectment.

2. And this, although the title used to accomplish this object could not be empowered by a plaintiff in an action of ejectment, who can only recover when he has the paramount legal title.

3. A wife of the owner of land has a right of dower only in the event that she survives her husband. She has no present title to the land, either legal or equitable.

[No. 124.]

Submitted Mar. 4, 1872. Decided Apr. 1, 1872.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The case is stated by the court.

Mr. Burton C. Cook, for plaintiff in error:

If any principle of law can be considered as settled in the state of Illinois by a judicial determination, it is settled that a bond for a deed does not constitute color of title under § 11, ch. 66, R. S. of Ill. *Irving* v. *Brownell*, 8 of Ill. 412.

In the case of *Dunlap* v. *Dougherty*, 20 Ill. 404, the court said: "The defendant paid taxes for two or three years under his contract for a conveyance, and without including these payments by him, payment of the taxes for seven successive years was not shown, and the defendant not having shown color of title and payment of taxes running together for the period limited, has failed to bring himself within the provision of section 9 of the statute." The provisions of sections 8 and 9, in relation to color of title, are identical. This case is referred to and approved in the case of *Dickenson* v. *Breeden*, 30 Ill. 320, where the court says: "In *Dunlap* v. *Dougherty*, 20 Ill. 404, we said that an executory contract for a conveyance was not color of title."

Also: "That the substance of the decisions is that any deed purporting on its face to convey title, no matter on what it may be founded, is color of title."

Shackleford v. *Bailey*, 35 Ill. 387; *Brooks* v. *Bruyn*, 35 Ill. 394; *Blanchard* v. *Pratt*, 37 Ill. 245; *Hinckley* v. *Greene*, 52 Ill. 227, in which the court said: "It has been held by numerous cases of this court, that a deed which, on its face, purports to convey title, constitutes claim and color of title."

From these cases, the doctrine of which is entirely uncontroverted in this case, it would seem to be settled that a bond for a deed which does not purport on its face to convey any present title, does not constitute color of title.

Mr. Jackson Grimshaw for defendants in error.

NOTE.—*Omission of, or error, in middle name not material or a misnomer; idem sonans; "Senior" or "Junior" forms no part of name*—see note to Keene v. Meade, 28 U. S. (3 Pet.) 1.

A man may have divers names at divers times, but not divers christian names. A man cannot have two names of baptism as he may have divers surnames. Co. Litt. 3 a.

The law knows but one christian name and the omission of a middle letter or name is of no importance. State v. Martin, 10 Miss. 391; Gotobed's Case, 6 City Hall Rec. 25; Franklin v. Talmadge, 5 Johns. 84; Van Voorhis v. Budd, 39 Barb. 479; Roosevelt v. Gardinier, 2 Cow. 463; Milk v. Christie, 1 Hill, 192; McKay v. Spick, 1 Tex. 376; Edmonston v. The State, 17 Ala. 179; Hart v. Lindsey, 17 N. H. 235, 43 Am. Dec. 597.

"Junior" or "Senior" is no part of a man's name and need not be affixed to the name or signature of a person. Johnson v. Ellison, 4 T. B. Monr. 526, 16 Am. Dec. 163; Brainard v. Stilphin, 6 Vt. 9, 27 Am. Dec. 532; Lepiot v. Browne, 1 Salk. 7; Goodhue v. Berrien, 2 Sandf. Ch. 633; Farnham v. Hildreth, 32 Barb. 280; Hadley v. Shaw, 30 Ill. 354. Father and son having the same name, when that name is used without explanation, the father prima facie is intended. Brown v. Berright, 3 Blackf. 39, 23 Am. Dec. 373; Graves v. Colwell, 90 Ill. 615; People v. Cook, 14 Barb. 300; Padgett v. Lawrence, 10 Paige, 170, 40 Am. Dec. 232.

The law knows but one christian name, and where one christian name is stated and also the initial letter of another christian name, the initial letter may be rejected as surplusage, and need not be proved. Dilts v. Kinney, 3 Green (N. J.) 130; Thompson v. Lee, 21 Ill. 242; Erskine v. Davis, 25 Ill. 251; Bletch v. Johnson, 40 Ill. 116; Isaacs v. Wiley, 12 Vt. 674; Allen v. Taylor, 26 Vt. 599; State v. Manning, 14 Tex. 402; People v. Lockwood, 6 Cal. 205; Bratton v. Seymour, 4 Watts, 329; *contra*, Price v. State, 19 Ohio, 423; The State v. Hughes, 1 Swan (Tenn.) 261.

In Mass. it is held that a double baptismal name is in fact but one name, and essential to the proper description of the person. Com. v. Perkins, 1 Pick. 388; Com. v. Hall, 3 Pick. 262.

Mistake in spelling name is unimportant where the name admits of different modes of spelling;

Mr. Justice **Davis** delivered the opinion of the court:

This is an action of ejectment, to recover possession of a quarter section of land in Adams county, Illinois.

The plaintiff, to maintain the issue on his part, introduced in evidence a patent for the tract of land in controversy from the United States to Benjamin Stephenson, and by various mesne conveyances proved title in himself. His immediate grantors were the heirs of Jacquemart and Thiriat, from whom he purchased in June, 1864. It was proved that the death of Jacquemart occurred in 1848, and Thiriat died in 1845.

The defendant, Cain, in denial of the plaintiff's right to recover, proved that he purchased from Jacquemart the real source of title of both parties, through Washington Cockle, his attorney in fact, the quarter section in dispute, on the 29th day of July, 1848, and took a bond for a deed; that Jacquemart and wife, who were residents of Paris in France, on the 10th of August, 1847, empowered Francis R. Tillon and Walter L. Cutting, of the city of New York, by letters of attorney, to sell their lands in Illinois, with powers of substitution, and that on the 20th of September following, Tillon and Cutting by letter of substitution authorized Washington Cockle, a resident of Peoria, Illinois, to act in their stead. It was further proved that Cain performed his part of the contract of purchase, as far as he was able; that he paid all the instalments but the last, and offered to pay this, but Cockle refused to receive it, because it was rumored that Jacquemart was dead; that there has been a readiness and willingness at all times to make full payment, but the purchaser did not know who was entitled to receive the money. Cain took possession of the land very soon after its purchase, and has occupied it continuously, by himself or tenants, from that time until the commencement of this suit, in 1865, and for seventeen years paid the taxes on it. Cockle, soon after he made the sale, reported it to Tillon and Cutting, who approved it, and under their direction expended all the money received from Cain in paying taxes on other lands belonging to Jacquemart.

On this state of facts, the court below decided that the possession of Cain was protected by certain limitation laws of Illinois, and directed judgment accordingly. From this decision the plaintiff has sued out a writ of error; and the sole question in the case is: whether the defendant, Cain, the other defendant being his tenant, is within the protection of these laws.

They, in substance, declare that whoever has resided on a tract of land for a period of seven successive years prior to the commencement of an action of ejectment, having a connected title in law or equity deducible of record from the state or the United States, can plead the possession in bar of the suit.

It is objected that the entire title of the defendant is not evidenced by acts of record, but this is not necessary. If the source or foundation of the title is of record, it is available to every person claiming a legal or equitable interest under it who can connect himself with it by such evidence as applies to the nature of the right set up. *Collins* v. *Smith*, 18 Ill. 163; *Poage* v. *Chinn*, 4 Dana, 50.

Is the right set up by Cain, then, within the purview of the statute?

It is conceded to be, if the bond was executed under a valid power of attorney, coupled with full payment of the purchase money, and the obligor had the legal title to the land. This concession was necessary, because it is too plain for controversy that a union of these elements would constitute a complete equitable title, which a court of chancery, on the *prop- [*477 er application, would perfect into a legal title. But there are other principles by which an equitable title can be tested and, in their application to this case, relieve it of all difficulty. If a party has done all that could reasonably be expected of him to perform his part of the agreement, it will be considered, in equity, as having been done. Cain is within this condition. He purchased the land from Cockle, paid him all he agreed to pay, except the sum of $66, and this he was ready and willing to pay, but Cockle would not receive it, on the plea that it was rumored his principal was dead. Was not this offer equivalent to payment? What more, under the circumstances of this case, would a court of equity require? It would be a harsh rule to say that the purchaser should lose his land because he did not institute inquiry, in France, to ascertain whether the rumor of Jacquemart's death was well founded or not. There was no revocation of the power, and Cockle was the proper person to receive the money, unless Jacquemart were dead; and there is nothing in the record to show that Cain ever received any information on the subject, except

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but the ordinary rule is, that the pronunciation according to the ordinary rules must produce the true sound. Donnel v. United States, 1 Morris, 141. 39 Am. Dec. 457; State v. Houser, Busb. 410; Belton v. Fisher, 44 Ill. 32.

The following have been held *idem sonans* and no variance. *viz.:* Deadema for Diadema (State v. Patterson, 2 Ired. L. 346, 38 Am. Dec. 299); Anny for Anne (State v. Upton, 1 Dev. 513); Whineyard for Wineyard (Rex v. Foster, Russ & R. 412); Steven for Stevens (Stevens v. Stebbins, 3 Scam. 25).

The strict rule of *idem sonans* has been somewhat relaxed and the following variances held immaterial: between Japhath and Japheth (Morton v. McClure, 22 Ill. 257); Corn and Conn (Moore v. Anderson, 8 Ind. 18); Hearn and Hearne (Coster v. Thomason, 19 Ala. 717); Charleston and Charlestown (Alvord v. Moffatt, 10 Ind. 366); Woolley and Wolley (Power v. Woolley, 21 Ark. 462); Hudson and Hutson (Cato v. Hutson, 7 Mo. 142); Penryn and Pennyrine (Elliott v. Knott, 14 Md 121).

The following variances have been held fatal, viz.: Lyons for Lynes (Lynes v. The State, 5 Port. 236, 30 Am. Dec. 557); Shakespeare for Shakespeare (Shakespeare's Case, 10 East, 83); Tarbart for Tabart (Bingham v. Dickle, 5 Taunt. 814); McCann for McCarn (Tannet's Case, Russ & R. 351); Donald for Donnel (Donnel v. U. S. 1 Morris, 141, 39 Am. Dec. 457).

One to whom an instrument is made payable by name differing from his own may declare on it in his own name, averring that it was made to him by the wrong name. Nicholay v. Kay, 6 Ark. 59. 42 Am. Dec. 680; Taylor v. Strickland, 37 Ala. 642; Wood v. Coman, 56 Ala. 283; Board of Education v. Greenebaum, 39 Ill. 609; Pinckard v. Milmine, 76 Ill. 278; Medway C. M'f'y v. Adams, 10 Mass. 360; Leaphardt v. Sloan, 5 Blackf. 278; Patterson v. Graves, 5 Blackf. 593; Robb v. Bailey, 13 La. Ann. 457; Jester v. Hopper, 10 Ark. 43.

Where a party executes an instrument by a wrong name, he may be sued by his true name with an averment that he signed it by the wrong one. Wood v. Coman, 56 Ala. 283; *contra*, that he must be sued by the name by which he executed the instrument. Wooster v. Lyons, 5 Blackf. 60.

what was contained in the reply of Cockle when he offered to pay him the money. Naturally a man in the predicament of Cain would rest in security, until advised by Cockle that he could safely pay the money to him, or until some one having authority called upon him for payment. This was never done; and, after sixteen years' residence on the land, he is called upon to surrender it because he did not employ unusual means to ascertain the proper parties to whom the small balance due on the land should be paid. If there were no limitation law in Illinois applicable to this case, the action of ejectment would, on proper application, have been enjoined until Cain could, through a court of equity, have perfected his title so as to make it available as a legal defense in a court of law. If, then, Cain had such a title as a court of equity would recognize and convert, by its decree, into a legal title, it must be considered a title in equity within the meaning of the statute. Indeed, it is difficult to conceive what the law does mean by title in equity if this be not 478*] *one. It must be something less than a legal title, else these words in the statute can have no effect. The law was designed to protect both kinds of title alike, and unless equal influence is extended to both, there is a practical repeal of a portion of the statute. In no proper sense can it be said that Cain broke his agreement. It is true he did not formally tender the money to Cockle, but this would have been a useless act, as Cockle told him, on his application to pay, that he could not receive the money. Besides, he had good right to suppose, from what had previously occurred, that the offer to pay Cockle was as valid as the offer to pay Jacquemart.

Why, then, has not Cain, having shown a record foundation, brought himself within the scope of the statute?

It is urged, as an additional reason against this, that Jacquemart did not own the legal title, because one of the mesne conveyances made in 1823 was to Thiriat in trust for Jacquemart. This is true, but Thiriat died in 1845, and Jacquemart, the beneficial owner of the land, assumed to have the right to sell it in July, 1848, when he executed his letter of attorney to Tillon and Cutting, with power of substitution. Nothing is heard from the heirs of Thiriat for a period of nineteen years from the death of their ancestor, when, in 1864, they convey, as do also the heirs of Jacquemart, the tract of land in controversy to the plaintiff. After such a lapse of time, in the absence of any proof on the subject, it is difficult to resist the conclusion that some undue influence must have been used to procure these conveyances; but, be this as it may, the title of Cain is not less an equitable one on account of them and, if so, the statute will not allow his possession, rightfully obtained and continued the requisite length of time, to be disturbed. Without discussing the effect of the deed of Thiriat's heirs, in its application to this case, it is enough to say that a court of equity, looking through forms to the substance of things, would find a way to protect Cain's purchase.

It is urged, as an additional reason why this defense cannot prevail, that the bond is in the 479*] name of Jacquemart *alone, while the power was to convey the joint property of husband and wife. There would be some force in this position if the original deed to Thiriat had been in trust for the wife as well as the husband; but, as this was not the case, the joinder of the wife could only have been intended to alienate any supposed right of dower in the event that she survived her husband. She had no present title to the land, either legal or equitable; and, although Cockle was empowered to use her name, as well as her husband's in any instrument of sale he might execute, the failure to do so cannot, in any event, operate to invalidate the bond for a deed which he gave to Cain.

It is hardly necessary to notice the objection, that Jacquemart's name is incorrectly given in the contract of sale. Cockle testifies that this was a mistake, and it is the business of a court of equity to see that Cain is not harmed by it.

On the whole case we are of the opinion that the defendant is within the protection of the limitation laws of Illinois, which he invoked for his defense and which he had a right to do for that purpose, although the title used to accomplish this object could not be employed by a plaintiff in an action of ejectment, who can only recover when he has the paramount legal title.

In conclusion, it is proper to state that we have examined the decisions of the supreme court of Illinois, to which we have been referred as affecting the question at issue, and do not find anything decided which militates against the views we have presented.

The judgment of the Circuit Court is affirmed.

TRADERS' NATIONAL BANK OF CHICAGO,
Appt.,
v.
GEORGE W. CAMPBELL, Assignee of Charles Hitchcock and Edward M. Endicott.

(See S. C. 14 Wall. 87-98.)

Judgment against bankrupt, when an unlawful preference—necessary parties to suit to set aside—suit against bank which has proceeds—fraudulent preference—when payment is.

*1. Suit in chancery by assignee to recover proceeds of goods sold under judgment against bankrupt taken by confession when both parties knew of the insolvency.

Such a judgment, though taken before the first day of June, 1867, but after the enactment of the bankrupt law, is an unlawful preference under the 35th section of that act.

2. The proceeds of the sale of the bankrupt's goods being in the hands of the defendant, another person who had a like judgment and execution levied on the same goods, is not a necessary party to this suit, being without the jurisdiction. Rule laid down as to necessary parties in chancery.

3. The proceeds of the sale being in the hands of the bank, though it has given the sheriff a certificate of deposit, the assignee was not obliged to move against the sheriff in the state court to pay over the money to him, but had his option to sue the bank which had directed the levy and sale, and held the proceeds in its vaults.

4. The defendant, having money received as collections for the bankrupt, delivered it to the sheriff, who levied the defendant's execution upon it, and applied it in satisfaction of the same. This was a fraudulent preference or taking by process under the act, and does not raise the question whether, if defendant had retained the money it could be

*Headnotes by Mr. Justice MILLER.

set off in his suit against the bankrupt's debt to defendant.

5. So, taking a check from the bankrupt and, crediting the amount of the check then on deposit on the bankrupt's note, the day before taking judgment, was a payment by way of preference and, therefore, void, and does not raise the question of set-off.

[No. 123.]

Argued Mar. 1, 1872. Decided April 8, 1872.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Messrs. **Geo. C. Campbell** and **B. C. Cook** for appellant.

Messrs. **Melville W. Fuller** and *James H. Roberts* for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

This suit is brought in the district court of the United States for the northern district of Illinois, by Campbell, assignee in bankruptcy of Hitchcock and Endicott, against the Traders' National Bank of Chicago and Hotchkiss & Son, to recover money received by them of the bankrupt, by way of fraudulent preference.

Hitchcock and Endicott were, on the 13th of July, declared bankrupts by the district court, at the suit of their creditors, Dowain & Company, commenced the 25th day of June.

On the 28th of May preceding, this bank brought a suit against Hitchcock and Endicott in which, on an allegation of fraud, a *capias* was issued for the arrest of Hitchcock. To avoid this arrest, the bankrupt firm gave the bank a demand note with warrant of attorney to confess judgment, and on the next day the bank entered a judgment for the debt, less $325.-20, the amount of the bankrupts' deposit account with the bank on that day, which was indorsed on the note as a credit. Execution was immediately issued on this judgment and levied on the bankrupts' stock of goods.

On the 30th May, Hotchkiss & Son obtained a judgment against the same parties for a much smaller debt, on which execution was also issued and levied on the same goods.

94*] *It is not asserted by counsel here that the defendant acquired any rights to the property levied on by its execution. It would be useless to do so, for the president of the bank acknowledged that he was aware of the insolvent condition of Hitchcock & Endicott, and had instituted his proceeding after taking the opinion of counsel, that the bankrupt law did not affect such cases until after the first day of June, the earliest time at which proceeding could be commenced under that law.

We are of opinion that the proviso to the 50th section of the bankrupt act, which declares that no petition or other proceeding under it shall be commenced before the first day of June, 1867, is limited in its effect to such commencement, and that any act done after its approval, March 2, 1867, in fraud of the purpose of the statute, was within its prohibitions.

We will consider the objections to the decree in favor of the plaintiff, in the order in which they are assigned in the appellant's brief.

1. It is said that Hotchkiss & Sons were necessary parties, without whom the court could not proceed. They were not within the jurisdiction of the court and, though made defendants by the bill, never appeared in the case, and it was dismissed as to them without prejudice.

Their interest, as asserted by the appellant's counsel, was that they also had a judgment against the bankrupts on which execution was levied, on the same property, and that, as it was sold under both executions, Hotchkiss & Sons have a right to be heard as to the validity of that sale.

In the case of *Barney* v. *Baltimore*, 6 Wall. 280, 18 L. ed. 825, this court, after reviewing the former decisions on this subject, remarks that there is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that, while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class whose relations to the suit are such that, if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties. *If within its jurisdiction, before [*95 deciding the case. But, if this cannot be done, it will proceed to administer such relief as may be in its power between the parties before it. And there is a third class, whose interest in the subject-matter of the suit and in the relief sought is so bound up with that of the other parties that their legal presence as parties in the proceeding is an absolute necessity, without which the court cannot proceed.

Hotchkiss & Sons manifestly belong to this second class, and not the third. The bank is sued for its own wrong in procuring judgment and selling the property, and for the proceeds now in its vaults. Hotchkiss & Sons may or may not be in the wrong in procuring their judgment and levy, but it is not alleged that they have received any of the money. If they are entitled to any of it, they will be at liberty to bring any suit they may be advised to after this suit is disposed of, against the assignee or anyone else, and their rights will not be precluded by the present decree; nor have they any such interest in the subject-matter of this suit that their presence is necessary to the protection of the bank. A complete decree can be made between the bank and the assignee without touching the rights of Hotchkiss & Sons or embarrassing the bank in its relations to them. The organization of the Federal courts has always required them to dispense with parties in chancery not within their jurisdiction unless their presence was an absolute necessity, which it clearly is not in this case.

2. It is said that the assignee should have applied to the state court for an order on the sheriff to pay over the proceeds of the execution to him.

But it cannot be maintained that the assignee, who is pursuing the assets of the bankrupt in the hands of third parties, is bound to resort to the state courts because there is a litigation there pending. The language of the 14th section, that the assignee may prosecute and defend all suits pending at the time of the adjudication of bankruptcy in which the bankrupt is a party, does not oblige him to seek a remedy in that way. The 2d section of the act declares that the *circuit courts of the United [*96 States shall have concurrent jurisdiction with

the district courts of all suits at law or in equity which may or shall be brought by the assignee against any person claiming an adverse interest touching any property or rights of property of said bankrupt.

The decree in the present suit is founded on the idea that the bank, by means of its illegal and collusive proceedings in the state court, has received the proceeds of property which ought to have come to the assignee. He has a right to proceed against the bank directly in the Federal court for those proceeds, and is not obliged to resort to the state court, where the matter is substantially ended, for relief.

3. The third objection is, that the bank has not received from the sheriff any sum whatever in satisfaction of the judgment which it recovered against the bankrupts.

The facts of the case are simple and undisputed. The goods of the bankrupt were sold under the execution in favor of the bank, and the sheriff, after deducting the costs of the proceeding, deposited the remainder with the defendant. This suit being then pending, the defendant, instead of giving the sheriff a receipt for the amount as paid on the execution in his hands, gave him a certificate of deposit. This transparent device can deceive no one, and does not vary the legal character of the transaction. The sheriff, under the direction of the Bank, levies upon and sells the property of the bankrupt after the title has passed to the assignee and in violation of the law. He deposits the proceeds of the sale with the party whose agent he was in this illegal appropriation of the goods. The assignee electing to assert his right to the proceeds of the sale instead of the goods themselves, sues the party who caused the seizure and sale, and who has their proceeds in his possession. His right to recover under such circumstances cannot well be doubted.

4. The fourth objection is that the decree rendered against the bank is for too large a sum.

This assignment of error has regard to certain sums coming to the hands of the defendant 97*] as bankers of Hitchcock & *Endicott, and which they claim a right to retain by way of set-off.

The amount of $943.20 was received on the 12th day of June, some days after their judgment had been recovered in the state court, and after the execution had been levied on the stock of the bankrupt's goods. It was received as collections made by the bank from drafts placed by the bankrupts in their hands in the ordinary course of business, and if they had retained it and appropriated it as a set-off against the debt of the bankrupt to them, an interesting question might have arisen as to their right to do so. But instead of doing this, they handed it over to the sheriff, who levied on it as the property of the bankrupt by virtue of the same execution under which he levied on and sold the goods. By the act of the bank it was thus placed in the same category with the goods, and instead of exercising their own right of set-off by directing the sheriff to credit the execution with the sum received by them on the debt, they delivered it to him to be treated as the goods of the bankrupt and subjected by him to their illegal judgment. This amount, then, must be treated in the same manner as the other money received by them from the sheriff on the sale of the goods.

There was in the bank on deposit to the credit of Hitchcock & Endicott, on the day they gave the judgment note, the sum of $325.20. This sum was not computed or deducted when the note was given. On the next day, before the bank caused the judgment to be entered up, they credited this amount on the note and took judgment for that much less. They now claim that this was what they had a right to do, and that it should remain a valid set-off. But this does not appear to have been really what was done. It appears that Hitchcock & Endicott gave the bank a check for the sum, and by virtue of that check it was indorsed on the note as a payment. Now, as both the bank and the bankrupts knew of the insolvency of the latter, this was a payment by way of preference and, therefore, void by the 35th section of the bankrupt act. In this case, as in the other, if they had stood on their right of set-off, it might *possibly have been available, but when [*98 they treat it as the bankrupts' property and endeavor to secure an illegal preference by getting the bankrupts to make a payment in the one case and seizing it by execution in the other when they knew of the insolvency, both appropriations are void.

We see no error in the decree which was rendered in the District Court and affirmed in the Circuit Court on appeal, and which is again affirmed by this court.

THE STEAMSHIP JAVA, etc., James Burns, John Burns, and Charles McIver, *Claimants, Appts.*,

v.

JUDD LINSEED & SPERM OIL COMPANY, *Libt.*

(See S. C. "*The Java*," 14 Wall. 189-199.)

Collision in harbor—duty of steamer—inevitable accident.

1. A steamer in a crowded harbor is not liable for a collision simply because she pursued an unusual course in going to her dock, and she was only bound to use that degree of care and precaution which the particular circumstances of the case demanded.

2. She was not liable for a collision with a schooner which floated along slowly with the tide, without having her sails up (her crew being engaged in hoisting sail) not being under control, and entirely concealed from the view of the steamer by the intervention of another vessel, and which came out from behind the latter without any notice or warning.

3. An inevitable accident need not be caused by external force, as of winds and waves.

[No. 145.]

Argued Mar. 25, 1872. Decided Apr. 8, 1872.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The case is stated by the court.

Mr. **William G. Russell**, for appellants:

NOTE.—*Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting*—see notes, 13 L. ed. U. S. 537; 25 L. ed. U. S. 168; 28 C. C. A. 532; 29 C. C. A. 368.

Rules for avoiding collision; steamer meeting steamer—see notes, 14 L. ed. U. S. 68; 35 L. ed. U. S. 453; 30 C. C. A. 630; 60 C. C. A. 254.

The statute regulations and the rule of the admiralty courts, imposing upon steamers the obligation to avoid sailing vessels, do not apply except in cases where the vessels are in sight of each other in time to avoid the collision; provided their failure to see each other earlier results from no fault or omission on the part of the steamer.

Peck v. *Sanderson*, 17 How. 178, 15 L. ed. 205; *Steamship Co.* v. *Rumball*, 21 How. 37? 16 L. ed. 144; *Bentley* v. *Coyne*, 4 Wall. 509, 18 L. ed. 457; *The Morning Light*, 2 Wall. 550, 17 L. ed. 862; *Wakefield* v. *The Governor*, 1 Clif. 93; *Baker* v. *The City of New York*, 1 Clif. 75; *Hall* v. *The Buffalo*, Newb. 115; *The Wings of the Morning*, 5 Blatchf. 15; *The Scotia*, 7 Blatchf. 308; *The Ebenezer*, 2 W. Rob. 206; *The Itinerant*, 2 W. Rob. 236.

The rule which holds the steamer prima facie in fault for not avoiding a collision with a sailing vessel, does not preclude proof that in fact she exercised in due season all possible precaution and skill, or that degree of caution and skill which the circumstances required and admitted, and that upon such proof she is exempt from liability.

The Grace Girdler, 7 Wall. 196, 19 L. ed. 113; *The Scotia*, 7 Blatchf. 308.

Upon the authorities, and making the distinction between sustaining the burden of proof and a prima facie case, until fault be proved on the part of the steamer in bringing the vessel into danger of collision, the burden of proof is, throughout, on the libelant, to show that the collision was for the misconduct or negligence of a vessel sought to be charged.

Pritch. Adm. Dig., Damages, 1, 66-87; Pars. Ship. & Adm. 529, and cases cited; *The Bolina*, 3 Notes of Cas. 208, 210; *The London*, 11 Moore, P. C. 312; *The George*, 4 Notes of Cas. 161.

Whatever be the rule as to the burden of proof, a steamer is not to be held liable for a collision which cannot be attributed to any act or omission on her part, which, under the circumstances, the court can condemn as a fault; and if it be affirmatively proved that from the earliest period at which caution and skill can be required or exercised, down to the fact of the collision, she has exercised in every particular that degree of caution, diligence and skill which the circumstances of the case require, she is exempt from liability.

But whether this court shall adopt the earlier definition of inevitable accident, of Doctor Lushington in *The Virgil*, 2 W. Rob. 201, 204, "That which the party charged with the offense could not possibly prevent by the exercise of ordinary care, caution and maritime skill;" or that given later in *The Lochlibo*, 3 W. Rob. 310-315, "When both parties have endeavored by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident," adopted by this court in *Union S. S. Co.* v. *N. Y. & Va. S. S. Co.* 24 How. 313, 16 L. ed. 701, or the more elaborate definition given in *The Europa*, 14 Jur. 627, and adopted by this court in *The Grace Girdler, supra*, "Where a vessel is pursuing a lawful avocation in a lawful manner using the proper precautions against danger, and an accident occurs, the highest degree of caution that can be used is not required; it is enough that it is reasonable under the circumstances, such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view, the safety of life and property;" or even if this court should enforce the most stringent limitation to exemption by inevitable accident, as maintained in the dissenting opinion in *The Grace Girdler*. In either case and upon any rule of law yet laid down, the steamer is entitled to this defense upon affirmative proof that the collision occurred, notwithstanding she was at all times and in all respects in the exercise of the highest degree of care and skill, by reason of an event which she could not be reasonably required to anticipate or to guard against.

The appellants contend that the circuit court erred:

1. In misapplying the rule of law and holding the Java liable for a collision, which occurred while she was pursuing a course which she chose without fault and pursued with all possible vigilance, caution, and skill, merely because the result showed the possibility of danger without regard to the antecedent improbability that such danger should be met, or the caution and vigilance used to determine whether it was probable; or,

2. In assuming as a fact that the danger, which actually occurred and is, therefore, demonstrated as possible, was one which might reasonably have been anticipated as among the probabilities by which her course should have been determined.

We respectfully submit that the proposition that a ship may, without fault, take a certain course, and, pursuing it with the extremest degree of care, vigilance and skill may nevertheless, be held liable for a collision which results from her so taking it, or rather which would not have resulted had she not taken it, is at variance with the universal rule of law which limits the plaintiff's right of recovery to a breach of obligation on the part of the defendant.

We claim then:

1. That there was no want of due precaution on the part of the steamer in not discovering the schooner sooner than she did.

2. That the steamer was not in fault for the course which she took towards her dock, nor for the manner in which she pursued that course.

3. That the steamer used all proper measures and due diligence and skill to avert the collision, after discovering the schooner and imminence of the danger.

If these propositions be maintained, this case is broadly distinguishable from any of that long line of decisions of the courts of the United States referred to in the opinion of the judge of the circuit court, as holding steamships liable for collision with sailing vessels, in this: that here no direct fault can be attributed to the Java in any one particular; while in each of the cases cited, some direct positive fault is pointed out as the ground of liability.

That in case of collision by inevitable accident the loss rests where it falls, and neither party can recover, we cite *Union S. S. Co.* v.

N. Y. & Va. S. S. Co. 24 How. 307, 16 L. ed. 699; *The Morning Light*, 2 Wall. 550, 17 L. ed. 862; *The Brooklyn*, 4 Blatchf. 365.

Mr. **Richard H. Dana, Jr.**, for appellee:

I. Statute regulations (act 1864, ch. 69, art. 15, 13 Stat. at L. 60): "If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such direction as to involve risk of a collision, the steamship shall keep out of the way of the sailing ship."

II. If a steamer approaches a sailing vessel, the steamer is required to take the necessary measures to avoid collision; and if collision occurs and it is not shown to have been inevitable, the steamer is, prima facie, in fault.

The Oregon, 18 How. 570, 15 L. ed. 515; *Steamship Co.* v. *Rumball*, 21 How. 372, 16 L. ed. 144; *The City of New York*, 1 Clif. 84; *The Governor*, 1 Clif. 93; Cliff. J. 97; *The Carroll*, 8 Wall. 302, 19 L. ed. 392; *The Clement*, 2 Curt. 369.

III. Inevitable accident is not simply when it is too late, but it must appear that its being too late was not the fault of either side.

It must be understood to mean "a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution and a proper display of nautical skill, to prevent its occurrence." Adopted by the Supreme Court in *The Pennsylvania; The Union S. S. Co.* v. *N. Y. & Va. S. S. Co. supra.*

It does not apply to a case when it is simply too late; for the question remains: how came it to be too late?

See, also, dissenting opinion in *The Grace Gridler*, 7 Wall. 204, 19 L. ed. 116, showing unwillingness to admit a collision to be accidental or inevitable, when it occurs during the day, in good weather and with time enough, and one vessel has on her the duty to keep out of the way, unless the evidence of fault in the other is clear.

The Governor, 1 Cliff. 93; *The John Adams*, 1 Cliff. 404, Clifford, J. p. 14; *The Egyptian*, 8 Law Times, N. S. 776, a strong case, where the Privy Council held a vessel liable for a collision which had done all she could to avoid it, after the danger was discovered. *The Clement, supra; The Cuba*, Lush 14, 6 Jur. N. S. 152; *The Neptune* (*St. John* v. *Paine*), 10 How. 583; *The Oregon*, 18 How. 570, 15 L. ed. 515; *The Genesee Chief*, 12 How. 461; *Steamship Co.* v. *Rumball*, 21 How. Clifford, J. 385, 16 L. ed. 149.

IV. A steamer, in entering a harbor, is bound to great caution. The vigilance is thrown on her. Ordinary care will not excuse her. Steamers in such instances have been held in fault for not using precaution, although they may have done their utmost at the time.

Culbertson v. *The Southern Belle*, 18 How. 587, 15 L. ed. 495; *The Russia*, 3 Ben. 471.

If the night is too dark to distinguish a small vessel in season, a large steamer should not attempt to go down the harbor. *The R. B. Forbes*, 1 Spr. 329.

V. The Supreme Court always holds a steamer responsible for the selection of her course. If she takes an unusual course, or one that involves more risk than another, when she has an election, or voluntarily puts herself in position where, if a sailing vessel shall happen to come in the way, she cannot avoid her, or cannot do so without extreme measures on her part, she is responsible for the damage. And, in such cases, it is not an excuse to show that but for some mere error, not a fault in the other vessel, or some accident to her, the collision might not have occurred: it not being made clear that the collision was occasioned by a fault of the other vessel, to which the course taken by the steamer did not contribute. *Crockett* v. *The Isaac Newton*, 18 How. 581, 15 L. ed. 492; *The Southern Belle, supra; Fretz* v. *Bull*, 12 How. 466; *The Russia*, 3 Ben. 471; *The Roanoke* (*N. Y. & Va. S. S. Co.* v. *Calderwood*) 19 How. 245, 15 L. ed. 613; *The Peerless*, Vern. & Lush. 30; *The Falkland*, Brown & Lush. 204; *The Fyenoord*, Swab. 377.

Result of law and facts.

I. The Java had the usual broad channel, and deliberately elected to go through a narrow passage, very seldom used by screw steamers of her length and draft, for her own convenience solely. In doing this, she took upon herself the risk, if ill consequences ensued.

II. It is proved and is substantially admitted by the experts for the claimants, that such a vessel ought not to go through that passage unless the passage was clear; and that she ought not to go there if she knew she was to meet a vessel there.

III. At the place where she ported her helm to go that way, the Java could not see the course inside the school-ship. Still, if she had kept close on the north side of the channel, the course would have been more open to her view. In going through the passage, therefore, she had an election, and chose to keep in the middle of the channel, so as to bring her to such an angle with the school-ship that she could not see objects on the other side, or on the starboard bow of the school-ship. She is chargeable with negligence in this election.

IV. The passage inside was hazardous for a screw-steamer of her length and draft, in case any craft should be in her way there.

V. It is clear that as soon as she saw the McCloskey, a collision was inevitable. Neither her helm nor her machinery nor her ground-tackle nor all together, could prevent it.

VI. The Java could never be sure that small vessels, tugs, boats, barges and scows, might not come into the passage at any moment.

VII. Of the many hundred passages of defendant's steamers since the school-ship was moored there, only one or two had been inside. Some large steamers go inside, but not like the Java, and it is to be presumed that they keep on the north side, in order to keep the passage open to view, so that they can both see and be seen.

Therefore, if a small vessel left the wharf in East Boston to go inside, and saw no steamer in view, she was justified in supposing she should not meet one until she got clear of the school-ship. This crossing the stern of the school-ship by a huge screw-steamer, was a surprise.

VIII. The collision was not inevitable, for there were two other courses open to the Java, in one of which it could not and in the other probably would not have occurred

IX. The Java is prima facie in fault, the collision having occurred in fine weather and in broad daylight. No accident disabled her or put her to disadvantage. Nothing happened that she was not bound to anticipate as possible or probable.

She must make good the damage, unless it appears clearly that the collision was caused by the fault of the schooner.

X. No fault is charged on the schooner. It is only said that if her sail had been fully up, she would have been earlier seen by the Java. No one can tell how much earlier, or whether enough so to have affected the result. Besides, it is shown that the Java did see the masts of the McCloskey as they passed along, above the hull of the school-ship.

The McCloskey was neither in fault nor in error in not having her sail fully up. It is natural and usual that a vessel leaving a near dock without sail hoisted, as she was obliged to, should not get her sail fully up when passing the bow and beam of the school-ship. It was one of the probabilities the Java took the risk of when she went into that passage. The Java was bound to anticipate meeting vessels without masts or sails, or vessels with sails in process of being hoisted.

Mr. Justice **Bradley** delivered the opinion of the court:

On the 7th of November, 1866, the Cunard Steamship Java entered Boston harbor about noon, in fine, clear weather, the tide being about one hour's ebb, and the wind blowing a three or four knot breeze from the west. Her berth and point of destination was a wharf at East Boston, about two thousand feet east of the Boston commercial wharves. Her proper course, in coming up from what is called the upper middle, until she arrived within about a mile of the commercial wharves, and **190*]** *seven eighths of a mile from her own dock, was about northwest by west. At this point, a direct course to her dock would require her to change her course about two points more to the north. But almost directly in her path, a little to the right of it, lay at anchor a large school-ship for the instruction of boys, nearly two thirds of the distance between her and her dock and about seventeen feet out of water. In getting into her berth, she could go either to the right or left of this school-ship. The main expanse of water, two thousand feet wide, was to the left of the school-ship; but there was a sufficient channel of about five hundred feet in width at that period of tide to the right of it. Her most direct course would have been to the left, but her pilot chose the right, for the reason, as alleged, that several vessels were lying at anchor to the left or west of the school-ship along in front of the East Boston dock; and he judged that he could get the Java more easily into her berth by going to the right.

It so happened that just as the Java approached the school-ship, the schooner, James McCloskey came out from behind it, having been previously concealed by it; her sails not being up; and although the Java was only making about two knots an hour and used every exertion that human skill could devise, a collision was inevitable; and the schooner was so much injured that she had to run onto the East Boston flats, to prevent sinking. This suit was brought by the owners of the James McCloskey, to recover the damage to vessel and cargo.

The question is, whether the Java is at fault; and no fault is seriously suggested, but that of going to the right of the school-ship. The district court decided in favor of the Java; the circuit court in favor of the libelants. The learned judge who delivered the opinion of the latter court, in answer to the argument that the Java pursued an unusual course in attempting to go to her dock by the passage to the right of the school-ship, says: "A vessel is not to be considered in fault merely because she takes, for reasons of her own convenience or necessity, an unusual course; but when there is a usual and an unusual course for her convenience, does it at her peril, and is bound to see that she does it in safety." Again he says: "The school-ship for many years had been constantly, during the winter months, kept moored in the same position, near the edge of the channel. She was large and high out of water. The pilot of the Java knew her position, and that the view of a small sailing vessel might be shut out by the school-ship. The steamer was bound to guard against the emergency. If she went under the stern of the school-ship at an acute angle, under such circumstances, she was bound by law to proceed so slowly and with so much vigilance that she could keep out of the way of the sailing vessel." If these expressions mean that the Java was bound to use more than ordinary precaution by reason of taking an unusual route, they are correct; but if they mean that she was liable at all events, whatever precaution she took, we cannot concur in the position. A small vessel might have been concealed by the school-ship, and might have come out upon the Java unawares, whichever side of the school-ship she had gone. It was shown by the evidence that the Cunard steamers had before passed in by the same route which the Java took, and it seems on this occasion to have been the preferable one, inasmuch as the Java, from her great length, could not by herself, have turned into her dock had she taken the other route and gone around the vessels lying at anchor. She had a perfect right to go by the passage which she took, as much so as the James McCloskey had to come out by that passage; and in doing so, she was not liable at all events; she was only bound to use that degree of care and precaution which the particular circumstances of the case demanded. There is not the slightest evidence that in this regard anything was wanting, or that there was any lack of skill or vigilance on the part of the pilot and crew of the Java.

On the other hand, the James McCloskey was not without fault. She had been towed down from one of the East Boston wharves to the school-ship, and there discharged her tug, and floated along slowly with the tide, without having her sails up (her crew being engaged in hoisting sail), without being under control, and entirely concealed from the view of the Java by the intervention of the school-ship. She came out from behind the latter without any notice or warning. If either ship is to blame, we think the blame rests with her, rather than with the Java.

It is contended that the Java ought to have **199*]** anticipated *the possibility of a small vessel lying behind the school-ship. The answer is that she took every reasonable precaution which the circumstances required. She proceeded very slowly, only two knots an hour; she had lookouts posted in every proper place; as soon as the schooner was seen, she took every means in her power to stop and back and avoid the collision. How could she anticipate the possibility of a vessel lying behind the school-ship, without sails hoisted, incapable of being seen in a bright, clear day, drifting along helplessly with the tide, ready to drop under the Java at her approach? Is it not applying too severe a rule to the Java, to require her to anticipate all this, and to require the schooner to anticipate nothing?

It seems to us that if this was not an inevitable accident, so far as the Java was concerned, it would be very difficult to imagine a case of inevitable accident not caused by external force, as of winds and waves.

The decree of the Circuit Court is reversed, with directions to dismiss the libel.

Dissenting, Mr. Justice **Clifford** and Mr. Justice **Davis.**

GEORGE W. DENT, *Plff. in Err.*,
v.
FRANTZ EMMEGER *et al.*

(See S. C. 14 Wall. 308-314.)

Spanish titles in Louisiana—confirmation of—survey, when necessary—Cerre claim—surveys as evidence.

1. Titles which were perfect before the cession of the territory of Louisiana to the United States, continued so afterwards, and were in nowise affected by the change of sovereignty.
2. But inchoate rights which were of imperfect obligation, when confirmed by Congress took their legal validity wholly from the act of confirmation, and the elder confirmee has always a better right than the junior, without reference to the date of the origin of their respective claims.
3. After the passage of the act of 1812, the claim of the village of Carondelet was still indefinite and unenforceable, until made definite and located by the survey prescribed and provided for.
4. The survey made in 1817 and approved by the Surveyor General in 1834, is binding upon the village and estops it from claiming any land beyond the lines thus established.
5. The Cerre claim was confirmed after the lines of the commons had been defined and established by the surveys of 1817 and 1834, and was subject to the title of the village, and cannot prevail against its title.
6. Documents relating to surveys and a plat of a survey made since the resurvey in 1834, were incompetent evidence.

[No. 125.]

Argued Mar. 5, 1872. Decided Apr. 8, 1872.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

The case is stated by the court.

Messrs. **Glover & Shepley** for plaintiff in error.

Mr. **Britton A. Hill** for defendant in error:

309*] *Mr. Justice **Swayne** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of Missouri.

The plaintiff in error brought an action of ejectment to recover the premises described in his declaration. They consist of thirty acres of land, and are lots 90 and 91 of the commons tract of the town or village of Carondelet, as subdivided by the survey made by Jasper Myer, in 1837. The parties waived the intervention of a jury and submitted the case to the court. The court found the facts specially and adjudged that the plaintiff could not recover, and that the Carondelet title, which was held to be the better one, was in the defendants. In the progress of the cause, the plaintiff offered certain evidence which was excluded by the court, and he thereupon excepted.

Two questions are presented for our consideration:

Whether the facts found are sufficient to support the judgment given; and,

Whether the court erred in excluding the evidence to which the bill of exception relates.

The examination of these questions renders it necessary to consider the title of the respective parties as disclosed in the record, as well as the testimony excluded.

The premises in controversy are within the territory of Louisiana which belonged originally to France, was transferred by that country to Spain, and by Spain subsequently back to France, and by France to the United States by the Treaty of the 30th of April, 1803. Carondelet was a village of that part of the territory which subsequently became the state of Missouri, and contained four descriptions of real property. They were known as in-lots, out-lots, common field lots, and commons. It is with the last only that we have to do in this case. At the period of the transfer to the United States, the claim of the village to the premises in controversy was supported by no clear and definite evidence, and the out-boundaries of the tract had not been run. On the 25th of December, 1797, Soulard, then the surveyor general of the territory of Louisiana, certified that at the request of the inhabitants of the village of Carondelet, Berthelemy *had [***310** been appointed to survey the tract granted to them as commons by Lieutenant Governor Trudeau, and that he had failed to perform the work by reason of his compass being found out of order, and that want of time had prevented the surveyor general subsequently from having the survey made.

This condition of things subsisted when the territory came into the possession of the United States under the Treaty with France of 1803, and it continued until Congress acted upon the subject. By the act of June 13th, 1812 (2 Stat. at L. 748, § 1), it was declared "that the rights, titles, and claims to town or village lots, outlots common field lots, and commons, in, adjoining, and belonging to the several towns and villages," of which Carondelet is one, "which have been inhabited, cultivated, or possessed prior to the 20th of December, 1803, are hereby confirmed to the inhabitants of the respective towns or villages aforesaid according to their several rights in common thereto." It was provided that nothing in the act should affect the rights of persons whose titles had been confirmed by the board of commissioners appointed to adjust and settle such claims. It was made the duty of the principal deputy surveyor of the territory to survey, where it had not been done, the out-boundary lines of the villages named, so as to include the out-lots, common field lots and commons belonging to them

respectively. Plats of the surveys were to be forwarded to the surveyor general, who was required to forward copies to the Commissioner of the General Land Office and the recorder of land titles.

The act of April 29th, 1816 (3 Stat. at L. 325), provided for the appointment of a surveyor of the public lands in the territories of Illinois and Missouri, and after requiring him to appoint a sufficient number of skilful surveyors as his deputies, made it his duty, among other things, to cause to be surveyed the lands in those territories, claims to which had been or might thereafter be confirmed by Congress, which had not already been surveyed according to law.

311*] *Under the act of 1812, a survey of the out-boundary lines of Carondelet was made by Rector, a deputy surveyor, under instructions from the office of his principal, and the survey and field notes were deposited in that office in the year 1817.

The act of January 27th, 1831 (4 Stat. at L. 435), declared that the United States did thereby relinquish to the inhabitants of the villages named in the act of 1812 all the title of the United States, to the lots and commons "in, adjoining, and belonging to said towns and villages, to be held according to their respective rights, to be regulated and disposed of according to the laws of Missouri."

Pursuant to orders from the surveyor general, his deputy, Brown, retraced the lines of the commons of Carondelet, as run by Rector, and re-established the corners. This resurvey was returned to the surveyor general, and was approved by him on the 29th of July, 1834.

This statement exhibits the several links in the defendants' chain of title, so far as regards the action of the government.

That of the plaintiff in error had its inception also at a period preceding the Treaty of Cessions of 1803. In 1789 the then lieutenant governor of upper Louisiana, on the petition of Gabriel Cerre, conceded to him a tract of land of ten by forty arpents. In 1812 Cerre presented the claim for confirmation under the acts of Congress of 1805 and 1807, and it was rejected by the commissioners. It was presented by Cerre's legal representatives before the commissioners appointed under the act of Congress of July 9, 1832, and was by them recommended for confirmation, and was confirmed accordingly by an act of Congress of the 4th of July, 1836. 5 Stat. at L. 127. The right of all adverse claimants, to assert their claims in a court of justice was saved, and it was provided that if any of the land confirmed had been located by any other person under any law of the United States, or had been surveyed and sold by the United States, the confirmation should not avail against the title thus acquired; but that

312*] *the confirmee might, to the extent of the interference, locate his claim elsewhere in the state of Missouri or the territory of Arkansas, as the claim might have originated on one or the other, upon any lands of the United States, subject to entry at private sale. Under this act the claim of Cerre was surveyed for the first time, and the survey was made within the limits of the commons of Carondelet as previously run by Rector in 1817, and by Brown in 1834. Before this survey the Cerre claim was totally undefined and uncertain as regards its out-boundaries.

The act of March 3, 1869, declared that the claim of the legal representatives of Cerre was thereby confirmed "in place, subject to any valid adverse rights, if such there be," and that a patent should be issued accordingly. A patent bearing date the 3d of July, 1869, was accordingly issued. It was admitted in the court below that the plaintiff in error held whatever title was conveyed by this patent. The premises in controversy are within the limits of the Carondelet commons as surveyed by Rector and Brown, and embrace the premises in controversy in this suit.

The labor of our predecessors have left us little to do, and a few remarks will be sufficient to dispose of the case.

Titles which were perfect before the cession of the territory to the United States, continued so afterwards, and were in nowise affected by the change of sovereignty. *U. S.* v. *Roselius*, 15 How. 36. The treaty so provided, and such would have been the effect of the principles of the law of nations if the treaty had contained no provision upon the subject. According to that code, a change of government is never permitted to affect pre-existing rights of private property. Perfect titles are as valid under the new government as they were under its predecessor. *Strother* v. *Lucas*, 12 Pet. 412. But inchoate rights such as those of Cerre were of imperfect obligation and affected only the conscience of the new sovereign. They were not of such a nature (until that sovereign gave them a vitality and efficacy which they [*313 did not before possess) that a court of law or equity could recognize or enforce them. When confirmed by Congress they became American titles, and took their legal validity wholly from the act of confirmation and not from any French or Spanish element which entered into their previous existence. The doctrine of senior and junior equities and of relation back has no application in the jurisprudence of such cases. The elder confirmee has always a better right than the junior, without reference to the date of the origin of their respective claims or the circumstances attending it. Such is the settled course of adjudication both by this court and the supreme court of Missouri. *Menard* v. *Massey*, 8 How. 307; *Chouteau* v. *Eckhart*, 2 How. 345; *Les Bois* v. *Bramell*, 4 How. 449; *Mackay* v. *Dillon*, 4 How. 430; *Bird* v. *Montgomery*, 6 Mo. 514; *Mackay* v. *Dillon*, 7 Mo. 7; *Vasquez* v. *Ewing*, 42 Mo. 248.

After the passage of the act of 1812 the claim of the city was still indefinite and unenforceable until made definite and located by the survey prescribed and provided for. A survey made under the direction of the officer designated to have it made and approved by him was final and conclusive unless an appeal were taken to the Commissioner of the General Land Office. *Menard* v. *Massey*, 8 How. 313. The survey made by Rector in 1817, retraced by Brown, and approved by the surveyor general in 1834, is binding upon the village and estops her from claiming any land beyond the lines thus established. *Carondelet* v. *St. Louis*, 1 Black, 179, 17 L. ed. 102. And those lines must necessarily be of equal validity as regards those claiming against her. The confirmation by the act of 1812 was

exclusive except as to adverse claims which had then been confirmed. The Cerre claim was not within this category. It was confirmed subsequently, and after the lines of the commons had been defined and established by the surveys of 1817 and 1834. The action of Congress in confirming it was in every instance made subject to all prior valid conflicting rights. The title of the village asserted in this litigation was of that character.

314*] *Upon principle, authority, and the express legislation of Congress, we are constrained to hold that the adverse claim of the plaintiff in error cannot prevail against the title of the village.

The evidence excluded by the court is set out in full in the bill of exceptions, and consists of copies of documents relating to the surveys of Rector and Brown. The first of these documents bears date on the 24th of September, 1839, and the last on the 8th of October, 1855. They are communications from solicitors of the land office, setting forth objections to the surveys, from Commissioners of the General Land Office, the surveyor general of Illinois and Missouri, the Secretary of War and the Secretary of the Interior upon the same subject; and finally a plat of the survey as retraced by Brown —with a certificate appended by the surveyor general—which states that the survey so traced was sanctioned by the Secretary of the Interior on the 23d of February, 1855, with a large reservation in favor of the United States at Jefferson barracks, and subject to all other adverse claims.

As the right of the village, according to the judgment of this court in *Carondelet* v. *St. Louis* (*supra*), had been fixed by the resurvey of Brown, in 1834, which was conclusive, as regards all adverse individual claims, the testimony was clearly irrelevant and incompetent and was properly rejected. The Acts of 1812 and 1836 were inapplicable to the United States and did not affect their rights.

The judgment of the Circuit Court is affirmed.

THE FIRST NATIONAL BANK OF BETHEL,
Plff. in Err.,
v.
THE NATIONAL PAHQUIOQUE BANK.

(See S. C. 14 Wall. 383–402.)

National banks, where may be sued—dissolution of—effect of—receiver's decision, how reviewed.

1. National banks may be sued in any state, county or municipal court in the county or city in which they are located, having jurisdiction in similar cases.
2. The act of the Comptroller of the Currency in appointing a receiver of a national bank does not work its complete dissolution, but the bank, as a legal entity, continues to exist.
3. The bank may still sue and be sued in all cases where it may be necessary that the corporate name of the association shall be used for that purpose in closing its business.
4. The decision of the receiver disallowing a claim against the bank is not final, but is subject to review in the state court.

[No. 116.]

Argued Feb. 21, 1872. Decided Apr. 8, 1872.

IN ERROR to the Supreme Court of Errors of the State of Connecticut.

The case is stated by the court.

Messrs. **C. B. Goodrich, Roger Averill,** and *Lyman D. Brewster* for plaintiff in error:

An association, under the act of June 3, 1864, ch. 106, § 8, shall have succession, corporate existence, for the period of twenty years from its organization, unless sooner dissolved: First, according to the provisions of its articles of association; or, second, by the act of its stockholders owning two thirds of its stock; or, third, unless the franchise, which consists in a right of banking, shall be forfeited by a violation of the act.

The bank of Bethel committed a violation of the act, Feb. 21, 1868, at which time it failed to redeem some of its circulating notes, which failure was duly ascertained by the Comptroller of the Currency, who, Feb. 26, acted thereupon, by the appointment of a receiver.

The result is, that the power of succession, corporate capacity, ceased to exist prior to May 30, 1868, at which time the defendant in error instituted its suit. The association was dissolved; the receiver was clothed with power to reduce the assets to money, by suit in his own name; was directed to pay the money to the Treasurer of the United States, subject to the order of the Comptroller of the Currency for the use of those entitled as creditors, giving priority of payment to the United States; the remainder or surplus of the proceeds after the payment of debts, to be paid by the comptroller to the shareholders of the association or their legal representatives, in proportion to the stock by them respectively held; and not to the association in its corporate capacity.

Verplanck v. *Ins. Co.* 2 Paige, ch. 452.

The receiver is absolutely vested with all the property and effects of the corporation. The final order operates as a virtual dissolution of the corporation.

Edw. Rec. ed. 1839, p. 225; *Greeley* v. *Smith*, 3 Story, 657; *Mumma* v. *Potomac Co.* 8 Pet. 281; *Bacon* v. *Robertson*, 18 How. 480, 15 L. ed. 499; *Lum* v. *Robertson*, 6 Wall. 277, 18 L. ed. 743.

In the case at bar, the bank of Bethel has been deprived of its assets; has been, by the action of the comptroller, prohibited from the exercise of any of its franchises. This action of the comptroller must be regarded as having received judicial sanction, inasmuch as he has not been restrained in the manner provided in the act, § 50.

May 30, 1868, at which time the defendant in error commenced its suit, the bank of Bethel had no authority to pay, and was prohibited from paying any creditor. It had no means within its control with which to pay. If the bank had authority after notice by the comptroller, under § 46, to pay a creditor, it might by such payment defeat the provision of the act (§ 50) which gives to the United States, from the assets of the association, priority of payment, for any deficiency in the redemption of its circulating notes, after applying the bonds deposited for their redemption. § 16. It results from the want of authority to pay a creditor, at the time the suit by the defendant in error was instituted, that no suit at law in any court, state or national, could be instituted against the bank of Bethel.

§§ 46–52; *Atlas Bk.* v. *Nahant Bk.* 23 Pick. 480; *Hubbard* v. *Bk.* 7 Met. 340.

If a creditor, after the appointment of a receiver, may institute a suit in a court of law,

every creditor can, and by such course of proceeding may, disregard the winding up under the direction of the comptroller. The comptroller, under § 50, it is submitted, after giving notice for three consecutive months, calling upon all persons who may have claims, to present the same and to make legal proof thereof, may distribute the money paid by the receiver into the Treasury, subject to the order of the comptroller, to those who may have made such proof; and if no creditor has proved to his satisfaction, may distribute it to the shareholders. The fact that the defendant in error caused a copy of its writ of attachment to be given to the receiver, does not bind the assets in his hands, cannot impede the action of the comptroller, nor have the force and effect, indirectly, of an injunction which the state court could not grant. § 57; *Case* v. *Terrell*, *ante*, 134.

Sections 46 and 52 show very clearly that the bank of Bethel could not, May 30, 1868, by its cashier or any other officer, confess, or authorize to be confessed, a judgment against the bank, binding upon the judgment of the comptroller, or upon the stockholders of the bank.

Heath v. *Chadwick*, 2 Phil. 649; *Rochfort* v. *Battersby*, 2 H. of L. Cas. 388.

"An insolvent debtor has not such an interest in property assigned under the insolvent debtor's Acts, as to entitle him to enter into any litigation concerning it."

Wiswall v. *Sampson*, 14 How. 52; *Peale* v. *Phipps*, 14 How. 368; *Vaughan* v. *Northup*, 15 Pet. 1; *Williams* v. *Benedict*, 8 How. 107; *Harris* v. *Dennie*, 3 Pet. 292.

It is proved in § 50 that "the comptroller, after the appointment of a receiver, shall cause notice to be given, calling on all persons who have claims against such association, to present the same and make legal proof thereof." It then directs the comptroller, after providing for any deficiency due to the United States, to make a ratable dividend of the money subject to his order, on all such claims as may have been proved to his satisfaction, "or adjudicated in a court of competent jurisdiction."

These words must be construed with reference to the purpose and provisions of the section, in connection with the other provisions of the act of which they constitute a part; they were not designed to control the provisions of the act, which authorized the comptroller, in five different cases (§§ 12, 15, 31, 32, 46–50), to wind up the affairs of an association, by reason of certain violations of the act, to be ascertained by himself in the mode prescribed by the act. They were not designed to authorize the claimants to institute suits in a court of law against the comptroller, to determine the validity of their claims. § 57, proviso. They were not designed to authorize the institution of suits against a banking association after the appointment of a receiver, to which the comptroller is not made and cannot be made a party.

These words can have full force and effect by applying them to adjudications against a bank, which may have been made prior to any action by the comptroller. When so made, the comptroller is clothed with authority to determine whether they were made by a court of competent jurisdiction. Any other construction of the act, it is submitted, will defeat the winding up for which the act provides, and render it nugatory. A claimant cannot, by an attachment, arrest the assets of a bank in the hands of a receiver appointed by the comptroller; such receiver, in this respect, has all the exemptions and immunities of any receiver, by whatever authority appointed.

After an association has been placed in the hands of a receiver, the statute prescribes the mode of winding up, which includes an ascertainment of the creditors, and the amounts severally due to them. This mode of proof excludes all others. This cannot be doubted, except by holding that the act (§§ 12, 15, 31, 32, 46–50), conferring authority upon the comptroller of the currency to appoint a receiver; to receive proof of claims; to wind up the affairs of the corporation,—is unconstitutional. The voluntary winding up (§ 42) and the dissolution which is provided for under § 53, by judicial action, as already stated, depend upon different considerations.

Murray v. *Bridges*, 10 Barn. & Adol. 589; *Stevens* v. *Evans*, 2 Bur. 1157; *Cates* v. *Knight*, 3 D. & E. 442; *Kennedy* v. *Gibson*, 8 Wall. 498, 19 L. ed. 476; *Cary* v. *Curtis*, 3 How. 236.

The defendant in error, prior to the commencement of its suit, subsequent to the notice given, and to the appointment of a receiver by the comptroller, who called upon all claimants to present and make legal proof of their claims, presented the claim which is now in suit, to Edgar S. Tweedy, the receiver of the First National Bank of Bethel, by whom it was disallowed. He reported his action in this respect to the comptroller, and to the defendant in error. By this presentation the Pahquioque bank made itself party to the winding up of the bank of Bethel under the direction of the comptroller. If it had originally a right of election of remedy, which is not admitted, it exercised the right and could not, thereafter, institute a suit against the corporation; certainly not in a court of common law, nor in any state court, for the purpose of reversing or of reviewing the disallowance.

Messrs. **O. S. Seymour, W. L. Taylor,** and *M. W. Seymour* for defendant in error.

Mr. Justice **Clifford** delivered the opinion of the court:

Associations for banking, formed pursuant to the act to provide a national currency, and duly authorized by the Comptroller of the Currency to commence the business of banking, become bodies corporate and have a succession for the period of twenty years from their organization, unless sooner dissolved according to the provisions of their articles of association, or by the act of the shareholders owning two thirds of the stock, or unless the franchise shall be forfeited by a violation of the act under which the association was formed. Such an association is allowed to select, subject to certain conditions and the approval of the Comptroller of the Currency, another such association at which it will redeem its circulating notes at par, but the provision is that nothing in that section shall relieve any such association from its liability to redeem its notes in circulation at its own counter, at par, in *lawful money, on de- [*392 mand; and in case of failure so to do, the holder may cause the same to be protested in one pack-

age by a notary public, unless the president or cashier of the association which issued the notes, or the president or cashier of the association designated as the place for redeeming the same, will waive demand and notice of protest and execute an admission in writing stating the amount demanded and the fact of non-payment, and it is made the duty of the notary forthwith to forward the admission or notice of protest, as the case may be, to the Comptroller of the Currency for his information and action in the premises.

Notes to a large amount, issued by the corporation defendants for circulation, were held by the corporation plaintiffs, and the plaintiffs presented the same to the defendants for redemption, and the defendants failing to redeem the same, the plaintiffs offered the notes for protest, but the defendants having waived demand and notice of protest, and having tendered an admission in writing stating the amount demanded and the fact of non-payment, the plaintiffs accepted the written admission, and the notary forwarded the same to the Comptroller of the Currency as required under such circumstances. Pursuant to the requirement of law the Comptroller of the Currency appointed a special agent to ascertain whether the facts set forth in the protest were true, and the agent so appointed having reported that the defendants had failed to redeem in lawful money their circulating notes when payment thereof was duly and lawfully demanded, he, the Comptroller of the Currency, appointed a receiver of the delinquent association, with all the powers, duties, and responsibilities given to or imposed upon such an appointee in such case made and provided, and the record shows that the receiver entered upon the duties of his office and took possession of all the books, records and assets, real and personal, of the association, and that he has ever since had the exclusive possession of the same, to be disposed of according to law. Before the commencement of the suit, the Comptroller of the Currency caused notice to be published requiring all claimants to present and 393*] make proof *of their claims against the delinquent association, and the record also shows that the plaintiffs presented the claim in controversy to the receiver for allowance, and that the receiver having disallowed the same, the plaintiffs instituted the present suit in the state court to recover the amount. Appropriate proceedings followed, as in an action of assumpsit, and the parties having been heard, the subordinate court where the suit was brought made a finding of facts, but reserved the question whether the case ought to be dismissed for want of jurisdiction, and if not, what judgment ought to be rendered in the case, and all questions of law arising upon the facts found, for the opinion and advice of the supreme court of errors. Proper measures were adopted to obtain the opinion and advice of the appellate tribunal, and they were duly received and thereupon the subordinate court rendered judgment in favor of the plaintiffs for the whole amount claimed in the declaration. Proceedings in the nature of a writ of error were instituted by the defendants, by which the cause was removed into the supreme court of errors, where the parties were again heard and the decision of the court of errors was that the judgment should be in all things affirmed. Final judgment having been rendered in the state court, the defendants sued out a writ of error under the 25th section of the judiciary act and removed the cause into this court.

Four only of the errors assigned will be examined, as the others, in the view of the case taken by the court, either involve substantially the same considerations or present questions not re-examinable in this court under a writ of error to a state court. Briefly stated the errors assigned to be examined are as follows:

(1) That the state court had no jurisdiction of the case or of the parties at the time the suit was commenced.

(2) That the defendant association prior to the institution of the suit had forfeited its franchise by a violation of the act under which it was formed and had been dissolved by the action of the Comptroller of the Currency.

(3) That the defendant association could not be impleaded *at the time the action was [*394 commenced, as prior to that time the association was prohibited by the act of Congress from paying or satisfying any of its creditors.

(4) That the decision of the receiver disallowing the claim of the plaintiffs was final and was not subject to review in the state court.

Support to the first proposition is supposed to be derived from the conceded fact that such associations are created by an act of Congress and that they are instruments of the national government intrusted with the power of carrying on the business of banking and of employing and circulating Treasury notes as a national currency, subject to the supervision and direction of the Comptroller of the Currency and of the Secretary of the Treasury. Banking associations, it is said, were established as instruments by which the government might perform the trust of furnishing and regulating the National paper currency, and the argument is that inasmuch as they are instruments of the government to carry into effect a national purpose they cannot be impleaded in a state court. Confirmation of that view is also attempted to be drawn from the fact that such associations are controlled by the Treasury Department, that all the notes which they circulate as money are received from the Comptroller of the Currency, and that they cannot issue any instrument for circulation or use as money except the notes intrusted to them by the Comptroller of the Currency, as authorized by the act of Congress.

Beyond all doubt such associations are created by an act of Congress and for the purposes assumed by the defendants, but the conclusion attempted to be drawn from those facts cannot be sustained, as express provision is made by the 57th section of the act that suits, actions, and proceedings against any such association may be had "in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases. Commenced as the action was in the proper court of the state where the association is located and in a court having jurisdiction in similar cases, which is not denied, *it is [*395 quite clear that the objection to the jurisdiction of the court founded upon the character of the

association as an instrument of the national government, must be overruled. Jurisdiction in such suits is, unquestionably, vested in any circuit, district or territorial court of the United States held within the district in which such association may be established, but the decisive answer to the objection of the defendants is that the same section of the act of Congress gives authority to creditors to prosecute such controversies in "any state, county or municipal court in which said association is located" in all cases where it appears that such courts have jurisdiction under the state laws in similar controversies. Proceedings to enjoin the Comptroller of the Currency under that act must, it is true, be instituted and prosecuted in a circuit, district or territorial court of the United States, but the act allows creditors to sue in the proper state courts in all suits, actions, and proceedings against the association, as specifically provided in the 57th section of the act. Authorities to support the proposition are not necessary, as it rests upon an express provision in the act of Congress. 13 Stat. at L. 116.

11. Associations of the kind have a succession for the period of twenty years from their organization, unless sooner dissolved in some one of the modes pointed out in the act under which such associations are formed, and throughout that period, unless sooner dissolved, they may make contracts in the name designated in their organization certificate and may sue and be sued or complain and defend in any court of law or equity as fully as natural persons. Such corporate franchises cease to exist when the term for which they were granted expires, and the association may at any time go into liquidation and be closed by the vote of its shareholders owning two thirds of the stock, but it is not necessary to remark upon those topics, as it is not pretended that the defendant association has ceased to exist or been dissolved in either of those modes. All such as- **396*]** sociations *are bound to redeem their circulating notes either at their own counter or at such other similar association as they are allowed to select for that purpose, and the provision is that if any association shall fail either to make the selection or to redeem its notes as required, the Comptroller of the Currency may, upon receiving satisfactory evidence thereof, appoint a receiver, in the manner provided in the act, to wind up its affairs. Holders of the circulating notes of such an association may demand payment thereof at the office of such association or at its place of redemption designated as aforesaid, and if the association fail to redeem the same in lawful money they may cause the same to be protested, as before explained, and the notary on making such protest or upon receiving such admission, shall forthwith forward the same to the Comptroller of the Currency for his information and action in the premises. Being informed of the default of the association in that mode, it is made the duty of the comptroller to make an examination into the facts, and if satisfied that the default has been committed, to give notice to the association; and the same section provides that from that time it shall not be lawful for the association suffering the default to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it and to deliver special deposits. On receiving such notice the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, may appoint a special agent to examine into the facts of the case, and if satisfied from the protest or the report of the special agent that the charge of default as made is true, he shall, within thirty days, declare the bonds and securities pledged by the association forfeited and give notice to the holders of the circulating notes to present the same for payment at the Treasury, and the provision is that in that event he may in his discretion cause an amount of the bonds pledged, equal at current rates to the amount paid to redeem the outstanding notes of the association, or he may cause such an amount of the bonds pledged as may be necessary to redeem the outstanding notes, to be sold at *public auction; or, if he shall be of [***397** the opinion that the public interest will be best promoted thereby, he may sell at private sale any of the bonds so pledged and receive therefor either money or the circulating notes of such failing association. Power is also conferred upon the Comptroller of the Currency in such a case forthwith to appoint a receiver to take possession of the books, records, and assets of every description of the association and to collect all debts due and claims belonging to it, and upon the order of a court of record of competent jurisdiction he may sell or compound all bad or doubtful debts and may sell all the real and personal property of the association on such terms as the court shall direct, and may, if necessary to pay the debts of the association, enforce the individual liability of the stockholders, as enacted by the 12th section of the act. All moneys so made by the receiver he is to pay over to the Treasurer of the United States, subject to the order of the Comptroller of the Currency, and he is also to make report to that officer of all his acts and proceedings. Receivers may also be appointed for other causes than those already mentioned, as, for example, in case the money reserve which the association is required to have on hand shall fall below the prescribed amount, and when notified to make it good the association shall fail for thirty days to comply with the requirement, or shall fail for thirty days to increase the capital stock of the association to the minimum amount required, where the same has been reduced below that amount by the delinquency of the shareholders and consequent sale and reduction of the stock; or, in case any such association which is required to keep undiminished the twenty per centum surplus mentioned in the 12th section of the act, shall fail to keep it good, in which event the provision is that the Comptroller of the Currency may compel said banking association to close its business and wind up its affairs, as provided in the act under which it was organized. Whenever a receiver is appointed the comptroller is required to give notice of the fact, requesting all persons having claims against the association to present the same and to make the legal proof thereof. *Provision is first to be [***398** made by the comptroller for refunding to the United States any such deficiency in redeeming

the notes of the association as is mentioned in the act, and having refunded that amount the comptroller is required in the next place to make a ratable dividend of the money paid over to him by the receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction. Claims proved to the satisfaction of the comptroller are to be included in the list, and he is also to include in the list all claims adjudicated in a court of competent jurisdiction, which shows conclusively that claims disallowed by the comptroller may be prosecuted in a court having jurisdiction in such cases. *Kennedy* v. *Gibson*, 8 Wall. 506, 19 L. ed. 479. Where the whole assets are not collected and distributed in the first dividend, further dividends on claims proved and adjudicated may be made as the proceeds of the assets are collected and paid to the treasurer, and the remainder, if any, shall be paid to the shareholders.

None of these proceedings, however, support the theory that the association ceased to exist when the receiver was appointed, nor at any time before the assets of the association were fully administered and the balance, if any, is paid to the owners of the stock or their legal representatives.

Delinquent associations whose notes have been protested, and whose officers have been notified by the comptroller that proceedings for liquidation under the act have been instituted, cannot lawfully pay out any of their notes, or discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to the association, and to deliver special deposits, which of itself refutes the theory that the association at that stage of the proceedings has ceased to exist. Evidence to refute that theory is also found in the proviso to the 50th section of the act, which empowers the association, if they deny having failed to redeem their circulating notes, to apply, within ten days after being so 399*] notified by the comptroller *that such proceedings have been commenced, to the nearest circuit or district, or territorial court of the United States to enjoin further proceedings in the premises, and those courts are invested with full jurisdiction to hear and determine the matters put in issue by such an application.

Such associations are authorized to elect or appoint directors, and the directors are empowered to exercise all such incidental powers as shall be necessary to carry on the business of banking. They may make by-laws, discount and negotiate promissory notes, drafts, bills of exchange, or other evidences of debt; receive deposits, buy and sell exchange, coin and bullion; loan money on personal security and obtain, issue and circulate notes, according to the provisions of the act to provide a national currency. Throughout they are enjoined to conform to the regulations of that act, and the provision is that if they knowingly violate any of its provisions or knowingly permit them to be violated, all the rights, privileges, and franchises of the association derived from the act shall be thereby forfeited; but the further provision is that such violation, before the association shall be declared dissolved, shall be determined and adjudged by a proper circuit, district, or territorial court of the United States, which shows conclusively that the act of the comptroller in appointing a receiver does not work a complete dissolution of the association, as is supposed by the defendants. *Frost* v. *Coal Co.* 24 How. 283, 16 L. ed. 639; Ang. & Ames, Corp. 9th ed. 777; Abb. Dig. Corp. 338; Grant, Corp. 295.

III. Express power to sue and be sued, complain and defend, in any court of law and equity, is conferred on such associations by the 8th section of the act providing for their organization, and it seems quite clear that the association is a proper party to be sued in all matters in which the corporation is interested, unless the association is disqualified for that purpose by virtue of the appointment of a receiver or by his subsequent action as such under his appointment. Neither power to sue nor to be sued in such cases is *anywhere in [*400 terms conferred upon the receiver, nor upon the Comptroller of the Currency in any case except when he institutes a suit to forfeit the rights, privileges and franchises of the association, and in that case the provision is express that the suit shall be in his own name. *Case* v. *Terrell*, *ante*, 134. Beyond doubt the appointment of a receiver supersedes the power of the directors to exercise the incidental powers necessary to carry on the business of banking, as the receiver is required to take possession of the books, records, and assets of every description of the association, and from that moment the association is forbidden to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, but the corporate franchise of the association is not dissolved, and the association as a legal entity, continues to exist, as is shown to a demonstration by the fact that it is required safely to keep the money on hand belonging to it, and may deliver special deposits in its keeping to the rightful owners.

Much aid cannot be derived from authorities in the examination of this proposition, as the question turns chiefly if not entirely upon the construction of the act of Congress, and suffice it to say that we are all of the opinion that the act contains nothing in its subsequent provisions inconsistent with the theory of the plaintiffs, that the association may sue and be sued, complain and defend, in all cases where it may be necessary that the corporate name of the association shall be used for that purpose in closing its business and winding up its affairs under the provisions of the act which authorized its formation.

Suits and proceedings under the act, in which the United States or their officers or agents are parties, whether commenced before or after the appointment of a receiver, are to be conducted by the district attorney under the direction of the solicitor of the Treasury, and no doubt is entertained that the directors, from the time a receiver is appointed, cease to have any power in respect to such matters, and that *the [*401 control and supervision of the same are vested in the proper officers of the United States. Claims presented by creditors may be proved before the comptroller or may be established by a suit against the association in any court of competent jurisdiction. *Kennedy* v. *Gibson*, 8

Wall. 506, 19 L. ed. 479. Creditors, says the court in that case, must seek their remedy through the comptroller, in the mode prescribed in the act of Congress, and cannot proceed directly in their own names against the stockholders or debtors of the corporation. Suits may be brought by the receiver, both at law or in equity, and the express decision there is that he may sue in his own name or in the name of the association for his use, and no reason is perceived to doubt the correctness of the rule adopted in that case, though the act of Congress does not in terms give him authority to sue in his own name. *Booth* v. *Clark*, 17 How. 322, 15 L. ed. 164.

IV. Enough has already been remarked to show that the fourth proposition of the defendants cannot be sustained, as the act of Congress provides that the receiver, in making the basis for a dividend, shall include in the list not only claims proved before him to his satisfaction, but claims also adjudicated in a court of competent jurisdiction.

Attempt is made to show that the adjudicated claims there referred to are only such as had been adjudicated before the receiver was appointed, but the court is of the opinion that such a construction is not warranted, either by the language employed, or the subject-matter to which it relates, or the purpose to be accomplished, or by the analogies of the law, or the usual rules of interpretation which courts apply in ascertaining the meaning of a legislative provision of a remedial character. Tested by any one or all of these criterions, the court is of the opinion that the construction assumed by the defendants is quite too narrow to carry into effect the intention which the framers of the provision had in view at the time it was adopted. Claims presented by creditors may be proved before the receiver, or they may be put in suit in any court of competent jurisdiction, **402*]** as a means of *establishing their validity and to determine the amount owed by the association, but the judgment when recovered will not give the creditor any lien on the property of the delinquent association, nor secure to the judgment creditor any preference over other creditors whose claims are proven before the receiver. All alike must await the action of the Comptroller of the Currency, and be content with a just and legal distribution of the proceeds of the assets collected by the receiver and liquidated by the comptroller according to the act of Congress in such case made and provided.

Nothing further need be remarked in respect to the other errors assigned, as it is clear that the conclusions announced dispose of all the questions in the case which are examinable under a writ of error to a state court.

Judgment affirmed.

UNITED STATES, *Plff. in Err.*,
v.
CHARLES J. BALLARD *et al.*

(See S. C. 14 Wall. 457-463.)

Fees of collector—immaterial plea.

1. Under the act of June 17, 1864, a collector is authorized to retain all descriptions of fees paid him, not in excess of $2,500.

2. Where a demurrer to a plea was overruled, and the plaintiff did not reply, but allowed judgment to be entered upon the plea, another plea of *nil debet* became immaterial, and the judgment was properly entered for the defendant.

[No. 129.]

Submitted Mar. 6, 1872. Decided Apr. 8, 1872.

IN ERROR to the Circuit Court of the United States for the Northern District of Ohio.

This was an action of debt against Charles J. Ballard and his sureties on his official bond, as collector of customs for the district of Cuyahoga.

The breach assigned is the refusal of said collector to pay over to the plaintiff the amount of certain sums of money received from the owners of steamboats, as compensation for inspections and examinations, and from engineers and pilots, for certificates granted them by the inspector.

The defendants filed two pleas, *viz.*:

First. *Nil debet*, concluding to the country.

Second. A special plea concluding with a verification.

Upon the first plea issue was joined; to the second, plaintiff filed a general demurrer, and the defendants their joinder therein.

The circuit court overruled the demurrer, and thereupon, without disposing of the issue to the country, rendered judgment for the defendants.

The case further appears in the opinion.

Mr. **B. H. Bristow,** for plaintiff in error:

The order of the court overruling the demurrer, treats it as a demurrer to both pleas; but this is obviously a mistake, since the *similiter* to the first plea precedes the demurrer, which, in terms, applies only to the second. The judgment, however, extends to the whole case, and is final.

It is submitted that the circuit court erred:

First. In overruling the demurrer to the second plea.

Second. In rendering final judgments for defendants on the pleadings.

Mr. **A. G. Riddle** for defendants in error.

Mr. Chief Justice **Chase** delivered the opinion of the court:

The general question in this case is whether certain collectors of the customs are entitled to retain for their own use moneys received by them from the owners of steamers, and from engineers and pilots, by virtue of the 31st section of the act of August 30, 1852. The right to retain such moneys is asserted under the 2d section of the act of July 17, 1864. That act provides that the collectors referred to shall receive an annual compensation of $1,000, and in addition thereto, the fees now collected under the general regulation of the Treasury Department of February, 1857, and a commission of three per cent on all moneys collected and accounted for by them respectively; provided, that the aggregate compensation derived from salaries, fees, and commissions, shall not exceed the sum of $2,500 per annum. The act further provides that any excess, after deducting the necessary expenses, shall be paid into the Treasury of the United States, fees and emoluments of all kinds to be accounted for as provided by the 12th section of the act of the 7th of May, 1822.

The question is whether the description of fees now collected under the general regulations

of the Treasury Department of February, 1857, includes the sums collected under these regulations for licenses to steamers, and as compensation for the inspections and examinations made for the year under the steamboat act of August 30, 1852, in addition to the fees for issuing enrollments and licenses.

These sums are collected as fees under the regulations, and are not distinguished from the collector's fees proper, except by the circumstances that they are described as a compensation for inspections and examinations. The provision that these sums shall be quarterly accounted for and paid over to the United States does not distinguish them from fees and emoluments to be accounted for under the act of the 17th of July, 1864, or under the regulations of the Treasury Department of February, 1857.

The language of the regulations is that the fees are to be charged and collected and accounted for and paid over to the United States by collectors, in the same manner as other revenue. This language obviously means that they are to be accounted for in all cases, and paid over, unless retained under authority of law. The act of July 17, 1864, authorizes the collector to retain the fees and a commission of three per cent on moneys collected and accounted for, paying over to the Treasury only the excess beyond $2,500; and there is no distinction in the regulations between the fees for admeasure-
463*] ment, licenses, *etc., and the fees for licenses as a compensation for inspection and examinations.

We think, therefore, that the collector was authorized to retain all descriptions of fees paid him not in excess of $2,500. It follows that the demurrer was properly overruled; and, as the plaintiff did not think it proper to reply, but allowed judgment to be entered upon the plea, the other plea of *nil debet* became immaterial, and the judgment was properly entered for the defendant.

It is, therefore, affirmed.

FREDERICK STEINES, Washington Iman, Benjamin F. Reed, for Themselves and Five Hundred Other Citizens, Tax Payers and Property Holders, of Franklin County, Missouri, *Plffs. in Err.*,

v.

FRANKLIN COUNTY, John Wall, Amos P. Foster, Francis Becker, Charles Reinhard, W. J. Budd, W. H. Decker *et al.*

(See S. C. 14 Wall. 15-23.)

Jurisdiction over state court—motion for rehearing—not re-examinable — jurisdictional questions.

1. This court has no jurisdiction under a writ of error to a state court, of an ordinary bill to set aside a contract alleged to have been executed by the officers of a county, without authority of law.

2. The decision of a state court in granting or refusing a motion for rehearing in an equity suit, is not re-examinable in this court, although if the grounds relied upon, had been embodied in the bill of complaint, they would have been sufficient to raise questions re-examinable here.

3. Necessary jurisdictional allegations cannot properly be introduced for the first time on a motion for rehearing.

4. Where the motion might have been denied upon other grounds than those which give jurisdiction to this court, and it does not appear, even if those questions did arise in the case, that either of them was decided by the state court, this court has no jurisdiction.

[No. 503.]

Argued Apr. 5, 1872. Decided Apr. 15, 1872.

IN ERROR to the Supreme Court of the State of Missouri.

The case is stated in the opinion.

Messrs. M. Blair and **F. A. Dick** for defendants in error.

Messrs. **T. W. B. Crews**, *J. S. Laurie*, and **W. H. Letcher** for plaintiffs in error.

Mr. Justice **Clifford** delivered the opinion of the court:

Jurisdiction may be exercised by this court in three classes of cases where a final judgment or decree in any suit in the *highest court [*16 of a state in which a decision in the suit could be had, is brought here by virtue of a writ of error to the state court, as authorized to be issued under the act to amend the act to establish the Federal judicial courts. 1 Stat. at L. 85; 14 Stat. at L. 386.

First. Where is drawn in question the validity of a treaty or statute of or authority exercised under the United States, and the decision is against their validity.

Second. Where is drawn in question the validity of a statute of or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity.

Third. Where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of, or commission held, or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority.

Certain tax payers of the county complained in the state court that the county court of the county entered into a written agreement with the parties therein named to construct a certain county road and to pay the contractors for the work and materials in constructing the same the several sums and at the rates therein specified; that the county court agreed to make the payments in the bonds of the county, and that the contractors agreed to accept the bonds of the county in payment of all claims under the contract; that bonds of the county to the amount of $205,000 were accordingly issued by the county court, and were, by the authority of the county court, delivered to the contractors; that the county court did not, before making the contract, submit the amount of the proposed expenditure to the voters of the county at any election whatever, general or special, at any time or in any manner, * as required [*17 by the law of the state in such case made and provided.

Complaint is also made that the county court afterwards, on the 2d of July, in the same year, passed an order making the bonds transferable by the indorsement of the contractors, and directed that the clerk should indorse the order on the back of the bonds; and that the county court on the following day also ordered the

NOTE.—*What is "final decree" or judgment of state or other court, from which appeal lies*—see notes, 5 L. ed. U. S. 302; 17 C. C. A. 238; 28 C. C. A. 482.

county clerk to reissue one hundred and eighty-six bonds in substitution of the same number previously delivered, to correct an error in their execution; and also that the county court, on the 6th of May, in the following year, ordered the county clerk to issue bonds for the purpose of exchanging and taking up all bonds previously issued for the construction of such roads and bridges, whether completed or in the progress of construction, it being understood that all bonds issued prior to that date should be canceled and destroyed, and that warrants should also issue for the payment of such interest as had accrued to that time, and the charge is that bonds were issued under that order to an amount equal to the whole amount of the bonds held by the contractors and all other holders, amounting in the aggregate, reckoning both issues, to $600,000, and that warrants for the payment of interest to that date, amounting to $30,000, were also issued, and yet the complainants charge that the bonds previously issued have never been canceled, delivered up or destroyed, but that they remain to this day a charge against the property holders and tax payers of the county.

They also charge that the original agreement was, by collusion between the judges of the county court and the contractors, fraudulently antedated and made to bear a rate of interest greater than the legal rate at the time the agreement was actually executed, and they also charge the fact to be that the road is not made nor the work performed in accordance with the contract and specifications, and that the county court, or a majority of the judges thereof, acting collusively with the contractors, fraudu- [*18] lently connived at these flagrant *violations of the contract to the great injury and oppression of the property holders and tax payers of the county.

Other acts equally fraudulent and oppressive are also charged against the respondents in the bill of complaint, and the complainants finally allege that the contract and agreement, and all the orders of the county court based upon the same or in relation thereto, are without authority of law and contrary to the provisions of the statute applicable in such cases, and that the bonds are fraudulent, null and void; and they pray that an order may be made declaring that the contract and agreement, and all the orders of the county court based upon the same or in relation thereto, are null and void and of no effect, and that the parties holding the bonds shall deliver the same up, that the same may be canceled, annulled and held for naught; and that an injunction may be issued enjoining and restraining the respondents from negotiating, selling, transferring or disposing of the bonds, and enjoining and restraining the county and the county treasurer from paying the same, either interest or principal.

Service was made and the respondents appeared and filed an answer, in which they admit that the county court did not submit the amount of the proposed expenditure to the voters of the county, but they deny that it was required by law that the county court should do so before making the contract for the construction of the road. They admit that interest was paid as alleged and that the bonds of the county in lieu of those first issued were re-issued to the contractors, but they aver that it is not true that bonds of the county were re-issued to any other persons, and they deny that the bonds of the county were issued to any greater amount than $205,000 or that any greater amount was ever paid to the contractors on account of the road described in the contract; and they also aver that a like amount of bonds in lieu of those re-issued were at the same time given up, canceled and retired.

Apart from the merits they also deny that the agreement was antedated as alleged, and they also controvert each and every ille- [*19] gal and irregular act set up in the bill, and specifically deny all charges of fraud, collusion and want of good faith therein alleged and imputed, and they aver that they have complied in all respects with their obligations and duties in the premises.

Amendments were afterwards made to the bill and new parties respondents were added, and the complainants filed the general replication and the parties proceeded to take proofs, and having been fully heard upon the merits, the court made the following finding of facts: That none of the allegations of fraud or collusion are proved, and that no fraud, collusion or conspiracy existed as charged; that the bonds in question were not, nor were any of them, issued without authority of law, and that the same were and are valid. and were issued under legal authority; that the contractors were not the holders or owners of any of the bonds at the commencement of the suit; and that the defendants who were holders of the bonds at that time became such in good faith for value; and that they were and are innocent holders and unaffected by any irregularity which may have existed in the issue of the bonds. Consequently, the court denied the prayer of the complainants for an injunction and dismissed their bill of complaint. Exceptions were filed by the complainants, pursuant to the practice in that court, and the cause was removed into the supreme court of the state, where the decree of the subordinate court was in all things affirmed.

Argument to show that the case as exhibited in the pleadings does not present any question cognizable in this court under a writ of error to a state court is hardly necessary, as neither the bill of complaint nor the answer contains any averment which would warrant such a conclusion or which has any tendency to support such a theory. Instead of that, the bill is an ordinary bill to set aside a contract alleged to have been executed by the officers of a county without authority of law, and for an injunction to enjoin and restrain the county from paying certain bonds issued under the contract *to pay certain contractors for the con- [*20] struction of a certain road described in the contract, and from levying any taxes upon the property holders of the county for that purpose, because the bonds, as the complainants allege, were issued without authority and contrary to law and through fraud and collusion between the county court and the contractors; and also to enjoin and restrain the holders of the bonds from transferring or otherwise disposing of the bonds to other parties.

Clearly the pleadings do not present a case where is drawn in question the validity of or an authority exercised under the United States or where is drawn in question the validity of a statute of or an authority exercised under any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States; or where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States; or where is drawn in question the construction of the Constitution or of a treaty or statute of or commission held under the United States as the language is in the corresponding provision of the judiciary act. Cases not falling within one or the other of the three classes of cases mentioned are not re-examinable in this court under a writ of error to a state court, as the court possesses no other appellate jurisdiction in such cases than that conferred by those provisions. Apply that rule to the present case, and it is as clear as anything in legal investigation can be, that the pleadings in the case do not present any question re-examinable in this court under a writ of error to a state court.

Final judgments and decrees only of a state court are re-examinable in this court, and before the court can entertain jurisdiction to re-examine such a judgment or decree, it must appear, either by express averment in the pleadings or by clear and necessary intendment, that some one of the questions mentioned in the 25th section of the judiciary act or in the 2d section of the act to amend the judiciary act was raised in the state court, and that it 21*] was there *decided in the manner therein required to give this court such appellate jurisdiction, or that the state court could not have reached the conclusion it did without deciding the question and in the manner required by those provisions to give this court jurisdiction in the case. *Rector* v. *Ashley*, 6 Wall. 147, 18 L. ed. 733.

Clear and necessary intendment that the question was raised and must have been decided as claimed, in order to have induced the judgment, is sufficient: but it is not sufficient to show that such a question might have arisen and been applicable to the case, unless it appears in the record that it did arise and was applied by the state court in disposing of the controversy. *Hamilton Co.* v. *Massachusetts*, 6 Wall. 636, 18 L. ed. 906; *Furman* v. *Nichol*, 8 Wall. 56, 19 L. ed. 375; *Crowell* v. *Randell*, 10 Pet. 368.

Had the record stopped there the case would be free of all difficulty, but it does not stop there, as appears by the return to the certiorari granted by this court. On the contrary, the respondents afterwards moved the court to set aside the decree and to grant a rehearing of the cause for the following reasons, among others not necessary to be mentioned: (1) That the act of the legislature, under which the bonds in controversy were issued, is null and void because it is repugnant to the Constitution of the state; (2) that the act in question is null and void because it is repugnant to the Constitution of the United States, which forbids a state to pass any law impairing the obligation of contracts or to deprive any person of life, liberty or property without due process of law; and the proposition submitted is that the state law in question is repugnant to both of those provisions.

Much discussion of either proposition is not required, as the court is of the opinion that the decision of a state court in granting or refusing a motion for rehearing in an equity suit is not re-examinable in this court under any writ of error which this court can issue to review the judgment or decree of a state court. Beyond doubt, the respective averments *in [*22 question, if they had been embodied in the bill of complaint, would have been sufficient to raise questions re-examinable in this court, and if it had also appeared that one or both of them had been decided in the manner required to give this court jurisdiction in such a case, or that the state court could not have reached the conclusion it did without deciding the question in that way, it would be plain that the motion to dismiss ought not to be granted. Necessary jurisdictional allegations cannot properly be introduced for the first time on a motion for rehearing, as the motion itself is one addressed to the discretion of the court and one in which the decision of the court in granting or refusing it is not subject to review in an appellate court. *Thomas* v. *Harvie*, 10 Wheat. 151; *Peck* v. *Sanderson*, 18 How. 42, 15 L. ed. 262. Such a motion is not founded in a matter of right, but rests in the sound discretion of the court. *Daniel* v. *Mitchell*, 1 Story, 198; *Dexter* v. *Arnold*, 5 Mas. 315; Story, Eq. Pl. (7th ed.), §§ 412, 417; *Brown* v. *Aspden*, 14 How. 25; *Emerson* v. *Davies*, 1 Wood & M. 21; *Jenkins* v. *Eldredge*, 3 Story, 299; *Public Schools* v. *Walker*, 9 Wall. 603, 19 L. ed. 650; *U. S.* v. *Knight*, 1 Black, 488, 17 L. ed. 80; *U. S.* v. *Samperyac*, Hemp. 118. Matters resting in the discretion of a subordinate court cannot be assigned for error in an appellate court. *Murphy* v. *Stewart*, 2 How. 263; *Morsell* v. *Hall*. 13 How. 212. Exceptions do not lie to the granting or refusing a new trial in a suit at law, nor will an appeal lie from the circuit court to this court from an order of the circuit court in granting or refusing a petition for rehearing in an equity suit for the same reason, which is that the motion in the one case, or the petition or motion in the other, is alike addressed to the discretion of the courts, as shown by all the decisions in the Federal courts.

Even if it could be admitted that the questions suggested were raised in the case by the motion for rehearing, it certainly does not appear that either of them was decided in a way to give this court jurisdiction, as it is quite obvious that the motion may have been denied upon grounds altogether distinct from any question which is re-examinable in this court. All the information the record contains upon the *subject is that the motion was sub- [*23 sequently overruled, unaccompanied by any statement as to the grounds of decision, but it is quite clear that it may have been denied because that objection to the bonds was not made in the bill of complaint, or because the subsequent act of the legislature confirmed the doings of the county court under the prior act, or because the court was of the opinion that the subsequent acts of the county court or other

officers estopped the county from setting up that defense to the bonds in the hands of innocent holders, or for many other reasons which might be suggested, wholly irrespective of the questions which it is supposed may be re-examined in this court. Suppose, therefore, it does appear that one or more of the questions which give jurisdiction under such a writ of error was presented in the motion for rehearing, and that such a question may properly be presented in such a motion, still the motion to dismiss must prevail in this case, because the record shows that the motion might have been denied, upon other grounds, and it does not appear, even if those questions did arise in the case, that either of them was decided by the state court, or that the supposed erroneous rule was applied by the state court in disposing of the controversy. *Hamilton Co.* v. *Mass., supra.*

Viewed in any light, the case fails to show that this court has any jurisdiction of the controversy, and the writ of error is dismissed for want of jurisdiction.

GEORGE N. BLACK, *Plff. in Err.*,

v.

DAVID R. CURRAN.

(See S. C. 14 Wall. 463–473.)

Homestead right—extent of—sale of land on judgment—effect of.

1. The homestead right is not, in Illinois, an estate in the land.
2. As long as the property retains its homestead character, it is within the protection of the law, but the exemption from sale under execution or by deed, except with homestead waiver, can be lost by abandonment or surrender, that is; by acts *in pais*.
3. A judgment is a lien on the land subject to the homestead right, and the land or fee can be sold under execution subject to such right, and the purchaser has the absolute title when the homestead right ceases.
4. A sale under the judgment could not devest the homestead right of occupation.

[No. 64.]

Submitted Nov. 14, 1871. Decided April 15, 1872.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The case is stated by the court.

Messrs. **Lyman Trumbull,** *Stuart, Edwards, & Brown,* for plaintiff in error.

Mr. **Jackson Grimshaw** for defendant in error.

Mr. Justice **Davis** delivered the opinion of the court:

The rights of the parties to this suit depend upon the construction to be given the homestead laws of Illinois. Craddock, the common source of title of both parties, being the head of the family and residing with it, occupied, from 1853 to 1863, the premises in controversy as part of his homestead. In 1858, David Spear obtained a judgment against Craddock, and by regular judicial proceedings procured a sheriff's deed for the property. In 1863, Craddock and wife conveyed the lot in fee simple by deed, with full covenants, releasing the homestead, and properly acknowledged, to Starne and Shutt; and two weeks afterward, with his family, he removed from the premises, and has since then ceased to occupy them. In 1866, this suit was commenced by the defendant in error, who claims title through the judicial sale to Spear, and it is defended by the plaintiff in error under the title, if any, acquired by Starne and Shutt. The laws of Illinois exempt from forced sale on execution the lot of ground and the buildings thereon occupied as a residence and owned by the debtor, being a householder and having a family, to the value of $1,000. And the owner of the homestead, if a married man, is not at liberty to alienate it except with the consent of the wife, and there must be an express release and waiver of the exemption on the part of both to render the conveyance operative. A mode is provided for dividing the property, if divisible, in case its value exceeds $1,000; and of selling it, if indivisible, and applying the proceeds in a particular manner. *As Spear did not pursue [*469 these modes of obtaining satisfaction of his judgment, although the homestead property was sufficient to pay his demand and set off to the debtor what he was entitled to under the law, the inquiry arises whether the proceedings which he did take operated to pass the title after the homestead was abandoned.

It is conceded that this inquiry must be answered, if possible, by the decisions of the supreme court of Illinois on the subject, for these decisions constitute a rule of property by which we are to be governed. Although the exact point in dispute has not been adjudicated by that court, yet certain general principles have been announced which in their application to this case we think relieve it of difficulty. The embarrassment encountered in the administration of this law has been chiefly owing to the fact that the exemption was confined to real estate of a limited value. If the exemption had extended to the entire lot of ground occupied as a homestead without regard to its value, it is easy to see that many troublesome questions which have arisen would have been avoided.

In order to reach a proper conclusion in this case, it is necessary to understand what is the nature of the homestead right. It cannot, in an absolute sense, be said to be an estate in the land; the law creates none and leaves the fee as it was before, but in substance declares that the right of occupancy shall not be disturbed while the homestead character exists. While this continues, the judgment creditor cannot lay his hands on the property, nor the husband sell it without the consent of his wife, and not then without an express release, on the part of both, of the benefits of the law. The purpose of the legislature was to secure a homestead for the family, and the disposition of the property either by judicial sale or voluntary conveyance, was left unaffected except so far as was necessary to accomplish this object. As long as the property retained its peculiar character, it was within the protection of the law, but the exemption from sale under execution or by deed (except with homestead waiver) could *be lost by abandonment or surrender; [*470 that is to say by acts *in pais*.

The supreme court of Illinois has recognized and applied these principles in several recent cases, where the effects of voluntary conveyances by the owner of the homestead were the subject of consideration.

In *McDonald* v. *Crandall*, 43 Ill. 231, it was

held that where a conveyance is made not waiving the homestead, it passed the fee, but its operation was suspended until the grantor abandoned the premises or surrendered possession, and that the homestead when occupied by the debtor as such, is not subject to the lien of a judgment. But the case decides that where the homestead exceeds $1,000 in value, a judgment becomes a lien and may be enforced against the overplus, and that the homestead act has not created a new estate, but simply an exemption.

In *Coe* v. *Smith*, 47 Ill. 225, the facts of the case were these: the owner having a homestead right in the lot, made in 1858 a mortgage without waiver of the homestead, and then in 1860 made another mortgage with waiver; afterwards, in 1861, he abandoned the premises. The court held that the first mortgage was the prior lien.

In *Hewitt* v. *Templeton*, 48 Ill. 367, it was decided that upon the abandonment of the homestead by the grantor, the grantee in a deed in which the homestead right has not been waived is entitled to immediate possession, the homestead right being annihilated. The court, in commenting on the decision in *McDonald* v. *Crandall*, *supra*, which they say governs this case, uses this language: "We there held, although a judgment was no lien upon a homestead, where the premises were worth less than $1,000, and a lien upon the surplus where they were worth more than that sum, yet, where the owner conveys the same by an absolute deed or mortgage legally executed, the fee in the premises conveyed, no matter what their value, passes to the grantee, subject only to the right of occupancy on the part of the grantor in case **471*]** the *homestead has not been relinquished; and when such occupancy terminates, the homestead right is annihilated, it not being an estate in the premises which can be transferred as against a former conveyance that has passed the fee."

If a conveyance by the occupier of the homestead without the release of his right as required by the law has the effect to pass the title regardless of the value of the premises conveyed, and can be enforced so soon as the occupation of the homestead ceases, it is difficult to see why the conveyance by the officer of the law, instead of the debtor, should not have the same effect.

And if, as between two voluntary grantees, the first takes the land discharged of the homestead after its abandonment, although the second conveyance contains a release of the homestead and the first does not, why should not the same rule obtain when the property was sold on judicial process, before the debtor conveyed it? The junior grantee takes nothing, because there was no estate to pass, it having been transferred by the first conveyance. On the same theory, there was no estate to convey after the sheriff had sold the land. The only difference between a conveyance made by the judgment debtor who has a homestead, and by the sheriff under a sale or execution against his land, is: one is the act of the party, the other of the law; one a voluntary, the other an involuntary conveyance. It is certain that the owner of a tract of land of more than $1,000 in value, on which there is a judgment, cannot sell it freed from the judgment, and although the homestead as such cannot be sold under execution, nor is a judgment a lien on the homestead as such, but as the land can be sold by the owner subject to the homestead, so a judgment is a lien on the land subject to the homestead; and the land or fee can be sold under execution subject to the homestead, and the purchaser, as in the case of a deed by the debtor without the waiver, has the absolute title when the homestead right ceases.

If these views of the law on this subject are correct, and we think they are fairly deducible from the decisions in Illinois, * they [***472** are conclusive upon the rights of the parties to this suit.

On the hypothesis that there was no judgment against Craddock, it is clear that if he had conveyed the lot or any part of it in 1858 (the date of the judgment against him), without the waiver of the homestead, and then in October, 1863, conveyed it with the waiver (as he did), to Starne and Shutt, and then left the premises (as he did), the deed of 1858 would bind the land.

It follows equally, that the deed of 1863 with the clause of the waiver, did not convey the absolute title to the west half of the lot, because there was a deed made by the law under a judgment of 1858, and which operated (just as a deed made by Craddock himself would have operated) upon the west half as soon as it ceased to be a homestead; that is, by abandonment. And this is true while conceding that on neither hypothesis, that is, deed without the waiver and sale under the judgment, could Craddock's homestead right be disturbed—his occupation of the lot.

Judgment affirmed.

THE KENNEBEC & PORTLAND RAILROAD COMPANY, *Plff. in Err.*,

v.

THE PORTLAND & KENNEBEC RAILROAD CO., John Patten, Surviving Trustee, R. D. Rice *et al.*

(See S. C. 14 Wall. 23-26.)

When this court will not take jurisdiction of state judgments.

*The court re-asserts the principle, that in cases brought here by writs of error to the state courts, it will not entertain jurisdiction if it appears that, beside the Federal question decided by the state court, there is another and distinct ground on which the judgment or decree can be sustained, and which is sufficient to support it.

[No. 330.]

Argued Apr. 5, 1872. Decided Apr. 22, 1872.

IN ERROR to the Supreme Judicial Court of the State of Maine.

The case is stated by the court.

Mr. **A. G. Stanchfield** for plaintiff in error.

Messrs. **Artemas Libbey**, and *Jas. W. Bradbury*, for defendants in error:

*Headnote by Mr. Justice MILLER.

NOTE.—*What adjudication of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts*—see note, 62 L. R. A. 513.

In order to give this court jurisdiction of this case, under the 25th section of the act of 1789, it must be shown by the record itself to be one of the cases enumerated in that section. This must be shown in one of the following modes:

1. Either by express averment, or by necessary intendment in the pleadings of the case.

2. By the directions given by the court, and stated in the exceptions.

3. It must be entered on the record of the proceedings in the appellate court, in cases where the record shows that such a point may have arisen and been decided, that it was in fact raised and decided; and this entry must appear to have been made by the order of the court and certified by the clerk as a part of the record in the state court.

4. In proceedings in equity it may be stated in the body of the final decree of the state court, from which the appeal is taken to this court.

5. It must appear from the record that the question was necessarily involved in the decision, and that the state court could not have given the judgment or decree which it passed, without deciding it.

Crowell v. *Randell*, 10 Pet. 368; *Armstrong* v. *Treasurer, etc.* 16 Pet. 281.

"It is not sufficient that the point was involved in the case and might have been raised and might have been decided. It must appear, either in direct terms or by necessary intendment, that it was in fact brought to the notice of the court and decided by it."

Coons v. *Gallagher*, 15 Pet. 18; *Crowell* v. *Randell, supra; Messenger* v. *Mason*, 10 Wall. 507, 19 L. ed. 1028, and cases cited.

It is not enough that the validity of the state statute was drawn in question, as repugnant to the Constitution or laws of the United States, and that the decision of the court was in favor of its validity, but it must appear that the title depended on that statute.

Williams v. *Norris*, 12 Wheat. 117; *Gibson* v. *Chouteau*, 8 Wall. 317, 19 L. ed. 317; *Rector* v. *Ashley*, 6 Wall. 142, 18 L. ed. 733.

Applying the foregoing rules to the case at bar, we contend that this court has no jurisdiction.

It does not appear by the record, by any averments in the bill, answer or replication, nor in the decree of the court, that the validity of any statute of the state of Maine was drawn in question, as repugnant to any provision of the Constitution of the United States.

Nor is it clear, from the facts stated in the bill, answers and proofs made a part of the record, by just and necessary inference, that the question was raised and that the state court, in order to arrive at the decree dismissing the bill, must have come to the decision of that question as indispensable to that decree.

Mr. Justice **Miller** delivered the opinion of the court:

This case was brought before us by a writ of error to the supreme judicial court of the state of Maine, and a motion is made to dismiss for want of jurisdiction.

This motion has been delayed for some time by an effort on the part of the plaintiff in error to have the record so amended as to show that the state court decided against it one of the questions necessary to give this court jurisdiction; and to obviate this difficulty, it has been agreed by the parties here, that the opinion of that court delivered at the decision of the case, may be considered as though it were a part of the record.

It has been repeatedly decided by this court that the opinion is no part of the record, and it is only by agreement of counsel and consent of the court that it can be looked into for such purpose. As the record, without the opinion, does not show that such a question was decided, we have examined the opinion with care, and have felt bound to look to the whole of it, as well as that part of it relied on by the plaintiff in error; and though the matter which the plaintiff now alleges was one of the principal questions in the case—to wit: that the law under which the foreclosure was had was passed after the mortgage was executed, and that the method of foreclosure prescribed by that statute impaired the obligation of the contract of mortgage, and was, therefore, void by the Constitution of the United States—does not clearly appear from the pleadings, or the decree, or any other proceedings in the case, yet it does appear that the question was discussed in the opinion of the court, and that the court was of the opinion that the statute did not impair the obligation of the contract.

The mortgage was made in 1852. The statute referred to was passed in 1857, and the foreclosure complained of was had shortly after.

If this were all of the case we should undoubtedly be bound in this court to inquire whether the act of 1857 did, as construed by the court, impair the obligation of the contract. *Bridge Proprietors* v. *Hoboken Co.* 1 Wall. 116, 17 L. ed. 571.

But a full examination of the opinion of the court shows that its judgment was based upon the ground that the foreclosure was valid, without reference to the statute of 1857, because the method pursued was in strict conformity to the mode of foreclosure authorized, when the contract was made, by the laws then in existence.

Now, if the state court was right in their view of the law* as it stood when the con- [*26 tract was made, it is obvious that the mere fact that a new law was made does not impair the obligation of the contract. And it is also clear that this court cannot inquire whether the supreme court of Maine was right in that opinion.

Here is, therefore, a clear case of a sufficient ground on which the validity of the decree of the state court could rest even if it had been in error as to the effect of the act of 1857, in impairing the obligation of the contract. And when there is such distinct and sufficient ground for the support of the judgment of the state court we cannot take jurisdiction, because we could not reverse the case though the Federal question was decided erroneously in the court below, against the plaintiff in error. *Rector* v. *Ashley*, 6 Wall. 142, 18 L. ed. 733; *Klinger* v. *Mo. ante*, 635; and *Steines* v. *Franklin Co. ante*, 486, decided at this term.

The writ must, therefore, be dismissed for want of jurisdiction.

JAMES S. FRENCH, *Appt.*, *v.* SAMUEL M. SHOEMAKER.

(See S. C. 14 Wall. 314-335.)

Duress, what is—contract, when void for—issue of fraud—voluntary contract.

1. Actual violence is not necessary to establish duress. Moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, is sufficient to constitute duress.

2. A contract signed because a party was in straitened circumstances and greatly embarrassed and in pressing want of pecuniary means, where the other party to it is not responsible for those circumstances and did not create those necessities or embarrassments is a voluntary act, and he is bound by its terms.

3. Where fraud is charged in the bill or set up in the answer, the party making the charge, if it is denied in a proper pleading, will be confined to that issue.

4. Where a party signed a contract after he had ample time for inquiry, examination and reflection, neither a court of equity nor a court of law can release him from its obligation.

[No. 164.]

Argued Apr. 10, 1872. Decided Apr. 22, 1872.

APPEAL from the Circuit Court of the United States for the District of Virginia.

The facts of the case are fully stated in the opinion.

The original bill was filed in the court below by Shoemaker. The prayer of the bill was: "And that said French may be restrained and enjoined from doing or attempting to do any act whatever as President of the said Alexandria & Washington Railroad Company; and that he be restrained from intermeddling or interfering with the road and property of said company, or from intermeddling or interfering with the parties to said agreement, or your orator in carrying out the provisions thereof, or from holding any meeting for the reorganization of said company, or from taking or attempting to take any proceedings at law or in equity for that purpose, except by proceedings in this suit or by attending the meetings for the purpose of such reorganization and voting or using the interest he may have under said deed of assignment or said agreement, if he have any, for the quiet and proper object of said meeting; and that his said interest may be sold by a commissioner of this court appointed for that purpose, for the payment of said sum of $5.000, according to the practice of the court; and that your orator, in his own behalf and as trustee of said parties to said agreement, may have such other and further relief as his case and their interest may require."

The cross-bill prayed:

"That an account may be taken of the earnings of said road at any time received by the said Shoemaker; and that upon payment of said sum of $5,000 and interest, the said Shoemaker may be required to reconvey to your orator the property in said road, being three fourths of the whole, and that the whole agreement may be canceled and annulled so far as the said Shoemaker is concerned, and with regard to all the other parties thereto, if they shall be made defendants to the original bill; and that the said Shoemaker may be enjoined and prohibited from acting as president of the company, under the fraudulent election and organization aforesaid, and that the other parties to said agreement, if made parties to the original bill, may be prohibited and enjoined from acting as directors by virtue of said pretended election; and that your orator may have such other and further relief as the exigencies of the case may require."

The circuit court rendered a decree in favor of Shoemaker; and French appealed to this court.

Messrs. **H. O. Claughton** and **F. P. Stanton**, for appellant:

This suit was brought to set up a contract. A court of equity will not enforce an agreement which is liable to any of the following objections—to every one of which this agreement is liable:

1. If there has been unreasonable delay in the party seeking the assistance of the court. French having executed the contract Dec. 6, 1867, upon the condition that the parties would reorganize the company upon the title of the Alexandria & Washington Railroad Company, as decided by the decree of the circuit court for the county of Alexandria, rendered at the November term, 1867, and the appellee and those acting with him having accepted the contract from him with this understanding, their failure so to organize when required by French, precludes the possibility of their setting up the contract in equity.

Benedict v. *Lynch*, 1 Johns. Ch. 370; *Boone* v. *Iron Co.* 17 How. 340, 15 L. ed. 171; *Colson* v. *Thompson*, 2 Wheat. 336.

2. If there be want of mutuality. The contract was not mutual, in this, to wit: French could not have prevailed in a suit against Shoemaker, Stevens, Phelps, and Smith, for specific performance of the contract. Had he instituted such suit, their answer that they were directors, officers, and attorneys of the Washington, Alexandria & Georgetown Railroad Company, would have put French out of court, and as he could not have set up the contract against them they cannot maintain it against him.

Benedict v. *Lynch*, 1 Johns. Ch. 370; 1 Madd. Ch. 423; Atk. tit. 92.

3. If the contract is against public policy and binds a party to do what he cannot lawfully do. As Shoemaker, Stevens, Phelps, and Smith were directors and officers of the Washington, Alexandria, & Georgetown Railroad Company, and Smith, its attorney, charged with the duty of compromising with French for the benefit of their company, this contract for their own benefit is against public policy, because it involves a breach of trust and the violation of these fiduciary obligations in this, to wit: that while it was their duty to act for the company they represented, this contract was for their personal benefit and bound them to devote themselves to the maintenance of the adverse title.

1 Madd. Ch. 411.

4. Where there has been laches, or such an alteration of the property that it cannot be enjoyed according to the stipulations of the agreement. Stevens and Phelps, besides their obligation to assist in maintaining the French title, which they violated, contracted to assign their lease (they refused to execute the contract until after they had no lease to assign) until the court of last resort had decided the

NOTE.—*What is duress*—see note, 19 L. ed. U. S. 134.

lease fraudulent and void, so that they could not carry out their part of the contract.

1 Poth. 33; 1 Madd. Ch. 416; Story, Eq. § 141; *London* v. *Mitford*, 14 Ves. 41; *Morgan* v. *Morgan*, 2 Wheat. 290; *Fildes* v. *Hooker*, 3 Madd. 193.

5. If there be want of consideration. Merrick and Smith, in their deposition, state that they were not to give French any consideration for the $40,000 worth of stock they were to receive under the contract.

1 Madd. Ch. 425, n, 1, p. 267; 1 Poth. 42; *Seymour* v. *Delancy*, 6 Johns. Ch. 225, and cases cited.

6. If the contract was made under a mistake or misapprehension. French understood that Shoemaker and other parties were bound under the contract to aid in maintaining the French title, and to carry out the contract at the time he signed it, and if they were not so bound, he made the contract under a mistake, which avoids the contract. "Error is the greatest defect that can occur in a contract; for agreements can only be formed by the consent of the parties, and there can be no consent where the parties are in error respecting their agreement."

1 Poth. 17; Story, Eq. § 161; *Bickham* v. *Gough*, 4 Har. & McH. 17; *Graham* v. *Hendren*, 5 Munf. 185.

7. If the party seeking the aid of the court has failed to perform his part of the contract. Not only has the appellee, Shoemaker, and his associates, failed to perform their part of the contract, but they have violated the contract in almost every particular of it. Witness Stevens' and Phelps' answer filed by their attorney, Merrick, in the suit of *The Alexandria & Washington R. R. Co.* v. *Washington, Alexandria & Georgetown R. R. Co.*, the course of Shoemaker, Smith, Stevens, and Phelps in the matter of the *Adams Express Co.* v. *Marbury and others*, in filing the said bill and causing rules to be issued against French for taking possession of the road under the decree of the circuit court for the county of Alexandria; their efforts to procure an act of Congress condemning the road on the Washington side of the Potomac river and authorizing them to build another road.

Colson v. *Thompson*, 2 Wheat. 336; *Harvie* v. *Banks*, 1 Rand. 408.

8. If the consent of the party was not free, but was obtained under duress. "A court of equity will inquire whether the parties really did meet upon equal terms and, if it be found that the vendor was in distressed circumstances and that advantage was taken of that distress" will not only refuse to enforce the contract at the suit of the vendee, but will set it aside at the suit of the vendor.

Wood v. *Abrey*, 3 Madd. 423.

Shoemaker, Stevens, Phelps, and Smith were in possession of French's property, while he was enjoined from prosecuting his suit for the recovery of it, threatening to keep possession thereof, knowing French's distressed pecuniary condition, and, under these circumstances of duress and necessity, obtained his signature to the contract.

1 Bay, 470; 2 Bay, 211; 1 Story, Eq. § 239.

9. If the agreement was to pay one for doing what he was in duty bound to do, to wit: a contract to pay another for restoring to the owner property in the possession of the promisee. Such a contract is not only void but illicit. Such was this contract.

1 Poth. 43, 46.

10. If the contract was inequitable and unconscionable. These parties were in possession of French's road; by confession wrongfully in possession; admitting that they had no title to a single tie in the road, or a foot of ground upon which it was built; with his hands so manacled that he could neither prosecute his suit nor sell his interest, they prevail upon him to make a contract for their benefit, by which he agrees to assign to them valuable property, for which they all admit that they have given no consideration, and some claim that they never intended to give any. Nay, more; not only did they procure this contract under these circumstances, but they, at the same time, made delusive promises and entered into fraudulent covenants, all of which they have ruthlessly violated.

The contract is certainly inequitable, unconscionable, and without the least meritorious consideration.

Poth. 42; *King* v. *Hamilton*, 4 Pet. 311; *Cathcart* v. *Robinson*, 5 Pet. 275; *Colman* v. *Sarrel*, 1 Ves. Jr. 50.

11. When the party seeking the aid of the court has unfairly delayed the carrying out of the contract "with the view to see whether the contract would prove a gaining or a losing bargain, and, according to the event, either to abandon it or claim a specific performance."

Shoemaker and his associates retained possession of the road after the decree of Nov., 1867, under the lease, until the lease was declared null and void by the court of last resort; and after that, they retained possession as receivers in the suit of *Adams' Express Co.* v. *Marbury*, until the court of appeals of Virginia finally decided the French title to be good. Up to that moment, they had received all the earnings of the road, estimated at $100,000 per annum, and French had derived no benefit under the contract, and if the court of appeals had reversed the decree in favor of the French title, never could have received any; for the contract in that event could never have been carried out. The lease was gone, and the Washington, Alexandria, & Georgetown Company would have had undisputed possession. After that decision and not until then, Shoemaker and his associates took possession of the road under the contract. They were waiting for that decision, with the view to see whether the contract would prove a gaining or a losing bargain. *Benedict* v. *Lynch*, 1 Johns. Ch. 379; *Alley* v. *Deschamps*, 13 Ves. 224; *Brashier* v. *Gratz*, 6 Wheat. 541.

12. If the contract be tainted with fraud. Was not this contract tainted with fraud? Mark the gradation. Shoemaker, Stevens, and Smith were fraudulently elected directors of the Washington, Alexandria, & Georgetown Railroad Company. Shoemaker, prior to May 5, 1866; Stevens on that day, and Smith soon after. May 5, 1866, they made the fraudulent lease to Stevens and Phelps, which gave these parties possession of the road. Soon after they obtained such possession, they enter into negotiations with French and Leonard, which resulted in this fraudulent contract, which they have ever since fraudulently violated.

Tainted with fraud—polluted, would better express the fatal infection!

Atk. tit. 98; *Gibbons* v. *Jackson*, 10 Leigh, 364; 71 Law Lib. 555; 1 Madd. Ch. 4-16.

Messrs. **J. H. Bradley, Thomas J. Durant,** *R. T. Merrick,* and *George William Brent* for appellee.

Mr. Justice **Clifford** delivered the opinion of the court:

Complicated as the transactions are out of which the present controversy has arisen, it will be impossible to explain the grounds of our decision in a manner which will be satisfactory to the parties, without giving in the first place a pretty full statement of the facts.

On the 27th of February, 1854, the legisla-**325***] ture *of Virginia passed an act incorporating a company to construct a railroad between Alexandria and Washington, by the name of the Alexandria & Washington Railroad Company, and the record shows that three fourths of the stock of the company was taken by James S. French, and the other fourth by Walter Lenox, and that they continued to own the whole stock of the company and the entire railroad until they conveyed the same to the complainant. They proceeded to build the road, and in procuring means for that purpose they contracted large money obligations, and to secure those obligations they executed the three deeds of trust mentioned in the bill of complaint; that, on the breaking out of the Rebellion, they went within the lines of the insurgents, and our government took possession of the railroad and used it for military purposes; that, during their absence within the insurgent lines, Joseph Davison presented a petition to the county court of the state representing that he was the agent and attorney of all the holders of the bonds in the deed of trust to Walter Lenox, and that the trustee therein named was incapacitated from acting as such, and praying that a certain other person named might be appointed in his place; that the county court removed the trustee named in the trust deed and appointed the person mentioned in the petition as substituted trustee, and that the substituted trustee subsequently, on the 10th of April, 1862, sold the railroad and everything belonging to it to the persons named in the record, and that the purchasers and others associated organized, or pretended to organize, a new company, called the Washington, Alexandria, & Georgetown Railroad Company. When the government relinquished the road, some time in the year 1865, this new company took possession of the same, and on the first of February entered into a contract with the Adams Express Company in relation to the conveyance of express freight and the furnishing by the latter of means to operate the road. On the 28th of March, 1866, French and Lenox, having returned, caused a suit to be instituted in the county court in the name of the Washington & Alexandria Railroad Company against **326***] *the new company organized or pretended to be organized under the sale, to recover the railroad and property belonging to it, upon the ground that the whole proceedings by which the sale was made and the new company was formed were fraudulent and null and void. Dissatisfaction arose as to the contract with Adams Express Company, and on the 5th of May, 1866, by consent of both parties a lease for ten years was made by the new or spurious company to Oscar A. Stevens and W. J. Phelps, and on the 18th of June following another contract for means of operation and in respect to the conveyance of express matter was made for ten years with the same express company. Litigations ensued with respect to those contracts, some of which were pending when the contracts which are the foundation of the present litigation were executed, and others were commenced at a later period. Serious embarrassments surrounded the parties who had caused the suit to be instituted to set aside the pretended sale of the road during their absence within the insurgent lines, and it was at this stage of the controversy, in November, 1866, that it was arranged that the parties interested should meet for consultation, as shown by the proofs, and as admitted by the respondents. James S. French, S. M. Shoemaker, Walter Lenox, Oscar A. Stevens, J. Dean Smith, and R. T. Merrick were present at the interview. Satisfactory proof is exhibited that they came to an amicable arrangement, subject to the condition that the pending suit in the county court, to set aside the pretended sale of the railroad, should be determined in favor of the old company. They separated at the close of the consultation without reducing the agreement to writing, but it was drawn up in form leaving the date blank, not long after, and was signed by all the parties except the complainant and respondent, who were not present. By the proofs, however, it appears that the complainant signed it shortly after and the respondent, on the 6th of December, 1867, also signed it, though he earnestly objected to signing it when it was first presented to him for that purpose not long after it was signed by the other parties. He not only signed the agreement, but at *the same [*327 time executed a conveyance of all his interest in the railroad to the complainant to secure the repayment of $5,000 advanced to him by the grantee, and covenanted that it should be held by the grantee for the purpose and objects declared in the contract executed at the same time.

1. By that contract French and Lenox agreed to convey all their right, title and interest in the railroad to a corporation to be formed as specified, if such a company was formed, or to devote all their interest to the common benefit of the parties thereto, in the proportions specified, if the old company should be revived.

2. Stevens and Phelps agreed, if the parties decided to reorganize the old company or to form a new one as there suggested, to assign all their interest as lessees of the spurious company to such new company, or to hold the same for the exclusive benefit of the parties to the contracts in the proportions therein specified.

3. On behalf of himself and Adams Express Company the complainant agreed to aid the organization to be formed or revived, by money and credit, to pay, settle or compromise all liabilities of the old company, and the liabilities of the lessees of the spurious company, for procuring stock and materials for working the road, and all other bona fide liabilities incurred by them on behalf of the road, the claimant

being substituted to all the rights and remedies of any such creditors for the benefit of the parties to the agreement or the organization by them formed or revived, subject to certain conditions therein specified, excepting twenty per cent of the receipts, which it was agreed should be divided among the parties to the instrument according to their respective interests.

4. They also agreed that the arrangement should be carried into effect on the rendition of the decree of the county court in the pending case before mentioned, and that the company should then be formed and organized with a capital stock of three thousand shares, to be divided and distributed as follows: French and Lenox to have twelve hundred and 328*] *fifty shares, Stevens and Phelps to have eight hundred and fifty shares, S. M. Shoemaker to have five hundred shares, J. Dean Smith to have two hundred shares, and George W. Brent also to have two hundred shares.

5. It was also agreed that the lessees should be continued as general manager and superintendent, at $250 each as salary until otherwise ordered by the directors.

Five thousand dollars were paid by the complainant, or agreed to be paid, at the date of the agreement, and in consideration thereof the respondent executed the instrument called the assignment, in which he acknowledges the payment of that sum of money, and proceeds to say: "I do hereby assign, convey, transfer, and set over unto the said S. M. Shoemaker or his assigns, all my right, title, interest, claim, and demand in and to the property, stock, road, roadbed, franchise, and charter of the corporation known as the old company, or any interest I may possess in and to the same, and do further agree to make such other and further conveyances or assurance as may be hereafter required by the grantee or his assigns for the following purposes," to wit: (1) To secure the payment of $5,000 due to the grantee as an advance on the same; (2) for the purposes and objects set forth in the agreement bearing even date herewith, between the parties therein named, and which is particularly described in the pleadings.

Various defenses were set up in the answer, but those chiefly to be noticed are the two following: (1) That the signature of the respondent to the contract was obtained by fraud and oppression, that it is void as against public policy, and because it was fraudulently obtained; (2) that the assignment, though intended only as a mortgage to secure the $5,000 advanced to him by the complainant, was fraudulently prepared with the design of deceiving the respondent into an assignment of his interst and estate in the road, and that he was compelled to sign it by threats, oppression, and persistent and deceptive influences and importunities.

329*] *Proofs were taken and the parties were fully heard upon the bill, answer and replication, and upon the cross-bill, answer and replication, and upon the proofs; and the circuit court being of the opinion that the equity of the case was with the complainant, granted an injunction perpetually restraining the respondent from any and every proceeding not in accordance with the contracts. Appeal was regularly taken to this court, and the principal error assigned here is that the circuit court erred in setting up and enforcing the contracts for the conveyance by the respondent of his right, title and interest in the railroad to the complainant.

Complaint is also made that the decree of the circuit court is equivalent to a decree for specific performance, but it is clear that it cannot be viewed in that light, as the contracts were executed and the conveyance made and delivered nearly a year before the bill of complaint was filed, nor is that the theory of the defense as set up in the answer or in the cross-bill. On the contrary, they both admit the execution of the agreement and the assignment to secure the sum advanced, but the respondent appears to rely chiefly for his defense upon the circumstances of hardship, imposition, and oppression alleged in the answer, as affording a just ground to deny the prayer for relief contained in the bill filed by the complainant. He admits that the conveyance was made to secure the sum of $5,000, but he alleges that he tendered the amount to the complainant on condition that the complainant would reconvey the property to him to be held as it was prior to the assignment, and that the complainant refused to receive the money on those terms.

Fraud is certainly charged in the answer, but the charge is wholly unsupported by any satisfactory proof, and the charge is virtually abandoned by the cross-bill, in which it is alleged that the respondent, notwithstanding the oppression and injustice which compelled him to execute the agreement, was willing and anxious and for a long time continued to demand, that the same should be carried out according to its *spirit and intent. What he there alleges [*330 as matter of complaint is: That it was his necessities which compelled him to make the sacrifice and to surrender his stock on the hard terms of the agreement, and yet he affirms that he would have been satisfied if the other parties to the agreement had fairly and honestly performed their part of the same, but he alleges that they have utterly failed so to do, though often reminded of the delinquency and repeatedly urged to commence their performance. Many instances of such alleged failures are specified, but it is a sufficient answer to them all to say that they are separately denied in the answer to the cross-bill, and that the party making the charges has failed to introduce any sufficient proof to warrant a finding in his favor in respect to any one of the accusations. Nearly eight months elapsed after the contracts were signed before the county court rendered their decree annulling the charter of the spurious company and restoring the railroad to its rightful owners. They entered the final decree on the 28th of August, 1868, and on the 22d of September following Walter Lenox called a meeting of the parties to the agreement, and the record shows that the respondent was duly notified and that he attended the meeting. He not only attended the meeting but he knew that the persons composing the meeting intended to effect an organization under the agreements described in the pleadings, as they directed one of their number to prepare and publish a call for another meeting to carry that purpose into effect in accordance with the Code of the state and as contemplated by the terms of those agreements. Acting under those instructions the person des-

ignated for the purpose prepared the form of a call for such a meeting to be held on the 29th of October then next, and caused the same to be published; and the record also shows that the meeting was regularly held pursuant to the call for the same, and that the company was duly organized at that meeting by the choice of the complainant as president of the company. Prior to that meeting, however, to wit: On the 30th of the preceding month, the respondent, claim-
331*] ing to act as *president of the road, obtained a writ of possession under the decree annulling the pretended sale of the road, and it appears that he was put in possession of the road by the sheriff, to whom he delivered the writ for that purpose. Instead of co-operating with the other parties to perfect the organization the respondent applied to the county court for an injunction to restrain the other parties from holding the meeting called for that purpose, but the subpœna was issued in this case on the same day and the complainant obtained a rule requiring the respondent to show cause why an injunction should not issue restraining him from doing any act as president of the road, and from interfering in any way to prevent the execution of the agreement, and it appears that the subpœna and the order to show cause were served on him the day before he obtained his injunction forbidding the contemplated meeting.

Sufficient has already been remarked to show that the defense of fraud is not proved but, inasmuch as that defense is set up in several forms in the answer, it may be necessary to say that the antecedent remarks upon the subject apply to that defense in every form in which it is presented. Reference has also been made to the defense that the respondent was compelled to sign the contracts by threats, oppression, and by persistent and deceptive influences and importunities; but it becomes necessary to state that defense more in detail and to give it a more careful consideration.

He alleges that he was induced to sign the two instruments by threats that if he refused he should be kept out of the possession of the road for years, and that in consequence of his pecuniary embarrassments and through fear that the parties would render his property unavailing to him in case he continued to resist their importunities, he finally executed the agreement; that being pressed for the want of pecuniary means and overcome by threats, importunities and deceptive influences, he was ultimately forced to sign the agreement upon the condition that the complainant would advance him $5.000, and that the contract should be immediately carried into effect.

332*] *Even if admitted to be true the answer does not show that the instruments were executed under duress, as the respondent admits that the sum of $5.000 was to be advanced as a part of the consideration for the transfer, and that he finally consented to the arrangement on the condition that the contract should be immediately executed. Much discussion to show that a contract or written obligation procured by means of duress is inoperative and void both at law and in equity is hardly required, as the proposition is not denied by either party. Actual violence, even at common law, is not necessary to establish duress, because consent is the very essence of a contract; and if there be compulsion, there is no actual consent and moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient in law to destroy free agency, without which there can be no contract, because in that state of the case there is no consent. *Brown* v. *Pierce*, 7 Wall. 214, 19 L. ed. 136. In its more extended sense duress means that degree of constraint or danger, either actually inflicted or threatened or impending, which is sufficient in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness. Chitty. Cont., 217; 2 Greenl. Ev., 283. Decided cases may be found which deny that contracts procured by menace of a mere battery to the person, or of trespass to lands, or of loss of goods, can be avoided on that account, and the reason assigned for that restriction to the general rule is that such threats are held not to be of a nature to overcome the mind and will of a firm and prudent man, because it is said that if such an injury is inflicted, sufficient and adequate redress may be obtained in an action at law; but the modern decisions in this country adopt a more liberal rule, and hold that contracts procured by threats of battery to the person or of destruction of property may be avoided on the ground of duress, because in such a case there is nothing but the form of a contract without *the [*333 substance. *Foshay* v. *Ferguson*, 5 Hill, 158; *Cent. Bank* v. *Copeland*, 18 Md. 317; *Eadie* v. *Slimmon*, 26 N. Y. 12; 1 Story, Eq. J. (9th ed.), 239. Grant all this and still the concession cannot benefit the respondent, as the proofs exhibited in the record are not sufficient to support the charges as made in the answer. Substantially the same charges are made by the respondent in his cross-bill, and every one of them is denied by the complainant under oath in his answer to that bill.

Enough appears in the record to convince the court that the respondent was in straitened circumstances, that his business affairs had become complicated, that he was greatly embarrassed with litigations, and that he was in pressing want of pecuniary means, but the court is wholly unable to see that the complainant is responsible for those circumstances or that he did any unlawful act to deprive the respondent of his property, or to create those necessities or embarrassments, or to compel him to do what he acknowledges he did do, which was to yield to the pressure of the circumstances surrounding him, and as a choice of evils accepted the advance of $5,000 and the shares assigned him in the new organization as proposed, and voluntarily signed both the agreement and the assignment. Such an act as that of signing those instruments, under the circumstances disclosed in the record, must be regarded, both in equity and at law, as a voluntary act, as it was unattended by any act of violence, or threat of any kind, calculated in any degree to intimidate the party or to force the result, or to compel that consent which is the essence of every valid contract. Suppose he consented reluctantly, as he avers, still the fact is that he did consent when he might have refused to affix his signature to the instruments, as he had repeatedly done for

the year preceding; and having consented to the arrangement and signed the instruments he is bound by their terms, and must abide the consequences of his own voluntary act, unless some of his other defenses set up in the answer have a better foundation.

Want of consideration is also averred in the **334***] answer, but *the terms of the instrument disprove the allegation, and the proofs introduced by the respondent as well as those introduced by the complainant show that the defense is unfounded.

Mistaken misapprehension on the part of the respondents are alleged, but the allegation is not sustained by any satisfactory proof, and the attending circumstances, taken in connection with the lapse of time from the original meeting to the time the respondent signed the instrument, convinces the court that the defense is without merit, which is all that need be remarked upon the subject.

Delay in execution of the contract is also alleged in the cross-bill, and that the complainant has failed to perform his part of the agreement, but those allegations are expressly denied in the answer to the cross-bill, and being unsustained by any satisfactory proofs the defense must be overruled.

Inequitable and unconscionable contracts, it is said, ought not to be sustained, but it is not possible to regard the arrangement in question as falling within that category, as by the terms of the agreement the complainant was to advance $5,000 to the respondent and to aid the organization by money and credit, to pay, settle, and compromise all liabilities of the old company and the liabilities of the lessees of the spurious company, for procuring stock and materials for working the road, and all other bona fide liabilities incurred by them in behalf of the road. Authentic data to enable the court to compute the amount of those liabilities is not given in the record, but enough appears to satisfy the court that they must have been very large, and amply sufficient to constitute a valuable consideration for the contract.

Suggestion is also made that the contract was against public policy, as some of the parties were interested in the spurious company, but the court is of the opinion that the charge is without any foundation, as it is clearly proper that parties whose pecuniary interests are complicated and conflicting should compromise the controversy; nor is it possible to see how the respondent is injured even if some one or more **335***] of *the parties failed to perform their duty to the spurious company which was annulled.

Suffice it to say, in respect to the alleged want of proper parties, that the court is of the opinion that the objection cannot be sustained, and being entirely satisfied with reasons given for overruling the objection in the circuit court it is not necessary to give the point any further examination.

Want of mutuality in the contract is also suggested, but it is clear that the suggestion is not well founded, as the covenants to make the advance, pay the debts and liabilities of the company, and to allot the stock as stipulated, could be enforced by suit in any court of competent jurisdiction.

Strong doubts are entertained whether any of those defenses to the merits are open to the respondent, as the general rule is that where fraud is charged in the bill or set up in the answer, the party making the charge, if it is denied in a proper pleading, will be confined to that issue, but that court being disinclined to place the decision upon that ground has determined to give each defense a separate examination. *Eyre* v. *Potter*, 15 How. 42; *Fisher* v. *Boody*, 1 Curt. 206; *Price* v. *Berrington*, 7 Eng. L. & Eq. 254.

Parties who execute contracts must expect that they will be enforced when due application for that purpose is made to a court of justice; nor can they reasonably hope that courts of justice will reopen matters which they have voluntarily and understandingly closed. Even if the terms of adjustment were unfavorable to the respondent still he is bound by the arrangement, as he voluntarily signed both the agreement and the assignment. Had he refused his assent to the arrangement the case might have been different, but the proofs show that he signed instruments after he had ample time for inquiry, examination, and reflection, and having done so, neither a court of equity nor a court of law can release him from the obligation to fulfil his contracts according to the terms of the instruments.

Decree affirmed.

MICHAEL O'DOWD, *Plff. in Err.*,

v.

HENRY F. RUSSELL, Mayor of the City of Augusta, to the Use of William Glendenning, Admr. of Jerry Reeds, Deceased.

(See S. C. 14 Wall. 402–405.)

Writ of error by one defendant — final judgment — mistake in writ of error — when not a supersedeas.

1. A writ of error may be prosecuted by one defendant without summons and severance of his co-defendants where written notice was given to the co-defendants and they declined to join. This was equivalent to summons and severance.

2. Where, in a state court, a judgment against a defendant was reversed because he was held not entitled to the exemption which he claimed under the Bankrupt Act, and a judgment against his sureties was affirmed because they were held not entitled to the benefit of his discharge, both judgments were final and may be brought to this court by the writ of error.

3. A mistake in the date of a writ of error does not vitiate the writ where it was duly issued and served.

4. Where it does not appear from the record that any copy of the writ was lodged in the clerk's office within ten days, nor when the bond was allowed and filed, the writ of error cannot operate as a supersedeas.

[No. 608.]

Argued Feb. 16, 1872. Decided Apr. 22, 1872.

IN ERROR to the Supreme Court of the State of Georgia.

The case is stated by the court.

Messrs. **J. P. Carr** and *P. Phillips* for plaintiff in error.

Mr. **H. W. Hillard** for defendant in error.

Mr. Justice **Chase** delivered the opinion of the court:

Clarence V. Walker, William C. Jones, and Michael O'Dowd were sued in the superior court of Richmond county, Georgia, upon a bond given by *Walker as principal and Jones and [***403** O'Dowd as sureties for the faithful discharge

by Walker of his duties as vendue master in the city of Augusta.

The breach alleged was that Walker, having received as vendue master certain goods for sale, and having sold them and received the proceeds in his capacity as vendue master, failed to account. The defendants pleaded Walker's discharge under the bankrupt act, and the plea was sustained; but the sureties were held liable, notwithstanding the discharge of their principal under the 33d section of that act. Two writs of error were prosecuted upon this judgment to the supreme court of Georgia, one by Jones and O'Dowd to reverse the judgment against them, upon the ground that the discharge of Walker was a bar to the suit against them as sureties; and one by the plaintiff in the action, upon the ground that Walker could not avail himself of the discharge, the debt having been created by his defalcation as a public officer and while acting in a fiduciary capacity.

The judgment of the superior court in favor of Walker was reversed by the supreme court, and the judgment against the sureties was affirmed. To reverse the judgment of the supreme court, O'Dowd prosecutes his writ of error, which the defendant in error now moves to dismiss.

Several grounds are assigned for dismissing this writ. It will be necessary to notice but three of them.

The first of these is, that the writ of error is prosecuted by O'Dowd without summons and severance of his codefendants. Formerly this was held to be necessary when one of several defendants desired to prosecute his writ of error alone. But in the case of *Masterson* v. *Herndon*, 10 Wall. 418, 19 L. ed. 954, we held that such a writ of error would be sustained if it appeared from the record that the defendants not joined had been notified in writing and had refused to join. In this case, it appears by the record that written notice was given to the codefendants of O'Dowd, and that they declined to join. This was equivalent to summons and severance.

It is also insisted that the motion to dismiss must be allowed because the judgment was not final. The judgment against Walker was reversed, because he was held not entitled to the exemption which he claimed under the bank-
405*] rupt *act, and the judgment against the sureties was affirmed because they were held not entitled to the benefit of his discharge. We think that both judgments were final, and that both are brought under review by the writ of error.

Another reason assigned for dismissal is that the writ of error, the bond, the citation, and the copy of the writ of error for the defendants were not seasonably served or filed. It appears from the record that the judgment of the supreme court was rendered on the 31st of October, 1871, and on the 10th of November, 1871, a writ of error was issued, returnable on the first Monday of December, and was served by filing in the clerk's office. The writ is dated on the 16th of October, 1871. This was before the judgment was affirmed, and is obviously a mistake. It does not, however, vitiate the writ. The case was removed by service on the 10th of November.

The citation was served on the 3d of February, 1872. This was sufficient to advise the opposite party that the cause had been removed to this court, and was served and returned within the term.

It does not, however, appear from the record that any copy of the writ was lodged, for the defendants in error, in the clerk's office of the supreme court. It was necessary that such a copy should be filed within ten days to make the writ of error a supersedeas. *Railroad Co.* v. *Harris*, 7 Wall. 574, 19 L. ed. 100. Nor does it appear when the bond was allowed and filed. It bears date of the 10th of November. The allowance is not dated; nor is its filing noted.

We are of opinion, therefore, that a writ of error cannot operate as supersedeas; but the motion to dismiss must be denied.

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*ALBERT L. MOWRY, *Complainant, Appt.,* [*434
v.
ASA WHITNEY.

(See S. C. 14 Wall. 434–441.)

Scire facias to annul patent — suit in equity — when to be brought by the government or Attorney General.

*1. The ancient mode of annulling or repealing the King's patent was by scire facias, generally brought in chancery where the record of the instrument was found.

2. In modern times, the court of chancery sitting in equity entertained a similar jurisdiction by bill, when the ground of relief is fraud in obtaining the patent; and in this country it is the usual mode in all cases, because better adapted to the investigation and to the relief to be administered.

3. But scire facias could only be sued out in the English court by the King and his Attorney General, except in cases where two patents had been granted for the same thing to different individuals, and the 16th section of the act of July 4, 1836, concerning patents for inventions, is based upon analogous principles.

4. Both upon this authority and upon sound principle, no suit can be brought to set aside, annul or declare void a patent issued by the government, except in the class of cases above mentioned, unless brought in the name of the government or by the authority or permission of the Attorney General, so as to be under his control.

[No. 147.]

Argued Mar. 27, 1872. Decided Apr. 22, 1872.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case is stated by the court.

Messrs. Charles B. Collier and **A. G. Thurman**, for appellant:

As the bill charged and the demurrer confessed that the extension was procured by fraud, the extended patent must be regarded as void *ab initio* and as conferring no monopoly upon the patentee, as against the public or the complainant.

Notwithstanding the expiration by limitation of Whitney's patent, prior to the filing of the bill, the extended patent, until declared void for fraud, was and is alive and in effect for all pur-

*Headnotes by Mr. Justice MILLER.

NOTE.—*For what patents are granted; when declared void*—see note to Evans v. Eaton, 4 L. ed. U. S. 433.

poses of suits for infringements of it that occurred during its existence.

Nevins v. *Johnson*, 3 Blatchf. 80; Pat. Laws, act of 1870, § 55.

By reason of the fact that Whitney's patent had expired prior to the filing of the complainant's bill, the government of the United States was neither a necessary nor a proper party to the bill; and by reason of such expiration, the bill could not have been maintained in the name of the government, it having no interest in the subject-matter of the controversy.

Bourne v. *Goodyear*, 9 Wall. 811, 19 L. ed. 786.

The complainant, Mowry, as appears on the face of his bill, has a direct and personal interest in the subject-matter of the suit. He is sued by Whitney for an alleged infringement of said patent, in the United States circuit court for the southern district of Ohio. He cannot avail himself of the fraud of the patentee as matter of defense to the suit in that court, and in that cause. He is without remedy save in the court and according to the manner in which he has sought it by this proceeding.

Rubber Co. v. *Goodyear*, 9 Wall. 788, 19 L. ed. 566; *Wood* v. *Williams*, 1 Gilp. 517; 1 Robb, Pat. Cas. 717.

The extension of the patent having been, confessedly, fraudulently procured, and the government not being able to maintain a suit in relation to the patent, by reason of its expiration, and having no further interest in it, the suit could only be and was probably brought by one who had a continuing interest in the patent, and whose rights were, notwithstanding its expiration, affected by it.

The primary object of the suit is that the complainant may be relieved from a prosecution which is contrary to equity and good conscience; and the court is asked to find and declare that the patent, having been procured fraudulently, was *ipso facto*, void, as antecedent to granting the relief prayed for.

Messrs. **Henry Baldwin, Jr.**, *B. R. Curtis*, and *E. W. Stoughton*, for appellee:

There is no provision of law for any such proceeding as this to repeal a patent.

Rubber Co. v. *Goodyear*, 9 Wall. 788, 19 L. ed. 566.

Any proceeding for that purpose must be at the instance of the government. Story, Eq. Pl., § 8.

Instead of this bill being filed by the authority or with the consent of the government, it is, on its face, filed by an adjudged infringer, against a patentee whose rights he has invaded, and whose statute remedy he now seeks to enjoin.

The bill shows that the extended term of respondent's patent expired April 24, 1869, while this proceeding was not commenced until April 7, 1870, nearly twelve months thereafter.

There is, consequently, no equity to support this application to set the extension aside, nor does anything remain which can be subject of a suit.

Bourne v. *Goodyear*, 9 Wall. 811, 19 L. ed. 786; *Minnesota Co.* v. *National Co.* 3 Wall. 332, 18 L. ed. 42.

Mr. Justice **Miller** delivered the opinion of the court:

This is a bill in chancery, brought to set aside and annul a patent for an invention which was renewed in the office of Commissioner of Patents, on the ground that, in making the extension, the commissioner was deceived and imposed on by the fraud and false swearing of the patentee.

The suit was brought in the circuit court for the eastern district of Pennsylvania, in which the defendant resided, by Albert L. Mowry.

The patent was for an improvement in the process of annealing car wheels, and the interest of the plaintiff in the matter is: That, before the time of the first issue of the defendants' patent had expired, plaintiff had been engaged in the same business, and that he is now sued by the patentee for infringement of his extended patent, in an action still pending; and that, in the progress of the investigations necessary to his defense of that suit, he discovered the fraud by which the extension was obtained.

The bill was demurred to, and the demurrer sustained, on two grounds:

First. That the extended patent had expired, by its own limitation, before the bill was filed; and,

Second. That the complainant could not, in his own right, sustain such a suit.

As regards the first of these propositions we do not deem it necessary to make any decision. When a case arises in which the United States, or the Attorney General, shall initiate a suit to have a patent declared null, *ab initio*, which, though no longer in force as to present or future infringements, is used to sustain suits for infringements during its vitality, the question will be considered; for we are of opinion that no one but the government, either in its own name or the name of its appropriate officer, or by some form of proceeding which gives official assurance of the sanction of the proper authority, can institute judicial proceedings for the purpose of vacating or rescinding the patent which the government has issued to an individual, except in the cases provided for in § 16 of the act of July 4, 1836.

The ancient mode of doing this in the English courts was by scire facias, and three classes of cases are laid down in which this may be done.

1. When the King by his letters patent has by different patents granted the same thing to several persons, the first patentee shall have a scire facias to repeal the second.

2. When the King has granted a thing by false suggestion, he may by scire facias repeal his own grant.

3. When he has granted that which by law he cannot grant, he *jure regis*, and for [*440 the advancement of justice and right, may have a scire facias to repeal his own letters patent. 4 Coke's Inst. 88; Dyer, 197, 198, 276, 279.

The scire facias to repeal a patent was brought in chancery where the patent was of record. And though in this country the writ of scire facias is not in use as a chancery proceeding, the nature of the chancery jurisdiction and its mode of proceeding have established it as the appropriate tribunal for the annulling of a grant or patent from the government. This is settled so far as this court is concerned by the case of *The U. S.* v. *Stone*, 2 Wall. 525, 17 L. ed. 765, in which it is said that the bill in chan-

cery is found a more convenient remedy. A bill of this character was also sustained in the English chancery in the case of *The Atty.-Gen.* v. *Vernon*, 1 Vern. 277, on the ground of the equitable jurisdiction in matters of fraud. And in the case of *Jackson* v. *Lawton*, 10 Johns. 24. Chancellor Kent says that, in addition to the writ of scire facias which has ceased to be applicable with us, there is another remedy by bill in the equity side of the court of chancery.

It will be observed that in the case of a conflict under two patents granting the same right, the scire facias may, according to the authorities cited, be brought in the name of one of the patentees, but in the other cases, when the patent was obtained by fraud upon the King, by false suggestion, or where it was issued without authority, and for the good of the public and right and justice it should be repealed, the writ is to issue in the King's name or his Attorney General's. It is also said that when a patent is granted to the prejudice of the subject, the King, of right, is to permit him upon his petition to use his name for the repeal of it, in scire facias at the King's suit. *The King* v. *Butler*, 3 Lev. 220.

The 16th section of the patent act of 1836 seems to have in view the same distinction made by the common law in regard to annulling patents, for while it authorizes individuals claiming under conflicting patents, or one whose **441*]** claim *to a patent has been rejected because his invention was covered by a patent already issued, to try the conflicting claim in chancery, and authorizes the court to annul or set aside a patent so far as may be found necessary to protect the right, the suit by individuals is limited to that class of cases. And it is provided that the decree shall be of no validity except between the parties to the suit. The general public is left to the protection of the government and its officers.

It seems reasonable that the remedy by bill in chancery, which is substituted for the scire facias, should have the like limitation in its use. The reasons for requiring official authority for such a proceeding are obvious. 1. The fraud, if one exists, has been practised on the government, and as the party injured, it is the appropriate party to assert the remedy or seek relief. 2. A suit by an individual could only be conclusive in result as between the patentee and the party suing, and it would remain a valid instrument as to all others. 3. The patentee would or might be subjected to innumerable vexatious suits to set aside his patent, since a decree in his favor in one suit would be no bar to a suit by another party. If, on the other hand, an individual finds himself injured, either specially or as a part of the general public, it is no hardship to require him to satisfy the Attorney General that the case is one in which the government ought to interfere either directly by instituting the suit, or indirectly by authorizing the use of its name, by which the Attorney General would retain such control of the matter as would enable him to prevent oppression and abuse in the exercise of the right to prosecute such a suit.

It would seriously impair the value of the title which the government grants after regular proceedings before officers appointed for the purpose, if the validity of the instrument by which the grant is made can be impeached by anyone whose interest may be affected by it, and would tend to discredit the authority of the government in such matters.

The decree of the Circuit Court sustaining the demurrer and dismissing the bill is, therefore, affirmed.

ALBERT L. MOWRY, *Defendant, Appt.*,
v.
ASA WHITNEY, *Complainant, Respt.*

(See S. C. 14 Wall. 620–653.)

Whitney's patent — novelty of — utility — Mowry's patent — rule of damages — how computed — interest on.

1. Whitney's patent for an improvement in the process of making wheels for rail. cars, is a patent for a process, not for a combination.
2. The novelty of the patentee's invention is not disproved by evidence that glass, or speculum metal, or even other iron castings had been annealed and slow cooled, prior to the time when it was made.
3. The defense set up, that the patent is void for want of novelty of invention, is unsustained.
4. The patent is not void for want of utility, and the specification sufficiently describes the process invented and claimed.
5. Mowry's patent is an infringement of Whitney's patent. The object is the same and the process or mode of attaining it is, substantially, the same.
6. Whitney is not entitled to recover as damages more than the profits actually made in consequence of the use of his process in the manufacture of wheels. He cannot recover the profit made on the entire manufacture of the wheel.
7. The question to be determined in regard to profits is: What advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public, and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits.
8. Where the patent is for an entire process, made up of several constituents, the exclusive use of them singly is not secured to the patentee and he cannot prevent others from using them singly.
9. The defendant should not have been charged with interest before the final decree upon the profits. Interest is not generally allowable upon unliquidated damages.

[No. 148.]

Argued Mar. 28 and Apr. 1, 1872. Decided Apr. 22, 1872.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The case is stated by the court.

Messrs. **Charles B. Collier** and **A. G. Thurman**, for appellant:

Whitney's patent is invalid for want of novelty, his process being, at most, simply the application of a well-known process to a purpose analogous to those purposes to which, long anterior to his alleged invention, it had been applied.

Curt. Pat., ed. of 1867, §§ 53, 56; *Howe* v. *Abbott*, 2 Story, 190; *Winans* v. *Railroad Co.* 2 Story, 412; *Hotchkiss* v. *Greenwood*, 11 How. 248; *Losh* v. *Hague*, Web. Pat. Cas. 207; *Brook* v. *Aston*, 8 El. & Bl. 478, 32 Law Times, 341; *Bush* v. *Fox*, 26 Eng. L. & E. 464, (H. of L.), 38 Eng. L. & E. 1, 5.

NOTE.—*Distinction between inventions and processes; when latter patented*—see note to Corning v. Burden, 14 L. ed. U. S. 683.

Whitney's patent is void because that which is described and claimed therein is not useful, inasmuch as such process would destroy the hardness of the rim known as the "chill" of the wheels, and thus greatly detract from the usefulness and durability of the wheels.

A "chill" periphery or tread, is an essential feature to a car-wheel. Whitney's patent designates and provides for such degree of reheating as will destroy the "chill" and none other ("a little below that at which fusion commences").

The process, as conducted by the defendant (appellant), Mowry, did not infringe the patent of Whitney.

The measure of recovery, whether complainant's damages or defendant's profits be made the standard, is not the same when the invention or patent covers an improvement on a machine or process, as where it covers the entire machine or process.

Seymour v. *McCormick*, 16 How. 480; *McCormick* v. *Seymour*, 3 Blatchf. 211; *Seymour* v. *McCormick*, 19 How. 96, 15 L. ed. 557; *Burdell* v. *Denig*, 2 Fish. Pat. Cas. 595; *Serrell* v. *Collins*, 1 Fish. Pat. Cas. 297; *Suffolk Mfg. Co.* v. *Hayden*, 3 Wall. 315, 18 L. ed. 76; *Bell* v. *Daniels*, 1 Fish. 379; *Whitney* v. *Mowry*, 3 Fish. Pat. Cas. 157.

When the patent is for an improvement only, whether its subject-matter be a machine or a process, the recovery is measured by the increased value given to the machine or process by the "improvement" which is engrafted upon it.

Whitney's invention and patent does not cover, either the entire manufacturing arts or processes by which the perfected product is produced, or the product itself as a new article of manufacture; but embraces only an improvement in one of the several processes entering into the fabrication or manufacture of the article.

In the use of the reheating element determining the fact of infringement, the inquiry is: what proportion of Mowry's aggregate profit was due to or derived from the use of such element?

Seymour v. *McCormick*, 16 How. 480; *Burdell* v. *Denig*, 2 Fish. Pat. Cas. 595; *Whitney* v. *Mowry* (Record), 3 Fish. Pat. Cas. 157.

Whitney, to entitle himself to a recovery of more than nominal damages, assuming infringement, must prove either that he has been damaged, lost money by the infringement, or that Mowry has gained money thereby; he proves neither.

In computing damages or profits, interest is not to be allowed except from date of decree.

Silsby v. *Foote*, 20 How. 378, 15 L. ed. 953; *Le Roy* v. *Tatham*, 22 How. 132, 16 L. ed. 366.

Messrs. **B. R. Curtis, E. W. Stoughton,** and *Henry Baldwin, Jr.*, for appellee.

Mr. Justice **Strong** delivered the opinion of the court:

The patent of the complainant, first granted to him on the 25th of April, 1848, and extended for seven years from the 25th of April, 1862, was for a new and useful improvement in the process of manufacturing cast iron railroad wheels. The specification states the improvement to consist in taking railroad wheels from the molds in which they are ordinarily cast, as soon after being cast as they are sufficiently cool to be strong enough to be moved with safety, or before they had become so much cooled as to produce any considerable inherent strain between the thin and thick parts, and putting them in this state into a furnace or chamber that has been previously heated to a temperature as high as that of the wheels when taken from the molds. As soon as they are deposited in this furnace or chamber, the opening through which they have passed is closed, and the temperature of the furnace or chamber and its contents is gradually raised to a point a little below that at which fusion commences, *when all [*627 the avenues to and from the interior are closed and the whole mass is left to cool no faster than the heat it contains permeates through and radiates from the exterior surface of which it is composed. By this process all parts of each wheel are raised to the same temperature, and the heat they contain can only pass off through the medium of the confined atmosphere that intervenes between them and the walls of the furnace or chamber. Consequently, the thinnest and thickest parts cool and shrink simultaneously together, which relieves them from all inherent strain whatever when cold.

The mode of constructing and regulating as well as heating the furnace used by the patentee is then described; but it is stated that the heat required to perform the process may be obtained by the use of any other fuel, or may be taken from the furnace in which the metal is melted to form the wheels. This is followed by a description of some of the advantages resulting from the process and a disclaimer by the patentee, of his being the inventor of annealing castings made of iron or other metal, when done in the ordinary way, or of his being the inventor of any particular form or kind of furnace in which to perform the process. The claim is then set forth as follows: "But what I do claim as my invention, and desire to secure by letters patent, is the process of prolonging the time of cooling, in connection with annealing railroad wheels in the manner above described; that is to say, the taking them from the molds in which they are cast, before they have become so much cooled as to produce such inherent strain on any part as to impair its ultimate strength, and immediately after being thus taken from the molds, depositing them in a previously heated furnace or chamber, so constructed, of such materials, and subject to such control, that the temperature of all parts of the wheels deposited therein may be raised to the same point (say, a little below that at which fusion commences), when they are allowed to cool so fast and no faster than is necessary for every part of each wheel to cool and shrink simultaneously together, and no part before another."

It is for an alleged infringement of this patent that the complainant's bill was filed, and the defenses set up to the complainant's bill for an infringement are, that the patent is void for want of novelty in the invention, and for want of utility, and also that it has not been infringed by the defendant.

To determine how far these defenses are sustained it is important to have a clear apprehension of the state of the art when the patent was granted, and of the invention which it was intended to secure to the patentee. Prior to the 2d of August, 1847, cast-iron railroad wheels had been cast, and cast in chills, that is, they had been cast in sand molds with an outer circumference of iron. The effect of this outer circumference was to produce a more rapid chill on the periphery of the wheel, thereby crystalizing and hardening it, so that the wheel was made stronger, and more capable of resisting the friction of the rails. But the parts of the wheel were of different thicknesses. The hub and the rim were much thicker than the plate which connected them and, of course, they cooled after casting more slowly than the plate. The consequence of this unequal cooling was to produce a strain between the thick and thin parts that greatly impaired the strength of the 640*] wheel. Various devices had *been made to guard against or to remedy the mischief resulting from this inherent and inevitable strain, caused by an unequal contraction in cooling. The most common of these, perhaps, was casting the wheel with the hub in sections, in order that the sections might accommodate themselves to the contraction of the plate. But this was expensive. It required the open space between the sections to be filled up with other metal, and generally it required the hub to be hooped. It is unnecessary, however, to describe these devices. It does not appear that in any of them the idea existed of making a car-wheel with chilled tread, straight plates and solid hub, annealed and cooled so as to leave it uninjured by the strain attendant upon the unequal cooling of the thick and thin parts. Annealing some kinds of castings was known and practiced before 1847. This is abundantly proved by the witnesses, and various modes of annealing plain castings had been described by scientific writers both in this country and abroad, before that time. But there is no evidence that we have been able to discover that cast iron car-wheels had ever been subjected to an annealing process, in connection with slow cooling, before the process was discovered or invented by Whitney. In all the experiments made for annealing other castings the object sought was different, and in them all, as well as in the process described in the publications given in evidence, the effect upon the annealed metal or glass was not to leave them in the condition in which it was sought to bring car-wheels, with the crystallization or chill of the periphery unimpaired, and the plate or thin part unaffected by strain. Cast-iron railroad wheels are castings of a peculiar kind. The methods of slow cooling, or of annealing and slow cooling, which were applied to other castings before 1847, were not adapted to their peculiarities, or to what they needed. They are not homogeneous throughout. They are of different thickness in their several parts, and hardened at the tread, while the plate and hub are not crystallized, but are soft and tough. These different qualities of the different parts it is necessary to preserve, and what was needed when Whitney's invention was made, was to pre- [*641 serve them, and at the same time relieve against any strain, caused by unequal cooling, which might impair the strength of the wheel.

If now we proceed to inquire what Whitney's alleged invention was, as described in his specification and claim, it will be seen that it was a process, not to make a car-wheel nor to destroy any of the advantages which had already been secured, but to add another. Its avowed object was to obtain a new value, or rather exemption from imperfection. It was to remedy the evil of strain resulting from the more rapid cooling of one part of the wheel than the cooling of the other parts. And this was sought to be accomplished by a process that insured the cooling of all parts, both the thick and the thin, with equal slowness. The process consists of several parts. The first is taking the wheels from the molds after the melted iron has been run into the molds, before they become so much cooled as to produce strain on any part sufficient to impair their ultimate strength. The second is placing the wheels, immediately after their removal, in a furnace or chamber previously heated to about the temperature of the wheels when taken from the molds, the heat in the furnace being subject to control. The third is applying heat until the temperature of all parts of the wheels shall again be raised to the same point (indefinitely said to be a little below that at which fusion commences). The fourth and last stage in the process is allowing the wheels after they have been thus reheated, to cool so fast as, and no faster than, is necessary for every part of each wheel to cool and shrink simultaneously together, and no one part before another. It is, therefore, a patent for a process, not for a combination. Neither as a whole nor in parts can it be considered without reference to the ultimate object in view, which was to retard cooling by a second application of heat supplied until all parts of the wheel are raised to the same temperature, and then permit the heat to subside so gradually that the cooling of the parts shall not only commence at the same point of temperature, higher than that where hurtful strain begins, but shall continue *equable till [*642 all artificial heat ceases. The removal from the molds to the furnace or chamber, the removal at the time described, before the incipient strain has become permanently hurtful, and to a place where more heat may be applied, and where the heat can be under control, are parts of the process to secure equable cooling during the time when cooling without such appliances is likely to produce strain and consequent weakness. It is apparent that this is more than a process for annealing. That is included, it is true, but it is only a small part. It is applying foreign heat to a hot chilled wheel, at the point of time when it has reached a particular stage of cooling, by means of such foreign heat bringing the whole casting up to a higher and uniform temperature, and maintaining an equable abatement of heat in a furnace or chamber under the

control of the operator. We have sought in vain through the proof submitted in this case, for any satisfactory evidence that this process was known before 1847, when Whitney commenced it, or that anything equivalent to the process was known. Certainly nothing of the kind had ever been applied to cast iron railroad wheels, and, as we have seen, they are castings of a peculiar character, not admitting of the treatment that may be applied to other castings. What they needed was (what was substantially described by one of the witnesses), the discovery of the fact that the chilled cast iron, constituting one part of the wheel, could be subjected to heat less than that which would cause fusion, without producing any material effect upon its hardness, while the cooling of other parts of the wheel could be so prolonged by applying that heat externally, as to enable all parts to cool without being subjected to the strain attendant on unequal contraction and, in addition to the discovery, they needed the invention of a process by which it could be practically carried out. Such a discovery and such a process were needed for no other castings. The novelty of the patentee's invention is not therefore disproved by evidence that glass, or speculum metal, or even other iron castings had been annealed and slow cooled, prior to the 643*] time when it was made. Of this *there is very considerable evidence both in the testimony of witnesses and printed publications. The specification disclaims invention of annealing iron castings done in the ordinary mode. It claims annealing when applied to cast iron railroad wheels, in the mode or by the process described. It is not, therefore, merely an old contrivance or process applied to a new object, a case of double use. A new and previously unknown result is obtained, namely: the relief of the plate of the wheels from inherent strain without impairing the chilled tread, a result which, though anxiously sought, had not been obtained before Whitney's invention. We are, therefore, of opinion that the defense set up that the patent was void for want of novelty of invention is unsustained.

The validity of the invention is next assailed for the reason that the process described in it, and claimed, is denied to be useful, because it would destroy the hardness of the rim, or tread of the car-wheel known as the chill, and thus greatly detract from the durability and usefulness of the wheels.

It is undoubtedly true that a chilled periphery or tread is essential to the usefulness of a car-wheel. Indeed, the evidence is, that whenever car-wheels are spoken of, wheels with chilled tread are meant, and any process which destroys the chill must render them valueless for the purposes for which they are needed.

It is also true that the fusing point of cast iron is in the neighborhood of 2,786 degrees of Fahrenheit, twelve or fifteen hundred degrees above the point at which, according to the evidence, the chill of the tread of a car-wheel would be destroyed. If, therefore, the process patented to Whitney requires, after the removal of the wheel to the heated furnace or chamber, the application of a degree of heat closely approximating the point of fusion, it must be conceded that instead of being beneficial it is positively hurtful. And this is what is contended by the appellant. The objection seems to be aimed at the sufficiency of the description of the *patentee's invention, which it is abundantly proved he practiced successfully through many years, rather than at its utility. [*644 Whitney conceived a process and practiced it. That process may have been a highly useful invention and, therefore, patentable, and yet he may have failed so to describe it as to teach the public how to practice it. The law requires every inventor, before he can receive a patent, to furnish a specification or a written description of his invention or discovery, and of the manner and process of making, constructing, using and compounding the same, in such full, clear, and exact terms, avoiding unnecessary prolixity, as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same. The specification, then, is to be addressed to those skilled in the art, and is to be comprehensible by them. It may be sufficient, though the unskilled may not be able to gather from it how to use the invention. And it is evident that the definiteness of a specification must vary with the nature of its subject. Addressed as it is to those skilled in the art, it may leave something to their skill in applying the invention, but it should not mislead them. The objection here is that in describing the degree of heat to be applied after the wheels have been deposited in the heated chamber, the patentee states it to be such that the temperature of all parts of the wheels "may be raised to the same point (say a little below that at which fusion commences)," and the defendant insists that this amounts to a direction to raise the heat to a degree that must destroy the chill of the tread, and thus render the casting valueless as a railroad car-wheel. But it is obvious that only vague and uncertain directions could have been given respecting the extent to which the heat is necessary to be raised. It must differ with the difference in the progress of cooling which has taken place before the wheels are removed from the molds. The process requires this removal before they have become so much cooled as to produce such inherent strain on any part as to impair its ultimate strength. Precisely when such a strain begins cannot *be known. Cooling [*645 commences the instant the casting is made, and with cooling commences contraction, and strain must soon follow. Plainly, it is impossible to describe the point of time when the strain has proceeded so far as to impair the ultimate strength of any part of the wheel. That, in the nature of things, must be left to the judgment of the operator. But before that time the strain may be checked, and this is what is contemplated by raising the temperature of all parts of the wheel to the same point or degree. The moment that is done the strain ceases, and the primary object of the patentee's process is accomplished. The state of things is reproduced which existed

before the contraction and attendant strain began, when the slow cooling is allowed to follow in an atmosphere so heated and regulated that each part of the wheel loses its heat at an equal pace with all others.

Now, anyone skilled in making cast-iron railroad car wheels in view of this specification must see that the object of the process is to relieve from and guard against hurtful strain, without destroying the chill, and that heat is applied only for that purpose. It requires no particular science or skill to enable an operator to perceive that the moment all parts of the wheel are raised from a point above where serious strain begins, and where yet the thick and thin parts are in different stages of cooling, to a stage where the degree of temperature of all parts is the same, and above the degree where serious strain commenced, the thing sought has been attained. Then the avowed purpose of the inventor has been accomplished. It would be most unreasonable to read the directions of the specification without reference to the object which they profess to have in view. The evidence is that the chill is formed while the casting is in the mold, and that the hurtful strains commence after the formation of the chill. Indeed, it is manifest there can be no strain until the chill is complete. It must be, therefore, that all the heat which is needed to relieve from the strain is that which suffices to raise the temperature of the thin part, or plate, to the degree at which the strain commenced—a lower **646*]** *temperature than that which existed when the chill was formed. Hence an operator, in following the directions of the specification, would be taught by his practical knowledge that the instant all parts of the wheel had been heated to that temperature no more heat was needed.

And we do not think it a fair construction of the patentee's language to hold that it requires the heat to be raised in all cases to a degree only a little below the point of fusion. He does not attempt to give any more definite direction than that all parts of the wheel must be raised to the same temperature, suggesting in a parenthesis "(say, a little below that at which fusion commences)." He fixes a maximum. The heat must not reach the point of fusion, and the prescribed minimum is that degree where the heat of the different parts of the wheel is equal. Within those limits the degree is left to the judgment of the operator, and within those limits it is clear from the evidence that the process may be applied without injury to the chill. The proof is that it has been successfully applied in the manufacture of a vast number of wheels, and that failure has been very rare.

There are some witnesses who have testified that the Whitney process, as they understand it, would destroy the chill of the wheel. But they explain their understanding to be that the wheels are to be reheated to a degree far beyond what is required to relieve from strain, and thus heated for no purpose. They keep in sight the maximum limit, and approach near to that, overlooking entirely the minimum, and disregarding the single object of the process, namely: relief, of the plate or thin part of the wheel. from the strain caused by unequal contraction.

We are, therefore, of opinion that the patent is not void for want of utility, and that the specification sufficiently describes the process invented and claimed.

The remaining defense is a denial that the process conducted by the defendant is an infringement of Whitney's patent.

What the process of the defendant was is clearly set out *in a patent which he [***647** obtained on the 7th of May, 1861. It consists in placing in a pit the wheels as they are turned out of the molds red hot, with a layer of charcoal beneath the lowest wheel, and a layer between each wheel as well as above the uppermost, and covering the pit with a perforated metal plate. The charcoal is ignited by the hot wheels, and just sufficient air is admitted to effect combustion of the coal. Thus the wheels are reheated and permitted gradually to cool. There are some minor details which it is unnecessary to mention. So far as relates to reheating the wheels and retarding the cooling by the application of additional heat, it is obvious that the process is substantially the same as that covered by the complainant's patent. The object is the same and the mode of attaining it is, in substance, the same. The purpose of the charcoal interlaid with the wheels is avowed to be to heat them in the pit to a proper temperature, prolonging the heat and permitting them to cool gradually in a given time said to be seventy-two hours, more or less, as may be found necessary for the annealing operation. The rapidity of combustion of the charcoal is regulated by a damper in the flue. And this process is followed, as the specification explains, that the different parts of the wheels may adjust themselves to each other, and accommodate the unequal contraction which results from the process of chilling. It is under this patent, and in accordance with its directions, that the defendant has prepared his car-wheels for market. As the object of the patentees is the same, relief from the strain incident to unequal contraction, the only inquiry is whether the object is attained by substantially the same means. The idea of Whitney was, undoubtedly, arresting contraction before any remediless strain had commenced, and regulating the progress of cooling so that all parts of the wheel may maintain an equal temperature at all stages of cooling. Manifestly the process of the defendant embodied the same idea, and carried it out by means identical in principle. It reheats the wheels when removed from the molds to the chamber or pit. It prolongs the cooling in connection with the reheating, *and it [***648** subjects the rapidity of cooling to control of the operator. The form or structure of the furnace, chamber or pit, is not claimed by either patentee.

It hardly seems necessary to resort to the opinions of experts in order to reach the conclusion that the process of the defendant is only formally different from that of Whitney, while the essential element of the two processes is the same. But the testimony of the experts examined, taken as a whole, clear-

ly supports such a conclusion. It is true some of the witnesses testify that in their opinion the processes are different; but when they attempt to describe the difference they point out only matters which are merely formal, only variances in the mode of using the same process. On the other hand, several witnesses, entirely competent to apprehend the principle of the invention and the devices for practically using it, have testified that the processes of the defendant and of the complainant are substantially the same in principle, mode of operation, and in the effect produced. We must, therefore, conclude that the charge of infringement made in the bill has been sustained, and that the complainant was entitled to a decree for an injunction and an account.

We come next to the consideration of the account stated by the master and confirmed by the circuit court.

The master reported that Mowry, the defendant, used Whitney's process in the manufacture of 19,819 wheels, and the account has been stated on that basis. For the use of the process in making these wheels the defendant has been charged with $91,501.86 as profits made by him (more than $4.60 on each wheel), besides $19,984.21 interest upon such profits to the first day of August, 1868, and the further sum of $10,980.22, being interest from August 1, 1868, to August 1, 1870.

It is very obvious, in view of the evidence in the case, that the account has been erroneously stated. The patentee himself, in 1862, when applying for an extension of his patent, stated, under oath, that he believed there was no essential difference in the cost, per pound, of making cast iron chilled car-wheels of the various patterns, and by the different modes in use, provided the same skill and system controlled the manufacture; that by his process he was enabled to make them lighter than those made in any other way for a similar service and, therefore, could afford to sell them at the same price per wheel as other makers, and save the cost of the difference in weight; that this saving of metal he deemed to measure the essential advantage he had over his competitors, and also the profits arising from his patent, and he estimated that ten pounds per wheel would be a fair average of the metal saved by his process. If 649*] *he was correct in this statement the profits arising from the use of his patent in manufacturing 19,819 wheels (valuing iron at the price proved to have been paid for it by the defendant) must have been less than $5,500, instead of over $81,000, decreed in the circuit court—about thirty cents per wheel, instead of $4.60. It is not an unfair presumption that if the profit to the patentee was no greater than he claimed it was, it could not have been more when the invention was used by an infringer. Now, it is clear that Whitney is not entitled to receive more than the profits actually made in consequence of the use of his process in the manufacture of the 19,819 wheels. It is the additional advantage the defendant derived from the process—advantage beyond what he had without it—for which he must account. But he has been held liable far above this. The master reported, in the first instance, the difference between the cost of the wheels and the price for which they were sold at the profits realized by Mowry, thus charging him the profit obtained from the entire wheel, instead of that resulting from the use of Whitney's invention in a part of the manufacture; and this, though he found at the same time and reported that Mowry had built up his business before he commenced the use of Whitney's process; that the use of the process did not diminish the cost of making wheels, but increased it; that while he used the process he used the same quality of iron that he had used before, and made no difference in the weight or form of the wheels, or in their price, and that the wheels made by him before he commenced the use of Whitney's invention, and since he has abandoned it, have sold as readily and at the same prices as those manufactured by that process.

Exception was taken to the charge of the profit made by the entire manufacture of the wheel, including not only the selection and mixing of the iron, but its melting, pouring into molds, forming the chill, removing from the molds and cleaning, as well as annealing and slow cooling; and the case was again sent to the master with instructions to inquire:

*First. Whether the wheels made and [*650 sold by the defendant had, or could have been made to have any market value without being subjected to the process patented to Whitney; and,

Second. If they had or could have been made to have such value by any annealing or slow cooling process, outside of the Whitney patent, how much additional value, if any, they derived from being subjected to that patented process.

To this the master returned that he was unable to report any division of profits; and, being uninformed as to what was covered by the patent, he reported that, if the entire process of reheating and prolonging the cooling used by Mowry in the manufacture of the wheels was an infringement of the complainant's patent, the total profit realized by the defendant from the manufacture and sale of the wheels was due to the use by him of the complainant's invention He reported, secondly: that if there was no infringement of the complainant's patent unless the wheels are subjected to the process of reheating; that is to say, if the process of slow cooling used in connection with reheating is old, and not a part of the complainant's invention, nor included in his patent; no part of the profits realized by the defendant from the manufacture and sale of the wheels was due to the use by him of the complainant's invention. This second finding of the master the court set aside. But he further found that, had the wheels manufactured by the defendant been left to cool in the open air, they would have had no value as car-wheels, and have been worth only the value of the iron of which they were made; that reheating in connection with slow cooling, or slow cooling without reheating, is indispensable to make marketable cast iron wheels of the configuration of those made by the defendant; that there is no reheating process for the manufacture of cast iron car-wheels outside of the complainant's patent.

The master also found that the wheels could have been removed from the molds and finished without being subjected to the reheating process, or without any extraneous heat, and he specified two modes in which it might be done. Wheels so manufactured, he reported, have and did have during all the time in which the defendant used the complainant's process, a market value equal to that of wheels manufactured by that process. There are some other findings which may be briefly noticed:

1. That the 19,819 wheels were annealed wheels and sold as such.

2. That if the complainant's patent includes prolonging the time of cooling the wheels, as used by the defendant, the process conferred upon them their entire market value, above their weight in iron; but not so if the complainant's patent covers only the application of extraneous heat to the wheels after they are taken from the molds.

3. That taking annealing to mean reheating **634*]** in connection *with slow cooling, no other process of annealing in connection with slow cooling than that patented to the complainant and that described in the patent of the defendant, appears to have been known.

4. That the wheels made by the defendant required no treatment other than that described in the complainant's patent, to complete them as annealed wheels.

5. That still taking annealing to mean reheating in connection with slow cooling, the annealed wheels could not have been made by any process outside the complainant's patent.

Upon these findings the court decreed against the defendant the entire profits made by him in the manufacture and sale of the wheels from beginning to end; not only the profits resulting from the reheating and regulated slow cooling in connection, but also those which may have resulted from mixing and melting the iron, casting in molds, making the chill, and from the possible advance on the iron above its cost, with interest on the whole.

This we think was an error. The findings of the master justified no such decree. It must be conceded that the findings are incomplete, obscure and in some particulars incongruous, but it is not a legitimate construction of them taken together, that the benefit which the defendant derived from the use of the complainant's invention was equal to the aggregate of profits he obtained from the manufacture and sale of the wheels as entireties, after they had been completed. It is as true of a process invented as an improvement in a manufacture, as it is of an improvement in a machine, that an infringer is not liable to the extent of his entire profits in the manufacture. *Jones* v. *Morehead*, 1 Wall. 155, 17 L. ed. 662; *Seymour* v. *McCormick*, 16 How. 480. If the wheels made by the defendant would have had no market value above that of cast iron if they had not been annealed and slow cooled, the same may be said if they had been cast without a chill. The same principle, therefore, which gives to the complainants the aggregate profits of the entire manufacture would give the same profits to a patentee of **651*]** the process of chilling, *if there were one, and as there are many processes in the manufacture, for each of which it is conceivable there might be a patent, and as every one of the processes is necessary to make a marketable wheel, an infringer might be mulcted in several times the profits he had made from the whole manufacture. We cannot assent to such a rule. The question to be determined in this case is: what advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits. They are all the benefits he derived from the existence of the Whitney invention. It is found that there were other processes by which the inherent strain caused by unequal cooling could be and was prevented, counteracting which strain was the sole object of the complainant's invention, and a car wheel could be prepared for similar service, valuable in the market, and salable at a price not less than was obtained for those which the defendant manufactured. The inquiry then is: What was the advantage in cost, in skill required, in convenience of operation, or marketability, in bringing car-wheels by Whitney's process from the condition in which they are when taken hot from the molds, to a perfected state, over bringing them to the same state by those other processes, and thus rendering them equally fit for the same service? That advantage is the measure of profits. It is quite unimportant what name was given to the products of the processes, whether one could be called annealed wheels and the other could not, except so far as affected their marketability.

We have already noticed that the court overruled the alternative finding of the master, that if there is no infringement of the complainant's patent unless the wheels are subjected to the process of reheating—that is to say, if the process of slow cooling used in connection with reheating is old, and not a part of the complainant's invention, no part of the profit derived by the defendant from the manufacture and sale of the wheels was due to the use by him of that invention. *One exception taken to this finding **[*652** was that not only the entire process described in the patent, but each part of such entire process was the invention of the complainant, and the use of any material, substantial, and essential part of such entire process, the slow cooling being a substantial and material part, whereby only an improved chilled cast-iron railroad wheel could be made, and beneficial effects the same in kind if not in degree attained, that were attained by the complainant's entire process, is an infringement of complainant's patent, and the profits derived from the use of such material, substantial and essential part, should be accounted for in this case. This exception the court sustained and thereby held that the defendant is chargeable with the profits he derived from slow cooling alone. We cannot assent to this. The patent is for an entire process, made up of several constituents. The patentee does not claim to have been the inventor of the constituents. The exclusive use of them singly is not secured to him. What is secured is their use when arranged in the process. Unless one of

them is employed in making up the process, and as an element of it, the patentee cannot prevent others from using it. As well might the patentee of a machine, every part of which is an old and known device, appropriate the exclusive use of each device, though employed singly, and not combined with the others as a machine. The defendant was not, therefore, responsible for slow cooling alone, or for the profits he derived from it. He was liable to account for such profits only when he used slow cooling in connection with reheating in the manner described in Whitney's claim substantially, or when extraneous heat was employed to retard the progress of cooling. We have said that slow cooling is not claimed in the specification as the invention of the patentee. And it is found by the master that there are other modes of slow cooling, and even other modes of relieving against the inherent strain caused by unretarded cooling, than that practised by the complainant and claimed by him. Though, therefore, slow cooling is an essential part of the complainant's process, it is an equally essential part of oth-
653*] er processes which *the defendant was at liberty to use in preparing his car-wheels for market.

We add only that in our opinion the defendant should not have been charged with interest before the final decree. The profits which are recoverable against an infringer of a patent are in fact a compensation for the injury the patentee has sustained from the invasion of his right. They are the measure of his damages. Though called profits, they are really damages, and unliquidated until the decree is made. Interest is not generally allowable upon unliquidated damages. We will not say that in no possible case can interest be allowed. It is enough that the case in hand does not justify such an allowance. The defendant manufactured the wheels about which the complaint is made under a patent granted to him in 1861. His infringement of the complainant's patent was not wanton. He had before him the judgment of the Patent Office that his process was not an invasion of the patent granted to the complainant, and though this does not protect him against responsibility for damages, it ought to relieve him from liability to interest on profits.

The decree of the Circuit Court is reversed, and the cause is remanded, with instructions to proceed in accordance with the rules laid down in this opinion.

442*] *THE SCHUYLKILL & DAUPHIN IMPROVEMENT & RAILROAD COMPANY, The Bear Mountain Franklin Coal Company, *et al.*, *Plffs. in Err.*,

v.

SAMUEL A. MUNSON *et al.*

(See S. C. 14 Wall. 442-452.)

Second survey—question, when must be submitted to jury—ambiguous charge—authority for survey—lost records, proof of.

1. In Pennsylvania, after a survey made and returned into office, a second survey without an order of the board of property is void, and cannot give the warrantee any rights, either against the state or any other claimant of the tract.

2. Judges are not required to submit a question to a jury unless there is evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

3. If the charge of a judge is merely ambiguous, the party dissatisfied with it should request to have it made clear before the jury leave the bar.

4. A survey in Pennsylvania is not evidence, without first showing an authority to make it or proving that such authority existed and was afterwards lost.

5. Lost records may be proved by secondary evidence, but their former existence and loss must first be established by competent proof; and evidence, merely showing that they do not exist, is not sufficient to establish either of those requirements.

[Mr. Justice Strong, having been of counsel for one of the parties, did not sit in this cause.]

[No. 160.]

Argued Apr. 9, 1872. Decided Apr. 22, 1872.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case is stated by the court.

Mr. **Nathan H. Sharpless**, for plaintiffs in error:

1. The learned court below erred in charging the jury that "no subsequent official survey of this land, under these warrants, without a warrant of survey or order of the board of property, was authorized; therefore, if the jury take the same view of the evidence as the court, the verdict should be for the plaintiffs," as set forth in the bill of exceptions to their charge.

2. The same learned court erred in charging as set forth in the preceding assignment of error, for the reason that it thereby withdrew from the jury the consideration of the question as to whether or not there might have been, in this case, an order of the board of property for the resurvey made by Wheeler, the evidence of which order has been lost.

The second assignment of error is the one which will be pressed.

Granting the general rule to be, as it unquestionably is in Pennsylvania (*Bellas* v. *Cleaver*, 40 Pa. 260, per Thompson, J.; *Gratz* v. *Beates*, 45 Pa. 495, same judge; and *Hughes* v. *Stevens*, 43 Pa. 197, per Strong, J.) that after a survey upon a warrant has been returned and accepted the warrant is *functus officio*, and that no title under a resurvey can be made, unless such resurvey was ordered by the board of property, what do we find on coming to apply the rule to the facts of this case?

July 1, 1793, Jacob Yeager applied to the land office for a warrant of four hundred acres of land in Berks county; paid for that quantity to the commonwealth; within fourteen months procured a survey of so much land in Berks county, to be returned to the land office and accepted; he and they through whom his title came to the defendants below, paid taxes, and were in peaceable, undisturbed possession of this tract for thirty-five years; and now, the land having been tested and several valuable coal veins found upon it, and improvements at a great expense having been put upon it, we are to be turned out of possession by a speculator, who has become the holder of an overlying warrant, issued thirty-five years after the one under which we claim; the junior warrant, moreover, having attained also the ripe age of thirty-five years, before its holder thought it worth while to claim actual possession under it.

No layman could be made to understand

this as other than manifest injustice and a grievous wrong.

And it can fare but little better with an educated lawyer. The land office of Pennsylvania has always been in the hands of laymen; it would be unreasonable to expect of them to preserve accurate, written memorials of all their proceedings in each of the many thousands of warrants issued thereout; their minutes are not records. Sergeant, Land Laws, 172.

The court and jury allow them no more weight than in their judgment they are entitled to. Ch. J. Tilghman, *White* v. *Kyle*, 6 Serg. & R. 109.

They were often very imperfectly kept. Introduction to Houston on Land Titles in Pennsylvania, pp. 3, 4.

Now, when the Vanderslice surveys were returned, what appeared to everyone?

I. They had been made out, of his district and jurisdiction, in another county. An act just passed, and which had not then received any judicial construction (§ 6, act Apr. 3, 1792, Bright., Purd. Dig. p. 631, pl. 82), declared: "Every survey made by any deputy-surveyor without his proper district shall be void and of none effect."

II. The survey was bad upon its face. No one could possibly have found the land from it; it did not even inform the warrantee in what county his new possession lay; and,

III. A *caveat* was immediately filed by parties in Northumberland county, who claimed the land under an earlier warrant.

There is every reason to suppose that this matter was called to the attention of the court of property, consisting at that time of the secretary of the land office, the receiver general, the surveyor general, and master of the rolls for the time being or any three of them (act of Jan. 8, 1791, Bright, Purd. Dig., Laws of Pa. p. 619, pl. 8); and that they, by a minute probably indorsed on the back of a new copy of the warrant placed in Wheeler's hands, ordered the survey. Upon any other theory it is impossible to understand the acceptance of the return of the resurvey made by Wheeler. The practice of the land office at that time was, that the original warrant remained in the office of the surveyor general; a copy of it had been placed in the hands of Vanderslice, one of his deputies for Berks county, whose survey upon it was returned into the land office, and there remains to this hour. How did Wheeler get the same or another copy of this warrant, on which to make his survey and return? If there was an order of the board of property that it should be issued or re-issued to him, it is admitted by the court below and on all hands that the plaintiffs in error have the better title.

We only know that a copy of the warrant got into the hands of Wheeler; that he made a survey upon it, returned it to the land office within fourteen months of the date of the warrant, which return was accepted by the surveyor general, and a patent issued upon it. The surveyor general was a member of the board of property. How came he to accept the second survey, unless it had been duly authorized?

There is no suggestion of fraud on his part, nor anything in the case upon which to hang a suspicion of it. What, again, is the explanation of the board of property taking no action upon the *caveat* of Kunckel and Bowen, other than that, having ordered a resurvey on this warrant elsewhere, a decision of the question arising on that *caveat* was no longer material to anyone?

And just at this point it may be well to notice what became of the land surveyed in Northumberland county by Vanderslice, and claimed by Kunckel and Bowen in their *caveat*. They had a good title to it, or they had none. If they had, Vanderslice had no right to locate this warrant on their land. If they had not, Yeager's abandonment of the survey made for him, and the fall of the *caveat*, in nowise inured to their benefit. The land reverted to the commonwealth. Per Gibson, Ch. J., *Orr* v. *Cunningham*, 4 Watts & S. 294, s. p., per Rogers, J.; *Heath* v. *Knap*, 1 Pa. St. 482.

The point on which we supposed this case to turn, to wit: that a good title can be claimed as against the commonwealth and its subsequent grantee, upon a warrant and a resurvey, an acquiescence therein for more than twenty-one years and the payment of taxes by the warrantee on the land so resurveyed, notwithstanding that the warrantee after that efflux of time may not be able to produce written evidence from the land office, of an order by the board of property for the resurvey, is new in Pennsylvania, and has never been decided by our supreme court, unless practically decided in our favor by the cases hereafter noted; and many analogies of the law sustain the plaintiffs in error.

Matt. Pres. Ev. 187; *Roe* v. *Ireland*, 11 East, 280; *Green* v. *Proude*, 3 Keb. 310, 1 Mod. 117.

After twenty years' possession, a lease will be presumed in order to support a release.

Holmes v. *Ailsbie*, 1 Madd. Ch. 551.

It is true that this case was decided under the 5th section of the act of Geo. II. chap. 20; but the rule at common law was, undoubtedly, the same.

Knox v. *Jenks*, 7 Mass. 488; *Gospel Society* v. *Young*, 2 N. H. 310; *Blossom* v. *Cannon*, 14 Mass. 177; and *Brown* v. *Wood*, 17 Mass. 68.

"For the purpose of confirming and securing titles of long enjoyment, acts of Parliament, if needful, may be presumed."

Lord Ellenborough, Ch. J., *Bealey* v. *Shaw*, 6 East, 215; *Mather* v. *Trinity Ch.*, 3 Serg. & R. 509; *Schauber* v. *Jackson*, 2 Wend. 13; *Rex* v. *Montague*, 4 B. & C. 598.

Strong presumptions are to be made in favor of records irregularly kept, after a great lapse of time.

Shaw v. *Boyd*, 12 Pa. 217, per Coulter, J.

In order to support an alleged title, accompanied by thirty years' possession, the entry of a judgment may be presumed.

Per Grier, J., *Cromwell* v. *Bank*, 2 Wall. Jr. 569.

A long-continued title with acts of ownership uncontested by adverse possession on the part of him who is supposed to have conveyed, will be sufficient to supply the place of an absent link in a chain of title. The law will presume a conveyance to have been made. Per Gibson, Ch. J., in *Hastings* v. *Wagner*, 7 Watts & S. 215.

As to the analogy to be drawn from the rul-

ings in Pennsylvania in regard to chamber surveys.

A resurvey without an order of the board of property, is not absolutely and at all events void; if so, it would be incapable of consummation.

Light v. *Woodside*, 10 Serg. & R. 23.

In this particular, a resurvey differed from a chamber survey; that is, one which the deputy surveyor plats out in his orders on paper, without going upon the ground to run the lines and mark the corners.

By the act of Apr. 8, 1785, § 9 (Bright, Purd. Dig. 628, pl. 65), surveys thereafter to be returned into the land office, are directed to "be made by actual going upon and measuring the land and marking the line . . . after the warrant authorizing such survey, shall come into the hands of the deputy surveyor;" and chamber surveys are to be "accounted clandestine and shall be void."

Yet a series of cases, to wit: *Mock* v. *Astley*, 13 Serg. & R. 382; *Caul* v. *Spring*, 2 Watts, 390; *Norris* v. *Hamilton*, 7 Watts, 91; *Nieman* v. *Ward*, 1 Watts & S. 68; and *Ormsby* v. *Ihmsen*, 34 Pa. 462, all fully sustain the doctrine that, after a lapse of twenty-one years from a return of a survey into the land office, there arises a conclusive presumption that it was regularly made upon the ground as returned.

To support their position, that without an order from the board of property, the resurvey made by Wheeler was void, our adversaries will probably cite *Deal* v. *McCormick*, 3 Serg. & R. 343; *Oyster* v. *Bellas*, 2 Watts, 397; *McKelry* v. *Gillcland*, 3 Watts, 312; *Bellas* v. *Cleaver*, 40 Pa. 260; *Hughes* v. *Stevens*, 43 Pa. 197; and *Gratz* v. *Beates*, 45 Pa. 495.

In no one of these cases, so far as appears from the report, was a junior warrant twenty-one years younger than the one upon which the unauthorized resurvey was alleged to have been made. And a close examination of the books leads counsel for plaintiffs in error to confidently assert, that no case with this feature can be produced from the Pennsylvania reports, sustaining the defendants in error on the point here in controversy.

Messrs. **Franklin B. Gowen,** *James E. Gowen*, and **Geo. W. Woodward,** for defendants in error:

It is plain, and the nature of counsel's argument concedes it, that if any presumption were to be made in a case like the present, it would not be one of fact for the jury, but a presumption of law to be made by the court. Counsel present the point as one of law, to wit: that after the lapse of twenty-one years from the acceptance of a survey made upon a warrant, the authority of which is confessedly exhausted by a prior survey, an order of the Board of Property authorizing such a resurvey will be conclusively presumed.

It is an attempt to apply the maxim, "*Omnia præsumuntur rite et solenniter esse acta*," for the purpose of supplying a distinct independent act, the very origin of defendant's title, and without showing which they have none at all.

It is denied, upon principle and authority, that such is the law of Pennsylvania.

1 Greenl. Ev. § 20, speaking of legal presumptions and the proper application of this maxim says: it does not apply to records and public documents, which are supposed always to remain in the custody of the officers charged with their preservation, and which, therefore, must be proved or their loss accounted for and supplied by secondary evidence.

Brunswick v. *McKean*, 4 Me. 508, 6 Pa. St. 154; *Seechrist* v. *Baskin*, 7 W. & S. 403.

A missing record may be proved by secondary evidence; but then its former existence and loss must be first established by competent proof.

Sargent (Land L. p. 172) says the board of property is a court legally constituted for the trial of *caveats*, which are in the nature of equitable actions. It is not a court of record in the strict sense of the term, but the books and papers are so far records that, by the act of 1781, certified copies are evidence.

Ream v. *Com.* 3 S. & R. 207.

It is submitted that there is no analogy between the case of chamber surveys and the present case. In the former, the presumption is only that the survey was made properly "*rite et solenniter*" as prescribed by the act of assembly. A survey is made and returned, which, after a sufficient lapse of time, is conclusively presumed to have been made on the ground. It is a fair case for the application of the maxim; but in the present case the presumption sought to be made is not of an act which the board of property was bound to do, or one collateral to or regularly accompanying another shown to exist. It is an independent authority absolutely necessary to legalize the subsequent survey, and without which it is as worthless as if there had never been any warrant at all. That there can be no presumption in such a case has been expressly decided in *Wilson* v. *Stoner*, 9 S. & R. 39.

It was there decided that a survey is not evidence without showing an authority to make it, or proving that such authority existed and was afterwards lost; and that possession for upwards of thirty years, under a survey found in the handwriting of an assistant deputy surveyor, indorsed, "Copied for return," with a memorandum by him that it was made under an order, and the lines of which are marked on the ground, is not sufficient to presume a warrant.

This case covers the whole ground of the present. The defendants' survey was made in 1770—that under which plaintiffs claim in 1817, nearly fifty years afterwards. The court below admitted the survey of 1770 and charged the jury that they might presume the existence of an authority to make the survey, although it could not be produced. The Supreme Court reversed the judgment.

After a warrant has been once executed it is *functus officio* and no title under a resurvey can be made without an order by the board of property authorizing the same.

Porter v. *Ferguson*, 3 Yeates, 60; *Light* v. *Woodside*, 10 S. & R. 23; *Deal* v. *McCormick*, 3 S. & R. 346; *Oyster* v. *Bellas*, 2 Watts, 397; *Cassidy* v. *Conway*, 25 Pa. 240; *Hughes* v. *Stevens*, 43 Pa. 197.

Justice Strong said that a resurvey, without an order for it, amounts to nothing; without such an order the attempt of the deputy-survey-

or to locate the warrants a second time was an entirely unofficial act, which gave the warrantee no rights, either against the Commonwealth or any other claimant.

If it be considered that the question of presumption, in a case like the present, is not for the court, the questions arise, whether the learned court did not in fact withdraw the consideration of this matter from the jury, and whether if it did, it was error in this case.

It is submitted by defendants in error:

I. That there was no binding instruction given to the jury; the charge was but the expression of an opinion upon the evidence, which the court had a right to make.

II. That, at most, there was but the want of jurisdiction by the learned judge upon the question of the presumption of an order of the board of property. Such an omission will not be considered to be error. Where no direction is asked for, the court is only answerable for errors of commission.

Mere omission to say what might have been properly said, is not just ground of complaint by a party who submitted no propositions and suggested no views of the testimony for the consideration of the court. Judges are entitled to expect this kind of assistance from counsel; and when it is not rendered, counsel may still have the benefit of errors of commission, but they should not complain of omissions. By Woodward, J., in *Reeves* v. *R. Co.* 30 Pa. St. 460.

A simple omission of a court to charge the jury as fully on some of the points of a case about which it is charging generally, as a party alleges in error, that the court ought to have charged, cannot be assigned for error, when it does not appear that the party himself made any request of the court to charge in the form now asserted to have been the proper one. By Davis, J., *Exp. Co.* v. *Kountze*, 8 Wall. 343, 19 L. ed. 457.

III. But there was no evidence whatever in this case from which a jury could presume that there had been an order of the board of property, and that it was lost. The plaintiffs showed that a *caveat* was entered upon the return of the first survey, and that no proceedings or action was ever had by the board of property thereon. Could a jury have found that there had been an order of resurvey, in the face of this, simply from lapse of time?

The effect of the *caveat* was to suspend further proceedings, except upon a special order of the board of property, until the *caveat* be determined.

Jones, Land Office Titles, 69.

In *Lessee of Harris* v. *Monks*, 2 S. & R. 557, the court said that the departure of the surveyor general from the usual forms of his office, making a special deputation to a deputy-surveyor, out of his district, pending a *caveat*, without the immediate order of the board of property, was unjustifiable, either by law or custom, and that surveys made in pursuance of such special deputation could not be supported.

It would have been error to submit the question to the jury and allow them, in the expressive language of Ch. J. Tilghman, "to presume that a transaction was right because it appears not to be."

It is error in a court to submit the decision of a fact to a jury, unless there be some evidence of such fact.

Dubois v. *Lord*, 5 Watts, 49.

In *Haines* v. *Stouffer*, 10 Pa. 363, the court below suggested to the jury the possible understanding between the parties (of which there was no evidence whatever) in order to reconcile conflicting testimony. The cause was reversed; and it was said that where a state of facts could not be inferred on a demurrer to evidence, it is error to submit it to the jury as possible.

It is error to submit to the jury a fact alleged by the defense, of which the defendant gives no evidence, and the plaintiffs give some evidence to disprove.

Lower v. *Clement*, 25 Pa. 63.

If the evidence be such as cannot fairly warrant a jury in presuming a fact insisted on, the court is so far from being bound to instruct, that they are at liberty to presume it, that they would err in giving such instruction.

By Washington, J., *Bank* v. *Corcoran*, 2 Pet. 133.

Mr. Justice **Clifford** delivered the opinion of the court:

Rules of decision in the courts of the United States, as well as the forms and modes of process, are very largely derived from the laws of the states as construed by the decisions of the state courts in cases where they apply, except where the Constitution, treaties, or statutes of the United States otherwise require or provide.

Controversy having arisen between the parties in respect to the title to the tract of land described in the record, the *plaintiffs, [*443 on the 6th of February, 1866, brought an action of ejectment against the three corporation defendants and the other defendants therein named, to recover the possession of the tract, alleging that the title to the tract and the right of possession were in them, and not in the defendants. Service was duly made and the defendants appeared and pleaded that they were not guilty as alleged in the declaration. Issue was joined upon that plea and the parties went to trial, and the verdict and judgment were for the plaintiffs. Exceptions were duly taken by the defendants, and they sued out a writ of error and removed the cause into this court.

Title to the premises in controversy is deraigned by the plaintiffs from one Benjamin Bonawitz, whose claim to the same is supposed to be established by the following documentary evidences of title, as more fully set forth in the bill of exceptions: (1) An application to the land office of the state, dated December 14, 1829, made by him for sixty-six acres of unimproved land in Lower Mahantongo township, Schuylkill county, bounded as therein described. (2) Warrant from the state, of the same date, to the applicant for the land described in the application, as fully set forth in the record. (3) Return of survey made by a deputy-surveyor of the county, June 1, 1829, in pursuance of the warrant, as duly returned to the land office, and accepted the 5th of March of the succeeding year, as follows, to wit: Situate in Lower Mahantongo township, Schuylkill county, containing sixty-six acres and one hundred and three perches, and allowance of six per cent, returned this 3d day of March, 1830, in pursuance of a warrant dated the 14th

of December, 1829, to Benjamin Bonawitz. Superadded to the return is the following statement, that the lines and corners of the survey were made on the 18th of June, 1829, in pursuance of a warrant dated the 17th of March of that year, granted to the same person, a return on which was made, but was rejected on account of the survey not answering the description of the warrant. (4) Sundry mesne conveyances from the warrantee and subsequent **444*]** *grantees of the land described in the warrant, to the plaintiffs.

Appended to the statement that those conveyances were introduced, is the admission of the counsel for the defendants that Schuylkill county was erected out of Berks County, and that Porter township, where the premises are situated, as alleged in the declaration, was created out of Lower Mahantongo township, which is the name of the township where the location was made under the warrant, survey, and return.

Documentary evidences of title were then introduced by the defendants to maintain the issue on their part, as follows: (1) An application, dated July 1, 1793, made by Jacob Yeager to the land office for four hundred acres of land adjoining land granted the same day to William Whitman, Jr., in the county of Berks. (2) Warrant from the state, dated July 1, 1793, to Jacob Yeager for the same land, as more fully set forth in the bill of exceptions. (3) Return of survey on the warrant by the deputy-surveyor of Berks county, on the 10th of July, 1794, of four hundred and forty acres and sixty-four perches of land and allowance, situate in Pinegrove township, in the county of Berks, returned and accepted August 26, 1794, as therein certified. (4) Sundry conveyances were also offered in evidence by the defendants, tending, as they contend, to deduce title to the said corporations, or one of them, to the land located and surveyed under the warrant to Jacob Yeager, which includes the land embraced in the warrant and survey under which the plaintiffs deraign their title.

Rebutting evidence was then introduced by the plaintiffs: (1) Certified copies of eighteen applications, dated July 1, 1793, to the land office, for four hundred acres each, the leading one being in the name of James Silliman, and one of the number being the application by Jacob Yeager given in evidence by the defendants, as follows: Jacob Yeager applies for four hundred acres of land adjoining land this day granted to William Whitman, Jr., in the county of Berks. (2) Certified copies of eighteen de- **445*]** scriptive warrants, issued *upon those applications, including the warrant given to Jacob Yeager, introduced in evidence by the other party. (3) Also certified copies of eighteen surveys, including the Jacob Yeager tract, made by a deputy-surveyor of Berks county, upon those warrants, corresponding with the descriptions set forth in the warrants, the certificate of the survey in question being fully set forth in the bill of exceptions. (4) Return and acceptance of those eighteen surveys made by Henry Vanderslice, July 16, 1793, as appears in the list annexed to the return. They also introduced a certified copy of a *caveat*, entered July 18, 1793, by John Kunckel and Aaron Bowen against granting the tracts either to the said Jacob Yeager or to any one of the other seventeen applicants under the warrants included in that list. (5) Certificate from the office of the surveyor general that no proceedings had ever been had upon the said *caveat*.

By that certificate it appears that diligent and careful search had been made in that department for proceedings on that *caveat*, and the proper officer certifies that he does not find that any citation was ever applied for, or that any proceedings or action was ever had by the board of property upon or concerning the same, which remains recorded in the office of the surveyor general. (6) They also offered in evidence a map, showing the two locations of the Jacob Yeager tract, the first by Henry Vanderslice, and the second by William Wheeler, both deputy-surveyors of Berks county. (7) Both sides admitted that Henry Vanderslice was a deputy-surveyor of Berks county, and that the location of the Jacob Yeager tract as made by him was made in the county of Northumberland, within one mile of the line between that county and Berks county, and that the second location of the warrant by William Wheeler was made in Berks county, about twenty-two miles distant from the survey made by the other deputy-surveyor.

Responsive to the rebutting evidence given by the plaintiffs, the defendants then introduced certified copies of returns of surveys made by William Wheeler, July 10, 1794, upon the Jacob Yeager warrant, and upon three others of the *eighteen warrants re- [***446** turned and accepted, August 26 of that year, together with a connected chart of the four tracts, as prepared from the original surveys on file in the office of the surveyor general.

Neither party desiring to offer any further evidence, the presiding justice proceeded to charge the jury. Speaking of the warrant and survey introduced by the plaintiffs, he told the jury that the court saw no defect in the plaintiff's title under that warrant and survey, adding that the only claim which the defendants have set up is under warrants located several miles from the land in controversy by surveys returned and accepted, and to that instruction no exception was taken by the defendants. But the court also told the jury that "no subsequent official survey of the land under those warrants, without a warrant of survey or order of the board of property, was authorized." Therefore, said the justice, if the jury take the same view of the evidence as the court, the verdict should be for the plaintiffs; and the jury followed that instruction, and the defendants excepted.

Two errors are assigned, as follows: (1) That the court erred in charging the jury that no subsequent official survey of the land under those warrants, without a warrant of survey or order of the board of property, was authorized. (2) That the court erred in telling the jury that if they took the same view of the evidence as the court the verdict should be for the plaintiffs, as the effect of the instruction, as the defendants contend, was to withdraw from the jury the consideration of the question whether or not the board of property might not have issued an order for a second survey of the tract, the evidence of which had been lost.

Much discussion of the first error assigned is unnecessary, as the defendants admit that the

law is well settled in that state that a warrant, where it appears that a survey has been ordered upon it and made, returned and accepted, is *functus officio*, and that no title under a second survey can be made unless such second survey was ordered by the board of property, which it is admitted is not directly proved in this case. **447*]** *Such an admission by the defendants is a very proper one, as the decisions of the state court which furnish the rule of decision for this court in this case are very numerous and decisive to that effect. Perhaps the leading case upon the subject is that of *Deal* v. *McCormick*, 3 Serg. & R. 346, in which Gibson, J., said: "The law is well settled that after a survey made and returned into office, a second survey without an order of the board of property is merely void." If the owner of a warrant be prejudiced by the fraud or mistake of the officer, the board of property, which is a board created by statute, will grant him relief, if no new right has attached itself to the land, but a new survey, even pursuant to an order of the board, will not affect an intervening claim. Purdon, Dig. 9th ed. 619, pls. 7 & 8.

Doubtless the official surveyor may correct his survey while the warrant remains in his hands, but his control over it ceases after his return has been made to the land office, and the decisions are direct that no second survey thereon without an order for that purpose is of any validity whatever, either against the state or any other claimant, or, as Justice Strong said, in the case of *Hughes* v. *Stevens*, 43 Pa. 197: A second survey without an order for it amounts to nothing, as it is merely an unofficial act, which cannot give the warrantee any rights either against the state or any other claimant of the tract. *Drinker* v. *Holliday*, 2 Yeates, 89; *Porter* v. *Ferguson*, 3 Yeates, 60; *Vickroy* v. *Skelley*, 14 Serg. & R. 377; *Oyster* v. *Bellas*, 2 Watts, 397; *Bellas* v. *Cleaver*, 40 Pa. 260; *Gratz* v. *Beates*, 45 Pa. 495.

2. Whether the circuit court erred, as alleged in the second assignment of errors, depends upon the disputed fact whether there was any evidence in the case which would have warranted the jury in finding that an order for a second survey was ever granted by the board of property, as it is settled law that it is error to submit a question to a jury in a case where there is no evidence upon the subject.

It is clearly error in a court, said Taney, Ch. J., in *U. S.* v. *Breitling*, 20 How. 254, 15 L. ed. 902, to charge a jury upon a supposed or con- **448*]** jectural *state of facts, of which no evidence has been offered, as such an instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the fact hypothetically assumed in the charge of the court; and if there be no evidence which they have a right to consider, then the charge does not aid them in coming to a correct conclusion, but its tendency is to embarrass and mislead them in their deliberations. *Goodman* v. *Simonds*, 20 How. 359, 15 L. ed. 938; *Dubois* v. *Lord*, 5 Watts, 49; *Haines* v. *Stouffer*, 10 Pa. 363. When a prayer for instruction is presented to the court and there is no evidence in the case to support such a theory it ought always to be denied, and if it is given, under such circumstances, it is error; for the tendency may be and often is to mislead the jury by withdrawing their attention from the legitimate points of inquiry involved in the issue. Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. *Ryder* v. *Wombwell*, Law Rep. 4 Ex. 39; *Giblien* v. *McMullen*, L. Rep. 2 P. C. App. 335. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule: that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed. *Jewell* v. *Parr*, 13 C. B. 916; *Toomey* v. *L. & B. R. Co.* 3 C. B. N. S. 150; *Wheelton* v. *Hardesty*, 8 Ell. & Bl. 266; *Schuchardt* v. *Allen*, 1 Wall. 369, 17 L. ed. 646.

Very strong doubts are entertained whether the construction of the language employed by the judge, assumed by the defendants, is the correct construction of the same, and *the settled rule is: if the charge is [*449 merely ambiguous, the party dissatisfied with it should have requested to have it made clear before the jury left the bar; that a party under such circumstances may not acquiesce in the correctness of the instruction by his silence and take his chance with the jury, and then be allowed, if the verdict is against him, to claim the benefit of the ambiguity without having invited attention to the subject and given the court an opportunity to have made the correction to the jury. Much weight is certainly due to the suggestions of the plaintiffs, that the judge did not withdraw the evidence from the jury, if any there was in the case, that the language only warrants the conclusion that he expressed his own opinion, as he had a right to do, if he thought it proper, and left the question to the determination of the jury. Assume that to be the true construction of the language employed, and it is quite clear that the exception cannot be sustained, but the court is not inclined to place the decision upon that ground, as it is even clearer that there was no evidence in the case which would have warranted the jury in finding that an order for a new survey was ever granted by the board of property, as required by law and the repeated decisions of the supreme court of the state.

Lost instruments may be proved by parol testimony where it is shown that the instrument once existed and is lost, and the proof of loss, where it is first shown that it once existed, may consist of evidence showing diligent and unsuccessful search and inquiry in the place where it was usually kept or in which it was most likely to be found, if the nature of the case admitted of such proof. 1 Greenl. Ev. 2d ed. § 558. Presumptions of law are frequently absolute and conclusive, as they determine the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. Such presumptions arise in respect to the

intermediate proceedings in cases where lands are sold under licenses granted by courts to ex-
450*] ecutors, administrators, *guardians, and other officers, where they are required to advertise the sales in a particular manner, and to observe other formalities in their proceedings. Lapse of time, usually for the period of thirty years, affords a conclusive presumption in such cases, if the license and the official character of the party and the deed of conveyance are proved, that all the intermediate proceedings were correct. Were it otherwise, great uncertainty of titles and other public mischiefs would ensue, but the rule that lapse of time accompanied by the acquiescence of parties adversely interested does not in general extend to records and public documents which are supposed always to remain in the custody of officers charged with their preservation, and which, therefore, must be proved or their loss accounted for by secondary evidence. 1 Green. Ev. 12th ed. § 20; *Hathaway* v. *Clark*, 5 Pick. 490; *Brunswick* v. *McKean*, 4 Me. 508.

Surveys, it seems, were sometimes made in that state by deputy-surveyors in early times without going upon the land, by plotting the chart and marking the lines and corners in their offices, and those surveys are called "chamber surveys," but such surveys were forbidden by the act of the state legislature of the 8th of April, 1785, which enacts that every survey hereafter to be returned into the land office upon any warrant issued after the passing of the act shall be made by actually going upon the land and measuring the same and marking the lines. Purdon, Dig. 9th ed. pl. 65. Decided cases are referred to by the defendants where it is held that in controversies respecting titles under those surveys there arises a conclusive presumption, after the lapse of twenty-one years from the return of the survey into the land office, that the survey was regularly made upon the ground as returned and required by law. *Mock* v. *Astley*, 13 Serg. & R. 382; *Caul* v. *Spring*, 2 Watts, 390; *Norris* v. *Hamilton*, 7 Watts, 91; *Nieman* v. *Ward*, 1 W. & S. 68; *Ormsby* v. *Ihmsen*, 34 Pa. 462. Evidently the cases referred to must be regarded as establish-
451*] ing a rule of property in that state, *but the court here is of the opinion that they are not applicable in this case, as the defect in the defendants' title arises from the fact that the new survey was made without any order to that effect ever having been granted by the board of property as required by law. Surveys made under those circumstances are simply void, as shown by the best considered cases upon the subject decided by the highest court of the state. *Deal* v. *McCormick*, 3 Serg. & R. 346; *Oyster* v. *Bellas*, 2 Watts, 397; *Cassidy* v. *Conway*, 25 Pa. 240; *Hughes* v. *Stevens*, 43 Pa. 197.

Attempt is made in this case to supply by presumption a matter absolutely necessary to give legality to the survey and without which it is a nullity and amounts to nothing, but is held to be as worthless as if there had never been any warrant at all. Viewed in that light, as it must be, it is clear that the case falls within the decision of the court in the case of *Wilson* v. *Stoner*, 9 Serg. & R. 39, which, indeed, is decisive of the controversy. It was there decided that a survey is not evidence without first showing an authority to make it, or proving that such authority existed and was afterwards lost. Possession in that case was proved for upwards of thirty years under a survey in the handwriting of an assistant deputy-surveyor, indorsed, "Copied for return," with a memorandum by him that there was authority to make it, but the court held that those circumstances could not be received as affording presumptive evidence from which the jury might draw the necessary conclusion, as matter of fact, that even if the existence of the location was admitted, some account of its loss would have to be given before secondary evidence of its contents could be received, as without that the survey would be inadmissible for want of a previous authority. Unless it can be shown that the rule laid down in that case is not good law, it is quite clear that the second error assigned must also be overruled, as the defendants did not prove possession for any considerable time, or occupation of the premises, nor the making of any improvements upon the same, *nor the payment [***452** of any taxes assessed upon the land. On the contrary, they proved nothing except the mere lapse of time, unaccompanied by evidence of possession, or of improvements, or the payment of taxes, or any other circumstance, as a ground of presumption to warrant the jury in finding that the board of property ever granted a new warrant of survey or made any order of a character to give legality to the title set up in their behalf, which is all that need be remarked to show that there is no error in the record. Unquestionably, lost records may be proved by secondary evidence, but their former existence and loss must first be established by competent proof, and it is clear that evidence merely showing that they do not exist is not sufficient to establish either of those requirements.

Judgment affirmed.

WILLIAM CREEVY, William Creevy, Theo. Nickerson, and Charles Fox, as Creevy, Nickerson, & Co., and David McCoard, *Appts.*,

v.

THE ECLIPSE TOW-BOAT COMPANY.

(See S. C. "*The Merrimac*," 14 Wall. 199-204.)

Collision—act of pilot—negligence of steamer.

1. That a vessel was in charge of a pilot at the time of the collision is no defense to a libel for damages, if it appears that the collision was occasioned by negligence or unskillful navigation.

2. It was a rash act for a steamship, with a tug on each side of her, to attempt to pass between a ship which was grounded, and a wreck; and if she made the attempt, it was her duty to keep out of the way of the other vessel.

[No. 163.]

Submitted Apr. 9, 1872. Decided May 6, 1872.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Mr. **J. Hubley Ashton** for appellants.

Mr. **Conway Robinson** for appellee.

Mr. Justice **Clifford** delivered the opinion of the court:

Vessels engaged in commerce are liable for damage occasioned by collision by reason of the negligence, want of care or skill on the part of

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NOTE.—*Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting*—see notes, 13 L. ed. U. S. 537; 25 L. ed. U. S. 168; 28 C. C. A. 532; 29 C. C. A. 368.

Rules for avoiding collision; steamer meeting steamer—see notes, 14 L. ed. U. S. 68; 35 L. ed. U. S. 453; 30 C. C. A. 630; 60 C. C. A. 254.

those intrusted with their navigation, or on account of the complicity, direct or indirect, of their owners. Owners appoint the master and employ the crew and, consequently, the owners are held responsible for the conduct of the master and crew in the management of the vessel.

Damages were claimed in the libel in this case, which was filed in the district court by the owners of the steam tug Gladiator, to recover compensation for injuries the tug boat received on the 11th of January, 1867, by a collision which occurred on that day in the Mississippi river at the Southwest pass, between the Gladiator and the steamship Merrimac, of the burden of two thousand tons, in tow of tug boats, to wit: The Calhoun, of five hundred tons, lashed to her starboard side, and the Harry Wright, of the same tonnage, lashed to her port side. They instituted the suit *in rem* against the steamship and the two tugs which had her in tow, and they charged in the libel that the damage to the Gladiator was done by the three steamers made respondents in the libel. Service was made by seizing the three respondent steamers, and the respective owners of the same appeared and filed separate answers. By leave of court a bond for value was given in each case, and each of the respondent steamers was released when the bond for value was filed. Testimony was taken on both sides and the parties went to hearing, and the district court entered a decree dismissing the libel, and the libelants appealed to the circuit court, where the parties were again heard, and the circuit court affirmed so much of the decree as dismissed the libel as to the two steam tugs, but reversed the decree as **201*]** to *the steamship, and pronounced for damages as against her in favor of the libelants.

Courts, under such circumstances, may estimate the damages without a reference, or they may send the cause to a commissioner for that purpose in the exercise of their discretion. *Silsby* v. *Foote*, 20 How. 386, 15 L. ed. 955. Pursuant to that rule the circuit court estimated the damages without a reference, and found the amount to be $4,697.40, with five per cent. interest from the time the libel was filed in the district court. Whereupon the owners of the steamship appealed to this court, and the only question presented is whether the decree of the circuit court awarding damages to the libelants against the steamship is correct, as none of the other parties have appealed. *The Bagaley*, 5 Wall. 412, 18 L. ed. 591; *The Quickstep*, 9 Wall. 665, 19 L. ed. 767.

By the pleadings and evidence it appears that the steam tug of the libelants was made fast to the larboard side of the ship, Celuta, bound to the port of New Orleans, and which in endeavoring to pass up the river, had grounded some twelve hours before on the bar of the Southwest pass. Her master had employed the Gladiator and the steam tug Switzerland, which was lashed to the starboard side of the Celuta, to assist the crew of the ship in getting her over the bar, and at the time of the collision these three vessels, lashed together in the manner described, were lying on the bar, the port side of the Gladiator being at the distance of seventy to seventy-five feet from a certain buoy indicating the place on the bar where was a certain "wreck" which entirely obstructed navigation. Under these circumstances the Gladiator was unable to move, as she was lashed to the ship Celuta and the ship was aground on the bar, and it was while the Celuta and her two steam tugs were in that situation that the steamship Merrimac and the two steam tugs which had her in tow, also bound to New Orleans, came up and attempted to pass between the Gladiator and the buoy which indicated the location of the wreck, and the pleadings and evidence show that the steam tug Calhoun was lashed to *the port side of the steam- [***202** ship, and having a considerable list to port, her starboard guard was elevated and passed over the rail of the Gladiator, striking the latter vessel with great violence, raking her from stem to stern, and carrying away all her upper works. By the collision the cabin, cook-house, pilot-house, and engine-room of the Gladiator were entirely smashed and carried from the port side over to the starboard side of the steam tug. Her boiler was knocked out of place, her steam drum broken to pieces, her lever and exhaust pipe broken, and much other damage was done to the engine and other parts of the steam tug, as more fully set forth in the record.

Two defenses were set up by the owners of the steamship: (1) That the steamship and the two steam tugs which had her in tow were in the charge and under the control of a branch pilot, taken on board conformably to the requirements of the law of the state, and they allege that the owners of the vessels, while they were under the control and management of such a pilot, are not in any way responsible for their navigation. (2) That there was sufficient space to allow the steamship and her two tugs to pass up between the wreck and the Gladiator, and that they came up in a skilful and proper manner; that, as they were passing the Gladiator and touched shoal water, the Calhoun careened two points, which made it impossible to prevent a collision, which was an event wholly unforeseen and which could not have been anticipated by the most skilful seamanship.

Much discussion of the first defense, since the decision in the case of *The China*, 7 Wall. 58, 19 L. ed. 70, is entirely unnecessary, as the whole subject was there very carefully considered. By the law of the state it is provided that if the master of any ship or vessel coming to the port of New Orleans shall refuse to receive on board and employ a pilot, the master or owner of such ship or vessel shall pay to such pilot who shall have offered to go on board and take charge of the vessel half pilotage. Rev. Stat. La. 1856, pp. 403, 404. *State pilot laws which [***203** compel the owners of vessels to pay half pilotage in cases where the pilot offers his services and they are refused, where the law is not enforced by any penalty, are not regarded as compulsory and, therefore, the fact that the vessel was in charge of a pilot under such a law at the time of the collision is no defense to a libel for damages, if it appears that the collision was occasioned by negligence or unskilful navigation. *The Marcellus*, 1 Cliff. 490. Port regulations are supposed to be known to the ship-owner before he sends his vessel on the voyage, and the general rule is, that in sending her to any particular port he elects to submit to the lawful regulations established at that port, and that the vessel, in case she unlawfully collides with another vessel engaged in lawful commerce,

shall be responsible. *The Carolus*, 2 Curt. 6? Where the law is not enforced by any penalty i' is not regarded as compulsory, and if not compulsory the defense that the ship was in charg' of a pilot is not a valid defense, which is all that need be said upon the subject. *Martin* v. *Hilton*, 9 Met. 371; *Hunt* v. *Carlisle*, 1 Gray, 257.

2. Other defenses failing, it is quite common to set up the defense of inevitable accident. Most collisions are inevitable at the moment they occur; but the primary rule is that precautions must be seasonable, as all experience shows that in order to be effectual they must be seasonable, and if they are not so, and a collision ensues in consequence of the delay, it is no valid defense to say that nothing could be done at the moment to prevent the two vessels from coming together. Inability to prevent a collision usually exists at the time it occurs, but it is generally an easy matter to trace the cause of the disaster to some negligent or unskilful act, or to some antecedent omission of duty on the part of one or the other or both of the colliding vessels. *Wakefield* v. *The Governor*, 1 Cliff. 97. Few cases arise where there is less difficulty in answering such a defense or in pointing to the antecedent error than in the case under consideration, as it is quite clear to any one acquainted with the rules of navigation **204*]** *that it was a rash act for the steamship with her two tugs, one on her larboard side and the other on her port side, to attempt to pass between the Gladiator and the wreck, even if the space between those objects was somewhat wider than the three steamers abreast, which, to say the least of the proposition, is very doubtful.

Beyond doubt it was the duty of the steamship to keep out of the way, both because she was astern and because the Celuta to which the Gladiator was lashed was aground, and it is no answer to say that it was possible to pass, and that the attempt would have been successful if the Calhoun, when she reached shoal water abreast of the Gladiator, had not careened, as alleged in the answer. Under the circumstances, it must be assumed that those in charge of the steamship knew that it was their duty to keep out of the way, and if they did not know that the water shoaled where the Celuta was grounded, it only furnished additional evidence to support the conclusion that the attempt to pass between the Gladiator and the wreck was a rash act, and that the owners of the steamship are responsible for the consequences. Such being our conclusion, it is unnecessary to examine the other questions discussed at the argument.

Decree affirmed.

JACOB H. V. COCKROFT *et al., Plffs. in Err.*,
v.
WALTER S. VOSE *et al.*

(See S. C. 14 Wall. 5–9.)

Writ of error dismissed.

*The court reiterate the proposition, that unless it can be seen from the record that a state court decided the question relied on to give this court jurisdiction, the writ of error will be dismissed.

[No. 571.]

Submitted Apr. 26, 1872. Decided May 6, 1872.

IN ERROR to the Supreme Court of the State of New York.

*Headnote by Mr. Justice MILLER.

NOTE.—*What the record must show*—see notes, 63 L. R. A. 329, 471.

The record shows that this suit was brought in the supreme court of the state of New York, by the defendants in error, to enforce an alleged lien for supplies furnished the brig Jachin, in the port of New York; that, prior to the commencement of the suit, a warrant of attachment was issued by one of the justices of said court, pursuant to the provisions of art. 8, ch. 8, part 3, of the Revised Statutes, entitled, "An Act to Provide for the Collection of Demands against Ships and Vessels" directed to the sheriff of the city and county of New York, to seize said vessel for the purpose of enforcing said alleged lien, and that the sheriff thereupon seized the vessel as directed.

That for the purpose of discharging the vessel from the custody of the sheriff, and, in pursuance of the statute, the plaintiffs in error gave their bond to the defendants in error, whereby they became bound to pay the amount of all such claims and demands "as shall have been exhibited, which shall be established to have been subsisting liens" upon the vessel pursuant to the statute above mentioned; and that afterwards this suit was brought by the defendants in error to enforce the bond.

The cause was tried Nov., 1863, and judgment given for the defendants in error. This judgment was affirmed on appeal to the general term. An appeal was taken by the plaintiffs in error from this judgment to the court of appeals, and May 19, 1871, that court rendered final judgment affirming the judgment of the supreme court; the cause was remitted to the supreme court, and judgment given by said court in favor of the defendants in error and against the plaintiffs in error, June 6, 1871; whereupon this writ of error was brought by the plaintiffs in error to correct the alleged error in the rendition of the judgment given in the court of appeals.

The case further appears in the opinion.

Messrs. **J. M. Carlisle, J. D. McPherson,** and *Charles N. Black*, for plaintiffs in error:

The record not only shows upon its face that the state law was drawn in question as in conflict with the Constitution and laws of the United States, and that the question was necessarily involved in the decision, so that the state court could not have given judgment without deciding it, but it also shows that the decision of the court was in favor of the state law.

It is true that the validity of the state law was not discussed in the supreme court, and that the supreme court decided the case on other grounds; but this writ of error is not brought to correct any error in the rendition of the judgment of that court. It is brought to correct the error in the rendition of the judgment in the court of appeals.

The action of the supreme court, however, was based upon the assumption that the state law was valid, as the foundation of the action rested upon the validity of that law.

It is conceded by the defendants in error that the constitutionality of the state statute was discussed in the court of appeals. In that court the main question was as to the validity of this act; but it was said by the court, that the plaintiffs in error had waived that defense by not pleading it, and insisting upon it on the trial of the cause. *Vose* v. *Cockroft*, 44 N.Y. 415.

Assuming that the law tolerates such a thing

as a waiver of this character, this waiver does not appear upon the face of the record. So far as the record shows, and that is all we have to consider upon this motion, it appears that a state statute was drawn in question as in conflict with the Constitution and laws of the United States, and that the decision of the court was in favor of the state law.

The plaintiffs in error contend that they did not and could not waive the constitutionality of this law; that if the court held the law to be unconstitutional, it was bound to give the plaintiffs in error the benefit of it; that the court had no right to exercise any authority under it. An unconstitutional law is no law, and a party cannot waive nor be affected by that which never existed. *Brookman* v. *Hamill*, 43 N. Y. 554.

It is enough to say that the face of this record shows that the court sustained the validity of this state statute, no matter what reasons the judges may have assigned in their opinions.

Messrs. **Benedict** & *Benedict* for defendants in error:

This court has held, by a long series of authorities, that where it is sought to review by writ of error the judgment of a court of a state, it must appear from the record itself that a question was raised in the state court as to the repugnancy of some state statute to the Constitution or laws of the United States, and that the state court upon such question adjudged the statute valid.

Crowell v. *Randell*, 10 Pet. 392; *Bank* v. *Buckingham*, 5 How. 341; *Williams* v. *Oliver*, 12 How. 111; *Lawler* v. *Walker*, 14 How. 149; *Maxwell* v. *Newbold*, 18 How. 511, 15 L. ed. 506; *Hoyt* v. *Sheldon*, 1 Black, 518, 17 L. ed. 65; *Rector* v. *Ashley*, 6 Wall. 142, 18 L. ed. 733; *Parmalee* v. *Lawrence*, *ante*, 48.

There is nothing in the record which shows that the question of the constitutionality of any provision of the Revised Statutes was made or passed upon by the supreme court of the state. The pleadings show that no such question was raised. No such question is suggested by the evidence or the exceptions. The opinions of the judges at the general term show that no such question was raised before them or passed upon by them, nor does any such question appear in the *remittitur* from the court of appeals, or the judgment of the supreme court entered thereon.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the supreme court of New York, and motion is made to dismiss for want of jurisdiction.

The ground of jurisdiction relied on is that a statute of New York which gave a lien on a vessel for supplies furnished her in her home port and prescribes the mode by which the lien could be enforced was an invasion of the exclusive jurisdiction of the district court of the United States over that subject.

But it does not appear to us that the court of appeals in which the case was decided, held the state statute to be valid, and if it did not, the jurisdiction of this court cannot be invoked to declare it invalid.

The suit before us was an action on a bond given by the owners of the vessel and their sureties to release her when she had been attached in the original proceeding to enforce the lien, and several questions were raised in the defense, none of which seem, from the pleading, or anything else in the record, to have been founded on the invalidity of the statute. One of these questions evidently was whether the credit was given to the owner personally, or to the vessel; and another was whether, after the bond had been given and the vessel released, the obligors in the bond were not estopped to deny the validity of the proceeding in the attachment suit.

Now, if the court decided the case on this latter ground, as it may have done, or on any of the other grounds except the validity of the statute, we have no jurisdiction.

The inference from the condition of the record, that the court did not decide the statute valid, might receive confirmation *from [*9 the opinion of that court, if we were at liberty to consider it, for it is there held that the statute is invalid for the very reason given here by the plaintiffs in error why we should hold it invalid.

On the whole, we do not find, from anything in the record of this case, that the question relied on here was decided against the right claimed by the plaintiffs in error, *and the writ is, therefore, dismissed.*

HENRY J. HOLMES and Rebecca B. Holmes, his Wife, *Appts.*,

v.

AMBROSE H. SEVIER, as Admr. of the Estate of Jno. A. Jordan, Deceased, *et al.*

State decision, when reviewed—case dismissed.

Where the state court, in its decision, proceeded upon the general principles of the jurisprudence of the state, this court will not review its decision.

Where the record from the state court exhibits no question of which this court takes cognizance, the case will be dismissed.

[No. 31.]

Argued Nov. 8, 1871. Decided May 6, 1872.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas.

The case is sufficiently stated in the opinion, and in the case therein referred to.

Messrs. **P. Phillips** and **S. F. Clark** for appellants.

Messrs. **Watkins** and **Rose** for appellees.

Mr. Justice **Swayne** delivered the opinion of the court:

This is an appeal in equity, from the decree of the circuit court of the United States for the eastern district of Arkansas.

The bill was filed by the appellants, to enforce the payment of the balance due upon a promissory note, bearing date on the 25th of December, 1856, made by John A. Jordan, since deceased, to Robert Ryan, also since deceased, for $10,000, payable on the 1st of January, A. D. 1860, with interest at the rate of ten per cent per annum from date until paid. The note was secured by a mortgage, and is averred to have been given for the purchase money of slaves subsequently emancipated by the government of the United States. The defendants demurred to the bill. The demurrer was sustained and the bill dismissed. The opinion of the court was confined to the effect of the emancipation of the slaves upon the validity of the note. The judgment proceeded upon that ground. The views of this court upon that subject were fully expressed in *Osborn* v. *Nicholson*, *ante*, 689, re-

cently decided at this term, and they are decisive of this case.

In accordance with those views, the decree of the court below is reversed, and the case will be remanded to the Circuit Court, with directions to proceed in conformity to the opinion of this court.

152*] ***Ex parte:*** In the Matter of MAX NEWMAN *et al.*

(See S. C. 14 Wall. 152-170.)

Mandamus, when issued—effect of—practice on.

1. This court has power to issue writs of mandamus to any courts appointed under the authority of the United States, where such court, having jurisdiction, refuses to hear and decide a case; or where, having heard, it refuses to render judgment or enter a decree.
2. But the writ will not be issued in any case, if the party aggrieved may have a remedy by writ of error or appeal.
3. The supervisory court will never prescribe what the decision of the subordinate court shall be, nor control the judgment of discretion of the subordinate court in disposing of the controversy.
4. Practice on mandamus to subordinate courts considered.
5. It is not competent for the superior tribunal, upon such a writ, to re-examine the judgment or decree of the subordinate court, or to interfere in any manner with the judicial discretion and judgment of the subordinate court.

[No. 12. Orig.]

Argued Apr. 19, 1872. Decided May 6, 1872.

PETITION for writ of mandamus to the United States Circuit Judge for the Eastern District of New York.

This case came before this court on a petition filed for a writ of mandamus, to be directed to the circuit judge holding the circuit court in and for the eastern district of New York, in the second circuit, commanding him to entertain jurisdiction of a certain cause then pending in said court, and to decide the same on the merits thereof. This court granted a rule to show cause Apr. 19, 1872, why a writ of peremptory mandamus should not be granted. The hearing of the application is now on that rule.

The case is stated by the court.

Mr. **D. McMahon,** for the petitioners:

The definition of the writ of mandamus shows that it is issued to inferior courts "to enforce the due exercise of those judicial or ministerial powers, with which the Constitution or Congress have invested them: and this, not only by restraining their excesses, but also by quickening their negligence and obviating their denial of justice."

Ex parte Bradley, 7 Wall. 364, 375, 19 L. ed. 214, 218; *Ex parte Crane,* 5 Pet. 190; *Stafford* v. *Bank,* 17 How. 275, 15 L. ed. 101.

While this court will not restrain or direct by mandamus in what manner the discretion of the inferior tribunal should be exercised, it will, in proper cases, require the court to hear and decide.

Ins. Co. v. *Wilson,* 8 Pet. 291; *Ex parte Bradstreet,* 7 Pet. 634.

The 13th section of the judiciary act gives ample power to this court to issue writs of mandamus, in cases warranted by the principles and usages of law, to any court appointed or persons holding office under the authority of the United States. See 1 Stat. at L. 180.

The principles and usages of law give the right to a mandamus, where a party has a legal right and no other remedy to enforce it.

Phill. Pr. 230.

In the case at bar, the proposed mandamus does not usurp the functions of a writ of error or appeal.

No appeal lies in this case, because the amount is less than $2,000.

The circuit judge refuses to consider and determine on the merits, a case over which he has ample jurisdiction; he entertaining the opinion that the courts of the United States sitting as courts of admiralty and maritime jurisdiction, have not jurisdiction of the subject-matter, because of the treaty with Prussia.

In this court it is submitted that the conclusion of the circuit court is erroneous. Being erroneous, his refusal to act judicially on the plea that he has not jurisdiction, brings him within the operation of the law of mandamus.

While it is conceded that the writ of mandamus cannot be used to correct an erroneous judgment of a court of acknowledged jurisdiction, yet it can be invoked to compel a court to exercise its jurisdiction, even though such court be of the opinion it had no jurisdiction. The distinction between the two classes of cases is obvious.

See, *Ins. Co.* v. *Adams,* 9 Pet. 571; *Ex parte Story,* 12 Pet. 339; *Ex parte Hoyt,* 13 Pet. 279; *Rex* v. *Justices of Kent,* 14 East, 395; *Hull* v. *Supervisors of Oneida,* 19 Johns. 260; *Judges of Oneida C. P.* v. *People,* 18 Wend. 92; *Swing* v. *Inhab. of Alloways Creek,* 5 Halst. 58.

Mr. **Edward Salomon,** in opposition to the petition:

Mandamus cannot perform the functions of a writ of error or of an appeal. The court will not, by mandamus, direct a judge what judgment to enter in a suit; but in a proper case, will only require him to proceed to enter judgment. It will never direct in what manner the discretion of an inferior tribunal shall be exercised; but will only, in a proper case, require the inferior court to decide. It cannot by mandamus control the judicial discretion or conscience of the court below.

Ex parte Crane, 5 Pet. 190; *Ex parte Bradstreet,* 7 Pet. 634; *Ins. Co. of N. Y.* v. *Wilson,* 8 Pet. 291; *Same* v. *Adams,* 9 Pet. 571; *Ex parte Hoyt,* 13 Pet. 279; *Ex parte Many,* 14 How. 24; *Commissioner of Patents* v. *Whitely,* 4 Wall. 522, 17 L. ed. 335.

We submit that in this application for a mandamus, this court cannot look into the opinion of the circuit judge for the purpose of ascertaining on what ground his decision is based, with a view of revising it. The opinion is no part of the record of the case. That record shows that the circuit court has entertained the appeal, heard and tried it, and upon such hearing and trial, after due consideration, has ordered that the decree of the district court be reversed and the libel dismissed. After entertaining the appeal and hearing the case, the circuit court has decided the controversy upon the points presented. How can this court, then, upon an application for a mandamus, look into the opinion of the judge with a view of controlling his judicial conscience, in order to compel him to decide differently?

The application in this court is for a mandamus directing the circuit judge "to hear the

NOTE.—*Mandamus in exercise of superintending control over inferior courts*—see note, 51 L. R. A. 33.

appeal of said parties, taken from the decision of Charles L. Benedict, district judge of the United States, and to decide the same on the merits of the controversy." He has entertained the appeal, has heard it and has decided it, and we respectfully insist that the circuit judge has decided the appeal "on its merits." What are the merits of the controversy? Is not this question of the jurisdiction of the Prussian Consul and his decision a part of the "merits of the controversy?" Will this court by mandamus determine what is, and what is not, "the merits of the controversy?" We submit that the question presented on the appeal, whether under the treaty and considering the action and alleged and proved decision of the consul, the district court should have dismissed the libel, went to the "merits of the controversy" and that the circuit judge has decided the appeal upon its merits.

Mr. Justice **Clifford** delivered the opinion of the court:

Attempt was made in the first place to prosecute the suit in the name of the mate for himself and as assignee of the crew, but the court before entering the decree suggested an amendment, and the crew were admitted as co-libelants, which will render it unnecessary to make any further reference to that feature of the pleadings.

Proceedings *in rem* were instituted in the district court against the bark Elwine Krepline, by the mate, for himself and in behalf of the crew of the bark, on the 24th of August, 1870, in a case of subtraction of wages civil and maritime, and they allege in the libel, as amended, that the bark is a Prussian vessel, and that they are Prussian subjects, and that they were hired by the master and legally shipped on board the bark for a specified term of service, and that they continued well and truly to perform the duties they were shipped to fulfil, and that they were obedient to the lawful commands of the master, until they were discharged. They also set forth the date when they were shipped, the length of time they had served, the wages they were to receive, and the amount due and unpaid to them respectively for their services, and aver that the owners of the bark refuse to pay the amount.

Process was issued and served by the seizure of the bark, and the master appeared as claimant, and filed an answer. He admits that the appellants shipped on board the bark at the place and in the capacities and for the wages alleged in the libel; but he avers that they signed the shipping articles and bound themselves by the rules, regulations, and directions of the shipping law and rules of navigation of the country to which the bark belonged, and he denies that they well and truly performed their **162*]** duties, or that they were *obedient to his lawful commands. On the contrary, he alleges that they, on the day they were discharged, were guilty of gross insubordination and mutinous conduct; that they resisted the lawful commands of the master, and refused to obey the same, and interfered with him in the performance of his duty, and with force and threats prevented him from performing the same, and thereafter, on the same day, deserted from the vessel.

Apart from the merits he also set up the following defenses:

1. That the court had no jurisdiction of the matter contained in the libel, because the bark was a Prussian vessel, owned by Prussian citizens, and because the libelants were Prussian subjects belonging to the crew of the vessel, and were also citizens of that Kingdom.

Support to that defense is derived from the tenth article of our treaty with that government, which provides that consuls, vice-consuls, and commercial agents of the respective countries, in the ports of the other, shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews, or of the captain, should disturb the order or tranquillity of the country, or the consuls, vice-consuls, or commercial agents should require their assistance to cause their decisions to be carried into effect. 8 Stat. at L. 382.

He set up that provision of the treaty, and prayed that he might have the same advantage of it as if the same was separately and formally pleaded to the libel.

2. That the libelants in signing the shipping article bound themselves, under the penalty of a forfeiture of wages, not to sue or bring any action for any cause, against the vessel, or the master, or owners thereof, in any court or tribunal except in those of Prussia.

*3. That the Consul General of the [***163** North German Union, resident in the city of New York, which government included Prussia and other sovereignties, heard and examined the questions of difference between the libelants and the claimant and adjudicated the same; that the libelants appeared before the court on the occasion and presented their claim to be discharged and their claim for wages, and that the consul, in his character as such, heard and examined their said claims and adjudged that the libelants should return to the vessel, and that no wages were due them or would be due them until they complied with the contract of shipment.

Testimony was taken in the district court, and the district court entered a decree in favor of the libelants for the amount due them for their wages, and referred the cause to a commissioner to ascertain and report the amount. Subsequently he reported that the amount due to the libelants was $743.41. Exceptions were filed by the claimant, and the district court upon further hearing reduced the amount to $712.32, and entered a final decree for that amount, with costs of suit. Thereupon the claimant appealed to the circuit court, and the record shows that the appeal was perfected, and that the cause was duly entered in that court.

On the 5th of the last month the petition under consideration was filed in this court in behalf of the appellees in that suit, in which they represented that the cause appealed was fully argued before the circuit court on the same pleadings and proofs as those exhibited in the district court, and that the circuit judge reversed the decree of the district court and dismissed the libel for want of jurisdiction in the district court to hear and determine the controversy; that the circuit judge declined to enter-

tain the cause or to consider the same on the merits, and that no final decree on the appeal has been entered in the circuit court or signed by the circuit judge.

His refusal to entertain jurisdiction and to **164***] hear and decide *the merits of the case was placed, as they allege, upon the ground that the matter in difference, under the tenth article of the treaty, was within the exclusive cognizance of the consul, vice consul, or commercial agent therein described, and in consequence thereof that the district court was without any jurisdiction, which they contend is an error for the following reasons:

(1) Because the treaty stipulation, if so construed, is unconstitutional and void.

(2) Because that article of the treaty applies only to disputes between the masters and crews of vessels, and has no reference to suits *in rem* against the vessel.

(3) Because the record in this case shows that the Prussian authorities refuse to entertain jurisdiction of the controversy.

(4) Because the treaty is with Prussia, and it appears that her government has no consul, vice consul, or commercial agent at that port.

(5) Because the consul who acted in the case requested the district court to take jurisdiction of the matter in difference.

Hearing was had on the day the petition was presented, and this court granted a rule requiring the circuit judge to show cause on the day therein named why a peremptory writ of mandamus should not issue to him directing him to hear the appeal of the petitioners and decide the same on the merits. Due service of that rule was made, and the case now comes before the court upon the return of the judge to that rule. He returns, among other things not necessary to be reproduced, as follows: that the cause of the libelants proceeded to a decree in their favor in the district court; that an appeal from that decree was taken in due form to the circuit court for that district; that the circuit court did not refuse to entertain the appeal, nor did the circuit court refuse to decide the case on the appeal nor hold or decide that the circuit court had no jurisdiction to hear or decide the same, as required by the proofs or by the law. On the contrary, the circuit court did entertain **165***] the appeal, *did hear the counsel of the parties fully on all the questions raised in the case, and did decide the same. But in making such decision, the said court did hold and decide that the matter in controversy was within the jurisdiction of the consul under the treaty, and that the consul, in the exercise of that jurisdiction, after hearing the parties had decided the matter. Pursuant to those views the circuit court, as the return shows, did thereupon direct that the decree of the district court be reversed and that the libel of the petitioners be dismissed.

Power to issue writs of mandamus to any courts appointed under the authority of the United States, was given to this court by the 13th section of the judiciary act, in cases warranted by the principles and usages of law. 1 Stat. at L. 81. When passed, the section also empowered the court to issue such writs subject to the same conditions to persons holding office under the United States, but this court very early decided that the latter provision was unconstitutional and void, as it assumed to enlarge the original jurisdiction of the court, which is defined by the Constitution. *Marbury* v. *Madison*, 1 Cranch, 175; *Ex parte Hoyt*, 13 Pet. 290.

Applications for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refuses to hear and decide the controversy, or where such a court, having heard the cause, refuses to render judgment or enter a decree in the case; but the principles and usages of law do not warrant the use of the writ to re-examine a judgment or decree of a subordinate court in any case, nor will the writ be issued to direct what judgment or decree such a court shall render in any pending case, nor will the writ be issued in any case if the party aggrieved may have a remedy by writ of error or appeal, as the only office of the writ when issued to a subordinate court is to direct the performance of a ministerial act, or to command the court to act in a case where the court has jurisdiction and refuses to act; but the *supervisory court will never pre- [***166** scribe what the decision of the subordinate court shall be, nor will the supervisory court interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy. *Ins. Co.* v. *Wilson*, 8 Pet. 302; *U. S.* v. *Peters*, 5 Cranch, 135; *Ex parte Bradstreet*, 7 Pet. 648; *Ex parte Many*, 14 How. 24; *U. S.* v. *Lawrence*, 3 Dall. 42; *Commissioner* v. *Whitely*, 4 Wall. 522, 18 L. ed. 335; *Ins. Co.* v. *Adams*, 9 Pet. 602.

Where a rule is laid, as in this case, on the judge of a subordinate court he is ordered to show cause why the peremptory writ of mandamus shall not issue to him, commanding him to do some act which it is alleged he has power to do, and which it is his duty to do and which he has improperly neglected and refused to do as required by law. Due service of the rule being made, the judge is required to make return to the charge contained in the rule, which he may do by denying the matters charged on by setting up new matter as an answer to the accusations of the relator, or he may elect to submit a motion to quash the rule or to demur to the accusative allegations. Matters charged in the rule and denied by the respondent must be proved by the relator, and matters alleged in avoidance of the charge made, if denied by the relator, must be proved by the respondent. Ang. & Ames, Corp. 9th ed. § 727; *People ex rel.* v. *Supervisors*, 2 Abb. Pr. (N. S.) 78. Motions to quash in such cases are addressed to the discretion of the court, but if the respondent demurs to the rule, or if the relator demurs to the return, the party demurring admits everything in the rule or the return, as the case may be, which is well pleaded, and if the relator elects to proceed to hearing on the return without pleading to the same in any way, the matters alleged in the return must be taken to be true to the same extent as if the relator had demurred to the return. Tapping, Mand. 347; Moses, Mand. 210; *Com. Bk.* v. *Commissioners*, 10 Wend. 25; *People ex rel.* v. *Russell*, 1 Abb. Pr. (N. S.) 230; *People ex rel.* v. *Board of Police*, 26 N. Y. 316; *Com. of Pa.* v. *Commissioners*, 37 Pa. 245; 3 Stephen, N. P. 2326; 6 Bac. Abr. ed. 1856, 447. Subordinate judicial tri-

167*] bunals, when the writ is *addressed to them, are usually required to exercise some judicial function which it is alleged they have improperly neglected or refused to exercise, or to render judgment in some case when otherwise there would be a failure of justice from a delay or refusal to act, and the return must either deny the facts stated in the rule or alternative writ on which the claim of the relator is founded, or must state other facts sufficient in law to defeat the claim of the relator; and no doubt is entertained that both of those defenses may be set up in the same return, as in the case before the court. *Springfield* v. *Hampden*, 10 Pick. 59; *People* v. *Commissioners*, 11 How. Pr. 89; *People* v. *Champion*, 16 Johns. 61. Several defenses may be set up in the same return, and if any one of them be sufficient the return will be upheld. *Wright* v. *Fawcett*, 4 Burr. 2041; Moses, Mand. 214.

Evidently the district judge was inclined to adopt the proposition advanced by the libelants, that the suit for wages, as it was prosecuted by a libel *in rem*, was not within the treaty stipulation, nor a controversy within the jurisdiction of the consul, but he did not place his decision upon that ground. He did, however, rule that the treaty did not have the effect to change the jurisdiction of the courts, except to require them to decline to hear matters in difference between the masters and crews of vessels in all cases where the consul had acted or perhaps was ready to act as judge or arbitrator in respect to such differences. Beyond doubt he assumed that to be the true construction of the treaty, and having settled that matter he proceeded to inquire whether the consul had adjudicated the pending controversy, or whether the evidence showed that he was ready to do so, and having answered those inquiries in the negative he then proceeded to examine the pleadings and proofs, and came to the conclusion in the case which is expressed in the decree from which the appeal was taken to the circuit court.

All of those matters were again fully argued in the circuit court, and the circuit judge decided to reverse the decree of the district court upon the following grounds: (1) That 168*] *the Prussian consul, under the treaty, had jurisdiction of the subject-matter involved in the suit in the district court; (2) that the jurisdiction of the consul under the treaty was exclusive; (3) that the proofs showed that the consul heard and adjudicated the matter involved in the suit appealed to the circuit court, and that the libelants were bound by that adjudication.

Such questions were undoubtedly raised in the pleadings, and it is equally certain that they were decided by the district court in favor of the libelants. Raised as they were by the pleadings, it cannot be successfully denied that the same questions were also presented in the circuit court, and in view of the return it must be conceded that they were decided in the latter court in favor of the respondent. Support to that proposition is also found in the opinion of the circuit judge, and in the order which he made in the case. Suffice it, however, to say, it so appears in the return before the court, and this court is of the opinion that the return, in the existing state of the proceedings, is conclusive.

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634; *Ins. Co.* v. *Wilson*, 8 Pet. 304; *Ex parte Many*, 14 How. 25.

Viewed in the light of the return, the court is of the opinion that the rule must be discharged and the petition denied.

THE STEAM TUG R. L. MABEY, etc., John Caldwell, Executor, and Rachel Corwin, Exrx., etc., *Appts.*,

v.

JOSHUA ATKINS and Edwin Atkins, Owners of the Ship Isaac F. Chapman,

and

THE SHIP HELEN R. COOPER, her Tackle, etc., the Union Navigation Company, *Claimant, Appt.*,

v.

SAME.

(See S. C. *"The Mabey and Cooper,"* 14 Wall. 204-216.)

Collision from natural causes—negligence—inevitable accident—faulty navigation.

1. Where a collision occurs exclusively from natural causes, and without any negligence or fault on the part of either party, the loss must rest where it fell.
2. This rule has no application to a case where negligence or fault is shown to have been committed on either side.
3. Inevitable accident is where a collision occurs after both parties have endeavored, by every means in their power, to prevent the accident, and where it occurred in spite of everything that nautical skill, care and precaution could do to keep the vessels from coming together.
4. Want of due care is shown where a ship went to sea when the master of the tug which had her in tow knew that it was not safe in view of the condition of the weather and tide.
5. Faulty navigation of itself is a sufficient answer to the defense of inevitable accident.

[Nos. 173, 174.]

Argued April 25, 1872. Decided May 6, 1872.

APPEALS from the Circuit Court of the United States for the Eastern District of New York.

The case is stated by the court.

Messrs. **Charles Donohue**, *W. W. Goodrich*, and *T. M. Wheeler* for appellants.

Mr. **E. C. Benedict** for appellees.

Mr. Justice **Clifford** delivered the opinion of the court:

Controversies growing out of collisions between ships arise where the colliding vessel was in charge of a tug in which both the tug and the tow are liable for the consequences, as when the officers and crews of both vessels jointly participated in their control and management and where those in charge of both vessels are **212*]** deficient in skill, *omit to take due care, or are guilty of negligence in their navigation. Cases also arise where the tow alone is responsible, as where the tug is employed as the mere motive power to propel the tow from one point to another, and both vessels are under the exclusive control and management of the officers and crew of the tow. Other cases also arise where the tug is solely responsible, as where the tug, under the charge of her own master and crew, undertakes to transport another vessel from one point to another, which, for the time being, has neither her master nor crew on board, as in that case her officers and crew direct and control the navigation of both vessels. *Sturgis* v. *Boyer*, 24 How. 122, 16 L. ed. 594.

Compensation is claimed in this case by the owners of the ship Isaac Chapman for injuries which the ship received in a collision between the ship of the libelants and the ship Helen Cooper and the steam tug R. L. Mabey, which had the latter ship in tow. As alleged in the libel, the collision occurred on the 17th of February, 1866, in the harbor of New York, while the ship of the libelants was moored on the upper side of pier forty-five in East river, and the proofs show that she lay with her head towards the shore, her stern being twenty feet inside of the outer end of the pier. She had a cargo of merchandise on board and was ready for sea, but those in charge of her did not deem it prudent to leave the wharf at that time as the tide was ebb with a strong current and there were large masses of floating ice in the stream.

Different views, however, were entertained by those in charge of the ship Helen Cooper, which was also loaded and ready to sail for a southern port. By the answer as originally filed it appears that she was lying at the wharf of the gas works, on the Brooklyn side of the river, with her head towards the shore and her stern towards the stream; that while in that situation those in charge of the steam tug R. L. Mabey made fast to her bows on the port side by a hawser *which was passed aft and there [***213** fastened by stops, and by that means she was towed into the stream stern foremost, the tide having just commenced to ebb, and the statement of the answer is, that as the ship passed out into the stream the stop at the stern was cut so as to allow the ship to turn and head down the river, and that both the ship and the steam tug, while the ship was in the act of turning, were unexpectedly caught in an immense field of floating ice, which, in spite of the power of the steam tug, set both vessels towards the opposite shore and carried them down and across the river so that the bows of the ship passed inside of pier forty-five and struck the side of the ship of the libelants and caused whatever damage the libelants' ship received by the collision. Proof of the collision, therefore, is unnecessary, as the allegation is admitted, but the respondents allege that the ship is not liable, as the collision was the result of inevitable accident.

Prompt appearance was also entered by the claimant of the steam tug, and he filed a separate answer, in which he alleges that the master of the steam tug when applied to on that day to tow the ship of the respondents to sea, informed the owners that it was not safe to proceed to sea in the then condition of the weather and tide. Had he himself been governed by that opinion the case of the steam tug would be quite different, but the proofs show that he yielded to the importunity of the owners or agent of the ship and took her in tow, the owners of the ship agreeing to assume the risk of all accidents and dangers. Apart from that he also charges that the collision was occasioned by disobedience of the orders of the pilot and faulty navigation of the ship; that the order of the pilot was not to cast off the hawser by which the ship was moored, but only to slacken it until the head of the ship was

NOTE.—*Collision; rights of steam and sailing vessels with reference to each other and in passing and meeting*—see notes, 13 L. ed. U. S. 537; 25 L. ed. U. S. 168; 28 C. C. A. 532; 29 C. C. A. 368.

Rules for avoiding collision; steamer meeting steamer—see notes, 14 L. ed. U. S. 68; 35 L. ed. U. S. 453; 30 C. C. A. 630; 60 C. C. A. 254.

swung round; that the order was disobeyed, and that the hawser was cast off before the ship came round, which had the effect to set the ship over to the opposite shore towards the ship of the libelants; and he also charges that those in command of the respondents' ship, when she had reached the middle of the stream "and 214*] *was headed down stream," put her helm hard a-port so that the ship took a sudden sheer to starboard, which caused her to run into the ship of the libelants.

Leave was granted to the owners of the respondent ship to file an amended answer, in which they still insist that the collision was the result of inevitable accident, but of a widely different character from that described in the original answer filed more than five months earlier. They now allege that the river was clear of ice for a considerable distance on the opposite side of the river; that owing to the ice on the side where the ship lay it was more difficult than it otherwise would have been to turn the ship so that she would head down the river, and that while the steam tug was endeavoring to accomplish that object a ferry-boat suddenly and improperly crossed the bows of the steam tug, and in order to prevent striking the ferry-boat it became necessary that the steam tug should be suddenly slowed, which had the effect to turn the ship towards the opposite shore and caused the collision, in the manner more fully described in the amended answer.

Both parties took testimony and were fully heard in the district court, and the district court being of the opinion that both the tug and the tow were in fault, entered a decree for the libelants against both the respondent vessels, and the owners of the ship appealed from the whole decree to the circuit court, where the parties were again heard upon the same pleadings and proofs, and the circuit court affirmed the decree of the district court, holding that both the respondent vessels were in fault. Whereupon the owners of the respective vessels took separate appeals to this court.

Objection is made that the owners of the steam tug could not properly appeal to this court, as they did not formally appeal from the district court to the circuit court, but it is not necessary to decide that question, as it is quite clear that the decree must be affirmed against the tug as well as the tow. Nor is the court prepared to admit the validity of the objection, as the record shows that the owners of the tow 215*] *signed a written stipulation before the decretal order was entered in the district court, that they, as the owners of the ship, would assume the entire conduct of the defense and that they would answer and pay whatever sum the libelants should recover in the case against both vessels. Undoubtedly the general rule is that a party who does not appeal cannot be heard in opposition to the decree. Still it appears in this case that an appeal from the district court to the circuit court was taken from the entire decree, and by a party who represented the entire interest of the losing party in the suit. Well founded doubt may, perhaps, arise as to the regularity of the proceeding, but it is not necessary to solve that doubt in the present case.

Suppose the appeal is correctly here, we are all of the opinion that the decree of the court below was correct.

Where the collision occurs exclusively from natural causes, and without any negligence or fault on the part of either party, the rule is that the loss must rest where it fell, as no one is responsible for an accident which was produced by causes over which human agency could exercise no control. Such a doctrine, however, can have no application to a case where negligence or fault is shown to have been committed on either side. Inevitable accident, as applied to a case of this description, must be understood to mean a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident, and where the proofs show that it occurred in spite of everything that nautical skill, care and precaution could do to keep the vessels from coming together. *Union S. S. Co.* v. *N. Y. & Va. S. S. Co.* 24 How. 313, 16 L. ed. 701; *The Morning Light*, 2 Wall. 556, 17 L. ed. 863.

Want of due care is shown in the fact that the ship went to sea at a moment when the master of the tug which had her in tow knew that it was not safe in view of the condition of the weather and tide; nor can the tug be held blameless any more than the ship, because the master ultimately *yielded to the im- [*216 portunities of the owners of the ship and assumed the risk, subject to his claim on the owner of the ship for indemnity. Faulty navigation is also shown, which of itself is a sufficient answer to the defense of inevitable accident.

Palpable error is shown to have been set up in the original answer filed by the owners of the ship, and the court is not satisfied that the defense set up in the amended answer is entitled to any more credit. Such a defense as that set up, that a ferry-boat suddenly and improperly crossed the bows of the steam tug, if founded in fact, could easily be proved by those who were on board the ferry-boat and know what occurred. Instead of that, not even the name of the ferry-boat is given, either in the answer or in the proofs, and not a witness is called except the pilot and the master of the ship, and their statements in that behalf are not satisfactory No such defense is set up in behalf of the steam tug, and nothing of the kind was alleged in the original answer filed by the owners of the ship shortly after the suit was commenced. Neither of the courts below appear to have given that defense much credence, and this court concurs with the subordinate courts that the defense is not established.

Decree affirmed.

ALLEN T. CAPERTON, *Plff. in Err.*,

v.

PHILIP BOWYER.

(See S. C. 14 Wall. 216-237.)

Certificate of clerk not sufficient to show jurisdiction—effect of war on suits—jurisdiction over state judgments.

1. A certificate signed by the clerk and certified by the presiding justice of the state court, that there was drawn in question the validity of a state act, on the ground that it was repugnant to the Constitution of the United States, and that the decision of the state court was in favor of its validity, is not conclusive to show that the question was raised in the case.

2. Absolute suspension of the right to sue and prohibition to exercise it exist during war, by the

law of nations; but the restoration of peace removes the disability and opens the doors of the courts.

3. Questions not decided in the state court, because not raised or presented by the complaining party, will not be re-examined in this court on a writ of error sued out under the 25th section of the judiciary act.

4. It must appear that the question presented for decision in this court was raised in the state court, and that the decision of the state court was given as required by that section in the manner to give jurisdiction.

[No. 165.]

Argued April 11, 1872. Decided May 6, 1872.

IN ERROR to the Supreme Court of Appeals of the State of West Virginia.

The case is stated by the court.

Messrs. **Conway Robinson,** *Simeon Nash,* and **R. T. Merrick** for plaintiff in error:

Messrs. B. Stanton and **J. H. Ashton** for defendant in error.

Mr. Justice **Clifford** delivered the opinion of the court:

Special jurisdiction only is given to this court by virtue of a writ of error to a state court, and unless the record shows that the case falls within the conditions annexed to the right of a party to invoke the exercise of the jurisdiction, the writ of error must be dismissed. Primarily those conditions are two: (1) That it shall appear that some one of the questions specified in the 25th section of the judiciary act, or the 2d section of the amendatory act, did arise in the case. (2) That the question which did so arise in the case was decided by the court in the way therein required to give this court jurisdiction to re-examine the question, and the rule is settled that unless both those things appear the jurisdiction does not attach. 1 Stat. at L. 85; 14 Stat. at L. 386.

On the 6th day of August, 1866, the plaintiff brought an action of trespass for false imprisonment against the defendant in the state court, in which he alleged that the defendant, on the 29th of June, 1862, with force and arms, seized the plaintiff and incarcerated him in a dungeon and imprisoned him there for twenty-four days, separated from his home and family, and that he subjected him to great danger and many hardships, and seriously impaired his health and put him to great pain and distress, both of body and mind.

Service having been made, the defendant appeared and demurred to the declaration, and filed seven other pleas, as follows: (1) That he was not guilty in manner and form as alleged; (2) that the action was not brought within one year next after the right to bring the same ac- [*232] crued; (3) *that the action was not brought within two years next after the right to bring the same accrued; (4) that more than two years had elapsed after the right to bring the action accrued, and before the present limitation act of the state was passed; (5) that the plaintiff and defendant were citizens of the same state, and that the whole time prescribed as a limitation had elapsed before the present act modifying the pre-existing law was passed; (6) that the supposed grievances were acts done by the defendant as provost-marshal under the military orders of the state, in time of actual war, as more fully set forth in the plea; (7) that the President, on the 7th of September, 1865, granted the defendant a full pardon and amnesty for all offenses by him committed, arising from participation, direct or indirect, in the Rebellion.

Subsequently the plaintiff filed a joinder to the demurrer, joined the issue tendered under the plea of not guilty, and filed a replication to the six special pleas as follows: (1) That the action is not barred as alleged, and tendered an issue to the country; (2) that the action is not barred as alleged in the second special plea, and also tendered an issue to the country; (3) that the action is not barred as alleged in the third special plea, and tendered an issue to the country; (4) plaintiff filed a demurrer to the fourth, fifth, and sixth special pleas, and the defendant demurred to the replication of the plaintiff to the defendant's first special plea.

All the issues of law were determined by the court in favor of the plaintiff, that is, the court overruled the demurrer to the declaration, sustained the demurrers of the plaintiff to the fourth, fifth and sixth special pleas of the defendant, and also overruled the demurrer of the defendant to the plaintiff's replication to the defendant's first special plea, which left nothing for trial but the issues of fact, which were submitted to a jury, and the jury found all the issues of fact in favor of the plaintiff, and that the defendant was guilty as alleged in the declaration, and assessed damages for the plaintiff in the sum of $833. Judgment was rendered for the plaintiff, and *the defend- [*233] ant excepted and removed the case into the court of appeals of the state, where the judgment was in all things affirmed. Whereupon the defendant sued out the present writ of error and removed the cause into this court for re-examination under the 25th section of the judiciary act.

Jurisdiction, it is claimed by the defendant, may be sustained in this case upon three grounds, which will be separately considered: (1) Because the judge told the jury that, in computing the time of the statute of limitations, they ought to exclude from the computation all that period of time between the 17th of April, 1861, and the 27th of February, 1866, as that ruling, as he contends, was equivalent to a ruling that the recent acts passed by the state upon that subject are valid laws, which he denies. (2) Because the court sustained the demurrer of the plaintiff to the fifth special plea of the defendant, setting up belligerent rights as a defense to the action. (3) Because the court excluded the pardon granted to him by the President when offered in evidence under the plea of not guilty.

1. Two acts of limitation have recently been passed by the state legislature. By the first, which was passed on the first day of March, 1865, it was enacted that, in computing the time within which any civil suit, proceeding, or appeal, shall be barred by any statute of limitations, the period from the 17th day of April, 1861, to the date of the passage of the act, shall

NOTE.—*Suspension of statute of limitations during war*—see note to Hanger v. Abbott, 18 L. ed. U. S. 939.

Jurisdiction of U. S. Supreme Court where Federal question arises or where is drawn in question statute, treaty, or Constitution of U. S.—see note to Matthews v. Zane, 2 L. ed. U. S. 654; note to Martin v. Hunter, 4 L. ed. U. S. 97; and note to Williams v. Norris, 6 L. ed. U. S. 571.

be excluded from such computation. Sess. Acts, W. Va. 1865, p. 72. By a subsequent act passed on the 27th of February, 1866, it is provided that, in computing the time within which any civil suit, or proceeding in trespass or case, shall be barred by any statute of limitations in certain counties, including the county in which this suit was brought, the period from the first day of March, 1865, to the date of the passage of the act shall be excluded from such computation.

Sess. Acts, W. Va. 1866, p. 92.

Two prayers for instruction upon that subject were also presented by the defendant which 234*] were refused by the court, *but it is not necessary to reproduce them, as the question involved is as fully raised by the instruction given to the jury as by the refusal to give those instructions.

Exception was taken by the defendant to the refusal to instruct and to the instruction given, but the grounds of the exception are not stated, nor are the reasons for the ruling given by the court. Such an exception is not sufficient to show that any one of the questions mentioned in the 25th section of the judiciary act was either raised or decided in the manner therein required to give this court jurisdiction under a writ of error to a state court. Unless both those things appear; that is, unless it appears that the question was raised and that it was decided in the way required, the jurisdiction does not attach, and it is clear that the exception is not sufficient to show that either occurred at the trial. Nothing further was done upon the subject in the court of original jurisdiction, but the cause was removed into the court of appeals of the state, where the judgment was affirmed. Appended to the judgment in that court is a certificate signed by the clerk and certified by the presiding justice of the court, that there was drawn in question the validity of the act of the state passed March, 1865, in relation to the statute of limitations, on the ground that it was repugnant to the Constitution of the United States, and that the decision of the highest court of law and equity in the state was in favor of its validity. Evidently that court had before it nothing but the exception taken and signed in the subordinate court, which is clearly insufficient to raise such a question or to show that it was decided in a way to give this court jurisdiction in such a case. Undoubtedly such a certificate is entitled to much weight, as showing that the question was decided by the court which gives it, and in the manner required to give jurisdiction; but it is not conclusive to show that the question was raised in the case, as the latter question may depend upon the construction of the pleadings, or, as in this case, upon the proper construction of the language of the bill of exceptions.

Necessary implication, it is said, will suffice, 235*] which may *be granted; but it can hardly be said in this case that it must necessarily be implied that the judge instructed the jury that the state statute was consistent with the Federal Constitution. What he did tell the jury was that a certain period of time should be excluded from the computation in determining the issues of fact presented by the pleadings, whether the action was barred by the one or two years' limitations. Three years before that this court had decided that the period during which the courts of the state where the defendant resided were closed, by reason of the insurrection and Rebellion, should not be deemed and taken as a part of such limitation. *Hanger* v. *Abbott*, 6 Wall. 534, 18 L. ed. 941

Congress allowed one year from the date of the act to the time allowed for suing out writs of error and taking appeals in districts where the sessions of the courts had been suspended or interrupted by insurrection or rebellion, and this court decided that the act of Congress was a remedial and not a restraining one, and applied the rule laid down in the prior case, that in computing the five years allowed for the purpose, the period for which the courts were closed by insurrection or rebellion, must be excluded from the computation. 14 Stat. at L. 545; *The Protector*, 9 Wall. 687, 19 L. ed. 812. Provision was also made by Congress that the time during which any person was beyond the reach of legal process, by reason of resistance to the execution of the laws, or the interruption of the ordinary course of judicial proceedings, shall not be deemed or taken as any part of the time limited by law for the commencement of any action, civil or criminal. Objection was taken to the validity of that provision, but this court unanimously held it to be constitutional. 13 Stat. at L. 123; *Stewart* v. *Kahn*, *ante*, 177.

Prior to these decisions, founded upon acts of Congress, this court had decided, as before remarked, that the period during which the courts were closed by the insurrection must be excluded from every such computation, and this *court has twice since that decided in [*236 the same way, every justice of the court concurring in the opinion. *Levy* v. *Stewart*, *ante*, 87; *Steinbach* v. *Stewart*, *ante*, 57. Enemy creditors cannot prosecute their claims subsequent to the commencement of hostilities, as the rule is universal and peremptory that they are totally incapable of sustaining any action in the tribunals of the other belligerent. Absolute suspension of the right to sue and prohibition to exercise it exist during war, by the law of nations, but the restoration of peace removes the disability and opens the doors of the courts.

Tested by these considerations this court is of the opinion that the judge of the state court may well have followed the decisions of this court in the instruction he gave to the jury without having intended to express any opinion as to the constitutionality of the state law, and that it does not appear with sufficient certainty that the supposed Federal question did arise in the case or that it was decided in the manner required to give this court jurisdiction under a writ of error to a state court.

2. Next ground assumed is that the court erred in sustaining the demurrer of the plaintiff to the fifth special plea of the defendant, setting up belligerent rights as a defense to the action.

Unquestionably it does appear that the plaintiff demurred to that plea and that the court sustained the demurrer to the plea, but it nowhere appears that the court held the plea bad for the reason supposed by the defendant. On the contrary, the plea is very defectively drawn, and it may be that it was held bad for many other sufficient reasons, and the fact that the certificate filed by the Chief Justice makes no

mention of this point, justifies the conclusion that it was not decided by the court of last resort. Questions presented in a subordinate court are frequently waived in the appellate court, and it is plain law that questions not presented in the court of last resort do not give jurisdiction in a case like the one before the court. Such a question may be raised in a 237*] *bill of exceptions, but sufficient of the proceedings must be stated to show not only that it was raised, but that it was decided in the manner required to give the jurisdiction.

3. All that remains to be considered is the question respecting the pardon. By the bill of exceptions it appears that the defendant offered the pardon, both in mitigation of damages, and as a justification of the alleged wrongful acts, and it appears that the plaintiff objected to the introduction of the instrument and that the court sustained the objection, and that the pardon was excluded. Enough appears to show for what purpose the pardon was offered, but nothing appears to show upon what grounds it was rejected at the trial or that the question was ever examined or decided by the court of appeals. Five conditions are embodied in the pardon, but the record shows that the defendant complied with the first and fifth, and it does not show that he has ever violated any one of the others. No mention is made of that ruling in the certificate of the Chief Justice, nor is there anything in the record to show that the exception was presented to the court of appeals, unless that may be inferred from the fact that the court of appeals found that there was no error in the record and affirmed the judgment. Questions not decided in the state court, because not raised or presented by the complaining party, will not be re-examined in this court on a writ of error sued out under the 25th section of the judiciary act. *Hamilton Co.* v. *Massachusetts*, 6 Wall. 636, 18 L. ed. 906. Such is the settled practice, and the act of Congress provides that it must appear that the question presented for decision in this court was raised in the state court, and that the decision of the state court was given as required by that section. *Steines* v. *Franklin Co. ante*, 846. Repeated decisions have established that rule, and inasmuch as the point has been several times ruled at the present session, we forbear to extend the discussion.

Dismissed for want of jurisdiction.

238*] *ALLEN T. CAPERTON, *Plff. in Err.*,
v.
WILLIAM A. BALLARD, Admr. of William Ballard, Deceased.

(See S. C. 14 Wall. 238-243.)

Jurisdiction over state judgments—when exercised—authentication of judgment.

1. It is only under the 25th section of the judiciary act that this court takes cognizance of error committed in the highest courts of the state.
2. There must be a Federal question, within the terms of that section, or this court cannot consider the point, whatever may be the hardship of the particular suit.
3. A judicial state record must be authenticated as required by the act of Congress, in order to have the same effect in another state as it has in its own, and unless this is done the Federal question, whether such effect has been given to it, cannot arise.

[No. 166.]

Argued Apr. 11, 1872. Decided May 6, 1872.

IN ERROR to the Supreme Court of Appeals of the State of West Virginia.

The case is stated by the court.

Messrs. **Conway Robinson,** *Simeon Nash,* and **R. T. Merrick** for plaintiff in error.

Messrs. B. Stanton and **J. H. Ashton** for defendant in error.

Mr. Justice **Davis** delivered the opinion of the court:

This case has certain points in it common with that of *Caperton* v. *Bowyer, ante*, 882; decided at this term, which we do not propose to notice further. It was held in that case that the record presented no Federal question for review, and the writ of error was accordingly dismissed. But the present case presents one point not presented by that case, which it is insisted confers jurisdiction of the court, and this constitutes the only point of inquiry.

This suit was brought in the state circuit court of Monroe county, West Virginia, by William A. Ballard, as administrator of William Ballard, deceased, against Caperton, for a tortious seizure, sale, and destruction of the property of the intestate. The letters of administration were issued to the plaintiff by the circuit court of Monroe county, on the 25th of April, 1866, after the suppression of the Rebellion. In bar of the suit the defendant pleaded that on the 16th of February, 1863, letters had been duly granted by the county court of the same county on the same estate, to one John C. Ballard, who properly qualified as administrator. To this it was replied that the letters were granted by a court in rebellion, and void.

On the trial the plaintiff produced evidence to show that he was regularly appointed administrator by the Monroe county circuit court, on the 25th of April, 1866. The defendant, on the other hand, in order to sustain his plea, offered in evidence an order from the county court of the same county, dated February 16, 1863, reciting that administration of the estate of William Ballard, deceased, is granted to John C. Ballard, who has made oath, etc., and "that letters in due form are granted to him." This order, so far as the record shows, was certified in no other manner than by the teste of the clerk. There was not even a seal attached to the certificate. The defendant then offered evidence that he had paid to this administrator the net proceeds of the tortious seizure and sale of the decedent's property, and he requested the court *to charge that if the administra- [*240 tion of the plaintiff's intestate had been granted to John C. Ballard by the county court, composed of justices who held their commission under authority of the commonwealth of Virginia issued to them in 1860, such appointment was sufficient to authorize him to act as such administrator, and that there could be no other appointment subsequent thereto, until the original appointment was set aside by a court of competent jurisdiction. The court refused so to charge, but, on the contrary, charged that if on the 16th of February, 1863, when the appointment of John C. Ballard was made by the Monroe county court, that court was in rebellion against the government of the United

States, and was composed of justices who were then engaged in giving aid and comfort to the Rebellion by levying supplies, etc., its proceedings were void, and that their appointment to John C. Ballard gave no authority, and that it was not necessary to set aside an invalid order of such a court in order to give effect to the plaintiff's appointment, which was made by a competent tribunal.

Judgment having been given against the defendant, he took the case to the supreme court of appeals of West Virginia, where the instruction was declared to have been proper, and the judgment was affirmed.

This court has repeatedly declared that it is only under the 25th section of the judiciary act that it takes cognizance of error committed in the highest courts of a state. There must be a Federal question, within the terms of that section, to enable us to review the decision of a state tribunal. Is there such a question here?

It is argued that a constitutional provision has been disregarded, because the courts in West Virginia did not give proper effect to the letters granted in 1863 by the court of a county which at that time formed a part of Virginia, but which, when the subsequent letters were granted and this suit was tried, had become incorporated into West Virginia.

It may be conceded that the decision on this subject could be reviewed, if the record showed a state of case in which this provision of the Constitution was applicable, but in the absence of this we cannot consider the point, whatever may be the hardship of this particular suit. The same constitutional provision which ordains "that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," also ordains that "the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." Congress acted on this subject, and on the 26th of May, 1790 (1 Stat. at L. 122), prescribed the manner in which judicial records, and the proceedings of the courts of any state shall be authenticated, so as to be considered proved and admitted in any other court in the United States. This act declares, further, that the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every other court **242*]** within the United *States as they have, by law or usage, in the courts of the state from whence the said records are or shall be taken. The mode of authentication prescribed by the law requires the attestation of the clerk with his seal attached and the certificate of the judge that the attestation was in due form. If a judicial proceeding has the effect of record evidence in the courts of the state from which it is taken, it has the same effect in the courts of every other state. To receive this conclusive effect, however, it must not only be pleaded but proved in conformity with the act of Congress on the subject. Unless this is done there is nothing for this court to act upon.

It is only through the instrumentality of the statute that the clause of the Constitution, which the plaintiff in error relies on, can be invoked for his protection. Legislation was required to make the constitutional provision effective, and this having been done by a general law, it requires no argument to show that a party cannot claim that a right under the Constitution and law has been denied by a state court, unless he has used the means for his protection which the statute directs.

This the plaintiff in error failed to do. He relied for his justification upon letters of administration granted in 1863 by the county court of Monroe county, while it was a part of Virginia, but did not furnish the legal evidence required to establish the existence of the record. It would seem that, in Virginia, the tribunals intrusted with probate business were designated by the name of county courts; while in West Virginia the circuit courts of each county were empowered to grant letters of administration. Doubtless the county court records of Monroe county were transferred to the custody of the clerk of the circuit court, after West Virginia was admitted into the Union. This is fairly inferable from the fact that the only evidence offered of the grant of letters in 1863 was the transcript of the records of the county court, under the hand of Lewis Callaway, styling himself clerk of the Monroe county circuit court.

This proof, if received by the state court as sufficient to *establish the record of a [**243** judicial proceeding in Monroe county, while a part of Virginia, lacked the formalities required by the act of Congress. The seal of the county court was wanting, as well as the certificate of the presiding magistrates. It will not do to say that they could not be procured on account of the anomalous condition in which the records of the county were placed by the change of jurisdiction. There is nothing to show that any effort was made to supply the omission. In fact the case does not seem to have been tried in reference to the conclusive effect of the judgments of one state in the courts of another. It rather seems to have been tried on the theory that the judgment was void because the court granting the letters were disloyal. Indeed, neither in the pleading nor proof is the particular provision of the Constitution on this subject relied on. It is certainly not set up in words, nor from the pleading itself could an inference even be drawn that Monroe county in 1866 was not in the same state as in 1863. It is only through the history of the country that we ascertain this fact.

It may be that the attention of the court below was called to the conclusive effect of judicial proceedings under the Constitution and laws of Congress, but if so, there is nothing in the record to show it. It is, doubtless, unfortunate that the plaintiff in error did not in proper terms set up the right he now claims, and conform his proof to the requirements of the law. If he had done so, and the decision had been adverse to him, he could have had it reviewed here, although the question would still arise whether the constitutional provision concerning the effect of judgments of different states would be applicable on account of the transfer of Monroe county to the jurisdiction of West Virginia.

As the case is, the Federal question is not presented at all, and the writ of error must be dismissed for want of jurisdiction.

ZADOC HOOK *et al.*, *Appts.*,
v.
ANN PAYNE.

(See S. C. 14 Wall. 252-257.)

Suit to recover share of an estate—parties to—none but parties can be heard—what interest allowed against an administrator.

*1. In a suit in the circuit court of the United States, by a distributee of the estate of a decedent, to recover a distributive share, the mere fact that the administrator is ordered to account before a master, does not make parties all who were entitled to distribution, nor authorize a decree in their favor.

2. If such persons do not appear before the master, no decree can be made for or against them, because they would not be bound thereby.

3. If they should appear and claim an interest, if there are controverted matters between them and the administrator outside of the mere accounting to be made by him, this can only be decided on proper pleadings and regular hearing by the court.

4. A bill which seeks to set aside a fraudulent receipt obtained by an administrator from one distributee, and to recover the amount coming to that distributee, is not a suit in which all other persons interested in the estate can be heard, unless they are made parties or make themselves parties to the suit in some appropriate mode.

5. In a state where the law allows ten per cent per annum interest, a decree will not be reversed because it allows against a fraudulent administrator eight per cent interest, with annual rests.

[No. 158.]

Argued Apr. 2, 1872. Decided May 6, 1872.

APPEAL from the Circuit Court of the United States for the District of Missouri.

The case is stated by the court.

Mr. **J. B. Henderson,** for appellants:

The value of the estate in June, 1865, depending upon the amount of interest received by Hook from 1861 to 1865, or during the existence of the war, the broad question is presented in this case: "Have the complainants, being alien enemies, any claims, either at law or in equity, against Hook for interest, during said period?" The testimony shows that the money and assets of the estate not being needed for the payment of debts, was subject, under the laws of the state of Missouri to distribution. The law itself withheld from Hook the power to discharge himself and sureties from liability. It did more. It made the payment a penal offense. All intercourse was interdicted. Should he be charged with interest, as is insisted upon, it would present the anomaly of the law itself, while punishing payment as an act of disobedience, likewise *flagrante bello* raising in behalf of an alien enemy an implied assumpsit against its own citizen. The rules in regard to charging interest against trustees, at the rate of interest which the law implies from the possession of the funds, where the trustee has failed to keep an exact account of the date of the receipt of money and its subsequent disposal, can have no application in favor of an alien enemy. Thus Hook, having in his hands the estate before the beginning of the war, is liable for that estate at its close. Nor is he liable for interest on it, nor for losses accruing thereto, although, amid "the clash of arms" he may not have pursued the civil rules laid down for the investment of money.

See 1 Pet. (C.C.) 447, 524; *Hoare* v. *Allen*, 2 Dall. 102; *Foxcraft* v. *Nagle*, 2 Dall. 132; *Ward* v. *Smith*, 7 Wall. 453, 19 L. ed. 210; *Denniston* v. *Imbrie*, 3 Wash. 396; 15 Am. Law Reg. (vol. 6, N. S.) 732; *Tucker* v. *Watson*, 6 Am. Law Reg. (N. S.) 220; *U. S.* v. *Grossmayer*, 9 Wall. 72, 19 L. ed. 627; *Prize Cases*, 2 Black, 635, 17 L. ed. 459; *Mrs. Alexander's Cotton*, 2 Wall. 404, 17 L. ed. 915; *The Venice*, 2 Wall. 258, 17 L. ed. 866; Mr. Jefferson's Letter to Mr. Hammond, 1 Am. St. Papers, 289; *Blake* v. *Quash*, 3 McCord, 340; *Dickinson* v. *Legare*, 1 Desaus, 537; *Davis* v. *Wright*, 2 Hill (S. C.) 560; *Brewer* v. *Hastie*, 3 Call. Pa. 22; *Chamberlain* v. *Brown*, 2 Bland, 221, n.; *Christie* v. *Hammond*, 2 Bland, 645, n.; *Bordley* v. *Eden*, 3 Har. & McH. 167; 4 H. & McH. 161; 5 Call. 133; *The Rapid*, 8 Cranch, 155; 15 Johns. 24; 16 Johns. 438; 16 Johns. 510; Vattel, *Droit des Gens*, V. 3, ch. 5, § 70; Grotius, de Jure Belli ac Pacis, ch. 3, § 9, ch. 4, § 13; Vesey, 71; Whart. Int. Law, §§ 305, 317; 7 Taunt. 43; *Dorsey* v. *Kyle*, 30 Md. 512; 8 Am. Law Reg. 34; 8 Chicago Legal News, 26 *Ib.* 82.

The circuit court, however, erred in applying the rules of interest adopted against Hook, for the reason that the evidence showed that he had received no such rate of interest on the whole estate. He accounted regularly, from year to year, in his annual settlements for interest, and it is to be assumed as true that the court, having supervision of the estate, investigated the matters of his accounts. They were apprised of the difficulties attending the lending of the money. Judges Johnson, Turner, Bartley, and also Bailey and Nolley, clerks of the Callaway county court, whose testimony is found in the record, all show the state of affairs existing during the war, in the locality where the administration was pending. The testimony of a great number of the prominent business men of that country show the absolute impossibility of lending money at any rate of interest, or even of lending it with an obligation to return the principal free of interest. Money, when a loan could be obtained at all, was never obtained at eight per cent simple interest. Gold was considered the safest investment. This fact all the witnesses concur in. Taking this testimony as being worthy of belief, we must suppose that the Callaway county court, having jurisdiction over Hook, did charge him upon the whole estate, taking into consideration the necessary time for receiving and paying out money, the difficulties of loaning the money, and all the attendant facts, such rate of interest as he ought in equity to have been charged with. The settlements stand unimpeached for fraud, and are judgments of a court of competent jurisdiction, and we claim that prima facie, at least in the absence of proof to the contrary, that these settlements must be taken as the best evidence of the amount of money in Hook's hands at the date of Hook's settlement in May, 1865—just previous to his visit to Virginia, when he purchased the estate, or obtained from complainants a release of their shares of the estate, upon payment to each of $5,000.

The settlements of Hook not being impeached for fraud, are at least prima facie evidence that he had not a greater amount in his hands than the sum therein charged against him. They are equally evidence for, as well as against him.

See, *Picott* v. *Biddle*, 35 Mo. 29; 33 Ill. 219; 4 Halst. 70.

The general rule is now established, that ex-

*Headnotes by Mr. Justice MILLER.

ecutors or administrators are not chargeable with interest except where they have received interest or used the money, or retained it unreasonably after they ought to pay it out to claimants, or to account to the court.

9 Pick. 369; 2 J. J. Marsh. 195; 6 Dana, 3; *Boynton* v. *Dyer*, 18 Pick. 2; 1 Am. L. Cas. 363; 13 Mass. 232; 1 Pick. 530; 18 Pick. 2; 4 Met. 317; 4 Halst. 70; 6 Halst. 145; 4 Har. 106; 3 Desaus. 241; 7 Yerg. 173; 41 Pa. 500; 5 Rawle, 334; 16 How. 535; 45 Barb. 182; 14 Mo. 116.

The current of authority is decidedly against the allowance of compound interest in any case. See *Schieffelin* v. *Stewart*, 1 Johns. Ch. 620.

It has been repeatedly held that mere neglect to invest the money, or a mistaken or improper investment without gross delinquency of corruption, does not justify compound interest.

13 Eng. L. & E. 304; 9 Eng. L. & E. 69; 1 Ashm. 57; 2 Rawle, 305; 5 Rawle, 325; 7 Serg. & R. 264; 5 Pa. 87.

Merely mingling the trust money with that of the trustee, is not sufficient to charge him with compound interest.

1 Hopk. Ch. 24; *In re Stafford*, 11 Barb. 353; *Fay* v. *Howe*, 1 Pick. 527.

The circuit court erred in entertaining jurisdiction of a cause of action arising out of the dealings between Hook and those parties who filed a statement of facts before the master. The subject-matter of the statement of fact contained the substance of an original bill in equity, upon which the master in chancery, not being clothed with judicial power, could not adjudicate. The rights of the parties, growing out of those subsequent transfers, being passed upon by him, such proceedings were *coram non judice*. Said causes of action were cognizable by the circuit court in the exercise of its original chancery jurisdiction, upon bill and answer, according to the usual course of proceeding. To tack these causes upon another and submit them to the adjudication of its ministerial officer, was not only irregular, but absolutely without authority of law.

Messrs. **Glover & Shepley**, for appellee:

When an administrator or trustee mixes up his own money with that of the trust, or uses it or lends it and is not ready to pay when he should, he shall pay interest on the principal, and if he invests or deposits the trust money in his own name, without describing it in some way as property of the trust, he shall account for any loss that happens.

Jacot v. *Emmett*, 11 Paige, 142; *Jenkins* v. *Walter*, 8 Gill & J. 218; *Spear* v. *Tinkham*, 2 Barb. Ch. 211; *Clemens* v. *Caldwell*, 7 B. Mon. 171; *Swindall* v. *Swindall*, 8 Ired. Eq. 286; *Stanley's Appeal*, 8 Pa. 431; *Morris* v. *Wallace*, 3 Pa. 323; *Com.* v. *McAlister*, 28 Pa. 480.

When an administrator or trustee loans, invests, deposits, or uses the trust funds and fails to disclose the uses or amount of interest or profit received he shall be charged with the highest rate, and rests made in the account upon the presumption that he received compound interest.

Clemens v. *Caldwell*, 7 B. Mon. 171; *Moore* v. *Beauchamp*, 5 Dana, 70; *Swindall* v. *Swindall*, 8 Ired. Eq. 286; *Ins. Co.* v. *Lynch*, 11 Paige, 520; *Jennison* v. *Hapgood*, 10 Pick. 104; *Bently* v. *Shreve*, 2 Md. Ch. 219; *Barney* v. *Saunders*, 16 How. 535. Ten per cent is the highest rate of interest in Missouri. R. S. 1865 and 1855, tit. *Interest*.

The interlocutory decree directed the master to inquire and report who were the other distributees of said estate, what payment had been made to them, and what was due to them.

The proceedings in the master's office were in accordance with the ordinary practice in such cases. The distributees, not originally parties to the suit, appeared and filed a statement of facts, which was answered by the defendants and proofs heard.

See 2 Dan. Ch. Pl. and Pr. Perk. ed. title *Proceedings in the Master's Office*, pp. 1175, 1193, 1200, 1201, 1205–1220, inclusive; *Remsen* v. *Remsen*, 2 Johns. Ch. 495.

There is no pretense that those who appeared before the master did not make a satisfactory and sufficient statement of facts. No plea of surprise is set up. It is only said that they had no right to appear. *Crone* v. *O'Dell*, 2 Hogan, 144.

Mr. Justice **Miller** delivered the opinion of the court:

Ann Payne, a citizen of Virginia, filed a bill in chancery in the circuit court of the United States for Missouri, against *Zadok [*253 Hook and others, citizens of the state of Missouri.

Hook had acted as administrator of the estate of Fielding Curtis, and the other defendants were sureties on his official bond, and the object of the bill was to assert the right of plaintiff, as one of the heirs of Curtis, to an account and a distribution of the assets in Hook's hand.

But she had received of Hook a certain sum of money, in consideration of which she had signed a paper which might be called either a release or assignment to Hook of all her interest in the estate of which he was administrator, and she charged in her bill that this instrument had been procured by fraud, and prayed to have it set aside and held for naught.

She also charged that certain settlements made by Hook with the county court, which had probate jurisdiction of such matters, were fraudulent; and she prayed that they be restated; and she alleged that she was entitled to one-eighth part of the estate of Fielding Curtis on final distribution, and prayed that, on a fair statement of the administrator's account, a decree be rendered in her favor for the one eighth of the sum found in his hands subject to distribution. Susan Curtis and Mary Gwinn, each of whom held a like interest with Ann Payne in the estate, had signed the same papers, and each of them brought a similar suit to that brought by Ann Payne in the same court; and though the bills in these cases are not in the record, it is conceded that, except in the name of the plaintiffs, they are identical with that of Ann Payne. These suits were consolidated before answer by order of the court, and were treated in the subsequent proceedings as one case.

The defendants answered, and the court made an interlocutory decree setting aside the relief given by the plaintiffs and the settlements made by Hook with the county court, and appointed a master to state an account with Hook as administrator, and he was directed to inquire what other persons were interested in the estate be-

sides the claimant, and to report what payments, if any, had been made to them, and what was due to them respectively at the date of the report.

254*] *The report of the master seems to have been based upon diligent inquiry and accurate information, and if the principles on which it is founded are sound, there seems to be no reason to question the facts on which it proceeds.

It charges the administrator with interest on all that came to his hands, at the rate of ten per cent per annum, with annual rests. It reports the names of all who are entitled to distribution, which the master believes he has correctly ascertained. He says that some of these appeared before him, either in person or by attorney, and claimed their rights in the estate, while others did not, and he gives the names of those who did and those who did not. He reports that as to some that appeared, they had given releases similar to those given by plaintiff; and that though this was shown, he disregarded them and allowed their interest as though the releases were void, and ascertains and reports what is due to each distributee, whether appearing or not. The final decree modified the report by substituting eight per cent per annum as the rate of interest, and confirmed it in all other respects, and made a final decree distributing the estate according to the report, and ordering Hook to pay to each person the specific sum found due, with interest from the date of the report.

Many objections are taken to this decree—a few only of which will be noticed.

1. We are of opinion that all that part of the decree which attempts to settle the rights of the parties, who were neither plaintiffs nor defendants in the original suit, must be reversed.

We do not propose, in this case, to lay down any precise rule on the subject of adjusting administrators' accounts in the Federal courts, or how far certain persons, not made parties in the original suit, or incapable of being made parties by reason of their citizenship, may or may not come in before the master, on a general accounting, and protect their rights; nor do we intend to go into that question.

In the case before us persons representing a considerable interest in value have not appeared at all. As to them we hold it to be clear that they cannot be bound by the decree rendered in this case, and they have an undoubted right to bring such a suit or institute such other proceeding as the law authorizes for the assertion of their rights, notwithstanding this decree.

256*] *It follows from this also, that as they are not bound by it, so Hook, the administrator, cannot be bound by a decree which does not bind them as to any rights to be controverted between them and him.

It is also equally clear that if Hook had paid money to any other parties who did not appear before the master, and had made a purchase of the interest of these parties in the estate, that purchase could not be set aside and held for naught without such adversary proceedings between them and Hook as would give him a fair hearing on that subject. They should have filed such a bill as the present plaintiffs did, and the question of the fraud should have been heard and decided by the court. It by no means follows that because the court, on full hearing, set aside his purchase from Ann Payne, that the master could without pleading or trial assume that all other purchases were equally fraudulent.

Another reason for this may be found in the nature of the original bills. Although there are three of them there is no attempt to make the other distributees parties, nor do they make each other parties to their separate bills. They are each framed on the basis of setting aside the release executed by them, in which no other distributee had any interest, and each claims for herself the one-eighth to which she is entitled, without any prayer for general accounting or general distribution. The consolidation, then, of these cases does not change this feature of the relief sought, and the ground of that relief, namely: the fraud in obtaining the release.

These bills are obviously not framed on any theory of a final settlement of the estate and distribution among all entitled. They are merely brought to obtain for each plaintiff the special relief from the fraudulent release and the specific sum of money due to each from Hook, and on this theory it is that counsel brought three separate suits instead of one.

For these reasons we are of opinion that the only relief to be administered in this case is that in favor of the three complainants.

2. It is strongly urged upon us that the account stated against the administrator is too hard to be justified, in reference *to the [*257 interests, both as regards the rates charged and the annual rests.

The laws of Missouri allow a conventional rate of interest not exceeding ten per cent. The master stated the account on that basis, but the court below, on mature consideration, reduced the rate to eight per cent and we are not disposed to disturb that decision. The annual rest is one which can hardly be sustained in a case of honest administration unless it be shown that the amount so ascertained was actually received. But there are circumstances in this case which seem to justify the decree of the court so far as to disincline us to interfere with it on that point. The administrator is shown to have mixed the funds with his own, and to have used them for purposes of speculation for his own profit. The assets for which he was held accountable were almost exclusively notes due the intestate, bearing ten per cent interest and collected by the administrator. In his settlement with the county court he rendered no account of the interest received on these notes, nor any interest account for the use of the money after it came to his hands, nor of the profits made by him by its use in his own business transactions. He is shown to have made private arrangements to settle separately with the distributees, or to buy out their interests, and these have been shown to be accompanied with fraud and without any fair statement of the condition of the estate, and he kept no separate account of the trust funds in his hands. Under such circumstances we are of opinion that he should be held to account for all that he might have made by the use of the money, and as the master and the circuit judges have held that he might have invested and re-

invested annually, at eight per cent, we will not disturb their finding.

The decree in favor of Ann Payne, and Susan Curtis, and Mary Gwinn, is affirmed, and the decrees in favor of the other parties are reversed, and the case remanded to the circuit court with directions to dismiss the case as to them without prejudice, and that each party pay their own costs of appeal.

JAMES S. EASLEY, *et al.*, *Appts.*
v.
JOHN H. KELLOM *et al.*

(See S. C. 14 Wall. 279–282.)

Mortgage on government land—competition in bidding—bill of review.

1. Where a mortgagor of government land had no title the subsequent sale by the government agents conveyed a good title to the purchasers, clear of the mortgage.
2. An agreement looking to a combination to prevent competition in bidding at the government sale, is an objection which, if valid, can only be taken by the government itself.
3. A bill of review may be maintained on the discovery of an agreement which was absent at the trial, which absence was satisfactorily accounted for.

[No. 157.]

Argued Apr. 2, 1872. *Decided May 6, 1872.*

APPEAL from the Circuit Court of the United States for the District of Nebraska.

The case is stated by the court.

Messrs. J. M. Woolworth, and **Jas. Hughes** for appellants.

Mr. **Lyman Trumbull** for appellees.

Mr. Justice **Bradley** delivered the opinion of the court:

This case was commenced by a bill filed by the appellants, Easley and Willingham, for the foreclosure of a mortgage or deed of trust, dated June 25, 1857, given by Harrison Johnson, to secure the payment of his note for $5,600. The mortgage covered the west half of a pre-emption right of 160 acres claimed by Johnson, within the limits of the city of Omaha. Sometime afterwards the city of Omaha filed a *caveat* against Johnson's claim, and on the 29th of December, 1859, the commissioner of the land office notified the local register and receiver that Johnson's certificate of location had been canceled. Thereupon the property was advertised for sale as a part of the public land. Johnson being largely in debt, it was proposed between him and some of his creditors to bid off the property as cheaply as possible, so that the creditors might receive satisfaction for their claims, and that something might be left for **280***] him. *An agreement was for this purpose drawn up and signed by Johnson and several of his creditors; but the appellants and one or two others refused to come into it. They insisted on their priority of lien. The sale took place in August, 1860. In pursuance of the agreement, Johnson bid off the southern half of the 160 acres at the minimum government price in the name of his mother; and the defendant, John H. Kellom, on behalf of the creditors, bid off the northern half; each part containing forty acres of the land mortgaged. Kellom executed conveyances to the other creditors who, with himself, had signed the agreement, so as to divide between them the eighty acres purchased by him, in proportion to their claims against Johnson; and these creditors gave Johnson acquittances in full. Johnson's mother has been in possession of her portion ever since the sale, he living on a portion of it.

In 1866, the appellants filed their bill in this case to foreclose their mortgage. They charged, first, that the cancelation of Johnson's pre-emption right was procured by his complicity and acquiescence, for the purpose of defrauding them out of their mortgage debt, and paying the other creditors; and second, that when the public sale took place it was agreed between Johnson and the other creditors who participated in the purchase, that Johnson was to have an interest in the said purchase, proportionate to the claims of those creditors who did not sign the agreement, so that he might afterwards make settlements with them. The answer denied these charges; and further, Sarah A. Johnson, the mother of Harrison Johnson, alleged that she was a bona fide purchaser of the eighty acres purchased by her; and the other defendants alleged that Kellom was a bona fide purchaser of the eighty acres purchased by him. They further insisted that the complainant's mortgage or trust deed being made by Johnson before he obtained a patent of the land, was void by the 12th and 13th sections of the pre-emption act of September 4, 1841.

*Upon these pleadings the parties [***281** went into proofs. No evidence, however, was adduced to show that the cancelation of Johnson's pre-emption certificate was improperly obtained, and the case is to be considered upon the hypothesis that he had no valid claim and that the land belonged to the government and was properly sold as such in 1860.

But on the question in regard to the agreement between Johnson and his creditors, the preponderance of the evidence seemed to establish the allegations of the bill. Neither the original agreement nor any copy of it could be found, and the parol evidence, taken after the lapse of seven years (notwithstanding the stout assertions of Kellom and his associates to the contrary) went to show that Johnson had reserved an interest in such portion of the land as would have belonged to the creditors that failed to come into the agreement. Johnson himself testified this. The consequence was, that a decree was entered for the complainant against Kellom and those who received portions of his purchase, for one undivided half of the property in their possession, covered by the mortgage.

After the decree was entered, a copy of the agreement was accidentally discovered and was found to sustain the position of the defendant, that no provision was made for the benefit of any creditor but those who signed it. A bill of review was thereupon filed by the defendants, and the circuit court pronounced a decree in their favor, reversing the former decree. From this decree an appeal was taken to this court. **282***] After this statement of the case, *it

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NOTE.—*Pre-emption rights*—see note to U. S. v. Fitzgerald, 10 L. ed. U. S. 785.

Bill of review, nature of; when may be brought; who may maintain; time within which; what it should contain—see note to B'k of U. S. v. Ritchie, 8 L. ed. U. S. 890.

seems difficult to find any ground for sustaining this appeal. Conceding that the deed of trust held by the complainants would have been valid as against Johnson. and his assigns, had his pre-emption right been sustained, still, this right was not sustained. He had nothing that he could mortgage or convey. The subsequent sale by the government agents conveyed a good title to the purchasers, clear of the mortgage. The other ground on which the appellants relied, namely: that at the public sale Johnson had made some reservations in his own favor, in his agreement with the other creditors, for the purpose of enabling him to settle with the appellants, is taken away by the discovery of a copy of that agreement. It contains no such provision whatever. On the contrary, it is a mutual agreement made for the sole benefit of those who executed it.

No question arises here in reference to the eighty acres purchased by Johnson's mother. The original decree did not embrace any portion of that, and no appeal from that decree was taken by the complainants.

Some observations were made in reference to the provision of the agreement, looking to a combination to prevent competition in bidding at the government sale, but that objection, if valid, could only be taken by the government itself.

To conclude, the copy of the agreement which was discovered, and which laid the foundation for the bill of review, is sufficiently proved; and its absence at the former trial is satisfactorily accounted for.

The decree must be affirmed.

JAMES BIGLER, *Appt.*,
v.
WILLIAM WALLER *et al.*

(See S. C. 14 Wall. 297-308.)

Notice necessary, on sale on deed of trust—purchaser, when trustee—what necessary to trust—revival of suit.

1. Where a deed of trust of real estate stipulated that in case of a sale, the trustee should give sixty days' notice in newspapers in Richmond and in the city of New York, a sale without such notice conveyed no title.
2. A purchaser at such sale who entered in pursuance of his purchase, claiming title in himself by virtue thereof, is chargeable as a trustee, though the purchase was wholly void.
3. But actual occupation of the mortgaged premises is indispensable to the existence of such trust. A false claim of title is, of itself, insufficient.
4. Such purchaser is not responsible for the waste committed upon the land and the destruction of improvements, which was done by the Confederate military forces in his absence, and, so far as it appears, without his knowledge.
5. Where, upon the death of a defendant during the pendency of a suit, the suit is revived as against his administrator, but not against his heirs, no decree can be made against them.

[No. 151.]

Argued Mar. 26, 1872. Decided May 6, 1872.

APPEAL from Circuit Court of the United States for the District of Virginia.

The decree of the court below, from which this appeal was taken, found, in substance, that upon the contract between Bigler and Waller, made April 2, 1853, there was due from Bigler to Waller May 10, 1860, on account of purchase money for the tract of land mentioned therein, the sum of $13,000; that Waller was entitled to interest thereon at the rate of six per cent per annum, except from April 19, 1861, until May 26, 1865; and that Bigler is entitled to a credit of $2,000 in Confederate notes received by Waller in October, 1863, and then worth, at the rate of thirteen for one, $153.84 in United States coin, with interest; but that Bigler is not entitled to compensation for damages alleged to have resulted from failure of Waller to make releases of portions of the estate sold by him, nor for other acts or omissions charged in his bill. And thereupon the court decreed that Bigler pay to Waller's administrator the sum of $17,377.48 in United States coin, and to the several defendants their costs. And the court, dissolving the injunction which had been granted Bigler, substituted a trustee in the place of Saunders, with power, unless the said sum should be paid, to sell so much of the land embraced in the deed of trust from Bigler, as had not been by him sold with Waller's consent.

Messrs. E. L. Fancher and **J. K. Hayward** for appellant:

This cause has proceeded on an erroneous assumption from the time it was first decided by Commissioner Chahoon.

The assumption that Waller's foreclosure, in 1862, was a nullity, and that the property is now Bigler's, is an error.

We contend that the estate does not belong to Bigler, but belongs to Waller, under his foreclosure in 1862.

Hence the bond has been satisfied by the sale under the trust, and there is about $1,100 of the purchase money and interest thereon, still due Bigler, under the foreclosure, for which Waller is liable.

If the court will compel Bigler to retake title to the property, then what was Waller's relation to the estate during the *interregnum*, and what are his responsibilities, if any, growing out of that relation?

It cannot be said that Waller's actual relation to the property was not sufficiently intimate to warrant his being said to be in actual possession, because:

1. He regularly bought it, paid for it, and took a deed thereof. Possession follows the title.
2. He sold thereafter and conveyed it away (notwithstanding the sale fell through).
3. He undertook to dispose of the personalty left.

In fact he exercised all the acts of dominion over the property possible under the then condition of that portion of the country.

Waller took the esplees for four years.

See, 2 Smith, L. Cas. 641, 643, n. 566, 6th Am. ed. and cases there cited.

What is Waller's liability as such disseisor, trespasser, or wrong-doer?

We learn from Bracton, p. 186, 187, b, Britton, ch. 42, 44, and from 1 Reeves' History Eng. Com. p. 331, *et seq.* (old ed. not quarto), that a person, wrongfully in possession of realty, was liable to the rightful owner for all the damage done to the property while the wrong-doer was in possession. This was ordinarily found by the jury, who were allowed to find as much as three times the actual damage done.

The Year Books are full of these cases, cited, margin of *Liford's Case*, 11 Co. 51.

The consequences of disseisin to the disseisor

are, a liability for all waste and for mesne prof its made, or which might have been made.

Dewey v. *Osborn*, 4 Cow. 338, and cases ther cited or quoted; *Moore* v. *Hussey*, Hob. 98, an n.; *Liford's Case, supra; Symons* v. *Symons* Het. 66; Brooks, Abr. Trespass, pl. 35; Bac Abr. Trespass, G. 2; 1 Wood's Conv. 108; Keil's Pleas, 2; Vin. Abr. Trespass, R. 4, pl. 2, 5: *Case* v. *Degoes*, 3 Cai. 261; *Fletcher* v. *McFarlane*, 12 Mass. 46; *Emerson* v. *Thompson*, 2 Pick. 491; Stearns, Real Act. in notes, 419.

Waller's relation and responsibility to Bigler are well defined in *Robertson* v. *Norris*, 5 Jur. N. S. 1238.

Another injury done to Bigler was this: Waller, through forms of law, assumed the role of owner, and induced the C. S. A. authorities to recognize him as Bigler's agent, and then fraudulently sacrificed a valuable claim which might have been realized for Bigler.

The coin element of this decision should be eliminated from the case, if the court comes to that.

Shortridge v. *Macon*, 1 Abb. U. S. 58.

If plaintiff is compelled to retake the estate, he should have releases from Waller's heirs.

Only Waller's heirs at law can make this reconveyance, and they were not made parties at the time the administrator was let in to defend.

If the court sustains the first point in this brief, these heirs are not wanted here; if not, they must be present to release to Bigler.

Mr. **Conway Robinson** for appellees.

Mr. Justice **Strong** delivered the opinion of the court:

The complainant, on the 23d day of June, 1853, made a deed of a tract of land in Virginia, to Saunders, one of the defendants in trust, to secure the payment of a bill single, which he had given to Waller, the other defendant, for part of the purchase of the tract. After the purchase he took possession of the land, erected valuable improvements thereon, and from time to time made payments on account of the purchase money until April, 1861, when, upon the breaking out of the Civil War, he left the state, but returned in 1865, and resumed possession of the property. In November, 1865, Waller, the vendor of the land, instituted a suit in the supreme court of New York against him, claiming to recover a balance alleged to be due upon the bill single, and the complainants set up a defense to the suit. But before its final determination, this bill was filed in the circuit court of Virginia. It sets out an agreement for the sale of the land, dated April 2, 1853, the subsequent sale on the 10th of May next following the execution of the deed of trust, the possession taken by the complainant, the improvements made, the abandonment of possession in 1861, and its resumption in 1865. It charges, also, that the complainant made contracts for the sale of portions of the land, and tendered to Waller the proceeds of such sales sufficient to afford ample security for the liquidation of the part of the residue of the debt for the purchase money then due, but that Waller declined to ratify the sales, in disregard of his contract and greatly to the damage of the complainant; that about September 1, 1861, Waller authorized Saunders, the trustee, to sell the land, and that a sale was then made to Waller himself, but without such publication as was required by the deed of trust; that out of the proceeds of sale the trustee satisfied the complainant's obligation, and failed to pay over the balance; that Waller then took possession both of the land and of the personal property thereon, and applied the proceeds of the personalty to the payment of the complainant's debt; that he received large sums of money for rents of the real estate, and also received confiscation from the Confederate authorities for the destruction of the property. The bill further charges the pendency of the suit in the supreme court of New York, and that Saunders, the trustee, was *proceeding again to [*301 sell the property, without advertising the sale sixty days in the newspapers of the city of New York, as required by the deed of trust. It avers, also, that Waller is insolvent; that he and Saunders will confederate to cheat the complainant in the sale; and that if the sale should be made, the complainant will be unable to recover from Waller what is due to him, or to avail himself in the courts of Virginia of his just rights. The relief prayed is, that Saunders, the trustee, may be enjoined against selling the land or any part of it, and that Waller may be enjoined against assigning his interest in the complainant's obligation, until the determination of the action in the supreme court of New York, or until the matter is referred to a master to take an account of the rents and sales made by them and an inquiry of the damage done by Waller to the complainant's property; that whatever is due, the complainant may be decreed to be paid him and all his proper offsets be allowed. The bill also contains a prayer that all deeds, and papers in the defendant's possession concerning the sales may be decreed to be delivered up, and it concludes with the prayer for general relief.

The bill is most inartificially drawn, but from this abstract sufficiently full for all the purposes of the case, it appears to be in substance and legal effect a bill for an account brought by a mortgagor against his mortgagee, charging that the mortgagee had been in possession, had received the rents, issues, and profits, and had committed waste.

It is unnecessary to refer to the answer of Waller, the defendant, further than to state that it denies he was ever in the possession of the land after the deed of trust was made; denies that he sold or appropriated any of the personal property thereon; that he received any of the rents, issues and profit, or that he committed waste, or induced the Confederate forces to commit waste. The case having been heard and decided in the circuit court on the bill, answers, replications, and proofs, an appeal has been taken to this court, and the complainant now insists that the circuit court erred in assuming that the sale which was made by Saunders in 1862 (not 1861, as charged) was a nullity, and that the property remained the complainant's notwithstanding. This position is taken in order that it may be inferred that the residue of complainant's bond for the purchase money was satisfied by a sale under the trust, and that Waller has not only been thus paid, but that he is accountable for the excess of his bid at that sale above

the amount then due him by virtue of the bond. 304*] The position* is certainly a strange one. It is directly in conflict with the law of the case and with the complainant's bill. By the deed of trust it was stipulated that in case of a sale the trustee should give sixty days' notice in newspapers in Richmond and in the city of New York. To a valid execution of the power of sale such notice was indispensable, and a sale without it of course conveyed no title. It is not pretended that such notice was given. On the contrary, the bill charges that it was not, and to this the answer of Waller makes no denial, while the answer of Saunders expressly admits that there was no advertisement in a New York paper, giving as a reason for the failure thus to advertise, that communication with the northern states was then prohibited. The fact that the sale was made without the requisite notice is, then, an established fact; and the inevitable inference is that the sale was inoperative to devest the ownership of the complainant. Without confirmation by him it was a mere nullity, disturbing no right and conferring none. But if this were not so, the theory of the complainant's bill is that his title was not devested. It charges that the necessary notice was not given. It complains that possession was taken by Waller after the sale; that he received the rents, issues, and profits, down to 1865; received compensation for injuries done to the improvements by the Confederate military forces; and it claims that Waller is accountable to the complainant for such possession, rents and profits, as well as for the compensation he obtained. All this is utterly inconsistent with the assertion that the sale was effectual to change the title. But this is not all. There is much more in the bill that asserts continued ownership of the complainant, and the invalidity of the sale made in 1862. The averment that the trustee is about to sell the lands again under the trust deed, and the charge that the sale will be conducted in such a partial and unjust manner as to cheat and defraud the complainant, are full of meaning. So is the prayer for an injunction against another sale, and the prayer for the delivery over of the deeds. In view of all this it is impossible for the complainant to maintain 305*] now that the attempted *foreclosure in 1862 was not a nullity, ineffective to transfer his right to Waller. Even if he could have affirmed the sale, he has precluded himself from doing so, and has left nothing for the court but to adjudicate upon the case as he has made it. There has then been no actual payment of the bond.

The next inquiry is whether Waller is chargeable with the rents, issues and profits of the property from the 1st of April, 1862, when the sale was made, until the spring of 1865, when the complainant returned to the land and resumed actual possession. This, of course, assumes that the sale had no validity, for if it worked a foreclosure of the complainant's equity, if it vested the title in Waller, there can be no pretense that he is liable for subsequently accruing rents and profits. It is only while he can be considered as holding the possession in trust for the mortgagor that he can be called to account. Had he entered in pursuance of his purchase, claiming title in himself by virtue thereof, he would doubtless be chargeable as a trustee, though the purchase was wholly void; and it may be conceded, if he had taken actual possession without claim of right that he might be treated as such. But actual occupation of the mortgaged premises is indispensable to the existence of such a liability. It is the enjoyment of the property, or the pernancy of its profits, that raises the trust. A false claim of title is, of itself, insufficient.

The difficulty of the complainant's case is, there is no proof that Waller was in actual possession, or even that he was on the land at all, from the time of the sale until this bill was filed, or that he ever received any of its rents, issues or profits. There is a total failure of any such evidence. The most that can be alleged is that he claimed sometimes to be the owner without ever enjoying any of the rights of ownership. It is proved that he had possession neither of the personalty nor of the realty.

Equally unsustained is the claim that Waller is responsible for the waste committed upon the land, and the destruction of improvements. The property was greatly injured *be- [*306 tween 1861 and 1865, during the existence of the Civil War, but the evidence wholly fails to show that the injury was caused by any act of the defendant's. It was done by the Confederate military forces in Waller's absence and, so far as it appears, without his knowledge.

It is further insisted, on behalf of the complainant, that the circuit court erred in refusing to allow him a credit for damages which, it is alleged, he sustained in consequence of a refusal by Waller to release portions of the land from the operation of the deed of trust in order to enable him to sell them. This claim is founded upon the clause in an executory agreement between the parties, dated April 2, 1853, by which it was stipulated that Waller would allow Bigler to sell such portions of the land as, from time to time, he might see fit, Bigler paying over such proceeds of the sales as would afford ample security for the residue of the debt due for the purchase money of the land. The deed for the land from Waller to Bigler was, however, not made until the 10th of May, 1853, and probably not delivered until the 22d of June next following, when the deed of trust was executed. Neither the deed nor the deed of trust contains any such stipulation for releases as is contained in the agreement of April 2d, and it might perhaps be maintained that the agreement was subsequently changed, or merged in the after-executed contracts. But, assuming that it was not, what is the evidence of the breach of the agreement? It does appear that in 1853 or 1854, the complainant had offers to purchase some parts of the land situated in the heart of it; that he applied to Waller for releases, and that they were refused. But it does not clearly appear that those lots thus located could have been sold without so impairing the value of the remainder as to leave it less than ample security for the payment of the residue of the debt. Applications were afterwards made for releases of other and larger portions differently situated, and the releases were given. That those first asked were not given, when only one sixth of the purchase money of the whole property had been paid, ought not to be regarded as a violation of the agreement without *very clear evidence that Waller knew [*307 they could have been given with entire safety.

Besides, it does not distinctly appear that the complainant was injured by the refusal, or that he ever claimed compensation for it until this bill was filed. From year to year, down to 1860, and including that year, he paid the annual instalments of the purchase money called for by his contract without claiming any deduction—a course of conduct inconsistent with the existence of any just claim to compensation for a prior breach of his creditor's engagement. There is, then, no sufficient reason for the allowance of a credit on his bond in consequence of Waller's refusal to execute releases.

It is further objected to the decree of the circuit court that it does not direct a conveyance by the heirs of Waller to the complainant. His heirs were not called in, and they are not parties. No decree could, therefore, have been made against them, nor was any necessary. If, by the conveyance of Saunders to Waller in 1862, and his subsequent death, the legal title was cast upon Waller's heirs, it was only a naked legal right, which they may be compelled to surrender whenever the purposes of the trust shall be accomplished—when the debt secured by the deed of trust shall be paid. Besides, Saunders, the trustee, has also died, and a new trustee has been appointed clothed with all the rights, duties and responsibilities of the trustee named in the deed.

It is, however, easy to protect the complainant against any outstanding title in the heirs of Waller by staying the execution of any decree until those heirs shall have conveyed to Henry Coalter Cabell, the new trustee, all the interest, if any, conveyed to their father by the deed of Saunders to him, to be held by Cabell under and subject to the trust declared in the deed of trust to Saunders. Such an order the circuit court may properly make.

There remains to be considered but one other objection made to the decree. It is that the sum found by the account due to the administrator of Waller was decreed to be paid in United States coin. In view of the ruling of 308*] this court *in *Knox* v. *Lee* and *Parker* v. *Davis*, *ante*, 287, this was erroneous and for this cause alone the decree must be reversed.

The decree of the Circuit Court is reversed, and the cause is remanded, with directions to proceed to an amended decree in accordance with the foregoing opinion.

THE REPUBLIC FIRE INSURANCE COMPANY, *Plff. in Err.*,
v.
CHARLES WEIDE, *et al.*

THE HANOVER FIRE INSURANCE COMPANY, *Plff. in Err.*,
v.
SAME.

THE GERMANIA FIRE INSURANCE COMPANY, *Plff. in Err.*,
v.
SAME.

THE NIAGARA FIRE INSURANCE COMPANY, *Plff. in Err.*,
v.
SAME.

(See S. C. *"Insurance Companies* v. *Weides,"* 14 Wall. 375-383.)

Memoranda, when evidence—examination of assured—requirements of policies — fraud and false swearing—when avoids policy—question for jury.

1. Papers, not evidence *per se*, but proved to have been true statements of fact, at the time they were made, are admissible in connection with the testimony of a witness who made them.
2. Footings of the amount of stock of a merchant correctly entered upon an old ledger and transferred to a new one, are admissible from that, the old ledger being burnt.
3. Where, by the policies, the assured, after furnishing proofs of loss, were bound, if required, to submit to an examination under oath, and it was stipulated that until such examination should be permitted the loss should not be payable, they are not bound to answer questions respecting the amounts for which they had made settlements with other insurance companies.
4. Where the insured was bound by his policy to produce certified copies of invoices to show his loss, if required, he is not bound to produce certified copies on a demand to produce duplicates.
5. Where the policies stipulated that fraud or false swearing on the part of the assured should work forfeiture of all claim under them, statements in the proofs of loss honestly made, although subsequently discovered to be mistaken, will not work a forfeiture.
6. It is only fraudulent false swearing, in furnishing the preliminary proofs or in the examinations which the insurers have a right to require, that avoids the policies.
7. It is for the jury to determine whether such swearing was false and fraudulent.

[Nos. 169, 170, 171, 172.]

Argued Apr. 25, 1872. Decided May 6, 1872.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

These actions were begun in the district court for the county of Ramsay, Minnesota, by the defendants in error, upon policies of insurance issued by the respective insurance companies, now plaintiffs in error. The defendants below removed the cases to the United States circuit court, where the four actions were tried together. The trial resulted in verdict and judgment for the plaintiffs, and the defendants sued out writs of error. The nature of the exceptions appears in the opinion.

Messrs. J. M. Carlisle and **J. D. McPherson** for plaintiffs in error.

Messrs. Lorenzo Allis and **W. H. Peckman** for defendants in error.

Mr. Justice **Strong** delivered the opinion of the court:

These causes were tried together before one jury, and they present the same questions. They were actions upon policies of insurance against fire, in which it became *material* to prove what was the quantity and value of the goods the plaintiffs had when the fire occurred. As bearing upon this, evidence was introduced, without objection, tending to show that the plaintiffs took a correct inventory of their

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NOTE.—*Evidence of loss of paper and secondary evidence of its contents*—see *note* to Bouldin v. Massie, 5 L. ed. U. S. 414.

Use of memoranda to refresh memory of witness.

The use of memoranda to refresh memory is confined to cases where the witness is at fault without it. Sackett v. Spencer, 29 Barb. 180; Key v. Lynn, 4 Litt. 338; Young v. Catlett. 6 Duer, 437.

The form of the memorandum is not material. Guy v. Mead, 22 N. Y. 462; Marcly v. Shults, 29 N. Y. 351.

Witness may use a memorandum made by himself or at his dictation, or by another and read by

stock on the 28th of February, 1866, which was correctly reduced to writing by one of them in an inventory book; that the prices or values were correctly footed up therein; that at the same time the footings were correctly entered by one of the plaintiffs upon the fly-leaf of an exhausted ledger and afterwards transferred, also by one of the plaintiffs, to the fly-leaf of a new ledger; that neither of the plaintiffs could remember the amount of such inventory or footings, and that both the inventory book and the exhausted ledger had been destroyed. The plaintiffs then offered the entry of the footings on the fly-leaf of the new ledger, which the court received, and in this it was contended there was error.

It will be observed that the footings upon the fly-leaf of the ledger were not offered or received as independent evidence. They were accompanied by proof that they were correct statements of the values of the merchandise, and that they were correctly transcribed either from the inventory book or from the fly-leaf of the exhausted ledger, both of which appear to have been originals. How far papers, not evidence *per se*, but proved to have been true statements of fact, at the time they were made, are admissible in connection with the testimony of a witness who made them, has been a frequent subject of inquiry, and it has many times been decided that they are to be received. And why should they not be? Quantities and values are retained in the memory with great difficulty. If, at the time when an entry of aggregate quantities or values was made, the witness knew it was correct, it is hard to see why it is not at least as reliable as is the memory of the witness. It is true a copy of a copy is not generally receivable, for the reason that it is not the best evidence. A copy of the original is less likely to contain mistakes, for there is more or less danger of variance with every new transcription. For that reason even a sworn copy of a copy is not admissible when the original can be produced. But in this case the inventory book and the fly-leaf of the exhausted ledger *had both been burned. There was no [*381 better evidence in existence than the footings in the new ledger. And we do not understand the bill of exceptions as showing those footings to have been copied from a copy. It does not appear whether they were taken from the inventory book or from the fly-leaf of the old ledger. And it is of little importance, for as those entries were made at the same time, neither ought to be regarded as a copy of the other, but rather both should be considered originals. We do not, however, propose to discuss this exception at length, for we regard it as settled by the decision in *Insurance Company* v. *Weide*, 9 Wall. 677, 19 L. ed. 810, that the evidence under the circumstances was properly received.

The second and third exceptions are disposed of by what we have already said, and they are unsustained.

There is nothing, also, in the fourth exception. By the policies the assured, after furnishing proofs of loss, were bound, if required, to submit to an examination under oath, and it was stipulated that until such examination should be permitted the loss should not be payable. Of course it is to be understood that the examination contemplated relates to matters pertinent to the loss. In these cases the plaintiffs did submit to an examination, but declined to answer questions respecting the amounts for which they had made settlements with other insuring companies. We are unable to perceive that the questions proposed had any legitimate bearing upon the inquiry, what was the actual loss sustained in consequence of the fire? If the plaintiffs had claims upon other insurers, and compromised with some of them for less than the sums insured, it is not a just inference that their claim against these insurers was exaggerated. A compromise proposed or accepted is not evidence of an admission of the amount of the debt. There was, then, no sufficient foundation laid for the instruction requested by the defendants, that if the jury should believe that the plaintiffs, or either of them, in the course of an examination on oath, under the policies,

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witness, at the time of or soon after the transaction. He must testify that he knew it was correct when he made or read it. Steph. Dig. Ev. art. 136; Lewis v. Ingersoll, 3 Abb. Ct. App. Dec. 55; Krom v. Levy, 1 Hun, 173; Filkins v. Baker, 6 Lans. 518; Van Buren v. Cockburn, 14 Barb. 181; Halsey v. Sinsebaugh, 15 N. Y. 485; Guy v. Mead, 22 N. Y. 462; Russell v. Hudson Riv. R. Co. 17 N. Y. 134; Riordon v. Davis, 9 La. 239, 29 Am. Dec. 442.

Witness may rely upon the accuracy of such memoranda, and not his memory, in testifying. Cole v. Jessup, 10 N. Y. 96, 9 Barb. 395, 10 How. Pr. 515.

Such an original memorandum may be read itself as evidence, if the witness' memory is not refreshed by the paper itself. Marcly v. Shults, 29 N. Y. 348; Halsey v. Sinsepaugh, 15 N. Y. 485; Lapham v. Kelly, 35 Vt. 195.

Copies of original memoranda after proof of the facts therein contained may be read as a statement in detail of what witness has testified. McCormick v. Pa. Cent. R. Co. 49 N. Y. 301, 315; Bullock v. Hunter, 44 Md. 416.

Where witness swears he made a list of articles at the time but cannot give details, he may be shown his list and read it. Wilcox Silver Plate Co. v. Green, 9 Hun, 347; Philbin v. Patrick, 3 Abb. Ct. App. Dec. 605.

Witness may be shown, while on the stand, original memoranda, made at time of occurrence, although not by him, and he may refer to copies or abstracts of such memoranda made by him, if they refresh his memory so that he can testify of the original facts without relying on the accuracy of the memoranda. Huff v. Bennett, 6 N. Y. 337; Howland v. Willetts, 5 Sandf. 221; Sturm v. Atl. Ins. Co. 38 Sup. Ct. (J. & S.), 286, 296, 318; Wilde v. Hexter, 50 Barb. 448.

Opposite party may see anything shown witness to refresh his memory and may cross-examine witness as to same but is not obliged to put it in evidence. Steph. Dig. art. 137; Peck v. Lake, 3 Lans. 136; Tibbetts v. Sternberg, 66 Barb. 201.

A witness may refresh his memory from any book or paper, if he can swear to the fact from recollection; but if he cannot swear to the fact except from finding it in the paper, the original must be produced. Doe v. Perkins, 3 Term, 749; Tanner v. Taylor, 3 Term, 754; 8 East, 282, 289; 1 East, 760; Maughan v. Hubbard, 8 Barn. & C. 14; Juniata B'k v. Brown, 8 S. & R. 87; Robertson v. Lynch, 18 Johns. 451; Feeter v. Heath, 11 Wend. 477; Smith v. Lane, 12 S. & R. 87; Holladay v. Marsh, 3 Wend. 142. 20 Am. Dec. 678; Lapham v. Kelly, 35 Vt. 195; Spann v. Baltzell, 1 Fla. 321; Moots v. State, 21 Ohio St. 653; Newell v. Houlton, 22 Minn. 19.

A witness may testify from written memorandum, though it does not recall the facts to his memory; and such evidence is better than unaided recollection. Pearson v. Wightman. 1 Mill. 336, 12 Am. Dec. 636; Lapham v. Kelly, 35 Vt. 195; Cross v. Bartholomew, 42 Vt. 206; Lewis v. Ingersoll, 1 Keyes, 357.

Witness in testifying to contents of lost paper may use even a copy of a copy to refresh his memory. Dunlap v. Berry, 4 Scam. 327, 39 Am. Dec. 413.

refused to answer any questions by which 382*] *the defendants could fairly estimate or reasonably infer plaintiffs' real loss in the insured property, and had not before the commencement of the actions answered the questions under oath, the verdict must be for the defendants. There was no evidence of refusal to answer such questions.

The fifth exception is to the refusal of the court to instruct the jury that if they believed from the evidence the plaintiffs were requested by the defendants to produce duplicates of invoices of goods purchased by them, the originals of which were alleged by them to be destroyed, and neglected to do so before the commencement of the actions, their right of action never accrued, and that the verdicts must be for the defendants. The prayer for this instruction was founded on the clause in the policy that the assured should produce certified copies of all bills and invoices, the originals of which had been lost, and exhibit the same for examination to any person named by the company, and that until the proofs, declarations and certificates (stipulated for in case of loss) were produced and examinations and appraisals permitted, the loss should be not payable. The bills of exception state that there was evidence tending to show that the plaintiffs were requested to produce duplicate bills of purchases, but there does not appear to have been any evidence when the request was made, whether before the commencement of the actions or afterwards, or whether there was neglect or refusal of the plaintiffs to comply. Moreover, the request was for duplicates, and not for certified copies. We cannot, therefore, say there was error in refusing the instruction asked for.

Nor was there error in denying the defendants' third and fourth prayers. It is true the policies stipulated that fraud or false swearing on the part of the assured should work a forfeiture of all claim under them. The false swearing referred to is such as may be in the submission of preliminary proofs of loss, or in the examination to which the assured agreed to submit. But it does not inevitably follow from the fact that there was a material discrepancy between the statements made by the plaintiffs 383*] under oath in their proofs *of loss, and their statements when testifying at the trial that the former were false, so as to justify the court in assuming it, and directing verdicts for the defendants. It may have been the testimony last given that was not true, or the statements made in the proofs of loss may have been honestly made, though subsequently discovered to be mistaken. It is only fraudulent false swearing in furnishing the preliminary proofs, or in the examinations which the insurers have a right to require, that avoids the policies, and it was for the jury to determine whether that swearing was false and fraudulent.

The remaining two assignments of error are not pressed, and it is properly conceded that the court could not lay down as a rule of law the mode of computation designated in the prayers for instruction.

The judgment in each case is affirmed.

JOHN M. YOUNG, *Appt.*,
v.
THE STEAMBOAT KEY CITY, Barge Jim Sheets, The Northwestern Union Packet Company, *Claimant.*

(See S. C. *"The Key City,"* 14 Wall. 653–661.)

Laches as a defense to maritime liens—what delay will defeat—purchaser for value.

1. While the courts of admiralty in cases for the enforcement of maritime liens are not governed by any statute of limitation, they adopt the principle that laches or delay in the judicial enforcement of them will, under proper circumstances, constitute a valid defense.
2. No arbitrary or fixed period of time has been established as an inflexible rule, but the delay which will defeat such a suit must in every case depend upon the peculiar equitable circumstances of that case.
3. Where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense of laches will be held valid under shorter time than when the claimant is the owner at the time the lien accrued.

[No. 49.]

Argued Nov. 18, 1872. Decided Dec. 9, 1872.

APPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin.

The libel in this case was filed in the United States district court for the district of Wisconsin, by the appellant, to enforce a lien against the vessel for breach of contract of affreightment. A decree having been entered dismissing the libel, the libelant took an appeal to the circuit court, by which the said decree was affirmed; whereupon the libelant took a further appeal to this court.

The case is further stated by the court.

Mr. **N. J. Emmons** for appellant:

The court erred in holding the claim of libelant a stale one, when there was no allegation or proof that he had knowledge that the vessel had been within the jurisdiction of the court during the period elapsing since the accruing of the demand and the commencement of suit.

The Sarah Ann, 2 Sumn. 212; 2 Pars. Mar. Law, 664, n. 3.

The court erred in dismissing the libel, when liability of the original owners and of the vessel and barge *in rem* was confessed; no equitable circumstances appearing to show why the lien should be deemed to have been waived or barred for staleness.

The Bolivar, 1 Olcott, 474; *The Mary*, 1 Paine, 180; *The Batavia*, 2 Dod. 500; *The Utility*, 1 Blatchf. & H. 218; *Willard* v. *Dorr*, 3 Mass. 161; *The Eastern Star*, 1 Ware, 185; *Leland* v. *The Medora*, 2 Wood. & M. 92; *Packard* v. *The Louisa*, 2 Wood. & M. 48; *The Chusan*, 2 Story, 455; *Joy* v. *Allen*, 2 Wood. & M. 304; *Mason* v. *Crosby*, Davies, 313; *The Sea Lark*, 1 Sprague, 571; *The Gen. Jackson*, 17 Law Rep. 324; *The Admiral*, 8 Law. Rep. 91.

The authorities cited are perhaps unnecessarily multiplied. They all prove and illustrate the proposition involved in this assignment of error.

The mere conveyance of a vessel, even to an innocent purchaser without notice, will not of itself necessarily disturb a maritime lien.

Shepard v. *Taylor*, 5 Pet. 675.

In order to defeat the lien, some other circumstance than mere lapse of time should be

made to appear, before the equity upon which the doctrine is based can arise. The cases cited all show this. In the case of *The Batavia*, 2 Dod. 500, Lord Stowell concluded, upon the facts proved, that the transfer was merely colorable, to avoid payment of certain port charges and duties at Batavia; hence no equity in the purchaser to demand a discharge of the lien.

In *Willard* v. *Dorr*, 3 Mason, 161, Mr. Justice Story, passing on the question, says in substance: Courts of admiralty, like courts of equity, will refuse their aid to enforce old, dormant demands. It prescribes a rule to itself, to analogy, to statutes of limitation. They are rules of repose; otherwise demands would spring up after the evidence to repel them was gone by the death or dispersion of witnesses, or by the loss of important documents. Twelve years had elapsed, but no equitable circumstance appearing to bring the case within the rule suggested, the remedy was enforced.

In the case of *The Admiral*, which was much relied upon below, stress is laid upon the circumstance that the alleged cause of action was collision; the facts were denied and the witnesses dispersed. The purchasers were without notice and without ability to contest the claim upon the facts. In *The Chusan*, Justice Story says: "What will constitute a reasonable time, must depend upon the circumstances of each particular case, and is not a point susceptible of any definite or universal formulary." In a case (*Chapin* v. *The Favorite*, C. C. Dist. of Wis. 186), Mr. Justice Davis said: "There is no artificial rule in the admiralty, by which the court can determine at what period a claim becomes stale. Each case must be governed by its own circumstances." The case was one against this same respondent, and was one of the vessels transferred at the same time as the Key City.

In the present case, the respondent received its conveyance with notice of existing indebtedness, and covenanted to pay it. The validity of our demand is conceded, and the respondent received and still holds the full consideration for his covenant to pay our debt.

That we could, in equity, compel the performance of such covenant, will not be doubted.

What consideration arises here, what condition to demand that our maritime lien be discharged, more than would have arisen had the vessel remained in the hands and ownership of the Northwestern Packet Company?

The rule exists and is in force for the protection of innocent purchasers without notice, and as against whom it would be inequitable to decree payment of another's debt.

There could be no reasonable pretense of staleness, had the vessel remained the property of the old company.

Mr. Rhodes tells us in his testimony, that if there be a recovery here, it will be charged in account to the Northwestern Packet Company, and the facts prove the respondent to have an abundant indemnity fund. All the authorities show that such facts and circumstances are properly to be considered in determining the question of staleness of demands.

Mr. **John W. Cary** for appellee:

If the libelant ever had a maritime lien, which could be enforced in admiralty by a proceeding *in rem* against said steamboat and barge, he allowed the same to become stale by his delay in enforcing the same, and that it was wholly lost by said delay, so that it cannot now be enforced against said steamboat, as against the rights of the claimant. 2 Pars. Mar. L. 663.

This precise question has been frequently before our courts of admiralty.

In the case of *The Admiral*, 8 Law Rep. 91, decided by Judge Sprague, the question here involved was fully considered and decided. That was a case of collision, which occurred Oct. 7, 1852, and the libel was filed July 1, 1854, twenty months after, during all of which time the Admiral was plying between Boston and St. John, and in the meantime the Admiral had changed hands. The judge in this case said: "It may be, if third persons had not become interested in the Admiral, this libel might be maintained; although I am not prepared to say that I should hold that the lien still remained upon the vessel if there had been no change of ownership. If the boat still remained the property of her former owners, it would perhaps be a matter of no concern to them whether they were sued *in personam*, or whether the boat was seized. If the delay operated to prejudice them in any way, I am not certain but that the lien ought not to be held to have been lost."

Again he says: "The rule adopted in courts of admiralty is, to allow the continuance of the lien until a reasonable opportunity is given to enforce it. If a party neglect to avail himself of it, third persons are not to be prejudiced by his delay."

In *Packard* v. *The Louisa*, 2 Wood. & M. 48, the libel was for a seaman's wages and was filed in Nov., 1845, for wages due to him for services on board of her, commencing in Mar., 1842, and ending in November after. Mr. Justice Woodbury decided the case on appeal to the circuit court, affirming the decree dismissing the libel, on the ground "of the long delay to resort to the vessel, and when in the meantime the owners had changed and one of them became insolvent." His discussion of this question is on pages 55 to 63 of the volume, and fully sustains the position of the claimant in this case.

See, also, *Leland* v. *The Medora*, 2 Wood. & M. 92, 104; *The Bolivar*, 1 Olcott, 474.

In *Stilman* v. *The Buckeye State*, 1 Newb, 111, it was held that delay of three years to enforce a lien by a material man was a bar to recovery, and a libel was dismissed for that reason, a third person in the meantime having become the owner of the boat.

In *Bryant* v. *The Lillie Mills*, 18 Law Rep. 494, the supplies were furnished in March, June, and Oct., 1853, and the libel was filed Oct., 1855. Judge Sprague says: "If there had been no transfer of the property, I should hold the lien was not lost. When the rights of third persons have intervened, the lien will be regarded as lost, if the person in whose favor it existed has had a reasonable opportunity to enforce it, and has not done so. This is the well-settled rule in admiralty."

In *The General Jackson*, 17 Law Rep. 324, the supplies were furnished Sep., 1852. The vessel was sold to claimant in May, 1854, and libel filed about eighteen months after supplies fur-

nished. Judge Sprague says: "During all that period the vessel was plying between this port and the ports of Maine, as often as once a month, giving the libelant ample opportunity to enforce his claim, had he seen fit, long before the sale of the vessel to the present claimant. It must, therefore, be held that the libelant has waived his lien."

In the case at bar, nearly two years elapsed after the loss before the transfer to claimant, and about three and a half before the libel was filed. None of the cases above cited show as great delay in attempting to enforce liens. No excuse for the delay is shown, and pending this delay, the boat was transferred to the claimant without notice of the pretended lien. The case is, therefore, within the authorities, and the libel was rightfully dismissed.

The transfer of the boat and barge to the claimant was a legal and bona fide transfer, and was in no way impeached by the testimony taken on appeal in the circuit court.

It was not colorable or fraudulent. The property of the Northwestern Packet Company was paid for in stock of the new company, which was a good and valid payment, as much so as if paid in money. The new company was to pay the debts of the old out of the earnings of the new, in certain proportions, but in no other way. Dividends were withheld and applied for that purpose.

Mr. Justice **Miller** delivered the opinion of the court:

This is a suit in admiralty to enforce a lien against the vessel for a failure to perform a contract of affreightment. The defense was that the lien was lost by lapse of time, to wit: three years and a half between the period when the cause of action accrued and the commencement of the suit; and that defense was sustained by the circuit court. A change took place in the ownership of the vessel during that interval, which is relied upon as strengthening the defense.

The authorities on the subject of lapse of time as a defense to suits for the enforcement **660*]** of maritime liens are *carefully and industriously collected in the briefs of counsel on both sides, to which reference is hereby made without specifying them more particularly.

We think that the following propositions as applicable to the case before us may be fairly stated as the result of these authorities:

1. That while the courts of admiralty are not governed in such cases by any statute of limitation, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defense.

2. That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case.

3. That where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense will be held valid under shorter time, and a more rigid scrutiny of the circumstances of the delay, than when the claimant is the owner at the time the lien accrued.

The counsel for the appellees argue that the libel in the present case was rightfully dismissed under this last proposition; and we are of opinion that if the claimants had shown an ordinary case of purchase and payment without notice, the lapse of time would protect them. While, on the other hand, we are of opinion that if the claimant had been the owner when the lien accrued, it would not be a good defense in this instance.

We must, therefore, inquire into the special circumstances under which the claimant became the owner of the vessel against which the lien is asserted. At the time of the loss of the wheat in which this claim originates, the vessel that had it in charge, the Key City, was owned by a corporation called the Northwestern Packet Company, which had this and several other steamboats engaged in the navigation of the Upper Mississippi river. There was also, at the same time, another and a rival corporation engaged in the same business in the same waters, known as the La Crosse & Minnesota Steam Packet Company.

After the loss of the libelant's wheat, these two companies united their stock in trade, their vessels and their barges and other property, and formed a new corporation, the corporators of which were taken exclusively from those in the two old companies; and to the new corporation they gave the name of the Northwestern Union Packet Company. To this company all the property of the two other companies was transferred by appropriate instruments.

It does not appear whether the La Crosse & Minnesota Company owed debts or not, nor what became of them. It was probably thought immaterial to the questions before us. But it does appear that the Northwestern Company, the owner of the Key City, was largely indebted, and that this was well known to all the parties. Not only was it well known, but provision was made for the payment of the debts generally of that company by the newly formed company, out of a fund to come within its control. The nature of that agreement was this: certificates of stock of the value of the boats, barges and other property of the Northwestern *Company merged in the new company, [*655 were issued; but on their face they recited that no dividends would be paid on such stock until the indebtedness of the Northwestern Company should be paid out of the proportion of the net profits which the shareholders of that company would otherwise be entitled to. These facts show that there was no sale of the property of one of these original corporations to the other, but that they agreed to unite their property and their interests, and for convenience assumed a new corporate name; that in doing this they recognized a large and undefined indebtedness on the part of the Northwestern Company, and provided for its payment out of the earnings otherwise payable to that company. No doubt *these debts were [*661 most of them, like the present one, liens on the property of that company, and known to be so by all who united in the transaction. And, finally, that neither the stockholders of the La Crosse & Minnesota Company, nor of the new corporation, have ever parted with or paid any money or other thing of value for the Key City, otherwise than by this consolidation of the com-

panies into one; and it is not apparent, nor even a reasonable presumption, that if the new company has to pay the libelant's debt in this case they will be the losers, but it is nearly certain the loss will fall where it should, on the stockholders coming in through the Northwestern Company.

We do not see, under these circumstances, how the claimants can avail themselves of the rule for the protection of purchasers without notice.

The decree of the Circuit Court is reversed, with directions to enter a decree for libelant for the amount due him for his wheat lost by the Key City, with interest by way of damages.

END OF VOLUME 81.

XIV WALLACE.

14 Wall. 1-5, 20 L. 821, UNITED STATES v. CRUSELL.

Officers.— It will be presumed that government officials have performed their duties, p. 4.

Cited and applied in National Acc. Soc. v. Spire, 94 Fed. 751, holding it will be presumed in favor of validity of certificate of deputy clerk of Federal court, that clerk was absent. Cited in Globe Ins. Co. v. Gerisch, 163 Ill. 629, 54 Am. St. Rep. 489, 45 N. E. 565, as authority for holding a presumption cannot be based on a presumption.

War.— Judgment of Court of Claims, giving loyal owner the proceeds of cotton seized under abandoned property act, affirmed, the court indulging presumption, in absence of proof, that money had been regularly paid into the treasury, p. 5.

Distinguished in United States v. Ross, 92 U. S. 284, 285, 23 L. 709, holding claimant must show his ownership, that property captured was sold and money was paid into treasury.

Miscellaneous.— Cited incidentally in United States v. Pugh, 99 U. S. 271, 25 L. 324.

14 Wall. 5-9, 20 L. 875, COCKROFT v. VOSE.

Courts.— Supreme Court will dismiss writ of error to State court, unless it can be seen from record that State court decided question relied on to give jurisdiction, p. 9.

No citations.

14 Wall. 9-10, 20 L. 514, TENNESSEE BANK v. BANK OF LOUISIANA.

Courts.— No appeal lies to Supreme Court from decision of highest State court, based on its settled pre-existing rules of general jurisprudence, although rules have been embodied in State Constitution, and if decision had been on Constitution alone, writ of error would lie, p. 10.

Rule reaffirmed in Palmer v. Marston, 14 Wall. 12, 20 L. 827, Kreiger v. Shelby Ry. Co., 125 U. S. 46, 31 L. 678, 8 S. Ct. 756, and New Orleans Water-Works v. Louisiana Sugar Co., 125 U. S. 33, 34, 36, 39, 31 L. 613, 614, 615, 8 S. Ct. 749, 751, 752, all holding Supreme Court has no jurisdiction of error to State court, on ground obligation of contract has been impaired, unless some State legislative act is involved; Winona, etc., Ry. Co. v. Plainview, 143

U. S. 393, 36 L. 200, 12 S. Ct. 538, holding Supreme Court, without jurisdiction over State decision, when question as to State statute, impairing obligation of contract, was raised for first time in that court.

Distinguished in Delmas v. Insurance Co., 14 Wall. 666, 20 L. 759, holding decision of State court, expressly based on a constitutional provision and not on general ground of public policy, is reviewable in Supreme Court.

14 Wall. 10-12, 20 L. 826, PALMER v. MARSTON.

Courts.—Supreme Court has no power to review a decision of the highest State court in cause where claim is not made under State law or Constitution, and resisted as being repugnant to Federal Constitution or laws, p. 12.

Cited and relied on in New Orleans Water-Works Co. v. Louisiana Sugar Co., 125 U. S. 35, 31 L. 614, 8 S. Ct. 750, holding provision in Federal Constitution, which declares States shall pass no laws impairing obligation of contracts, is aimed at legislative power, not at decisions of courts; rule reaffirmed in Kreiger v. Shelby Ry. Co., 125 U. S. 46, 31 L. 678, 8 S. Ct. 756, where cases are collected.

Distinguished in Delmas v. Insurance Co., 14 Wall. 666, 668, 20 L. 759, where decision in State court was based on provision in State Constitution, held to be repugnant to Federal Constitution.

14 Wall. 12-15, 20 L. 827, SEVIER v. HASKELL.

Courts.—Necessary jurisdictional facts on error from Supreme to State court stated, p. 14.

Cited on this point in the following: Delmas v. Insurance Co., 14 Wall. 666, 20 L. 759, Home Ins. Co. v. City Council, 93 U. S. 121, 23 L. 826, Daniels v. Tearney, 102 U. S. 418, 26 L. 188, and Jacoway v. Denton, 154 U. S. 584, 20 L. 645, 14 S. Ct. 1170.

Courts.—Supreme Court has no jurisdiction on error to State court decision affirming a judgment on note given for slaves, and overruling contention that contract was invalid under provision of State Constitution prohibiting remedy on slave contracts, pp. 14, 15.

14 Wall. 15-23, 20 L. 846, STEINES v. FRANKLIN COUNTY.

Courts.—To give Supreme Court jurisdiction on error to State court, it must appear in record that some one of questions stated in twenty-fifth section of judiciary act arose and was applied by State court in disposing of controversy, p. 21.

Cited and applied in Caperton v. Bowyer, 14 Wall. 237, 20 L. 885, a Federal question cannot be assumed to have been raised and passed on in State court in order to give jurisdiction to Supreme Court; New Orleans Water-Works v. Louisiana Sugar Co., 125 U. S. 29, 38, 31 L. 611, 614, 8 S. Ct. 747, 752, holding Supreme Court with-

out jurisdiction where it appears judgment in State court may have been based on ground independent of statute said to be repugnant to Federal Constitution.

Appeal and error.— Motion for rehearing is addressed to discretion of trial court, and is not subject to review on appeal, p. 22.

Rule is reaffirmed and followed in Buffington v. Harvey, 95 U. S. 100, 24 L. 382, Boesch v. Graff, 133 U. S. 699, 33 L. 788, 10 S. Ct. 379, and Grame v. Mutual Ins. Co., 154 U. S. 676, 26 L. 740, 14 S. Ct. 1198, petition for rehearing, filed in court below after judgment and denied, is no part of record to be returned to Supreme Court with writ of error for review of judgment; Bondholders v. Toledo, etc., Ry. Co., 62 Fed. 169, 18 U. S. App. 479, M'Leod v. New Albany, 66 Fed. 382, 24 U. S. App. 601, and Pittsburg Wire Co. v. Roberts, 71 Fed. 711, 39 U. S. App. 44, all holding no appeal lies from ruling of court refusing to permit defendant to take further proofs, after proofs in rebuttal have been closed; Galloway v. Dunnington, 10 Lea, 218. Approved, arguendo, in Winchester v. Winchester, 121 Mass. 130.

Courts.— Supreme Court has no jurisdiction of writ of error under twenty-fifth section of judiciary act, if judgment of State court may have been given on grounds which the section does not make cause for error, as well as upon some ground which it does so make, p. 23.

Rule reaffirmed in Kennebec Ry. Co. v. Portland Ry. Co., 14 Wall. 26. 20 L. 851. See note in 91 Am. Dec. 197.

14 Wall. 23–26, 20 L. 850, KENNEBEC R. CO. v. PORTLAND R. CO.

Courts.— Supreme Court will not entertain jurisdiction of case on error to State court, when judgment or decree below may be sustained on grounds distinct from any involving Federal questions, p. 26.

Reaffirmed in New Orleans Water-Works v. Louisiana Sugar Co., 125 U. S. 37, 38, 31 L. 614, 8 S. Ct. 751, 752, and Kreiger v. Shelby Ry. Co., 125 U. S. 46, 31 L. 678, 8 S. Ct. 756. See note, 91 Am. Dec. 197.

14 Wall. 26–28, 20 L. 792, BARTEMEYER v. IOWA.

Appeal and error.— Writ of error to State Supreme Court, composed of chief justice and several associates, must be signed by chief justice or by justice of Federal Supreme Court, p. 28.

Cited and applied in Havnor v. New York, 170 U. S. 410, 411, 42 L. 1088, 18 S. Ct. 632, where writ was dismissed because signed by an associate justice of Court of Appeals, there being no showing he was acting as chief justice pro tem. Cited, arguendo, in Felix

v. Scharnweber, 125 U. S. 59, 31 L. 689, 8 S. C
such matters the chief justice of the State c
authority, vested in him by Congress, concurrentl
the United States Supreme Court; Butler v. Gage
L. 871, 11 S. Ct. 236, holding where writ of e
judge, who styles himself "Presiding judge of S
will be presumed he acts in capacity of chief jus

14 Wall. 28–44, 20 L. 792, WARD v. UNITED S

Trial.— If plaintiff presents a written contra
part of his case, he cannot recover on the me
verbal proposal different from the written one,
so instruct jury if requested, p. 39.

Cited, arguendo, in Indianapolis, etc., Ry. Co.
299, 23 L. 900, holding it error for court to give
assume a fact unsupported by evidence.

Miscellaneous.— Miscited in State v. Burke, 33

14 Wall. 44–69, 20 L. 815, HENDERSON'S DIST

Courts.— Parties may enter into stipulation to
trict Court, and submit their cause to court upon
of facts, independent of legislative provisions on

Approved, arguendo, in Town of Lyons v. Lyo
283, 8 Fed. 372. Cited, arguendo, in Rogers v. U
S. 554, 35 L. 856, 12 S. Ct. 93, without special ap

Forfeiture.— Where forfeiture is made absol
attempt to defraud government of liquor tax, d
tion, when entered, relates back to time of com
acts; hence where claimant alleges subsequent p
that he is an innocent purchaser, it is no defe

Reaffirmed in Thacher's Distilled Spirits, 103
Boyd v. United States, 14 Blatchf. 320, F.
Mary Celeste, 2 Low. 357, F. C. 9,202, and fa
an innocent purchaser after commission of of
United States v. Stowell, 133 U. S. 17, 33 L.
holding further as to interest of mortgagee
mortgagor for illicit distilling purposes; In re
F. C. 12,066, holding the government a prefe
assets of a bankrupt who had sold matches w
stamps as required by law; United States v.
10 Ben. 372, F. C. 15,145, where bona fide p
tered by means of false invoice, was held
therein as against the United States; Heidri
Co., 6 Fed. 141, proceedings to charge propert
subsequent to commission of offense are vol

ernment; United States v. Cigars, 18 Fed. 150, where cigars in hands of bona fide purchaser were seized by government and declared forfeited because of failure of manufacturer to stamp true number of factory on boxes; Kriess v. Faron, 118 Cal. 146, 50 Pac. 389, holding a promissory note given for purchase price of property, which was subject to forfeiture under revenue laws, and was subsequently seized and condemned, was without consideration. Cited, arguendo, in dissenting opinion in Burbank v. Conrad, 96 U. S. 299, 24 L. 726, as an instance where property vested in sovereign immediately on commission of offense by subject; United States v. Auffmordt, 19 Fed. 901, in construction of statutes relating to fraudulent importation of goods; Summers v. Clark, 29 La. Ann. 102.

Distinguished in United States v. Three Hundred and Seventy-two Pipes of Spirits, 5 Sawy. 421, 424, F. C. 16,505, in construing section 3281, revised statutes, holding spirits not the subject of illicit operations, which have passed to bona fide purchasers, although owned by distiller at time of illicit operations, are not subject to forfeiture; The Kate Heron, 6 Sawy. 110, F. C. 7,619, holding, under section 4189, revised statutes, providing vessels shall be liable to forfeiture on the commission of certain offenses, property does not pass from owner until decree of condemnation.

Internal revenue.— If spirits are moved from place where distilled to bonded warehouse, with intent to defraud government of revenue tax, act is unlawful and spirits are subject to forfeiture, p. 61.

Cited in United States v. Quantity of Tobacco, 6 Ben. 83, F. C. 16,106, in discussion as to what acts amount to a sale of tobacco, so as to make same liable to forfeiture under revenue laws.

Miscellaneous.— Cited in Jeck v. Anderson, 57 Cal. 253, 40 Am. Rep. 116, holding confiscations without judicial hearing and judgment are void; Glennon v. Britton, 155 Ill. 245, 40 N. E. 598, as authority for holding goods may be seized, condemned and destroyed without service of process on owner, other than seizure of goods and arrest of person in whose possession they are found. Miscited in Bell v. Railroad Co., 34 La. Ann. 794, and Croy v. Marshall, 8 Ohio C. C. 492.

14 Wall. 69-84, 20 L. 762, CHRISTMAS v. RUSSELL.

Courts.— Circuit Court has no jurisdiction over an original, as distinguished from an ancillary, bill between citizens of same State, p. 80.

Reaffirmed in Ralston v. Sharon, 51 Fed. 709, holding further as to what facts are necessary to constitute ancillary jurisdiction. Cited in Shainwald v. Davids, 69 Fed. 703, holding party to a suit which as to him is original cannot be brought before a court in jurisdiction foreign to his residence by substituted service. Cited, argu-

endo, in Merchants v. Memphis, 9 Baxt. 87, where State or Federal court has jurisdiction of parties and subject-matter it must be allowed to proceed to judgment and execution, and cannot be enjoined by suit in other. Cited, arguendo, in Romaine v. Union Ins. Co., 28 Fed. 637, 639, and Hauf v. Wilson, 31 Fed. 390, without special application. Cited in M'Donald v. Seligman, 81 Fed. 757, and Hale v. Bugg, 82 Fed. 37, as bearing on question when lack of diversity of citizenship will not divest a Federal court of jurisdiction; Chaplin v. James, 11 R. I. 94, 23 Am. Rep. 417.

Distinguished in Osborn v. Michigan R. R. Co., 2 Flipp. 506, F. C. 10,594, Arnold v. Frost, 9 Ben. 268, F. C. 558, and Abraham v. North German Ins. Co., 37 Fed. 732, 3 L. R. A. 188, where a bill was held to be ancillary and not original; In re Sabin, 21 Fed. Cas. 124, holding District Court has jurisdiction of controversy in regard to funds in hands of assignee in bankruptcy, without regard to residence of parties in interest.

Equity — Courts.— A bill which does not relate to some matter already litigated in same court by same parties, and is not an addition to or continuance of an original suit, cannot be considered ancillary, so as to justify Circuit Court in taking jurisdiction on the strength of its jurisdiction over prior suit, p. 80.

Cited and relied on in Keyser v. Renner, 87 Va. 251, 12 S. E. 406, holding a party cannot file a supplemental bill which makes an entirely new case; Piercy v. Beckett, 15 W. Va. 451, matter which would constitute a new bill cannot be introduced under the privilege of amending. Cited, arguendo, in Hanby v. Henritze, 85 Va. 183, 7 S. E. 207, in discussion as to purposes for which supplemental bills are allowed. Cited, arguendo, in Sheffield Coal Co. v. Newman, 77 Fed. 793, 41 U. S. App. 766, without special application.

Distinguished in Webb v. Barnwall, 116 U. S. 197, 29 L. 596, 6 S. Ct. 352, where a bill to enjoin the enforcement of a judgment at law in same court was held ancillary; Smythe v. Henry, 41 Fed. 713, holding bill ancillary which was filed to enjoin the prosecution of an action of ejectment between same parties in same court.

Assignment.— Phraseology employed in making assignment is not material, provided intent to transfer is manifested, p. 84.

Reaffirmed in Clark v. Sigua Iron Co., 81 Fed. 312, 39 U. S. App. 753; Holmes v. Evans, 129 N. Y. 145, 29 N. E. 234, holding there must be a purpose to pass a present interest, absolute or qualified.

Assignment.— To be valid, even as an equitable assignment, the transfer must be of such a character that the fundholder may safely pay, and is compellable to do so, though forbidden by assignor, p. 84.

Cited and applied in Freights of The Kate, 63 Fed. 712, holding the hypothecation of freights earned and to be earned by a steamship company, as consideration for advances made, created a lien

on all freights of the line; Maier v. Freeman, 112 Cal. 13, 53 Am. St. Rep. 154, 44 Pac. 358, an agreement that mortgagor of personal property shall sell same and pay proceeds to mortgagees, cannot be held to create an equitable assignment of proceeds of sale to mortgagees; Coates v. First Nat. Bank, 91 N. Y. 31, holding it not necessary to validity of assignment that fundholder be informed thereof (for opposite rule see Lane v. Magdeburg, 81 Wis. 348, 51 N. W. 564); Sandmeyer v. Dakota, etc., Ins. Co., 2 S. Dak. 352, 50 N. W. 354, unless debtor transfers absolute legal and equitable title of property to third person for benefit of his creditors, the relation of such third person to debtor is that of an agent; Seymour v. Aultman, — Iowa, —, 80 N. W. 402, where evidence was held not to show valid assignment. Cited, arguendo, in Skobis v. Ferge, 102 Wis. 131, 78 N. W. 428, as to notice necessary to be given fundholder.

Assignment.— A bill of exchange or check is not an equitable assignment, pro tanto, of funds of drawer in hands of drawee, p. 84.

Cited and applied in Laclede Bank v. Schuler, 120 U. S. 516, 30 L. 706, 7 S. Ct. 647, reversing S. C., 27 Fed. 425, holding check or draft does not bind funds in hands of bank until it has notice of same by presentment or otherwise; to same effect, Boettcher v. Colorado Bank, 15 Colo. 22, 24 Pac. 584, holding further, without acceptance there is no privity between payee and bank so that former can maintain suit against latter. Rule reaffirmed in Dickinson v. Coates, 79 Mo. 252, 49 Am. Rep. 230. See note in 45 Am. Rep. 355, 356.

Assignment.— An agreement to pay out of a particular fund is not an equitable assignment, p. 84.

Cited and relied on in Dillon v. Barnard, 21 Wall. 440, 22 L. 677, and Removal Cases, 100 U. S. 477, 25 L. 600, both holding the mere promise by an employer to pay a contractor for work performed out of a particular fund gave contractor no lien thereon. Rule reaffirmed in Ex parte Tremont Nail Co., 24 Fed. Cas. 184, Silent Friend Min. Co. v. Abbot, 7 Colo. App. 76, 42 Pac. 319, and Putnam Sav. Bank v. Beal, 54 Fed. 579, to constitute an equitable assignment of property there must be an appropriation or separation, and mere intent is insufficient; Badgerow v. Manhattan Co., 74 Fed. 926, where there was an agreement to transfer a certain number of bonds at a future date, no particular bonds being specified; Commercial Bank v. Rufe, 92 Fed. 795, where an agreement between attorney for a debtor prosecuting a suit in his favor, and attorney for debtor's creditor, that any recovery should be for creditor's benefit, was held not an equitable assignment as against a prior assignee of the recovery from debtor, who had no knowledge thereof; Foss v. Cobler, 105 Iowa, 731, 75 N. W. 517, holding equitable assignment not created by a letter from a party to her law-

yer, directing him to protect her interests, and take his pay out of money belonging to her, which he has in his possession; Stearns v. Quincy Ins. Co., 124 Mass. 63, 26 Am. Rep. 649, rule applied to an agreement by a mortgagor to keep property insured for benefit of mortgagee; Hale v. Dressen, — Minn. —, 78 N. W. 1046, and Fairbanks v. Welshans, 55 Neb. 385, 75 N. W. 873, a promise by debtor to pay his creditor out of designated fund, of which debtor retains control, is a personal agreement only; and to same effect are Williams v. Ingersoll, 89 N. Y. 518, Bank v. Williams, 79 N. C. 137, and Feamster v. Withrow, 9 W. Va. 313; Hicks v. Roanoke Brick Co., 94 Va. 746, 27 S. E. 598, mere promise of assignee of fund not in hand that he will, when he receives fund, pay a debt of assignor, does not give an equitable lien on fund; Hossack v. Graham, 20 Wash. 192, 55 Pac. 38, holding an agreement in a mortgage that mortgagor will set aside a certain per cent. of proceeds received from sale of lands not included in mortgage as a fund for payment of mortgage debt, does not create a lien on lands not expressly mortgaged. Referred to, arguendo, in Walker v. Seigel, 29 Fed. Cas. 50, where general rules as to when an order drawn on a general or particular fund operates as an assignment are given; Delaware Co. v. Davenport, etc., Ry. Co., 46 Iowa, 412, and Plymouth Cordage Co. v. Seymour, 67 Minn. 315, 69 N. W. 1081, without special application; Geist's Appeal, 104 Pa. St. 355, holding the partial assignment of a claim upon a municipal corporation is not binding on the corporation; Dirimple v. State Bank, 91 Wis. 606, 65 N. W. 503. See monographic note on assignment of part of a demand, 2 Am. St. Rep. 473, 474.

Assignment.— An order to pay out of a specified fund is a valid assignment in equity, p. 84.

Rule reaffirmed and followed in Union Ins. Co. v. Glover, 2 Hask. 530, 9 Fed. 532, where an order from assured to company, requesting payment of specified sum to holder from amount due on insurance policy, was held equitable assignment; The Elmbank, 72 Fed. 615, holding order to pay a third party a specified amount out of whatever may be received for salvage services is enforceable in admiralty as an equitable assignment; Carroll v. Kelly, 111 Ala. 665, 20 So. 458, holding agreement whereby a legatee who purchased the interest of another legatee agreed that in case he did not pay, the executor should pay out of proceeds of property, he, purchaser, was entitled to under will, constituted an equitable lien in favor of vendor legatee on property purchaser was entitled to under will; Central Bank v. Spratlen, 7 Colo. App. 433, 434, 43 Pac. 1049, where order to "pay S. five hundred dollars out of money due me from city, assigned to you," was held equitable assignment; Seattle v. Liberman, 9 Wash. 288, 37 Pac. 437, holding an order directing city comptroller to pay assignee amount due assignor from city on a grading contract, is valid equitable assignment; Young v. Jones, 180

Ill. 220, 54 N. E. 236, where order by contractor on county clerk to pay out of fund due him was held valid assignment. Cited, arguendo, in Exchange Bank v. McLoon, 73 Me. 509, 40 Am. Rep. 393, holding an assignment of part of a chose in action valid in equity; James v. Newton, 142 Mass. 377, 56 Am. Rep. 699, 8 N. E. 127, holding there may be an assignment of a part of an entire debt in equity without consent of debtor.

Miscellaneous.— Cited in Brooks v. Memphis, 4 Fed. Cas. 286, and Switzer v. Noffsinger, 82 Va. 521, not in point.

14 Wall. 85–87, 20 L. 786, HURLEY v. STREET.

Courts.— To give Supreme Court jurisdiction on error to State court, some question, under twenty-fifth section of judiciary act, must have been involved, p. 86.

Not cited.

14 Wall. 87–96, 20 L. 832, TRADERS' BANK v. CAMPBELL.

Bankruptcy.— Any act committed after approval of bankruptcy act of March, 1867, in fraud of purpose of act, was within its prohibitions, although no proceedings under act could be commenced before June, 1867, p. 94.

Cited and relied on in Blake v. Francis Co., 89 Fed. 695, holding relations of debtor and creditor and those between creditors are governed by provisions of act of 1898 from date of its passage. Cited, arguendo, in In re Jacobs, 13 Fed. Cas. 273, where probable consequences of an act is to give a preference, debtor will be conclusively presumed to have intended to give such preference.

Bankruptcy.— In suit by assignee in bankruptcy to recover proceeds of goods sold under judgment by confession in State court against bankrupt, another person who had a like judgment and execution levied on same goods is not a necessary party to the suit, when without the jurisdiction of Federal court, p. 95.

Cited and relied on in Fisher v. Shropshire, 147 U. S. 146, 37 L. 116, 13 S. Ct. 206, in discussion as to when presence of a proper party to a proceeding is not absolutely a necessity; to same effect, McPike v. Wells, 54 Miss. 156. Cited, arguendo, in Penn v. Edwards, 50 Ala. 64, as to proper pleadings in bankruptcy proceedings.

Distinguished in State v. Burke, 33 La. Ann. 505, holding no adjudication can take place in absence of essential parties.

Bankruptcy.— Where proceeds of bankrupt's property have been seized and sold under a judgment confessed in a State court, or otherwise disposed of as a fraudulent preference, assignee may bring suit in chancery for recovery thereof, p. 96.

Cited in Flanders v. Abbey, 6 Biss. 19, F. C. 4,851, where it is held United States Circuit Court has jurisdiction of bill by assignee

to recover property of bankrupt preferentially or fraudulently conveyed; Southern v. Fisher, 6 S. C. 350, holding no action can be maintained in State courts against assignee in bankruptcy to enjoin collection of assets. Cited in Goodenow v. Milliken, 1 Hask. 356, F. C. 5,535, Cady v. Whaling, 7 Biss. 437, F. C. 2,285, and Harmanson v. Bain, 1 Hughes, 201, F. C. 6,072, as an instance where assignee recovered, in equity, money paid by a debtor to his creditor as a fraudulent preference under bankruptcy act.

Distinguished in Robinson v. Wisconsin, etc., Bank, 9 Biss. 124, 126, F. C. 11,969, payment of note held against bankrupt by bank in which he had money deposited, held not fraudulent preference.

Bankruptcy.— Where bank in whose favor bankrupt has entered judgment by confession, invalid as creating a fraudulent preference, does not elect to set off against its claim certain money and notes of the bankrupt deposited with it, but instead takes a bankrupt's check for the money and hands over to sheriff the proceeds of the notes to be by him levied on, the transaction as to the money and notes is also invalid as a fraudulent preference, p. 97.

Cited and relied upon in Martin v. Toof, 1 Dill. 211, F. C. 9,167, Alderdice v. State Bank, 1 Hughes, 56, F. C. 154, and Blair v. Allen, 3 Dill. 109, F. C. 1483, a bank holding an indorsed note may set off same against general deposit account of maker; Schrenkeisen v. Miller, 9 Ben. 65, F. C. 12,480, arguendo.

14 Wall. 98–109, 20 L. 804, THE THAMES.

Shipping.— Bill of lading, delivered to shipper, not the one retained by ship, will be considered as only true evidence of contract entered into between ship and shipper, p. 105.

Cited and relied on in Espey v. Blanks, 9 Fed. 432, holding parol evidence inadmissible to alter terms of bill of lading; The Saugerties, 44 Fed. 629, holding vessel cannot be compelled to deliver goods on the master's copy of bill of lading while the original bill is outstanding; Dyer v. Fredericks (appendix), 63 Me. 593; note, 38 Am. Dec. 408.

Distinguished in Robinson v. Memphis, etc., Ry. Co., 9 Fed. 141, holding carrier is not estopped from showing that no goods in fact were delivered for transportation.

Shipping.— Where bill of lading provides goods are to be delivered to order, ship becomes bound to deliver to no one who has not shipper's order, and it is no excuse where goods have been delivered to wrong party, that indorsee of bill was unknown, p. 107.

Cited and relied on in North Penn. Ry. Co. v. Commercial Bank, 123 U. S. 735, 31 L. 290, 8 S. Ct. 270, a similar state of facts, though shipment was by rail; Wells-Fargo Co. v. Oregon, etc., Co.,

12 Sawy. 525, 32 Fed. 54, holding carrier liable for goods delivered to parties other than those claiming under shipping receipt; Warner v. Illinois, 29 Fed. Cas. 259, holding carrier liable for so delivering goods that they were mixed with those of another party and lost; Walters v. Western Co., 66 Fed. 868, 30 U. S. App. 25, affirming S. C., 63 Fed. 393, holding carrier liable for goods delivered to purchaser from consignee, carrier not having required the bill of lading to be delivered up; Bank v. Cummings, 89 Tenn. 617, 24 Am. St. Rep. 623, 18 S. W. 117, reaffirming rule; note, 38 Am. Dec. 418, and 9 Am. St. Rep. 512.

Shipping.— Where consignee of goods or indorsee of bill of lading for delivery to order cannot be found, it is duty of carrier to retain goods until claimed, or store them for and on account of owner, p. 107.

Rule reaffirmed in The Ravensdale, 75 Fed. 413, and Providence Warehouse Co. v. Providence, etc., Ry. Co., 19 R. I. 425, 34 Atl. 740.

Shipping.— Indorsee of bill of lading may libel ship for failure to deliver goods, though he be but agent or trustee of goods for others, e. g., cashier of a bank, p. 108.

Reaffirmed in The Director, 13 Sawy. 186, 34 Fed. 66, where holders of bill of lading were held entitled to maintain action for damages to cargo, although they did not have general property in. See note, 38 Am. Dec. 423.

Carriers.— The legal title to goods is in party to whom bill of lading is made or indorsed, p. 108.

Cited and applied in Balfour v. Wilkins, 5 Sawy. 438, F. C. 807, holding indorsee of bill of lading holds legal title to goods free from lien for demurrage; for opposite rule, see Neilsen v. Jesup, 30 Fed. 139, and The Nora, 14 Fed. 432, both holding indorsees may maintain action for wrongful delivery; Forbes v. Boston, etc., Ry. Co., 133 Mass. 156, holding the indorsee of an inland bill of lading may maintain action against one who wrongfully converts goods; and to same effect is Union Pac. R. Co. v. Johnson, 45 Neb. 64, 50 Am. St. Rep. 544, 63 N. W. 146; McCantes v. Wells, 4 S. C. 387, and Nat. Bank v. Railway Co., 25 S. C. 223, both holding bill of lading a negotiable instrument, and when indorsed and delivered transfers property in goods to indorsee. Cited, arguendo, in Bass v. Glover, 63 Ga. 746, and Ratzer v. Burlington, etc., Ry. Co., 64 Minn. 247, 58 Am. St. Rep. 532, 66 N. W. 989, both holding carrier may exact production of bill of lading before making delivery of goods to consignee; Hallgarten v. Oldham, 135 Mass. 8, 46 Am. Rep. 434, without special application; note, 38 Am. Dec. 420.

Miscellaneous.— Referred to incidentally in Horrell v. Parish 26 La. Ann. 9.

14 Wall. 109–112, 20 L. 764, B

Courts.— Fourth and fifth
appeals from Court of Claims,
secure a finding of fact on an
court, p. 112.

Cited and applied in United
(app.), 24 L. 596, where reques
for a finding was refused, that
to make finding in accordance w

Courts.— Failure of Court of
it to be, does not justify bringing
Supreme Court, p. 112.

Cited and relied on in Collier
S. Ct. 331, holding findings of f
conclusive.

14 Wall. 113–116, 20 L. 785, FOU

Wills.— A probate, in Louisian
ciled in New York, is valid till set
decision of New York court on
founded, has been reversed, p. 114.

Wills.— Purchaser of Louisiana
probated in Louisiana as well as in
is not affected by subsequent ex pa
which he is not a party, setting w
collusive judgment to that effect in

Cited and relied on in Brown v. B
will was admitted to probate and le
but will was subsequently set asi
executors in due course of administ
are valid; Reeves v. Hager, 101 Te
title of purchaser from devisee unde
held superior to that of heir who sub

Distinguished in Fallon v. Chideste
168, holding where one purchases prop
an invalid will, he does not occupy
purchaser without notice as to lawfu

Miscellaneous.— Cited, but not in p
368.

14 Wall. 116–120, 20 L. 787, THE BR

Collision.— Steamer which deviated
from course usually followed by vessels
another vessel lying at a wharf, held li
thereby, p. 119.

Cited and relied on in The Virginia Ehrman, 97 U. S. 315, 24 L. 893, as authority for holding vessels in motion are required to keep out of way of vessels at anchor; The Steamboat Shady Side, 8 Ben. 425, F. C. 12,691, a case similar in fact to principal case.

Collision.— Where boat is fastened out of proper path of vessels navigating a port, she is not bound, in absence of regulations, to keep a light on deck, p. 120.

Rule reaffirmed in Hadden v. The J. H. Rutter, 35 Fed. 366, holding boats moored alongside wharf in usual manner not in way of other boats, are not required to exhibit lights; Humphreys v. Warner Co., 45 Fed. 272, and Railroad Co. v. Transportation Co., 32 Ohio St. 136.

Distinguished in Shields v. Mayor, 18 Fed. 750, where vessel was moored not entirely out of way of vessels landing at a pier, and further it was the custom to display a light.

14 Wall. 120–151, 20 L. 765, ARMSTRONG v. MORRILL.

Ejectment.— Judgment in favor of single plaintiff sustained where some counts alleged possession in himself alone, others in himself jointly with others, no objection having been taken at trial, p. 138.

Trusts.— Mere making of a trust deed does not vest trustee with title; the trust must be accepted, p. 139.

Cited and applied in Elliott v. Hobbs, 2 Colo. App. 171, 30 Pac. 55, holding assignment for creditors ineffectual when assignee accepts conditionally but repudiates before obtaining possession of assets. Rule reaffirmed in F. G. Oxley Stave Co. v. Butler Co., 121 Mo. 639, 26 S. W. 373.

Public lands.— Under Virginia act of 1788 authorizing grants with reservation of claims included in surveys then made, reservation includes lands claimed under inchoate as well as perfect grants, p. 143.

Cited and relied on in Halsted v. Buster, 140 U. S. 275, 277, 35 L. 484, 485, 11 S. Ct. 782, 783, in construing Virginia statute relating to forfeiture of lands for non-payment of taxes, holding statute did not operate to transfer such lands to holder of an "inclusive grant" within limits of which grant they were situated, and whose patent was subsequent to that of patentees of forfeited lands; to same effect in Reusens v. Lawson, 91 Va. 252, 21 S. E. 355, Bryan v. Willard, 21 W. Va. 72, and Stockton v. Morris, 39 W. Va. 438, 439, 19 S. E. 532, 533, reaffirming rule. Cited, arguendo, in Farnsworth v. Duffner, 142 U. S. 52, 35 L. 935, 12 S. Ct. 167, and Patrick v. Dryden, 10 W. Va. 418.

Adverse possession.— Where lands of A., in adverse possession of B., were forfeited to State for non-payment of taxes but after-

wards redeemed by A., forfeiture operates to break continuity of adverse possession, although possession was continuous in fact, and, therefore, destroys B.'s title claimed on this ground, p. 145.

Cited and applied in Depurton v. Young, 134 U. S. 254, 33 L. 929, 10 S. Ct. 544, holding possession to bar recovery must be continuous, uninterrupted, open, notorious, actual, exclusive and adverse; Ward v. Cochran, 150 U. S. 606, 37 L. 1197, 14 S. Ct. 233, where party relies on adverse possession as defense to action of ejectment, he must show actual and exclusive possession, not constructive, or possession in participation with others; Braxton v. Rich, 47 Fed. 188, reaffirming rule that statute of limitations does not run against the State; Gould v. Carr, 33 Fla. 534, 15 So. 263, 24 L. R. A. 135, holding where party yields possession under pressure of legal procedure to oust him, the continuity of possession is thereby broken; Allis v. Field, 89 Wis. 333, 62 N. W. 87, any interruption or discontinuance of possession of wrongdoer, by operation of law restores the seisin and possession of rightful owner. Cited, arguendo, in Shearer v. Middleton, 88 Mich. 630, 50 N. W. 740, as an authority for holding adverse possession may be interrupted by other means than by bringing suit; Straus v. Imperial Ins. Co., 94 Mo. 188, 4 Am. St. Rep. 372, 6 S. W. 700, in defining the word "notorious." Approved, arguendo, in Parkersburg Co. v. Schultz, 43 W. Va. 475, 27 S. E. 256, in extended discussion of subject of acquisition of title by adverse possession; note, 3 Am. Dec. 242.

Distinguished in Harrison v. Dolan, 172 Mass. 396, 52 N. E. 513, where statute of limitations runs against the Commonwealth as well as against private persons; Casey v. Anderson, 17 Mont. 171, 172, 174, 42 Pac. 761, 762, 763, where title did not become absolutely revested in the government; Griffith v. Smith, 27 Neb. 50, 42 N. W. 750, holding one in adverse possession of land does not impair his right to rely on statute of limitations by purchasing land at tax sale and receiving deed therefor.

Miscellaneous.— Cited incidentally in King v. Mullins, 171 U. S. 414, 18 S. Ct. 929, and State v. Sponaugle, 45 W. Va. 426, 32 S. E. 288, 43 L. R. A. 733.

14 Wall. 152-170, 20 L. 877, EX PARTE NEWMAN.

Mandamus.— Where subordinate court refuses to hear and determine cause over which it has jurisdiction, remedy is by mandamus to compel action, p. 165.

Rule reaffirmed in Railroad Co. v. Wiswall, 23 Wall. 508, 23 L. 104, and writ of error to review what has been done, there being no final judgment, will be dismissed; Harrington v. Holler, 111 U. S. 797, 28 L. 603, 4 S. Ct. 697, Jones v. Oceanic Nav. Co., 11 Blatchf. 412, F. C. 7,485, and Cowan v. Fulton, 23 Gratt. 585, approve and follow the rule; State v. Williams, 69 Ala. 316, but there will be no direction as to the manner in which the duty is to be performed;

State v. Young, 31 Fla. 601, 34 Am. St. Rep. 44, 12 So. 675, 19 L. R. A. 638, holding mandamus the proper remedy to compel a judge to hear a cause which he has erroneously refused to hear on ground that he is without jurisdiction; State v. Philips, 97 Mo. 342, 10 S. W. 859, 3 L. R. A. 480, and n., holding mandamus lies from Supreme Court to correct erroneous and arbitrary exercise of discretion by Court of Appeals; Page v. Clopton, 30 Gratt. 424, holding writ will lie to compel judge to sign bill of exceptions in case, if "truth of case be fairly stated therein." Cited, arguendo, in State v. Walker, 25 Fla. 573, 6 So. 172, the case goes off on other grounds.

Distinguished in State v. Judge, 33 La. Ann. 269, 270, and State v. Common Pleas, 38 N. J. L. 184, mandamus cannot be used to control the exercise of discretion of inferior court.

Mandamus.— Where District Court in admiralty took jurisdiction of libel for seamen's wages against Prussian ship, but Circuit Court on appeal decided it had no jurisdiction, because by treaty consul was given exclusive jurisdiction in such a case, and dismissed the libel, mandamus will not lie from Supreme Court to compel decision on merits, p. 169.

Cited and applied in Ex parte Railway Co., 101 U. S. 720, 25 L. 875, holding the Supreme Court will not by mandamus revise the action of inferior courts acting within scope of their authority; Amer. Const. Co. v. Jacksonville Ry. Co., 148 U. S. 379, 37 L. 489, 13 S. Ct. 761, writ of mandamus cannot be used to perform office of an appeal or writ of error; Ewing v. Cohen, 63 Tex. 485, holding mandamus cannot be used to revise judgment of an inferior court, dismissing an appeal for want of sufficient bond.

Miscellaneous.— Cited incidentally in The Belgenland, 114 U. S. 364, 29 L. 155, 5 S. Ct. 864.

14 Wall. 170-189, 20 L. 822, THE SCOTIA.

Collision.— Where position of steamship and sailing vessel involves risk of collision, steamship must keep out of way of sailing vessel, and vessel must keep her course, p. 181.

Cited and applied in The Free State, 91 U. S. 204, 205, 23 L. 301, holding steamship not responsible for a collision which caused loss of sailing vessel, where vessel changed her course after sighting steamer; The Servia, 149 U. S. 154, 37 L. 685, 13 S. Ct. 821, and The New York, 53 Fed. 557, where steamship was held not liable for damages caused to another by collision, the former being justified in assuming the latter would pursue her customary course, which would avert collision; The Britannia, 153 U. S. 144, 38 L. 665, 14 S. Ct. 800, affirming S. C., 34 Fed. 551, holding same principles should be applied in case of meeting of two steamers; The Nacoochee, 24 Blatchf. 105, 28 Fed. 464, and The Fred. W. Chase, 31 Fed.

95, assuming vessels observed rules of navigation, it devolves upon steamer, in case of collision, to show inevitable accident. Referred to in M'Williams v. The Vim, 12 Fed. 914, but without special application. See monographic note, 75 Am. Dec. 603.

Distinguished in Philadelphia, etc., Ry. Co. v. Adams, 89 Pa. St. 35, 33 Am. Rep. 724, holding steamer is not obliged to keep out of way of a rowboat.

Collision.—Where vessels are proceeding towards each other neither is under obligation to take precautions to avoid a collision until danger of collision should be apprehended, p. 181.

Cited and applied in The Manitoba, 2 Flipp. 254, F. C. 9,029, holding there is no obligation to slacken speed until it appears vessels are closing in on each other; to same effect in Kennedy v. Sarmatian, 5 Hughes, 160, 2 Fed. 918, The Louise, 52 Fed. 888, 8 U. S. App. 138, and The Oceanic, 61 Fed. 359, errors committed by one vessel do not excuse the other from adopting every proper precaution to prevent collision; and to same effect is The Victory, 68 Fed. 399, 25 U. S. App. 271. Approved, arguendo, in The Ellen Holgate v. Illinois, 8 Fed. Cas. 514, and The F. & P. M. No. 2, 36 Fed. 269, both holding as to duties of vessels in passing when both are proceeding in same direction.

Torts.— Whether act is tortious or not must generally be determined by laws of place where act was committed, but American vessels on the high seas are for some purposes considered a part of American territory, p. 184.

Approved in The Lamington, 87 Fed. 753, 754, in discussion as to what law governs in case of a tort committed on a foreign vessel on the high seas.

Collisions.— Persons in charge of vessels will not be held at fault for collisions on the high seas when they have observed the rules of navigation prescribed by their own government, p. 185.

Reaffirmed, arguendo, in The Belgenland, 114 U. S. 369, 370, 29 L. 157, 5 S. Ct. 867, and The Golden Grove, 13 Fed. 702, both holding section 4234, revised statutes, requiring sail vessel on approach of steamer at night to show a lighted torch, is as applicable to navigation on sea as to inland navigation.

Collision.— A sailing vessel which does not carry the lights prescribed by law for such craft, but carries a light which causes her to be mistaken for a steamer, is without remedy, if in consequence of such mistake she collides with a steamer on the high seas and is destroyed, p. 188.

Cited and relied on in The St. John, 54 Fed. 1020, holding a steamer not liable for colliding with a barge on a dark, rainy night, the barge having displayed no lights and being in usual way of travel.

Admiralty.— Rules and regulations adopted by principal commercial nations for government of vessels on high sea, are part of general maritime law; hence the rules of navigation of British orders in council of 1863, concurred in by nearly all the commercial nations of the world, will be deemed part of law of nations, pp. 187, 188.

Reaffirmed in The Belgenland, 114 U. S. 370, 29 L. 157, 5 S. Ct. 867, Richelieu Nav. Co. v. Boston Ins. Co., 136 U. S. 422, 34 L. 403, 10 S. Ct. 937 (affirming S. C., 26 Fed. 601), dissenting opinion in The Britannia, 153 U. S. 150, The Oregon, 158 U. S. 201, 39 L. 951, 15 S. Ct. 811, Thomassen v. Whitwell, 9 Ben. 408, F. C. 13,929, In re Long Island Transportation Co., 5 Fed. 622, 623, and The New York, 175 U. S. 197. Referred to, arguendo, in The Brantford City, 29 Fed. 385, holding "law of the flag," so far as it differs from general maritime law, has no authority abroad.

Evidence.— Supreme Court will take judicial notice of the law of nations, p. 188.

Cited in State v. Gramelspacher, 126 Ind. 404, 26 N. E. 83, as authority for holding courts will take judicial notice of acts of Congress; The Paquete Habana, 175 U. S. 712, where court took judicial notice of law of nations relating to status of fishing vessels in time of war. See note, 11 Am. Dec. 781, and monographic note reviewing authorities, 89 Am. Dec. 664, 670.

Collision.— American sailing vessel failing to carry lights required by act of Congress, cannot absolve herself from blame for collision with English steamer on plea that the act of Congress was a mere municipal regulation, of which English steamer could not avail herself, pp. 183–188.

Miscellaneous.— Cited in Hilton v. Guyot, 159 U. S. 163, 40 L. 108, 16 S. Ct. 143, as to rules for determination and construction of international laws. Erroneously cited in Dogge v. Nat. Ins. Co., 49 Wis. 504, 5 N. W. 891, and in note, 35 Am. Rep. 76.

14 Wall. 189–199. 20 L. 834. THE JAVA.

Collision.—Steamer pursuing, in crowded harbor, a channel not usually occupied by vessels of her size, is bound to use every precaution to avoid accident, but having done so, is not liable for collision with small schooner not visible till close aboard, p. 188.

Referred to in The Fred. W. Chase, 31 Fed. 94, as authority for holding a steamer has a right under all circumstances to use the channel of a harbor, provided she observes the law of the road.

Distinguished in The Hudson City, 38 Fed. 447, where in collision between ferry-boat and schooner, the former was under circumstances held to blame.

14 Wall. 199-204, 20 L. 873, THE MERRIMAC.

Collision.— For negligence or want of skill in management of boat the owner is responsible, notwithstanding a license pilot was in charge, p. 202.

Rule reaffirmed and followed in The E. M. Norton, 15 Fed. 688, also in The F. C. Latrobe, 28 Fed. 379, both holding municipality liable for damages caused by its boat in rendering gratuitous services to another vessel; The Shubert v. The Brown, 45 Fed. 503, approves the rule, arguendo. See notes, 45 Am. Dec. 57, and 75 Am. Dec. 612.

Cited in Ramsdell Co. v. Compagnie Generale Transatlantique, 63 Fed. 850, where modifications of rule are suggested.

Collision.— Precautions to prevent collisions must be seasonable, and it is no defense to say that nothing could be done at moment of collision to prevent vessels from coming together, p. 203.

This rule is reaffirmed in The Wenona, 19 Wall. 54, 22 L. 59, where steamer was held liable for damages caused by collision with a sailing vessel; The Merrimac, 2 Sawy. 597, F. C. 9,478, holding tug responsible for loss of a scow which it had been towing, the master of tug not having exercised due skill in attempting voyage. See note, 1 Woods, 367, F. C. 9,594, and monographic note, 75 Am. Dec. 605.

Collision.— Steamer held at fault for attempting to pass through space little wider than herself and the tugs alongside, pp. 200-204.

Miscellaneous.— Cited in The John G. Stevens, 170 U. S. 122, 42 L. 973, 18 S. Ct. 548, not in point.

14 Wall. 204-216, 20 L. 881, THE MABEY AND COOPER.

Collision.— Where those in charge of a tug and tow respectively, jointly participate in their control and management, both vessels are liable for damages as result of collision with another vessel, p. 211.

Rule reaffirmed and followed in The Virginia Ehrman, 97 U. S. 313, 24 L. 892, where tug and tow were held jointly responsible; also, to same effect is The Doris Eckhoff, 32 Fed. 559, and Cumberland County v. Tow-Boat Co., 90 Me. 99, 60 Am. St. Rep. 249, 37 Atl. 868, all holding fact that suit is pending against tug for an injury does not prevent a suit against tow for same injury. Cited in The Belknap, 2 Low. 285, F. C. 1,244, as giving summary of law of this country relating to collision between vessels when one is in tow; The Kallisto, 2 Hughes, 144, F. C. 7,600, and The Express, 46 Fed. 861, without particular application.

Distinguished in The Doris Eckhoff, 50 Fed. 137, 1 U. S. App. 29, reversing S. C., 32 Fed. 559, where, under facts, it was held sole management of tug and tow was with master of tug.

Collision.— Inevitable accident is that which party charged with offense could not possibly prevent by exercise or ordinary care, caution or nautical skill, p. 215.

This definition is approved and adopted in Arbo v. Brown, 9 Fed. 319, and The Mary Cushing, 60 Fed. 111, where breaking loose of steamer from its mooring during storm and inflicting damage on other shipping was held inevitable; The Olympic, 52 Fed. 991, where collision due to parting of a tiller rope was held inevitable.

Distinguished in The Columbia, 48 Fed. 326, and The Bowden, 78 Fed. 651, 42 U. S. App. 374, where it was held sufficient caution had not been observed to avoid danger.

Collision.— Where collision occurs exclusively from natural causes, without negligence or fault of either party, the loss must rest where it fell, p. 215.

Followed in The Florence P. Hall, 14 Fed. 416, holding further as to burden of proof where inevitable accident is alleged.

Collision.— In considering improbabilities of amended answer in libel for collision, fact that original answer also contained palpable errors, was accorded weight, p. 216.

Cited in The Sunnyside, Brown Adm. 239, F. C. 13.620, holding where original libel set up a grossly false case this will essentially affect the right to relief.

14 Wall. 216-237, 20 L. 882, CAPERTON v. BOWYER.

Courts.— Unless it clearly appears from record that State court decided questions relied on to give jurisdiction in Supreme Court, and in way required, writ of error will be dismissed. Hence instruction by trial judge that a certain period should be excluded from computation of statute of limitations does not impliedly involve a finding that the State statute on that point was consistent with the Federal Constitution, pp. 231-235.

Cited in 13 Am. Dec. 370, note on war as stopping statute of limitations.

Courts.— On error from Supreme Court, certificate of presiding justice of highest State court as to what question was raised, is of great weight; but if court had nothing before it which could raise such question, certificate is not conclusive, p. 234.

Cited and applied in Powell v. Brunswick County, 150 U. S. 439, 37 L. 1136, 14 S. Ct. 168, holding the determination of jurisdiction of Supreme Court to review judgment of State court devolves on Supreme Court itself. Cited, arguendo, in Snell v. Dwight, 121 Mass. 349.

Miscellaneous.— Miscited in Crescent Stock Co. v. Butchers' Union, 120 U. S. 146, 30 L. 617, 7 S. Ct. 474.

14 Wall. 238–243, 20 L. 885, CAPERT(

Courts.— What must be shown to
diction on error to State court, unde
tion which provides that full faith
to public acts of every other, discuss

No citations.

14 Wall. 244–252, 20 L. 797, GIBSON

Chattel mortgages.— Seal is not
a chattel mortgage, and if attached,

Cited and applied in Sterling v. Bo
holding the attachment of a seal to
quired to be under seal, is without

Distinguished in Sibley & Co. v. Y
where partnership instrument unde
to be under seal.

Partnership.—Mortgage executed
clause reciting that "R. M. & Sons
and seals, may be regarded as the
that, prior to its execution, firm h
ecution had acquiesced therein, p.

Cited and relied on in Ferguson v.
749, holding a deed to partnership p
in presence of his co-partner and w
effectual conveyance of land; Jeff
where bond executed under circu
partnership bond. Cited in collec
power of one partner to bind firm,
38 Am. Rep. 78.

Distinguished in Herzog v. Sa
partner cannot bind his co-partne
seal in firm name and style, simp
partner.

Bankruptcy.— Assignees stand i
his rights which are subordinate
table, upon property in question,

Cited and relied on in Yeatman
766, 24 L. 590, where property o
good faith for value; Creswell v.
855, holding commissioners appoin
institution have no right to secu
insolvency to secure its debts; St
L. 818, Keller v. Harris, 63 Tex.
368, Douglass v. Vogeler, 6 Fed. 5
667, all holding failure to record

validity between parties thereto, or between mortgagee and the assignee in bankruptcy of mortgagor; Casey v. La Societe Credit Mobilier, 2 Woods, 84, F. C. 2,496, applying principle to receiver of insolvent national bank. Approved, arguendo, in Longstreth v. Pennock, 20 Wall. 576, 22 L. 452, in construing Pennsylvania statute relative to lien given landlord for rents; Burnhisel v. Firman, 22 Wall. 178, 22 L. 769, where a mortgage given in satisfaction of a prior mortgage, although made within four months of time of decree of bankruptcy, was held to be a preferred lien on assets of bankrupt; In re Collins, 12 Blatchf. 552, F. C. 3,007, holding under facts, assignee cannot attack chattel mortgage given by bankrupt, although same was not recorded until after mortgagor was adjudged insolvent; Platt v. Stewart, 13 Blatchf. 500, 501, F. C. 11,220, where liens by execution were upheld as valid against assignee; Reber v. Gundy, 13 Fed. 56, holding judgment confessed for debt already secured by valid lien is not impeachable as a fraudulent preference; In re Windhorst, 107 Iowa, 62, 77 N. W. 515, and Lindemann v. Ingham, 36 Ohio St. 11, mortgagee's lien follows fund derived from sale of mortgaged property by assignee.

Approved, arguendo, in Schweizer v. Tracy, 76 Ill. 351, and Brown v. Deford, 83 Md. 311, 34 Atl. 789, without special application; Martin v. Bowen, 51 N. J. Eq. 458, 26 Atl. 825, where unrecorded equitable charge upon land given for full consideration, moving at date of creation, was held entitled to priority over subsequent legal mortgage given to secure prior indebtedness; Collender Co. v. Marshall, 57 Vt. 235. See note, 31 Am. Dec. 256.

Distinguished in Edmondson v. Hyde, 2 Sawy. 215, 216, F. C. 4,285, holding mortgages and bills of sale of personal property, which are void as to creditors under statute of frauds of State where transactions occur, are void as to assignee in bankruptcy; dissenting opinion in Cone v. Ivinson, 4 Wyo. 254, 35 Pac. 942.

Bankruptcy.— Section 35 of the bankruptcy act of 1867, relating to transfer of property by insolvent in defraud of creditors, construed, p. 248.

Construction adopted in Shearman v. Bingham, 1 Holmes, 273, F. C. 12,732, holding assignee in bankruptcy cannot recover money paid by bankrupt to bona fide creditor more than four months before filing of petition; Paige v. Loring, 1 Holmes, 277, F. C. 10,672, holding circumstances under which assignee may recover money paid a creditor of bankrupt within four months of time of filing petition; Barnewall v. Jones, 2 Fed. Cas. 883, where assignment by member of firm of all his individual property for benefit of individual creditors, although made more than six months before filing of petition in insolvency, was set aside at suit of assignee in bankruptcy; Jordan v. Downey, 40 Md. 412.

Cited, arguendo, in In re Temple, 4 Sawy. 97, F. C. 13,825, holding assignee in bankruptcy is entitled to recover property assigned in

fraud of bankruptcy act, although such assignment was made in compliance with State insolvency law; Harris v. Exchange Bank, 4 Dill. 135, F. C. 6,110, where deed of trust preferring certain creditors, executed more than four months before filing petition, but not recorded until within four months of that time, was held to be no bar to suit to have deed set aside as fraudulent; Judson v. Courier Co., 8 Fed. 425, holding a transfer by one in failing circumstances to a creditor was not void, where all creditors of whose existence preferred creditor was bound to know, joined in the arrangement; In re Carrier, 47 Fed. 444, without special application; Mathews v. Stewart, 44 Mich. 213, 215, 6 N. W. 634, where assignment for benefit of certain creditors, made more than two months before petition in bankruptcy was filed against debtor, was sustained.

Miscellaneous.— Cited incidentally in Casey v. Cavaroc, 96 U. S. 487, 24 L. 787, Alderdice v. State Bank, 1 Hughes, 56, F. C. 154, and Kane v. Rice, 14 Fed. Cas. 128, without particular application of any point decided. Cited in Vickers v. Carnahan, 4 Tex. Civ. App. 308, 23 S. W. 340, as approving rule that although statute requires chattel mortgage to be filed for record "forthwith," yet filing at any time is valid against all persons whose rights attach after filing.

14 Wall. 252-257, 20 L. 887, HOOK v. PAYNE.

Courts.— In suit in Circuit Court by distributee against administrator to recover share, fact that accounting is ordered does not make parties of all those who are entitled to distribution, but who have not appeared as plaintiffs or defendants, and if they do not appear before master, no decree can be made for or against them, p. 256.

Cited and relied on in Pulliam v. Pulliam, 10 Fed. 64, 80, holding under bill to ascertain amount due plaintiff from executor and to enforce payment, residuary legatees cannot recover anything; Miller v. Merine, 43 Fed. 269, holding party not bound by decree in action in which he had not been made a party. Arguendo, in New Orleans v. Warner, 175 U. S. 132.

Executors and administrators.— In a State where 10 per cent. interest is lawful, decree allowing 8 per cent., with annual rests against fraudulent administrator, will be sustained, p. 257.

Cited and applied in Estate of Camp, 6 Mo. App. 565, where compound interest was allowed against an administrator who had used funds of his intestate in his own business, rendering no account therefor; to same effect is Westover v. Carman's Estate, 49 Neb. 402, 68 N. W. 503. Cited, arguendo, in Cruce v. Cruce, 81 Mo. 683, 684, as authority for holding there is no absolute rule governing the rate of interest to be charged executors and administrators for trust funds coming into their hands. Cited in Howard v. Manning, 65 Ark. 125, 44 S. W. 1127, holding it error to arbitrarily charge an ad-

ministrator interest on funds received by him; Wheeler v. Bolton, 92 Cal. 173, 28 Pac. 563, and Estate of Young, 97 Iowa, 221, 66 N. W. 165, where rules are stated as to when an administrator or executor may be charged interest for trust funds in his keeping; Forbes v. Ware, 172 Mass. 311, 52 N. E. 449, fact that guardian mingled property of ward with his own and used it as his own, does not of itself justify the imposition of compound interest. See note reviewing authorities, 99 Am. Dec. 298.

Miscellaneous.— Erroneously cited in Ellis v. Davis, 109 U. S. 498, 27 L. 1010, 3 S. Ct. 335, Levi v. Columbia Ins. Co., 1 McCrary, 38, 1 Fed. 212, Donahue v. Roberts, 1 McCrary, 113, 1 Fed. 449, and Keys Mfg. Co. v. Kimpel, 22 Fed. 467; apparently confused with Payne v. Hook, 7 Wall. 425, 19 L. 260. Cited in Perrin v. Lepper, 72 Mich. 552, 40 N. W. 904, but not in point. Referred to in Houts v. Shepherd, 79 Mo. 144, in discussion as to acts of administrator which will be considered fraudulent as to estate.

14 Wall. 258-270, 20 L. 807, THE VAUGHAN AND TELEGRAPH.

Admiralty.— When exceptions of form are taken on a libel in admiralty in District Court, but are not found in record of appeal to Circuit or Supreme Court, they are deemed waived, p. 265.

Admiralty.— Bill of lading properly indorsed and sent to consignees, who on the receipt thereof make advances on cargo, gives sufficient title to permit consignees to maintain libel against carrier for loss of cargo, p. 266.

Cited in Balfour v. Wilkins, 5 Sawy. 438, McCants v. Wells, 4 S. C. 387, and The Director, 13 Sawy. 186, 34 Fed. 66, as authority for holding the legal property in a cargo is in person to whom bill of lading is made or indorsed; Richardson v. Hutchinson, 20 Fla. 24, bill of lading raises presumption of property in person for whose use or account consignment is made.

Distinguished in Robinson v. Memphis, etc., Ry. Co., 9 Fed. 141, holding carrier not liable on receipt and bill of lading issued by its agent, when no goods in fact were received for shipment.

Shipping.— Measure of damages for cargo lost in transitu by collision is value of cargo at time and place of shipment, p. 267.

Cited and relied on in Guibert v. British Ship George Bell, 5 Hughes, 175, 3 Fed. 585, and market price at destination cannot be considered, no matter how near vessel may have approached; The Steamship Aleppo, 7 Ben. 131, F. C. 158, but allowance should be made for expenses, charges, insurance and interest.

Distinguished in The Scotland, 105 U. S. 36, 26 L. 1005, affirming S. C., sub nom. Dyer v. National Steam, etc., Co., 14 Blatchf. 489, F. C. 4,225, giving rule where cargo has no ascertained value at place of shipment.

Damages.—Decree for damages suffered to a cargo at time when gold was at a large premium, held proper where it made judgment payable in notes sufficient to equal their then value in gold, although at time of final decree the premium of gold over the notes was small, p. 208.

Cited and rule reaffirmed in Simpkins v. Low, 54 N. Y. 184; Isett v. Caldwell, 101 Pa. St. 35, holding where interest on note payable in gold is paid in depreciated notes at a rate deemed by parties equivalent to gold, the excess paid above the legal rate is not to be considered usury; Bridges v. Reynolds, 40 Tex. 218. Cited without special application in Hus v. Kempf, 10 Ben. 365, F. C. 6,944. See note, 87 Am. Dec. 127.

14 Wall. 270–279, 20 L. 828, THE CAYUGA.

Collision.— Rules of navigation prescribed by Congress or by the decisions of the courts should not be followed when their observance would produce the very mischief they were intended to avert, p. 276.

Cited and relied upon in The Umbria, 166 U. S. 420, 41 L. 1062, 17 S. Ct. 616; The Columbia, 23 Blatchf. 271, 25 Fed. 845, where a situation is plain to a vessel she is bound to deal with it as it exists, not as it ought to have been; to same effect are The Aurania and Republic, 29 Fed. 104, 105, 108, 114, and The Non Pareille, 33 Fed. 526, cases of collision where damages were divided between vessels because both were in fact at fault, although in each case rules of navigation had been observed by one of vessels. Cited, arguendo, in N. Y. H. Towboat Co. v. New York, etc., Ry. Co., 148 N. Y. 580, 42 N. E. 1088, without special application.

Collision.— When two steamers are running same way, the one astern sailing faster is bound to avoid a collision, but if sailing on intersecting lines the ship which has the other on her own starboard must give way, pp. 275, 277.

Cited and applied in The State of Texas, 20 Fed. 256, holding one vessel cannot relieve herself from latter part of rule by crossing bow of other, and thereby putting latter in position of an overtaking vessel; Meyers Excursion Co. v. The Kate Ross, 41 Fed. 828, S. C. affirmed in 46 Fed. 873, 874, where under latter part of rule vessel whose duty it was to keep out of way was held at fault for collision; to same effect in The Zouave, 90 Fed. 443. Referred to in The Commodore Jones, 25 Fed. 507, 508, where sailing rules 17 and 22 were under consideration, and in The Britannia, 34 Fed. 551, holding sailing rules must be construed and applied with reference to each other.

Collision.— Restitutio in integrum is the rule in suits for damages occasioned by collision, p. 278.

Cited and relied on, for rule that damages should be allowed for profits vessel would have made had it not been for detention, in The

Mary Steele, 2 Low. 372, F. C. 9,226, The Freddie L. Porter, 2 Hask. 428, 5 Fed. 826, Missouri Riv. Packet Co. v. Hannibal, etc., Ry. Co., 1 McCrary, 291, 2 Fed. 294, Missouri River Packet Co. v. Hannibal, etc., Ry. Co., 79 Mo. 494, and The Margaret J. Sanford, 37 Fed. 152, the latter stating rule for ascertaining what earnings of vessel would probably be. Cited, in collection of authorities bearing on subject, in The Potomac, 105 U. S. 632, 26 L. 1194. Cited in Memphis, etc., Co. v. Steamboat Yaeger, 2 McCrary, 166, 4 Fed. 928, holding expenses from port of departure to place of collision and return to port of repairs will not be allowed in damages; The C. P. Raymond, 28 Fed. 766, in discussion as to damage recoverable for freight lost as consequence of collision. See monographic note, 45 Am. Dec. 59.

Collision.— Owners of ferry-boat are entitled to demurrage for injuries to boat in a tortious collision, notwithstanding another boat kept for such emergencies was used in place of ferry while repairs were being made on it, p. 276.

Rule reaffirmed under similar state of facts in The Favorita, 18 Wall. 603, and New Haven Co. Mayor, 36 Fed. 718, 21 L. 859. Cited and relied on in The Joseph Nixon v. The George Lysle, 2 Fed. 263, where vessel was held entitled to demurrage during time delayed while undergoing repairs. Cited in The Conqueror, 166 U. S. 129, 41 L. 946, 17 S. Ct. 517, and Huron Barge Co. v. Turney, 79 Fed. 111, where court holds further as to what is best evidence of amount of damages to be allowed a vessel as demurrage. Approved, arguendo, in The Steamship Aleppo, 7 Ben. 132, F. C. 158.

Distinguished in The Emma Kate Ross, 50 Fed. 847, 3 U. S. App. 171, where the question was as to the measure of damages where owners had hired another vessel to act in place of one injured.

14 Wall. 279–282, 20 L. 890, EASLEY v. KELLOM.

Auction.— Agreement among certain creditors of claimant to land sold at auction by the government, to prevent competition in bidding, cannot be urged against validity of sale by remaining creditors, but only by government, p. 282.

Not cited.

14 Wall. 282–297, 20 L. 809, CITY OF LEXINGTON v. BUTLER.

Removal of causes.— Suits may properly be removed from State court to Circuit Court which could not have been commenced in latter court, p. 293.

Cited and applied in Claflin v. Commonwealth Ins. Co., 110 U. S. 91, 28 L. 79, 3 S. Ct. 510, and Waterbury v. City of Laredo, 3 Woods, 374, F. C. 17,252, in construing act of March 3, 1875, relative to jurisdiction of United States Circuit Courts; Hobby v. Allison, 13 Fed. 404, Rosenblatt v. Reliance Lum. Co., 18 Fed. 708, Bell

v. Noonan, 19 Fed. 226, 227, and Glenn v. Walker, 27 Fed. 578, reaffirm and follow rule; Kansas City, etc., Co. v. Interstate Co., 37 Fed. 6, holding under act of 1887 action pending in State court may be removed by defendant to Federal court, though neither party is resident of district; Board v. Hurd, 49 Ga. 467, 15 Am. Rep. 683. Cited, arguendo, in Rosenbaum v. Bauer, 120 U. S. 457, 30 L. 746, 7 S. Ct. 636, and Goldey v. Morning News, 156 U. S. 523, 39 L. 519, 15 S. Ct. 561, without special application; St. Louis, etc., Ry. Co. v. McBride, 141 U. S. 132, 35 L. 661, 11 S. Ct. 984, holding if defendant appears and pleads in Circuit Court he waives right to challenge jurisdiction on ground suit was brought in wrong district; Lawton v. Blitch, 30 Fed. 642, holding where cause has been properly removed to Federal court it cannot be remanded by consent of parties; McDermott v. Chicago, etc., Ry. Co., 38 Fed. 532, 3 L. R. A. 457, construing act of August 13, 1888, relative to removal of causes.

Distinguished in Ferry v. Town of Merrimack, 18 Fed. 662, holding where non-negotiable instrument between citizens of same State is assigned to citizen of another, who brings suit thereon in State court, cause cannot be removed to Federal court; Central Trust Co. v. Virginia, etc., Iron Co., 55 Fed. 773, holding Circuit Court for district of Virginia has no jurisdiction of action brought by New York corporation against New Jersey corporation, although principal place of business of latter is in Virginia.

Courts.— Suits on negotiable instruments, transferable by mere delivery, are not within prohibition of eleventh section of judiciary act, forbidding suit in Federal court by assignee unless his assignor was also competent, p. 293.

This rule is approved and followed in Thompson v. Perrine, 106 U. S. 593, 27 L. 300, 1 S. Ct. 568, and Chickaming v. Carpenter, 106 U. S. 666, 27 L. 308, 1 S. Ct. 622, holding where interest coupons are payable to bearer, right of holder to sue thereon does not depend on citizenship of previous holder; Cooper v. Thompson, 13 Blatchf. 437, F. C. 3,202, holding holder of interest coupon is not an assignee of cause of action within meaning of act of March 3, 1875; Codman v. Vermont, etc., Ry. Co., 17 Blatchf. 3, F. C. 2,936, holding where promissory note is indorsed to bearer, no disability of bearer to sue as assignee could arise; Porter v. Janesville, 11 Biss. 67, 3 Fed. 619, holding assignee of municipal bond containing unconditional promise to pay a certain sum at certain time, may bring action in Federal court; Halsey v. Township, 3 Fed. 366, 367, municipal bonds do not come within prohibition of act of March 3, 1875; to same effect in Adams v. County of Republic, 23 Fed. 212, as to county warrants.

Municipal corporations.— When corporation has power under any circumstances to issue negotiable securities, bona fide holder has right to presume that they were issued under circumstances which give the requisite authority; municipal bonds in bona fide hands, accordingly held valid, p. 296.

Cited and relied on in Commissioners v. January, 94 U. S. 206, 24 L. 112, holding bonds issued by county commissioners in aid of construction of railroad, if they recite the performance of conditions necessary to power to issue, are in hands of bona fide holder binding on county; County of Warren v. Marcy, 97 U. S. 109, 24 L. 982, Farmers' Trust Co. v. Toledo Co., 54 Fed. 772, 6 U. S. App. 469, and Phelps v. Lewiston, 15 Blatchf. 158, F. C. 11,076, holding validity of bonds is not affected by fact that they were issued after suit had been brought to declare proceedings giving authority to issue invalid; County of Moultrie v. Fairfield, 105 U. S. 374, 26 L. 947, and Coler v. Commissioners, 6 N. Mex. 133, 27 Pac. 630, holding purchaser of bonds under no obligations to ascertain whether county had issued more bonds than authorized; Burr v. Chariton County, 2 McCrary, 605, 12 Fed. 849, and Smith v. Clark County, 54 Mo. 74, innocent purchaser of municipal bonds is not required to ascertain whether statute authorizing issue had been complied with; Miller v. Town of Berlin, 13 Blatchf. 247, F. C. 9,562, and State v. Anderson County, 8 Baxt. 258, holding right of bona fide holder to recover on municipal bonds cannot be defeated by showing that in issuance thereof conditions imposed by statute had not been complied with; Ex parte Estabrook, 2 Low. 549, F. C. 4,534, Hackensack Co. v. De Kay, 36 N. J. Eq. 567, and Auerbach v. Le Sueur Mill Co., 28 Minn. 296, 41 Am. Rep. 287, 9 N. W. 800, applying rule to commercial paper issued by private corporation; Carpenter v. Buena Vista County, 5 Dill. 560, F. C. 2,429, holding it unnecessary that municipal bonds should state therein the purpose for which issued; Tod v. Kentucky Union Land Co., 57 Fed. 52, holding corporation empowered to issue negotiable paper is liable upon its accommodation paper in hands of persons without notice that such paper was not executed for value; Black v. Cohen, 52 Ga. 629, holding irregularity or fraud in manner in which bonds were placed on market does not affect bona fide purchaser; Donnell v. Bank, 80 Mo. 172, fact that officers of corporation have misapplied borrowed funds does not defeat right of recovery in party making loan. Cited in note collecting authorities in Cooke v. United States, 12 Blatchf. 60, F. C. 3,178. Cited, arguendo, in Gause v. Clarksville, 5 Dill. 173, F. C. 5,276, in discussion as to inherent power of municipalities to raise loans by sale of its negotiable securities; National Life Ins. Co. v. Board of Education, 62 Fed. 792, 27 U. S. App. 244, Atchison, etc., Ry. Co. v. Fletcher, 35 Kan. 248, 10 Pac. 605, and Lewis v. Bourbon County, 12 Kan. 209, without special application; Hawkins v. Carroll County, 50 Miss. 764, where numerous authorities bearing on general subject are collected; Vicksburg v. Lombard, 51 Miss. 125, holding express authority to issue municipal bonds in negotiable form is unnecessary. Approved, arguendo, in Hodgman v. Chicago, etc., Ry. Co., 20 Minn. 54, and Catron v. La Fayette County, 106 Mo. 667, 17 S. W. 578, without special application. Cited in collection of authorities in Louisville, etc.,

tract for sale of land, although contract specified payment should be in coin; Bowen v. Clark, 46 Ind. 410, where a tender of treasury notes made in 1870, for satisfaction of a judgment rendered in 1858, was held good; Longworth v. Mitchell, 26 Ohio St. 344, holding treasury notes may be lawfully tendered in satisfaction of debt to be paid in money generally, whether debt was contracted before or after law under which notes were issued was passed. See note, 87 Am. Dec. 125.

Decree.— No decree can be rendered against heirs, where defendant dies during pendency of suit, and suit is revived as against his administrator but not against heirs, p. 307.

14 Wall. 308-314, 20 L. 838, DENT v. EMMEGER.

Public lands.— Inchoate rights to land in Territory of Louisiana at time it was ceded to United States, are without obligation on the United States unless confirmed by act of Congress, p. 312.

Reaffirmed in Muse v. Arlington Hotel Co., 68 Fed. 641, 644, and Chavez v. Sanchez, 7 N. Mex. 66, 32 Pac. 139.

Public lands.— Spanish grants which became perfected before cession of Spanish territory to United States were unaffected by change of government, p. 312.

Cited, arguendo, in Ainsa v. New Mexico, etc., Ry. Co., 175 U. S. 81, in discussion as to power of New Mexico courts to pass on Mexican title, asserted to have become perfect before cession to United States.

Distinguished in Grant v. Jaramillo, 6 N. Mex. 317, 28 Pac. 510, where claim set up was of an inchoate character.

Miscellaneous.— Cited incidentally in City of St. Louis v. Mo. Pac. Ry. Co., 114 Mo. 21, 21 S. W. 205. See note, 66 Am. Dec. 698.

14 Wall. 314-335, 20 L. 852, FRENCH v. SHOEMAKER.

Parties.— Where four parties enter into an agreement and suit is brought by one against another to compel latter to carry out his part of agreement, it is unnecessary to join the others, there being no relief sought against them, pp. 324, 335.

Cited and relied on in Jerome v. McCarter, 94 U. S. 736, 24 L. 137, holding prior mortgagees are not necessary parties to the bill of a junior mortgagee seeking to foreclose on the equity of redemption.

Contracts.— Duress required to avoid a contract, discussed, p. 332.

Cited in Tucker v. State, 72 Ind. 245, holding sureties cannot plead the duress of their principal in discharge of their own liabilities; Pilson v. Bushong, 29 Gratt. 238, where duress is defined. See note, 81 Am. Dec. 602, also note, 82 Am. Dec. 400.

Contracts.— Equity will not set aside a voluntary contract merely because party thereto entered into same because of great want of money at time contract was made, p. 333.

Cited, arguendo, in Lumley v. Wabash Ry. Co., 71 Fed. 27, as authority for rule that courts will not relieve a party from consequences of voluntary contract unless fraud has been practiced upon him; Camoron v. Thurmond, 56 Tex. 35, party cannot rescind contract merely because it is harsh or unequal in its operation.

14 Wall. 336-345, 20 L. 813, THE LAURA.

Shipping.— Vessel abandoned by her master and crew, although master had expressed intention to procure a tug if possible and come to her relief, is, while so abandoned, a derelict, p. 344.

Cited and relied on in The B. C. Terry, 9 Fed. 922, where burning vessel had been abandoned by crew; The Fairfield, 30 Fed. 701, where vessel deserted by crew was held derelict, although it was intention of master, to obtain relief and return; The Ann L. Lockwood, 37 Fed. 237, and The Burlington, 73 Fed. 264, both reaffirm and follow rule. Approved, arguendo, Murphy v. Dunham, 38 Fed. 511.

Salvage.— No liability attaches to a vessel which attempts to act as salvor of a derelict in case derelict be lost, provided master of vessel acted in good faith and with reasonable judgment and skill, p. 344.

Reaffirmed in Gilman v. The Tyler, 3 Woods, 113, F. C. 5,446, a case similar in fact to principal case.

14 Wall. 345-361, 20 L. 801, THE CONTINENTAL.

Collision.— It is the duty of a vessel about to be run down by another, although without fault, to use every precaution to avoid injury, p. 359.

Approved, arguendo, in The Oregon, 14 Sawy. 450, 45 Fed. 68, and in Cartier v. The F. & P. M. No. 2, 36 Fed. 269.

Collision.— Where collision between vessels was caused by failure of one to display proper lights, yet there being also lack of vigilance on part of other, which might have avoided the disaster, loss was divided between them, p. 361.

This rule is reaffirmed in the following: The Sunnyside, 91 U. S. 216, 23 L. 305, The Atlas, 93 U. S. 319, 23 L. 868, The Max Morris, 137 U. S. 9, 34 L. 587, 11 S. Ct. 31, The Helen, 5 Hughes, 122, 1 Fed. 922, The Columbia, 23 Blatchf. 271, 25 Fed. 845, The Monticello, 15 Fed. 480, and N. Y. H. Towboat Co. v. New York, etc., Ry. Co., 148 N. Y. 580, 42 N. E. 1088. Referred to in The Ping-On, 7 Sawy. 498, 11 Fed. 619, without particular application. See note, 45 Am. Dec. 52.

Miscellaneous.— Referred to in Chase v. Belden, 104 N. Y. 95, 9 N. E. 855, in discussion as to lights which a vessel should carry.

14 Wall. 361-375, 20 L. 789, PUGH v. McCORMICK.

Internal revenue.— Revenue stamp is not required to be annexed to an indorsement of a promissory note or to a waiver of demand and notice, in order to make same valid, p. 374.

Cited and relied on in Delmas v. Insurance Co., 14 Wall. 669, 20 L. 760, holding stamp unnecessary to extension of time for payment of a note and reinscription of mortgage. Cited in Robinson v. Robinson, 20 S. C. 573, holding in action brought after repeal of stamp act, a note previously executed without stamps, but with no intention of evading the law, cannot be held void.

Bills and notes.— Whenever a party is required to prove demand and notice or protest, he may comply with this requirement by proving other party waived these conditions, p. 374.

Cited and applied in Bolling v. McKenzie, 89 Ala. 475, 7 So. 659, holding if drawer or indorser of bill, with knowledge that usual steps of demand, protest and notice have not been taken, acknowledges his obligation to pay, this fixes his liability; Cady v. Bradshaw, 116 N. Y. 192, 22 N. E. 372, 5 L. R. A. 558, holding where indorser calls on holder of note before maturity and requests to have it extended, this constitutes waiver of demand and notice. Cited, arguendo, in Mehurin v. Stone, 37 Ohio St. 58, as exception to general rule that waiver, when relied on as excuse for nonperformance of conditions in contract, must be pleaded.

Appeal and error.— A cause erroneously decided in lower court will not be remanded, if subsequent to decision, law has been changed so that a second decision would be identical with first, p. 374.

Rule reaffirmed and followed in Fail v. Presley, 50 Ala. 345, and Hubbard v. Gilpin, 57 Mo. 444. See note, 58 Am. Dec. 699.

Miscellaneous.— Cited incidentally in Chambers County v. Clews, 21 Wall. 324, 22 L. 520.

14 Wall. 375-383, 20 L. 894, INSURANCE COS. v. WEIDES.

Insurance.— A statement of the value of certain goods destroyed by fire, which statement is a copy of an original inventory, which was also burned, may in suit against insurers be admitted to show value of merchandise burnt, even if there be no independent recollection by witnesses of value, p. 380.

Cited and relied on in Continental Ins. Co. v. Insurance Co., 51 Fed. 889, 1 U. S. App. 201, where a witness was permitted to testify from entries made by himself which were sworn to by himself to have been

true statements when made; Dunlap v. Hopkins, 95 Fed. 235, where letter written by witness to third party, containing statement of transaction which took place on day and date letter was written, and concerning which witness had testified, was admitted as a memorandum corroborating the witness as to date of transaction; Phœnix Ins. Co. v. Public Parks Co., 63 Ark. 204, 37 S. W. 963, holding an inventory of chattels prepared by assured before fire may be read to jury, if witness testifies he is unable to remember what it contains, but knows its contents to be true; Curtis v. Bradley, 65 Conn. 107, 48 Am. St. Rep. 183, 31 Atl. 593, 28 L. R. A. 146, and Owens v. State, 67 Md. 313, 10 Atl. 212, where an original memorandum was admitted, although witness had no recollection of matters stated therein, either before or after examination; Mispelhorn v. Farmers' Ins. Co., 53 Md. 480, where affidavit of insured, as to value of his stock, in making application for trader's license, was admitted in evidence to show amount of stock at time of fire; Levine v. Lancashire Ins. Co., 66 Minn. 142, 68 N. W. 857, holding in action against insurance company for value of stock destroyed by fire, books of account, kept in usual course of business, showing value of goods, are competent evidence. Cited, arguendo, in Maxwell v. Wilkinson, 113 U. S. 658, 28 L. 1038, 5 S. Ct. 692, holding memoranda not competent evidence by reason of having been made in regular course of business, unless contemporaneous with transaction to which they relate; Bates v. Preble, 151 U. S. 155, 38 L. 109, 14 S. Ct. 278, and Cooper v. State, 59 Miss. 273, in holding to what extent written memoranda is admissible in evidence; Stewart v. Morris, 88 Fed. 462, 60 U. S. App. 234, holding under Illinois rule, which is followed by Federal courts of that State, a witness may use memoranda to refresh his memory only when he has an independent recollection of the facts; Curtis v. Bradley, 65 Conn. 108, 48 Am. St. Rep. 184, 31 Atl. 594, 28 L. R. A. 147, in holding that rule in United States Supreme Court appears to be that memoranda is admissible only for purpose of refreshing memory of witness; Read v. State Ins. Co., 103 Iowa, 317, 64 Am. St. Rep. 188, 72 N. W. 668, and German Ins. Co. v. Amsbaugh, — Kan. App. —, 55 Pac. 482, as to evidence admissible to show amount of goods in store at time of fire; McCreery v. Green, 38 Mich. 186, without special application. Cited with reference to a note in Kahn v. Traders' Ins. Co., 4 Wyo. 472, 34 Pac. 1076. See monographic note, 98 Am. Dec. 621.

Insurance.— Stipulation that in case of loss, insured shall submit to examination under oath, requires only answers on matters pertinent to the loss; insured need not answer query as to amount for which he settled with other companies, p. 381.

Insurance.— Under policy which requires assured to produce certified copies of bills and invoices, originals of which are lost, on request of insurer, insurers must show when such request was

made before they are entitled to an instruction that no right of recovery exists under the policy, p. 382.

Cited in Mispelhorn v. Farm. Ins. Co., 53 Md. 483, without special application.

Insurance.— Whether there has been false swearing within meaning of stipulation in policy providing that such fraudulent acts shall work a forfeiture of all claim, is a matter for determination of jury, p. 383.

Rule reaffirmed in Commercial Ins. Co. v. Friedlander, 156 Ill. 599, 41 N. E. 184, Western Assurance Co. v. Ray, — Ky. —, 49 S. W. 328, whether there was a fraudulent overvaluation of goods in proofs of loss is a question for jury; Carson v. Jersey City Ins. Co., 43 N. J. L. 311, 39 Am. Rep. 592. Cited in Dogge v. Northwestern Ins. Co., 49 Wis. 504, 5 N. W. 890, holding false swearing as to value of property assured, when not knowingly and willfully but due to ignorance, will not avoid policy. Cited in note, 9 Biss. 43, F. C. 12,830, Erman v. Insurance Co., 35 La. Ann. 1095, and Fowler v. Phœnix Ins. Co., — Or. —, 57 Pac. 423, as to what false swearing will avoid a policy of insurance. See note, 35 Am. Rep. 76.

Insurance.— From mere fact that there is a discrepancy in two sworn statements made by insurance claimant it does not necessarily follow that his right to indemnity is lost for false swearing, p. 383.

Reaffirmed in Schulter v. Merchants' Ins. Co., 62 Mo. 239.

Miscellaneous.— Cited incidentally in Moore v. Virginia Fire Ins. Co., 28 Gratt. 523, 26 Am. Rep. 379.

14 Wall. 383–402, 20 L. 840, BANK OF BETHEL v. PAHQUIOQUE BANK.

Banks and banking.— National banks may be sued in any State, county or municipal court in the county or city where located, which has jurisdiction in similar cases, p. 394.

Cited and relied on in Paul v. De Graw, 3 Wash. 302, 28 Pac. 534, holding mandamus will lie in State court to compel officers of national bank to exhibit to a county assessor a list of names and residences of all shareholders in bank. Cited, arguendo, in Charlotte Bank v. Morgan, 132 U. S. 145, 33 L. 284, 10 S. Ct. 39, but holding the exemption from suits in State courts in counties other than county of residence, is a personal privilege, which may be waived.

Courts.— Jurisdiction is conferred on Federal, Circuit, District and Territorial courts over all suits by or against national banking associations located within their respective districts, p. 395.

Rule reaffirmed in Foss v. National Bank of Denver, 1 McCrary, 476, 3 Fed. 186, and Nat. Bank of St. Louis v. Harrison, 3 McCrary, 165, 8 Fed. 723, holding rule will be observed irrespective of subject-

matter; Gilbert v. McNulta, 96 Fed. 85, holding receiver of national bank may be sued in Federal court in relation to contract made by him on behalf of estate in course of its administration.

Banks and banking.— National bank may be sued in State court notwithstanding it is in hands of a receiver appointed by the comptroller of the treasury; it does not thereby lose its corporate existence, p. 395.

Cited and relied on in Calhoun v. Lanaux, 127 U. S. 639, 32 L. 299, 8 S. Ct. 1348, as authority for holding a company may be sued whose assets have been placed in hands of receiver in ordinary suit in chancery; Chemical Bank v. Bailey, 12 Blatchf. 483, F. C. 2,635, reaffirms the rule; Denton v. Baker, 79 Fed. 192, 193, 48 U. S. App. 240, 241, 242, holding receiver of insolvent national bank not a necessary party to suit to enforce claim against bank; Flint Co. v. Stephens, 32 Mo. App. 349, holding State court had jurisdiction to determine and segregate a trust fund held by receiver of insolvent national bank; Jackson v. McInnis, 33 Or. 531, 72 Am. St. Rep. 756, 54 Pac. 885, 43 L. R. A. 129, as authority for holding the dissolution of a corporation does not release it from its obligations. Referred to with approval in Adams v. Daunis, 29 La. Ann. 320, but without special application; note, 28 Am. Rep. 463.

Distinguished in Wilder v. New Orleans, 67 Fed. 569, where receiver has been appointed to receive a fund in hands of a compulsory trustee, the latter is no longer subject to suits in regard to such fund; Speckart v. German Nat. Bank, 85 Fed. 17, where suit was in Federal court instead of State; Citizens' Sav. Bank v. Circuit Judge, 98 Mich. 174, 57 N. W. 121, where State banking act was under consideration.

Banks and banking.— National banking associations are not dissolved by the mere default in paying its circulating notes, and the appointment of a receiver, p. 398.

Cited and applied in Nat. Bank v. Insurance Co., 104 U. S. 74, 26 L. 702, holding the voluntary liquidation of a national bank, under section 5220 of the revised statutes, does not dissolve the corporation; to same effect in Hutchinson v. Crutcher, 98 Tenn. 427, 39 S. W. 727, 37 L. R. A. 91, Rosenblatt v. Johnston, 104 U. S. 463, and Chemical Bank v. Hartford Deposit Co., 161 U. S. 8, 40 L. 598, 16 S. Ct. 442, affirming S. C., 156 Ill. 528, 41 N. E. 227, its corporate capacity continues until its affairs are finally wound up and assets distributed; Riddle v. Nat. Bank, 27 Fed. 506, holding statute of limitations is not set in motion against a certificate of deposit by the appointment of a receiver for bank which issued it; Swan Land Co. v. Frank, 39 Fed. 460, and Attorney-General v. Superior, etc., Ry. Co., 93 Wis. 612, 67 N. W. 1140, both holding corporation not dissolved by mere non-user of franchise, or by want of assets; State v. Port Royal, etc., Ry. Co., 84 Fed. 68, and Wallace v. Hood, 89

Fed. 22, the appointment of a receiver
ment; United States v. Jewett, 84 Fed.
had decided to go into voluntary liquid
agent for this purpose, it would still be
capable of acting through an agent; Or
Md. 239, holding the depositing of mon
urer to redeem outstanding notes, co
active operations, did not operate as a
proved, arguendo, in Scott v. Rainier P
Pac. 532, in discussion as to general eff
pointment of receiver. See notes in 96
Dec. 757.

Banks and banking.— Proceedings un
which United States or its officers or a
conducted by district attorney under
treasury, p. 400.

Cited in Gibson v. Peters, 35 Fed. 723
of bank had appointed special counsel
troller of treasury, district attorney was

Banks and banking.— Decision of rece
validity of claim presented to him for a
itor may have validity of his claim ad
State court, p. 401.

Cited and relied on in Denton v. Bak
App. 243, holding claim against insolve
either before receiver or in competent cou
ton v. Merchants' Bank, 18 Wash. 390, 51
as to laches which will bar right of rece
covered against bank, set aside on groun
Cited, arguendo, in Chemical Bank v. W
89, 48 N. E. 334, holding acceptance of di
by comptroller does not estop claimant
allowed.

Banks and banking.— Receiver of natio
for bank either in his own name or in nam

Reaffirmed in Bank v. Kennedy, 17 Wal
ceiver maintained suit in his own name
Rep. 359, F. C. 13,299, and Chicago Fire
Ill. 45, 32 N. E. 536. Cited, arguendo, i
win, 12 Fed. 398, holding receiver of n
Federal courts without regard to locality
ship; Hendee v. Connecticut, etc., Ry. Co
CX in holding receiver merely stands in
a controversy. Approved, arguendo, in d
son v. Fidelity Co., 73 Fed. 367, 41 U. S. A

Miscellaneous.— Cited incidentally in Eaton v. Pacific Nat. Bank, 144 Mass. 269, 10 N. E. 847, and Nat. Bank v. Nat. Bank, 89 N. Y. 441. Cited in Hade v. McVay, 31 Ohio St. 237, not in point.

14 Wall. 402–405, 20 L. 857, O'DOWD v. RUSSELL.

Appeal and error.— Notice by defendant to his co-defendants of intention to prosecute writ of error is equivalent to old proceeding of summons and severance, and on their refusal to join, such defendant may take his writ, p. 404.

Cited in Simpson v. Greeley, 20 Wall. 156, 22 L. 339, as exception to general rule that all parties against whom joint judgment is rendered must join in writ of error or appeal to make same effectual; to same effect, Whitlock v. Willard, 18 Fla. 158.

Appeal and error.— To operate as supersedeas in Supreme Court copy of writ of error must be filed in clerk's office within ten days, p. 405.

Cited and relied on in Board of Commissioners v. Gorman, 19 Wall. 664, 22 L. 226, after expiration of ten days an execution may issue; Crowder v. Morgan, 72 Ala. 540, reaffirms rule.

Appeal and error.— It appearing from record that writ of error was erroneously dated as though issued before judgment, the error was considered clerical and held not to vitiate the writ, p. 405.

Reaffirmed and followed in Glenn v. Liggett, 135 U. S. 542, 34 L. 266, 10 S. Ct. 870.

Appeal and error.— Judgment reversing judgment against vendue-master of a city, holding him not entitled to an exception claimed, and affirming judgment against his sureties, held final and appealable, p. 405.

Referred to in International Bank v. Jenkins, 104 Ill. 150, in discussion as to what are final judgments.

14 Wall. 406–418, 20 L. 774, THE STEAMER WEBB.

Towage.— An engagement to tow does not impose either an obligation to insure, or liability of common carriers, and damages sustained by tow does not raise presumption that tug was at fault. p. 414.

Cited and relied on in The J. P. Donaldson, 167 U. S. 603, 42 L. 294, 17 S. Ct. 953, holding no contribution in general average can be had against a tug for casting off her tow, with intention and effect of saving herself; The Merrimac, 2 Sawy. 592, F. C. 9,478, holding tug not being a common carrier master may contract for more restricted liability than law imposes; Bothwell v. Towing Assn., 3 Fed. Cas. 968, Wilson v. Pilots' Assn., 55 Fed. 1002, The Henry Buck, 38 Fed. 612, and The Lady Wimett, 92 Fed. 400, burden of

showing want of skill in management of tug is on party alleging; The James Jackson, 9 Fed. 615, Münks v. Jackson, 66 Fed. 572, 29 U. S. App. 482, The Fox, 4 Woods, 200, 15 Fed. 640, and Pederson v. Spreckels Co., 81 Fed. 208, as authority for holding steamboat engaged in towing does not assume the liability of common carrier; to same effect in The D. Newcomb, 16 Fed. 278, the owners of tug are bailees for hire; The Argus, 31 Fed. 483, where tug was held not liable for loss of a tow, it not being shown the tug was negligently managed; The A. R. Robinson, 57 Fed. 667, reaffirms latter part of rule; to same effect is dissenting opinion in Humboldt Co. v. Christopherson, 73 Fed. 249, 44 U. S. App. 434, majority holding tug negligent and liable for damages to tow.

Towage.— Contract of towage requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ, but the result may be a safe criterion to judge of the character of skill observed, p. 414.

Cited and relied on in The Burlington, 137 U. S. 391, 34 L. 733, 11 S. Ct. 140, The E. E. Simpson, 60 Fed. 453, 455, 23 U. S. App. 265, and The Merrimac, 2 Sawy. 596, 597, F. C. 9,478, facts showing unseamanlike conduct in management of tug, she was held liable for damages to tow; The Tug Adelia, 1 Hask. 508, F. C. 79, and The J. L. Hasbrouck, 14 Blatchf. 34, F. C. 7,326, both reaffirm the rule; The Merrimac, 2 Sawy. 591, F. C. 9,478, applying latter part of rule in case where question was whether line used for towing was strong enough to be used for such purpose; The E. M. Norton, 15 Fed. 688, applying latter part of rule where vessels were towed through unusual channel and were lost; The M. J. Cummings, 18 Fed. 184, where under facts it was held negligence in master of tug to start on trip with tow; The Taurus, 91 Fed. 797, holding where captain of tug permits his tow to collide with rocks bordering shore in place familiar to navigators, the burden rests on him to give exculpatory reason for occurrence. The latter part of rule is approved, arguendo, in Wilson v. Sibley, 36 Fed. 382. Cited, arguendo, in Pederson v. Spreckels Co., 87 Fed. 944, 945, 59 U. S. App. 449, 450, for general duty and liability of tug.

Admiralty.— Erroneous evidence, relating solely to amount of damages, is not ground for reversal in admiralty, if amount given was justified by other evidence, p. 416.

Admiralty.— Stipulators on bond for release of a ship are not liable for a greater amount than is specified in the bond; and on appeal decree in excess of that sum was modified accordingly, p. 418.

This rule is reaffirmed in The Wanata, 95 U. S. 605, 615, 24 L. 462, 466, and The Sydney, 47 Fed. 262, 263, but in case stipulators have been guilty of default or contumacy, they may be held for

costs and interest in nature of damages; United States v. Ames, 99 U. S. 36, 25 L. 298, holding bond given in admiralty for release of property is, in subsequent proceedings, a substitute for property; The Oregon, 158 U. S. 211, 39 L. 954, 15 S. Ct. 814, holding stipulators, in absence of an express agreement, are not responsible to intervenors in suit, intervening after bond is given and ship released; The Doris Eckhoff, 30 Fed. 141, Mitchell v. Chambers, 43 Mich. 158, 5 N. W. 63, and The Vanderkerchen, 87 Fed. 765, stipulation for release of vessel stands in place of res; Munks v. Jackson, 66 Fed. 574, 29 U. S. App. 482, fact that decree against stipulators is for greater sum than is named in bond does not affect court's jurisdiction, it is nullity as to excess. Cited, with other authorities, in Braithwaite v. Jordan, 5 N. Dak. 207, 212, 65 N. W. 704, 705, 31 L. R. A. 244, 246, without special application.

14 Wall. 419–433, 20 L. 748, SMITH v. MASON.

Bankruptcy.— Courts may exercise many of the powers conferred by the act of 1867 in a summary manner, as well in vacation as in term time, p. 430.

Cited, arguendo, in Gifford v. Helms, 98 U. S. 248, 25 L. 58, on this point.

Bankruptcy.— Clause in first section of bankruptcy act of 1867, providing powers conferred on District Court may be exercised as well in vacation as in term time, does not apply to suits at law or in equity, by or against assignee, relating to property or rights of property of bankrupt, transferable to or vested in such assignee. p. 430.

Approved, arguendo, in Sherman v. Bingham, 3 Cliff. 557, F. C. 12,762, and Smith v. Crawford, 6 Ben. 502, F. C. 13,030. Cited in Jobbins v. Montague, 5 Ben. 426, F. C. 7,329, as authority for holding first section in bankruptcy act must be considered in connection with all other sections.

Bankruptcy.— Controversies, to be cognizable in District or Circuit Courts, under third clause of second section of bankruptcy act of 1867, must relate to some property or rights of property of bankrupt transferable to, or vested in, assignee; and suit must be in name of assignee against party claiming adverse interest, or vice versa, p. 431.

Cited and relied on in Glenny v. Langdon, 98 U. S. 23, 25 L. 44, holding creditors can recover assets of bankrupt fraudulently transferred, only through instrumentality of assignee; Johnson v. Price, 13 Fed. Cas. 793, Circuit Court is without jurisdiction of bill filed by creditors before appointment of assignee, to restrain mortgagee in possession from disposing of goods of alleged bankrupt; Olney v. Tanner, 10 Fed. 103, suit against assignee in bankruptcy to as-

sert a claim of superior title to property fraudulently assigned before proceedings in bankruptcy. Cited, arguendo, in dissenting opinion in Cleveland Ins. Co. v. Globe Ins. Co., 98 U. S. 372, 378, 25 L. 203. Cited in Mason v. Hartford, etc., Ry. Co., 19 Fed. 55, as authority for holding jurisdiction of Circuit Court is concurrent with that of District Court in such matters. Cited, arguendo, in Mitchell v. M'Clure, 91 Fed. 622, in construing bankruptcy act of 1898.

Bankruptcy.— Where assignee desires to obtain property of bankrupt, which a transferee of bankrupt's firm claims adversely, the proceedings should not be summary, under first section of bankruptcy act of 1867, but plenary under second clause of third section, pp. 432, 433.

Cited and relied on in Marshall v. Knox, 16 Wall. 556, 21 L. 484, holding similarly, where controversy was as to right of possession of bankrupt's property, seized, before any act of bankruptcy, as a pledge for payment of rent due; Wood, etc., Co. v. Brooke, 2 Sawy. 583, F. C. 17,980, holding court cannot deprive assignee of possession of bankrupt's property without an action and trial by jury, unless parties consent to trial by court; Shainwald v. Lewis, 6 Sawy. 591, 5 Fed. 515, reaffirm rule; also, Ferguson v. Peckham, 8 Fed. Cas. 1153, but whether an adverse claimant may not proceed against an assignee by petition, quære; In re Marter, 16 Fed. Cas. 859, holding District Court without power to determine validity of assignee's title by summary proceedings; Rogers v. Winsor, 29 Fed. Cas. 1133, and In re Abraham, 93 Fed. 776, where assignee in bankruptcy sought to recover books of account transferred to assignee of bankrupt's own selection; Bowen v. Christian, 16 Fed. 731, holding receiver appointed to wind up partnership affairs, who seeks to set aside a mortgage given by one of partners, on ground of fraud, must proceed by original bill; In re Herdic, 40 Fed. 361, holding title of administrator of bankrupt, who was not a party to bankruptcy proceedings, cannot be adjudicated by Bankruptcy Court on rule to show cause; In re Brodbine, 93 Fed. 644, holding District Court had no jurisdiction to proceed summarily at suit of trustee in bankruptcy, to determine validity of claim of bankrupt and another party to a license; Smith v. Sullivan, 71 Me. 156, and Taylor v. Taylor, 74 Me. 587, where State insolvency law was under consideration; Marsh v. Armstrong, 20 Minn. 86, 18 Am. Rep. 359, and Doyle v. Sharpe, 74 N. Y. 159, holding actions involving interests of parties other than bankrupt, his assignee and creditors, can only be determined by actions which are separate from proceedings in bankruptcy. Cited, arguendo, in Goodall v. Tuttle, 3 Biss. 230, F. C. 5,533, without special application. Approved, arguendo, In re Litchfield, 13 Fed. 866, and Ex parte Hollis, 59 Cal. 415.

Qualified in In re Campbell, 3 Hughes, 288, F. C. 2,348, holding transferee may waive right to plenary proceedings. Distinguished in O'Brien v. Weld, 92 U. S. 83, 23 L. 677, where transferee, or in

this case plaintiff, in execution proceedings, takes matter into Bankruptcy Court and obtains orders and rules relating thereto, he is bound thereby; In re Pierce, 7 Biss. 427, F. C. 11,139, holding gift of personal property by insolvent husband to wife, without visible change of possession, does not constitute such an adverse interest in wife as to compel institution of separate proceedings; In re Ulrich, 6 Ben. 492, F. C. 14,328, where summary proceedings were had before the appointment of an assignee; In re Sims, 22 Fed. Cas. 181, holding assignee may petition summarily to set aside mortgage given after commencement of proceedings in bankruptcy; In re Baudouine, 96 Fed. 540.

Bankruptcy.— Strangers to bankruptcy proceedings, not served with process, who have not voluntarily appeared, cannot be compelled to come into court under petition for rule to show cause, p. 433.

Rule reaffirmed in Marshall v. Knox, 16 Wall. 557, 21 L. 484, and Harmanson v. Bain, 1 Hughes, 201, F. C. 6,072; Bradley v. Healey, 1 Holmes, 452, F. C. 1,781, holding court has no jurisdiction to entertain summary petition against assignees of bankrupt for sale of property never in possession of assignees, but in possession of parties claiming title, and not parties to petition; In re Litchfield, 13 Fed. 869, adopts the rule.

Explained in In re Anderson, 23 Fed. 498, 501, where strangers came in voluntarily.

Bankruptcy.— Appeal may lie from Supreme Court of District of Columbia to Federal Supreme Court, from a decree in bankruptcy, p. 433.

Miscellaneous.— Cited in Coit v. Robinson, 19 Wall. 286, 22 L. 155, Graham v. Boston, etc., 14 Fed. 761, and Stickney v. Wilt, 23 Wall. 160, 23 L. 53, not in point. Approved generally in Eyster v. Gaff, 91 U. S. 526, 23 L. 405, without being cited for any particular point. Cited incidentally in Goodrich v. Wilson, 119 Mass. 434, and Francisco v. Shelton, 85 Va. 788, 8 S. E. 794, both holding jurisdiction, conferred on Federal courts in bankruptcy matters, does not exclude concurrent jurisdiction in State courts; Minot v. Tappan, 127 Mass. 339, not in point; incidentally in Bromley v. Goodrich, 40 Wis. 137, 22 Am. Rep. 688. See note, 17 Am. Rep. 207.

14 Wall. 434–441, 20 L. 858, MOWRY v. WHITNEY.

Patents.— Suits to set aside, annul, or declare void a patent, must be brought in the name of the government, or by authority of attorney-general, by bill in chancery, which is substituted for the scire facias, the ancient mode of annulling the king's patent, p. 441.

Cited and applied in United States v. U. S. 281, 31 L. 750, 8 S. Ct. 855, holdin United States in any court of competen patent for land obtained by fraud or Bell Tel. Co., 128 U. S. 368, 32 L. 462, 9 32 Fed. 604, 606, 607, reaffirms rule; Cellu Co., 13 Blatchf. 384, F. C. 2,543, suit to h can only be sustained by the attorney-g government; United States v. Gunning, 21 holding United States may file bill in Ci ters-patent granted for an invention alleg by fraud, although there is no statute Birdsall v. McDonald, 3 Fed. Cas. 444, pri patent; Northern Pac. Ry. Co. v. Canno App. 507, holding company cannot mainta its title to lands within limits of its grant, issued to individuals for same before line v. Lockey Inv. Co., 60 Fed. 37, and Meyen 321, both holding government alone can ticed on it in procuring patent to land; Un Co., 4 N. Mex. 308, 17 Pac. 420, holding s tion of land patent, properly brought in n Approved, arguendo, in dissenting opinion 112 U. S. 365, 368, 28 L. 669, 670, 6 S. C holding suit may be maintained betwee infringer to determine whether patent is leged patentee has been guilty of laches New York, etc., Co. v. New York, etc., P 177, 9 Fed. 581, and Consolidated Light C 23 Blatchf. 413, 25 Fed. 720, without De arguendo, in Attorney-General v. Rumford 622, holding attorney-general has no power name a bill to repeal letters-patent for an in

Distinguished in Northern Pac. R. Co. where question was as to right of railroa ejectment for lands granted to it, but also c grant from government.

Patents.— Where two patents have been to different individuals, or a claim has be vention was covered by patent already is may try their conflicting claims by bringi 441.

Cited and explained in Foster v. Lindsa C. 4,976, and Foster v. Lindsay, 9 Fed. Cas. 5 tion 4918, revised statutes, and holding in su United States Circuit Court has power to a

fering patents void in whole or in part; to same effect is Lockwood v. Cleaveland, 6 Fed. 726.

Distinguished in Pentlarge v. New York Bung Co., 20 Fed. 814, where claims were held to be not conflicting; Nathan Mfg. Co. v. Craig, 49 Fed. 370, where answer to complaint denied interference, and it appeared claims of respective patents did not cover the same invention.

Miscellaneous.— Cited in Elizabeth v. Pavement Co., 97 U. S. 138, 24 L. 1006, Root v. Railway Co., 105 U. S. 202, 26 L. 980, Lockwood v. Cleveland, 20 Fed. 165, and Railway Mfg. Co. v. Hudson Co., 23 Fed. 595, probably in error for Mowry v. Whitney, 14 Wall. 620, 20 L. 860; incidentally in United States v. Frazer, 22 Fed. 109; in Knapp v. Thomas, 39 Ohio St. 386, 48 Am. Rep. 467, as authority for holding pardon may be impeached for fraud at common law by scire facias.

14 Wall. 442–452, 20 L. 867, IMPROVEMENT CO. v. MUNSON.

Public lands.— Under Pennsylvania law, no title can exist under a second survey, unless such survey has been ordered by board of property, p. 447.

Referred to, arguendo, in Fritz v. Brandon, 78 Pa. St. 356, a case relating to titles in Pennsylvania.

Trial.— Before submitting a cause to jury, court must determine whether there is any evidence upon which jury can properly proceed to find verdict for party producing it, upon whom onus of proof is imposed, p. 448.

This rule was cited with approval in Pleasants v. Fant, 22 Wall. 120, 22 L. 782, where instruction of court to find for defendant, under evidence introduced, was held right, although there was some evidence to sustain plaintiff's case; to same effect are Commissioners v. Clark, 94 U. S. 284, 24 L. 62, Herbert v. Butler, 97 U. S. 320, 24 L. 958, Bowditch v. Boston, 101 U. S. 18, 25 L. 981 (affirming S. C., 4 Cliff. 339, F. C. 1,719), Howard v. Railway Co., 101 U. S. 844, 25 L. 1083, and Schofield v. Chicago, etc., Ry. Co., 114 U. S. 619, 29 L. 225, 5 S. Ct. 1127 (affirming S. C., 8 Fed. 488), dissenting opinion in Patton v. Southern Ry. Co., 82 Fed. 986, 42 U. S. App. 567, and Ferguson v. Arthur, 117 U. S. 490, 29 L. 982, 6 S. Ct. 865; Norris v. M'Canna, 29 Fed. 762, holding, where testimony tending to show partnership is such that if jury found therefrom partnership existed, such finding would be set aside, testimony should not be submitted to jury; Horn v. Baltimore, etc., Ry. Co., 54 Fed. 304, 6 U. S. App. 381, holding instruction to find for defendant is correct, where action is for death for wrongful act, and only legal inference that can be drawn from evidence is that deceased was guilty of contributory negligence; Sullivan v. Colby, 71 Fed. 466, 34 U. S. App. 432, and Smyth v. New Orleans Co., 93

Fed. 927, reaffirm the rule, and hold further as to when question should be withdrawn from jury; Travelers' Ins. Co. v. Selden, 78 Fed. 289, 42 U. S. App. 253, holding it error for court not to direct verdict in action on accident insurance policy, when it appeared insured died from bodily infirmities; First Nat. Bank of Pierre v. Comfort, 4 Dak. 172, 28 N. W. 857, court should direct verdict, where there is some evidence tending to a certain conclusion, but which, from nature of controversy, is insufficient; to same effect is Knapp v. Sioux Falls Bank, 5 Dak. 395, 40 N. W. 589; Weis v. Madison, 75 Ind. 254, Candelaria v. Atchison, etc., Ry. Co., 6 N. Mex. 284, 27 Pac. 503, and Faris v. Hoberg, 134 Ind. 273, 39 Am. St. Rep. 264, 33 N. E. 1029, judge is not bound to submit question to jury where verdict, if contrary to his views of evidence at its effect, would be certainly set aside; to same effect is Meyer v. Houck, 85 Iowa, 325, 52 N. W. 237; Oleson v. Lake Shore, etc., Ry. Co., 143 Ind. 409, 42 N. E. 738, 32 L. R. A. 150, holding verdict may be directed for defendant in action for personal injuries, where plaintiff fails to prove freedom from contributory negligence; Heath v. Jaquith, 68 Me. 436, 438, holding, if party having burden of proof upon issue necessary to maintenance of an action, or to defense of prima facie case, introduces no evidence which, if true, will authorize jury to find in his favor, court may direct verdict against him; Paine v. Railway, 58 N. H. 614, and Baldwin v. Shannon, 43 N. J. L. 603, reaffirming rule that a mere scintilla of evidence is not sufficient to sustain the burden of proof; to same effect are Dwight v. Germania Ins. Co., 103 N. Y. 359, 57 Am. Rep. 739, 8 N. E. 661, Hall v. Stevens, 116 N. Y. 210, 22 N. E. 377, 5 L. R. A. 805, Joske v. Irvine, 91 Tex. 582, 44 S. W. 1063, Lenkauf v. Lombard, 137 N. Y. 425, 33 Am. St. Rep. 748, 33 N. E. 474, 20 L. R. A. 51, and Laidlaw v. Sage, 158 N. Y. 96, 52 N. E. 687, 44 L. R. A. 224; Peet v. Dakota Ins. Co., 1 S. Dak. 467, 47 N. W. 533, if proof of fact is so preponderating that verdict against it would be set aside, then it is duty of court to direct verdict. Cited and applied in following, where an instruction to find for plaintiff, in case where, if jury had found for defendant, verdict would have been set aside, was held proper: Four Packages v. United States, 97 U. S. 412, 24 L. 1032, Anderson County v. Beal, 113 U. S. 241, 28 L. 971, 5 S. Ct. 440, and Nat. Exchange Bank v. White, 30 Fed. 415; White v. Warren, 120 Cal. 328, 49 Pac. 131, holding, in action by wife against husband, for money loaned, the burden is on husband to show that he received money as gift, and not as loan, and in absence of such showing, court may properly instruct jury to find for plaintiff. Cited, arguendo, in Einstein v. Gourdin, 4 Woods, 419, F. C. 4,320, holding it proper for court to refuse an instruction which was purely abstract and might confuse jury; Mt. Adams, etc., Ry. Co. v. Lowery, 74 Fed. 469, 43 U. S. App. 408, in discussion, where difference is pointed out between discretion of court to set aside

a verdict, as against the weight of evidence, and obligation which court has to direct a verdict for insufficiency of evidence; Fidelity Assn. v. Miller, 92 Fed. 69, 63 U. S. App. 729, as authority for holding Federal judges may express opinion on evidence, before submitting cause to jury. Approved, arguendo, in Bartelott v. Bank, 119 Ill. 270, 9 N. E. 899, holding further as to stage of trial at which motion requesting court to direct verdict, should be made; State v. White, 89 N. C. 465, and St. Maries v. Polleys, 47 Wis. 75, 1 N. W. 389, without special application. Cited in M'Mechen v. M'Mechen, 17 W. Va. 712, holding it error to instruct jury on conjectural state of facts. See notes, 24 Am. Dec. 623, and 50 Am. Rep. 656.

Distinguished in Travelers' Ins. Co. v. Randolph, 78 Fed. 759, 47 U. S. App. 260, holding case cannot properly be withdrawn from jury because, in judgment of court, there is preponderance of evidence in favor of party asking such instruction. Limited in Grant v. Cropsey, 8 Neb. 209, and Jucker v. Chicago, etc., Ry. Co., 52 Wis. 151, 8 N. W. 862, both holding, if there be any testimony in favor of party on whom burden of proof rests, court is not at liberty to disregard same and direct a verdict against him; United States v. Gumm, 9 N. Mex. 616, 58 Pac. 399, where there was considerable evidence given to sustain plaintiff's declaration.

Trial.—Objection to instructions, on ground that they are ambiguous, must be made before the jury leaves the bar, otherwise they will be considered waived, p. 449.

Reaffirmed in Commonwealth v. Costley, 118 Mass. 22.

Public lands.— In Pennsylvania a second survey is a nullity as against a prior survey where made without any order from the board of property; and unless authority to make it be shown, or proof that it existed but was lost, such second survey is a nullity; mere lapse of time can raise no presumption which will give it validity, p. 452.

Cited in note in 11 Am. Dec. 667.

Distinguished in Stanus v. Smith, 8 Tex. Civ. App. 689, 30 S. W. 263, where question was as to when field-notes of deceased surveyor are admissible to show boundaries established by him.

Miscellaneous.— Erroneously cited in Cardwell v. American Bridge Co., 19 Fed. 562, 564.

14 Wall. 452–457, 20 L. 777, NICOLSON PAVEMENT CO. v. JENKINS.

Patents.— An assignment of a patent, for the full term for which letters-patent are, or may be granted, transfers an extension and renewal of patent, and this though patent be reissued subsequent to assignment, p. 456.

47 Fed. 855, as authority for holding that a wife, who has a right of dower only in event that she survive her husband, has no present title in husband's land.

Equity.— Mistake as to baptismal name of obligor of a bond, shown to be accidental, is immaterial, and equity will protect against harm from it, p. 479.

14 Wall. 479–484, 20 L. 721, CROSS v. UNITED STATES.

Courts.— Joint resolution of 1864, authorizing rehearing in Court of Claims, of claim for rents from United States, construed and held to authorize filing of a third petition, the second not being sufficiently comprehensive, p. 483.

Not cited.

14 Wall. 484–491, 20 L. 722, DIRST v. MORRIS.

Ejectment.— Plaintiff in ejectment proceedings, who claims title from sale on foreclosure of mortgage, may put in evidence, record of foreclosure suit, for purpose of showing title, even though defendant claims under grant from mortgagor, made prior to giving of mortgage, p. 490.

Appeal and error.— Under act of March 3, 1865, authorizing trial of facts by Circuit Courts, Supreme Court, as a court of error, has no power to review the evidence on appeal, as to its weight or sufficiency, p. 491.

Cited and relied on in Insurance Co. v. Folsom, 18 Wall. 252, 21 L. 834, holding findings of Circuit Court, even when special, cannot be reviewed, except for purpose of determining whether facts found are sufficient to support judgment, and same case, pp. 253, 254, 21 L. 834, if finding be general, the Supreme Court will only review questions of law arising in progress of trial and duly presented by bill of exceptions, or errors of law apparent on face of pleadings; to same effect are Crews v. Brewer, 19 Wall. 72, 22 L. 64, Rhodes v. United States Nat. Bank, 66 Fed. 515, 24 U. S. App. 607, 34 L. R. A. 744, and St. Louis v. Western Tel. Co., 166 U. S. 391, 41 L. 1045, 17 S. Ct. 609; Railroad Co. v. Pratt, 22 Wall. 131, 22 L. 830, holding similarly as to competent evidence put before jury; dissenting opinion in Insurance Co. v. Boon, 95 U. S. 139, 24 L. 401, the majority holding the findings in the cause, under peculiar state of facts, were subject to review; Ætna Ins. Co. v. Ward, 140 U. S. 91, 35 L. 377, 11 S. Ct. 725, reaffirming that Supreme Court, on writ of error, has no concern with questions of fact, or weight to be given properly admitted evidence; rule reaffirmed in Searcy County v. Thompson, 66 Fed. 93, 95, 98, 100, 27 U. S. App. 715, where cases bearing on subject are reviewed; Distilling Co. v. Gottschalk Co., 66 Fed. 610, 24 U. S. App. 638, where parties submit cause to court

without jury, and court makes general finding, neither correctness of finding nor refusal of court to make special findings, can be reviewed on writ of error; Sayward v. Dexter, 72 Fed. 769, 44 U. S. App. 376, and O'Hara v. Mobile, etc., Ry. Co., 76 Fed. 719, 40 U. S. App. 471, both holding rule applies to appeals from Circuit Court to Circuit Court of Appeals; Parker v. Whittier, 91 Fed. 513, 63 U. S. App. 40, where cause was submitted to Circuit Court without jury, Circuit Court of Appeals, on writ of error, cannot examine evidence and supply finding on material issue. Approved, arguendo, in Groves v. Sentell, 69 Fed. 225, 30 U. S. App. 382.

14 Wall. 491-493, 20 L. 723, COLLINS v. RIGGS.

Mortgage.— To redeem property sold under a mortgage, for less than mortgage debt, the whole mortgage debt must be tendered or paid into court, and not merely amount of sale, p. 493.

This rule is reaffirmed in the following: Jones v. Van Doren, 130 U. S. 692, 32 L. 1080, 9 S. Ct. 687, McGough v. Sweetser, 97 Ala. 365, 12 So. 164, 19 L. R. A. 472, Hosford v. Johnson, 74 Ind. 482, and Martin v. Fridley, 23 Minn. 16, applying rule to junior mortgagees, who sought to redeem from sale, under senior mortgage; Evans v. Kahr, 60 Kan. 722, 57 Pac. 951, where mortgagor sought to redeem. Approved, arguendo, in Cunningham v. Macon, etc., Ry. Co., 156 U. S. 425, 39 L. 478, 15 S. Ct. 367, holding junior mortgagees could not avoid a sale without tendering reimbursement to first mortgage creditors; Sheffield Co. v. Newman, 77 Fed. 794, 41 U. S. App. 766, without special application. Approved as a rule of equity in German Bank v. Barham, 57 Ark. 536, 22 S. W. 96, and Fields v. Danenhower, 65 Ark. 399, 46 S. W. 941, 43 L. R. A. 522, but is limited to some extent by statute providing lands may be redeemed on tender of amount for which sold, with interest. See note in 58 Am. Dec. 570.

Mortgage.— Party offering to redeem proceeds upon hypothesis that, as to him, the mortgage has never been foreclosed; therefore, he can only lift it by paying it, p. 493.

Cited, arguendo, to this effect, in Sellwood v. Gray, 11 Or. 540, 5 Pac. 199.

14 Wall. 493-504, 20 L. 726, UNITED STATES v. POWELL.

Internal revenue.— Condition in distiller's bond, that obligors shall in all respects comply with laws relating to business of distillers, is prospective as well as present, and applies to all laws in force during term for which bond was given, whether enacted before or after its execution, p. 501.

Cited and relied on in Soule v. United States, 100 U. S. 11, 25 L. 537, in holding obligors on collector's bond, liable for gauger's fees

received by collector, although power t re
ferred after execution of bond; to sa e
v. M'Cartney, 1 Fed. 108, and Chadwi k
756.

Distinguished in United States v. Sin ger,
holding official bond of distillers does not
reimbursements to government for sal ry
passage of resolution imposing this bur en

Internal revenue.—"Distillery war ous
houses, within meaning of resolution f C
prietors of "bonded warehouses" to r mbt
expenses and salary of storekeepers i char

Miscellaneous.— Cited in United St es
604, and Whitehead v. Fisher, 64 Tex 843,

14 Wall. 504-510, 20 L. 729, PHŒNIX NS.

Insurance may be effected in name o nom
business is carried on by and for use o one

Cited and relied on in California Ins Co.
410, 33 L. 736, 10 S. Ct. 369, holding t la
insure in its own name, goods held in t ust b
Dec. 518.

to l

Insurance.— Sale by retiring partne ditio
interest in firm, is not a breach of co sent
void if property is conveyed without c king,

Approved and followed in Texas Ba Am.
Tex. 412, 26 Am. Rep. 301. See note, 88

CO.

14 Wall. 511-531, 20 L. 731, GORHAM paten

Patents.— Law authorizing grant of corati
intended to give encouragement to d 524.
plated appearance, rather than utility, p 19 Bl

Cited and applied in Wood v. Dolbey, nt fo
where patentee was protected in his pat 345, h
settings; Untermeyer v. Freund, 37 Fed. mpres
protected where it presents a different dema
anything preceding it, and creates a how
originator, even though it does not Co., 3
other designs; Redway v. Ohio Stov is im
Smith v. Stewart, 55 Fed. 482, holding 46 Fe
of novelty is small; Anderson v. Sain h mar
for mantel was held patentable, altho Cited,
make up same had been in use before. d. 63, 1
authorities, in Foster v. Crossin, 44 F l not a
patentable, must be new and original, a

Distinguished in Smith v. Whitman Co., 148 U. S. 678, 37 L. 609, 13 S. Ct. 770, holding, in some cases, where new shape or configuration of article of manufacture is claimed in patent, its utility may be an element for consideration in determining validity of patent: Post v. Richards Co., 26 Fed. 619, mere substitution of one material for another in construction of article for ornament, the ornament to be of any approved form, cannot be patentable.

Patents.— It is the new thing produced, regardless of the manner of production, which the law, allowing patents for designs, regards and protects, p. 525.

Cited, arguendo, in Western Electric Co. v. Odell, 18 Fed. 323, in holding design patents require as high a degree of exercise of inventive faculty as do utility patents; Britton v. White Co., 61 Fed. 97, without special application.

Patents.— Designs are identical, within meaning of patent act, if they are so similar as to present same appearance to an ordinary observer, p. 527.

Cited and relied on in McLean v. Fleming, 96 U. S. 256, 24 L. 832, in determining whether trademarks were identical; to same effect in dissenting opinion in Manufacturing Co. v. Trainer, 101 U. S. 64, 25 L. 997, the majority holding, under facts, trademarks were not similar; Smith v. Whitman Co., 148 U. S. 679, 37 L. 609, 13 S. Ct. 770, applying rule where patent for saddle design was alleged to be for design identical with one already patented; Gilman v. Libbey, 4 Cliff. 478, F. C. 5,445, trademarks are identical if resemblance is such as to deceive ordinary purchasers, and cause them to purchase the one manufacture, supposing it to be the other; to same effect are Liggett Tobacco Co. v. Hynes, 20 Fed. 884, Godillot v. American Grocery Co., 71 Fed. 874, 875, Lawrence Mfg. Co. v. Lowell Mills, 129 Mass. 328, 37 Am. Rep. 365, and Kann v. Diamond Steel Co., 89 Fed. 707, 61 U. S. App. 25; Whittall v. Lowell Co., 79 Fed. 793, holding a design which imitates the figures of a patented design in their characteristics, and produces same general appearance, infringes, though imitative figures are much smaller than those of patent; Jennings v. Kibbe, 20 Blatchf. 354, 10 Fed. 670, applying rule in suit for infringement of letters-patent for designs, one for a "lace ruching," and the other for a "fringed lace fabric;" Perry v. Starrett, 19 Fed. Cas. 296, where, under rule, designs for stoves in question were held dissimilar; Tomkinson v. Willets Co., 23 Fed. 896, a slight deviation in details will not relieve from allegation of similarity; Dreyfus v. Schneider, 25 Fed. 481, and Ripley v. Glass Co., 49 Fed. 930, reaffirm and follow rule; Paine v. Snowden, 50 Fed. 778, 3 U. S. App. 122, affirming 46 Fed. 190, applying rule in holding design for chair back, not distinguishable from design previously patented; Anderson v. Monroe, 58 Fed. 399, 400, 17 U. S. App. 184, reversing S. C., 55 Fed. 404, where patent for a mantel

design was held not to be an infringement on patent for similar design, previously granted; Kraus v. Fitzpatrick, 34 Fed. 89, and New York Belting Co. v. New Jersey Co., 53 Fed. 815, 11 U. S. App. 637, where patent for design, readily distinguishable from design in prior patent, was held valid; Falk v. Donaldson, 57 Fed. 35, where a lithograph, which, to eye of ordinary observer, reproduced material parts of copyrighted photograph, was held an infringement, although it was not an exact copy. Approved, arguendo, in Cone v. Morgan Co., 6 Fed. Cas. 269, Miller v. Smith, 5 Fed. 365, and Smith v. Stewart, 55 Fed. 483, without special application; Britton v. White Co., 61 Fed. 98, little weight should be attached to evidence of experienced designers on question of infringement, since they are liable to be biased by the trained observation of the specialist; note, 23 Am. Rep. 30.

Modified in Dryfoos v. Friedman, 21 Blatchf. 566, 18 Fed. 826, holding articles must present same appearance to eye of person acquainted with article and its use.

Miscellaneous.— Cited incidentally in Williams v. Brooks, 50 Conn. 285.

14 Wall. 531-535, 20 L. 738, MORGAN v. UNITED STATES.

United States.— Power to give or withhold relief, where claim is founded on wrongful proceedings of an officer of the government, rests with Congress, p. 534.

Cited with approval in Schillinger v. United States, 155 U. S. 167, 39 L. 110, 15 S. Ct. 86, holding Court of Claims has no jurisdiction of claim against government for a mere tort; to same effect, United States v. Berdan Arms Co., 156 U. S. 566, 39 L. 534, 15 S. Ct. 424, and Belknap v. Schild, 161 U. S. 17, 40 L. 601, 16 S. Ct. 445, both holding, without consent of Congress, suit cannot be maintained against the United States for infringement of a patent.

Shipping.— Under charter whereby the government assumes war risks and owners marine risks of vessel chartered to government in time of war, loss of vessel must be borne by owners where she is stranded in attempting to cross a bar, at the order of the government quartermaster, and against advice of captain, the risk being taken because of urgent need of troops, p. 534.

Followed in Reybold v. United States, 15 Wall. 206, 21 L. 58, a similar case, vessel being wrecked by ice while proceeding under orders from government.

14 Wall. 535-550, 20 L. 753, UNITED STATES v. JUSTICE.

United States.— Where claimant against government voluntarily submits his claim to properly constituted commission, which finds sum due thereon, and he accepts same, he cannot afterwards sustain

claim in Court of Claims for further sum, even though he gave no receipt in full, p. 549.

Cited and relied on in Savage v. United States, 92 U. S. 388, 23 L. 662, holding where holder of treasury notes accepted payment for same in depreciated legal-tender notes, although under protest, he thereby waived all further claim against the government; United States v. Martin, 94 U. S. 404, 24 L. 129, where a receipt in full for a claim against the government, although less amount was received than was claimed, was held to bar any further claim; to same effect in Pray v. United States, 106 U. S. 595, 27 L. 265, 1 S. Ct. 484. Referred to, arguendo, in Mason v. United States, 17 Wall. 73, 21 L. 566, holding where contractor, at suggestion of commission appointed to adjust claims between government and contractors, modifies his original contract and executes modified contract, he can claim no damages for breach of original contract; Chicago, etc., Ry. Co. v. Clark, 92 Fed. 977, in discussion as to effect of acquiescence in an account stated.

Distinguished in Piatt v. United States, 22 Wall. 509, 22 L. 862, where by law the amount which the accounting officers could allow claimant was fixed and the claimant had, therefore, no option in the matter.

14 Wall. 550–553, 20 L. 739, UNITED STATES v. HUNT.

Army and navy.— Practice of war department in recognizing a distinction between brevet rank and regular rank is warranted by law; hence act of 1865, increasing commutation price of officer's subsistence, excepting officers above rank of brevet brigadier, excludes a regular brigadier-general, p. 552.

Not cited.

14 Wall. 553–564, 20 L. 724, TURNER v. SMITH.

Internal revenue.— Acts of June 7, 1862, and February 6, 1863, relating to collection of direct taxes in insurrectionary districts, explained and construed, p. 561.

Referred to, arguendo, in United States v. Lee, 106 U. S. 203, 27 L. 175, 1 S. Ct. 246.

Internal revenue.— Under act of February 6, 1863, providing for collection of taxes in insurrectionary districts, tax commissioners were not bound to hunt up owners of real property before proceeding to collect tax on land by sale thereof, p. 563.

Reaffirmed in Keely v. Sanders, 99 U. S. 445, 25 L. 328, it is duty of owners to pay tax when due.

Taxation.— Where land is sold for a tax which is a tax on land and all estates connected therewith, such as a rent charge, the pur-

chaser takes free of such interests, land only being subject to right of redemption, p. 563.

Cited, arguendo, in Hefner v. Northwestern Ins. Co., 123 U. S. 751, 31 L. 311, 8 S. Ct. 338, to effect that a purchaser under a tax sale receives a new and independent title under grant from sovereign authority, which extinguishes all prior titles and incumbrances of private persons; Hussman v. Durham, 165 U. S. 148, 41 L. 665, 17 S. Ct. 254, there is no privity between the holder of the fee and one who claims a tax title upon land.

14 Wall. 564–569, 20 L. 740, GREGG v. MOSS.

Appeal and error.— Judgment will not be reversed because of rejection of testimony in trial court, harmless to person offering same, p. 569.

Reaffirmed in Hornbuckle v. Stafford, 111 U. S. 394, 28 L. 470, 4 S. Ct. 518; approved in Lancaster v. Collins, 115 U. S. 227, 29 L. 375, 6 S. Ct. 35, holding no judgment should be reversed for errors which did not prejudice rights of party against whom ruling was made; to same effect are Sanger v. Flow, 48 Fed. 157, 4 U. S. App. 32, United States v. Shapleigh, 54 Fed. 137, 12 U. S. App. 26, Sipes v. Seymour, 76 Fed. 118, 40 U. S. App. 185, and Fisher v. State, 1 Pennewill, 391, 41 Atl. 185.

Appeal and error.— Findings of fact by jury are conclusive on Appellate Court in error, p. 569.

Cited and relied on in Tyler v. Angevine, 15 Blatchf. 543, F. C. 14,306, holding findings of fact by referee in bankruptcy could not be reviewed on writ of error; dissenting opinion in St. Louis, etc., Ry. Co. v. Whittle, 74 Fed. 312, 40 U. S. App. 23, whether there be sufficient evidence to support an allegation is a question for the jury; Newcomb v. White, 5 N. Mex. 438, 23 Pac. 672, reaffirms rule.

Novation.— Where A. lent money to B. and C., all three being members of a partnership, and subsequently the several partners by agreement mutually stated their respective contributions to the partnership, fact that A. agreed to treat this money as an advance to the partnership absolves B. and C. from liability, and it is immaterial that A. did not add the amount lent, to his statement, pp. 567, 569.

14 Wall. 570–578, 20 L. 743, PHILPOT v. GRUNINGER.

Contracts.— Distinction between motive of entering into a contract and its consideration, discussed, p. 576.

Cited, arguendo, in Morris v. Norton, 75 Fed. 926, 43 U. S. App. 739, holding motive for making a promise may be something entirely different from act, or forbearance or promise thereof, which

is offered and accepted in exchange for promise; Peck Co. v. Stratton, 95 Fed. 744, where party sought to avoid contract for want of consideration on ground that he had not received benefits from contract what other party thereto had led him to believe would be received; Howard College v. Turner, 71 Ala. 432, 46 Am. Rep. 328, Standley v. Northwestern Ins. Co., 95 Ind. 259, Warey v. Forst, 102 Ind. 212, 26 N. E. 89, and Nunn v. Larkey, 1 Tex. App. Civ. 778, all refer to principal case for this discussion.

Contracts.— Nothing is consideration that is not regarded as such by both parties to a contract at time of entering into same, p. 577.

Cited and applied in Fire Ins. Co. v. Wickham, 141 U. S. 579, 35 L. 867, 12 S. Ct. 88, holding the mere presence of some incident to a contract which might, under certain circumstances, be upheld as consideration for a promise, does not necessarily make it the consideration for the promise in that contract. Cited in Seymour v. Malcolm Lumber Co., 58 Fed. 962, 16 U. S. App. 245, without special application.

Contracts.— A consideration moving to A. and B., with whom C. afterwards enters into partnership, and of which consideration C. thus gets the benefit, will support a promise by C., p. 578.

Cited in collection of authorities in Lamp Co. v. Manufacturing Co., 64 Mo. App. 118, holding sufficiency of consideration depends on quality thereof, not quantity.

Miscellaneous.— Cited in Proctor v. Snodgrass, 5 Ohio C. C. 556, but not in point.

14 Wall. 579–606, 20 L. 779, THE DELAWARE.

Carriers.— Bill of lading acknowledges bailment of goods, and is evidence of contract for safe custody, due transport and right delivery of same, upon terms as to freight therein described, extent of obligation being specified in the instrument, pp. 596, 600.

This definition is cited with approval in Robinson v. Memphis, etc., Ry. Co., 9 Fed. 133, The Tongay, 55 Fed. 331, and The Henry Hyde, 82 Fed. 682; The Caledonia, 43 Fed. 685, holding where bill of lading is accepted without objection it is the real contract by which the mutual obligations of the parties is to be governed. Cited in The Guiding Star, 62 Fed. 411, 22 U. S. App. 344, but without special application; Woodruff v. Havemeyer, 106 N. Y. 134, 12 N. E. 630, holding bill of lading, in general, is binding upon and protects all parties who by means or under it, become owners or custodians of goods. See notes, 38 Am. Dec. 408, 409, and 56 Am. Dec. 679.

Shipping.— Goods stowed on deck contrary to custom, requiring them to be stowed in hold, if jettisoned will not be considered lost by perils of sea, p. 598.

Cited in Wood v. The Sallie C. Morton, 30 Fed. Cas. 476, The Schooner May and Eva, 6 Fed. 629, and Wellman v. Morse, 76 Fed. 577, 33 U. S. App. 610, as bearing on question when owners of a deck load which has been jettisoned for common benefit are entitled to a general average contribution. See notes, 17 Am. Dec. 236, and 41 Am. Dec. 284.

Evidence.— Receipts which are mere acknowledgments of payment or delivery are prima facie evidence of such facts only, and may be contradicted by parol; otherwise as to receipts containing a promise to do something in relation to the thing delivered, p. 601.

Reaffirmed in Rowe v. Bentley, 29 Gratt. 759.

Shipping.— A "clean" bill of lading imports that goods are to be stowed under deck, and that master is to see that they are properly stowed, p. 602.

Rule reaffirmed in The New Orleans, 26 Fed. 45, and The Sprott, 70 Fed. 331. See note, 45 Am. Dec. 106.

Distinguished in The William Crane, 50 Fed. 445, where cotton was stowed between main and upper deck in a protected place.

Carriers are not liable on bills of lading if party to whom given had no goods, or the goods described were never delivered to carrier or his agent, p. 602.

Cited and relied on in Witzler v. Collins, 70 Me. 298, 299, 35 Am. Rep. 330, 331, holding owners of vessel responsible only for goods described in bill of lading and delivered into custody of master at accustomed place of receipt. Cited in Louisville Trust Co. v. Louisville, etc., Ry. Co., 75 Fed. 457, 43 U. S. App. 550, as authority for holding that Supreme Court rule is that bill of lading issued without receiving goods is void into whosesoever hands it may come; The Eugene, 83 Fed. 224, holding suit in rem is not maintainable for breach of an executory contract to carry a passenger on a particular vessel, where vessel has never entered on performance thereof; The Humboldt, 86 Fed. 352, holding lien does not attach to vessel on an agreement to solicit business for ship. See note, 38 Am. Dec. 413.

Modified in Smith v. Mo. Pac. Ry. Co., 74 Mo. App. 55, holding where carrier himself issues bill of lading it is valid in hands of third parties, though goods were not in fact received by carrier.

Customs and usages.— Evidence of usage is admissible in mercantile contracts to prove that words in which contract is expressed are used in a particular sense different from sense which they ordinarily import; it may be introduced to explain what is ambiguous, but never to vary or contradict what is plain, p. 603.

Cited and relied on in Turnbull v. Bank, 4 Woods, 195, 16 Fed. 147, holding where contract provided consignees were to take goods "from alongside," evidence was inadmissible to show that goods were to be delivered otherwise than where ordinary appliances or

ship would leave them in discharging; Louisville, etc., Co. v. Rogers, 20 Ind. App. 599, 49 N. E. 972, holding evidence of usage not admissible to vary positive stipulations in bill of lading. See note, 8 Am. Dec. 151.

Evidence — Shipping.— Parol evidence is inadmissible to vary plain terms of written contract; therefore inadmissible to show that a shipper consented that goods be stowed on deck, bill of lading being clean, p. 604.

Cited and applied in Grace v. Am. Central Ins. Co., 109 U. S. 283, 27 L. 934, 3 S. Ct. 210, holding insurance contract, embodying in clear and positive terms the intention of parties, cannot be varied by evidence of usage or custom; Seitz v. Brewers' Co., 141 U. S. 518, 35 L. 840, 12 S. Ct. 48, holding silence of contract on point which might have been embodied therein will not admit parol evidence in regard thereto; Robinson v. Memphis, etc., Ry. Co., 9 Fed. 126, Espey v. Blanks, 9 Fed. 432, Louisville, etc., Ry. Co. v. Wilson, 119 Ind. 355, 21 N. E. 342, 4 L. R. A. 246, and n., and The Golden Rule, 9 Fed. 334, applying rule to bill of lading; The New Orleans, 26 Fed. 46, similar in facts to principal case; The Augustine Kobbe, 37 Fed. 699, and County of Johnson v. Wood, 84 Mo. 515, where written contract was held to have merged all previous oral agreements; Meyer v. Pacific Mail Steamship Co., 58 Fed. 925, where exceptions were sustained to answer setting up mutual mistake in terms of bill of lading; Gibbons v. Robinson, 63 Mich. 153, 29 N. W. 536, so far as bill of lading is an undertaking to transport and deliver goods as therein stipulated, in absence of fraud or mistake, its terms cannot be altered by parol proof; Wells-Fargo Co. v. Fuller, 4 Tex. Civ. App. 222, 23 S. W. 413, holding where bill of lading is silent as to route by which goods are to be sent, parol evidence that shipper directed a different route than one selected by carrier is inadmissible. Approved, arguendo, Eells v. St. Louis, etc., Ry. Co., 52 Fed. 905, without particular application. See monographic note, 38 Am. Dec. 416.

Modified in Witzler v. Collins, 70 Me. 301, 35 Am. Rep. 333, holding, as between parties to bill of lading, evidence is competent on part of carrier to contradict the admission in the bill that goods were received in good condition.

Miscellaneous.— Cited in Mo. Pac. Ry. Co. v. McFadden, 154 U. S. 161, 38 L. 946, 14 S. Ct. 991, as bearing on question when liability of common carrier begins. Cited incidentally in The Queen of the Pacific, 75 Fed. 78. Cited in Leitch v. Atlantic Ins. Co., 66 N. Y. 110, not in point. See note, 47 Am. Dec. 652, collecting authorities, holding ships are common carriers.

14 Wall. 607-613, 20 L. 756, LEARY v. UNITED STATES.

Shipping.— Where entire vessel is let to charterer with transfer to him of its command and possession, the charter-party is contract

for lease of vessel, and charterer will be considered as owner for the voyage or service stipulated, p. 610.

Cited and applied in United States v. Shea, 152 U. S. 186, 38 L. 406, 14 S. Ct. 521, where government was held liable for compensation for vessel so hired during time it was being repaired because of a collision while under control of officers of government; Somes v. White, 65 Me. 546, 20 Am. Rep. 721, holding general owners of vessel not liable for damages occasioned by a collision, happening through fault or negligence of master who controls her pro hac vice and is sailing her "on shares;" The Daniel Burns, 52 Fed. 160, where owners have let canal-boat and have sent a man therewith, he having nothing to do with control thereof, they will not be held liable for a shortage in a cargo of grain; The New York, 93 Fed. 497, holding further as to liability of charterers where vessel has been demised to them. Approved, arguendo, in The Bombay, 38 Fed. 513, but holding ship liable for coal furnished in a foreign port, parties furnishing same having no knowledge of charter-party.

Shipping.— Where charter-party merely provides for the let of vessel, owner retaining possession and command, contract is for special service to be rendered by owner of vessel, p. 610.

Cited and relied on in The T. A. Goddard, 12 Fed. 178, holding such a charter-party constituted a contract of affreightment only, and not a demise of vessel to charterers; The Craigallion, 20 Fed. 750, holding owners of vessel, under such charter, liable for negligence of master and crew which resulted in injury to cargo; Hagar v. Clark, 78 N. Y. 51, and Ross v. Charleston, etc., Co., 42 S. C. 452, 20 S. E. 287, reaffirm rule; The L. L. Lamb, 31 Fed. 32, where vessel was chartered to be accompanied by owner and master, but crew to be paid by charterers, seamen do not lose their lien on ship for wages even if they had knowledge of contract between owner and charterer; The Nicaragua, 71 Fed. 726, and The Terrier, 73 Fed. 267, owners must part with possession, command and navigation of vessel in order that the letting be considered a demise of her; Bramble v. Culmer, 78 Fed. 502, 42 U. S. App. 303, when owners have retained control of vessel they are liable for damages caused by acts of an incompetent pilot furnished by charterer; M'Gough v. Ropner, 87 Fed. 535, holding owners liable for injuries to stevedore caused by negligence of crew hired by them and under their control. See monographic note, 13 Am. Dec. 89.

Shipping.— In charter-party, whereby United States hired vessel, owner stipulating that government should indemnify him for "any extraordinary marine risk," held, that striking on fluke of sunken anchor in harbor was not such, pp. 612, 613.

14 Wall. 613–620, 20 L. 745, ERSKINE v. HOHNBACH.

Internal revenue.— Collector cannot refuse to enforce an assessment regularly made by assessor within his jurisdiction, p. 616.

Cited and applied in Haffin v. Mason, 15 Wall. 675, 21 L. 198, holding the warrant of the assessor is a justification to collector for distraining and selling taxpayer's property, on his refusal to pay assessment; Harding v. Woodcock, 137 U. S. 46, 34 L. 581, 11 S. Ct. 7, and In re Tyler, 149 U. S. 187, 37 L. 697, 13 S. Ct. 791, the duty of the collector is purely ministerial.

Officers.— Where ministerial officer acts on an order or process which is regular on its face and comes from an officer or tribunal having jurisdiction to issue it, the officer is protected in its regular enforcement, although officer or tribunal in reaching conclusions upon which order was issued may have committed serious error, p. 617.

Cited and applied in Stutsman County v. Wallace, 142 U. S. 309, 35 L. 1024, 12 S. Ct. 232, and Tyler v. Cass County, 1 N. Dak. 394, 48 N. W. 238, in holding county treasurer free from liability when he had sold land for taxes under warrant erroneously issued by assessor; First Nat. Bank v. Waters, 19 Blatchf. 248, 7 Fed. 157, Moss v. Cummings, 44 Mich. 362, Bird v. Perkins, 33 Mich. 32, Nowell v. Tripp, 61 Me. 430, 14 Am. Rep. 575, and Dixwill v. Jones, 2 Dill. 185, F. C. 3,937, all applying rule, as in principal case, to collection made by tax collector on assessment apparently regular; Mehlin v. Ice, 56 Fed. 16, 12 U. S. App. 305, holding sufficiency of evidence to warrant the issuance of a writ of ejectment cannot be inquired into in action against officer for enforcing same; dissenting opinion in Leachman v. Dougherty, 81 Ill. 328, the majority holding tax collector not protected by warrant when he knows of facts which render it void; Barr v. Combs, 29 Or. 401, 45 Pac. 777, and Holdredge v. McCombs, — Kan. —, 56 Pac. 537, applying principle to levy made by sheriff, holding evidence to charge him with knowledge that judgment on which execution was based had in fact been paid, was inadmissible in action for illegal seizure; Winchester v. Everett, 80 Me. 538, 6 Am. St. Rep. 229, 15 Atl. 597, 1 L. R. A. 426, holding judgment creditor not liable in trespass for refusing, on notice that judgment debtor is married woman, to release her from arrest already made by officer on execution regularly issued on judgment recovered against her as single woman, before court of competent jurisdiction; Atwood v. Atwater, 43 Neb. 156, 61 N. W. 577, holding error of judgment does not subject judicial officer to action for damages; Henline v. Reese, 54 Ohio St. 605, 56 Am. St. Rep. 739, 44 N. E. 270, holding ministerial officer may safely serve process, regular in form, although he may know court was without jurisdiction to issue same; Marks v. Sullivan, 9 Utah, 18, 19, 33 Pac. 226, 20 L.

R. A. 593, case of a constable acting on a warrant, legal on its face. Cited, arguendo, in McGraw v. Welch, 2 Colo. 290, in discussing liability of constable for seizure of goods under defective writ of attachment. Cited with approval in Milan v. Tillson, 17 Fed. Cas. 281, holding, under facts, owner of property sold by tax collector for taxes, cannot, on suit against collector, for value of same, introduce evidence to show no tax was due at time assessment was made. Cited, arguendo, in In re Anderson, 94 Fed. 495, and Mathews v. Densmore, 48 Mich. 463, 5 N. W. 671, without special application. See monographic note, 21 Am. Dec. 190, 191, 195, 196; also note, 60 Am. Dec. 399.

Distinguished in Philadelphia, etc., Ry. Co. v. Kenney, 19 Fed. Cas. 485, on ground that officer, upon whom ministerial officer relied for authority, acted without jurisdiction; Shepard v. Birth, 53 Ind. 108, where evidence showed that tax collector had seized and damaged or consumed property to an extent greater than the amount of the verdict.

Judgment should not be arrested and repleader awarded in case where two pleas present substantially the same issue, and replication to one joins issue on the merits, while replication to other presents an immaterial issue, all issues being found for plaintiff, p. 618.

See note to 4 McCrary, 465.

Pleading.— Effect of replication de injuria, considered, p. 618.

Miscellaneous.— Cited incidentally in Crystal Spring Co. v. Cox, 49 Fed. 561, 6 U. S. App. 42.

14 Wall. 620–653, 20 L. 860, MOWRY v. WHITNEY.

Patent to Whitney for improvement in manufacture of car wheels held to be a patent for a process, not a combination, p. 641.

Cited in Risdon Works v. Medart, 158 U. S. 75, 39 L. 902, 15 S. Ct. 748, and New Process Co. v. Maus, 20 Fed. 729, as an instance where patent was issued for process, involving chemical effects or combinations; Cary v. Lovell Mfg. Co., 31 Fed. 346, where patent for process for strengthening and making elastic steel wire was sustained; Carnegie Steel Co. v. Cambria Iron Co., 89 Fed. 753, 755, holding a process for preparing blast furnace metal for use in a converter, patentable.

Distinguished in Am. Strawboard Co. v. Elkhart Co., 84 Fed. 964, holding function or mode of operation of a mechanical device is not patentable as a process.

Patents.— Specifications are to be construed with reference to purpose of patent, p. 645.

Cited to this effect in Roberts v. Schreiber, 2 Fed. 867.

Patents.— Infringer of a process. as well as of an improvement in a machine, is not liable in damages for his entire profits, but for

advantage he has acquired from use of such process or improvement, p. 651.

This rule was reaffirmed in Littlefield v. Perry, 21 Wall. 228, 22 L. 581, where a patent for certain improvements in coal stoves had been infringed; Elizabeth v. Pavement Co., 97 U. S. 138, 24 L. 1006, reversing S. C., 1 Fed. Cas. 700, the burden is on infringer to show that all his profits were not derived from use of patented article, where profits are made from article patented as an entirety; Dobson v. Hartford Co., 114 U. S. 445, 29 L. 179, 5 S. Ct. 948, holding, where patentee claims damage for infringement of carpet design, he must show profits have accrued to infringer as a result of using same; Tilghman v. Proctor, 125 U. S. 144, 151, 31 L. 666, 669, 8 S. Ct. 898, 902, Mevis v. Conover, 125 U. S. 145, note, 23 L. 1009, 31 L. 667, 8 S. Ct. 899, Knox v. Great Western Co., 6 Sawy. 432, 433, F. C. 7,907, and McCreary v. Penn. Coal Co., 141 U. S. 463, 35 L. 819, 12 S. Ct. 42, follow the rule; Sessions v. Romadaka, 145 U. S. 45, 46, 36 L. 616, 12 S. Ct. 803, where defendant had used patented fastener on trunk manufactured by him; Maier v. Brown, 17 Fed. 737, a similar case; Key Stone Mfg. Co. v. Adams, 151 U. S. 147, 38 L. 105, 14 S. Ct. 298, and Black v. Munson, 14 Blatchf. 267, F. C. 1,463, holding, in such cases, the burden of proof, as to amount of profits, is on plaintiff. The following also reaffirm and apply the rule: Buerk v. Imhaeuser, 14 Blatchf. 22, F. C. 2,107, The Magic Ruffle Co. v. Elm City Co., 14 Blatchf. 115, F. C. 8,950, Schillinger v. Gunther, 15 Blatchf. 310, F. C. 12,457, Tuttle v. Claflin, 76 Fed. 233, 45 U. S. App. 105, Calkins v. Bertrand, 10 Biss. 449, 8 Fed. 759, Coupe v. Weatherhead, 37 Fed. 17, Garretson v. Clark, 10 Fed. Cas. 46, Shannon v. Bruner, 33 Fed. 872, 873, Wetherill v. New Jersey Zinc Co., 29 Fed. Cas. 836, Webster Loom Co. v. Higgins, 43 Fed. 676, Locomotive Truck Co. v. Penn. Ry. Co., 2 Fed. 679, 680, 681, and Everest v. Buffalo Oil Co., 31 Fed. 745, 746, all holding, if patentee cannot show an absolute advantage in the use of his patent over results which could be reached by other processes in common and unrestricted use, he cannot recover anything from an infringer as profits; Fischer v. Hayes, 22 Fed. 529, where infringer has infringed one of several claims in patent only, evidence is inadmissible to prove that patent, as an entirety, was capable of producing greater profits than other inventions in use; Freeman v. Freeman, 142 Mass. 102, 7 N. E. 713. Cited, arguendo, in Burdett v. Estey, 19 Blatchf. 4, 3 Fed. 569, 570, in general discussion as to what constitute profits arising from use of patented invention; Creamer v. Bowers, 35 Fed. 210, holding rule for ascertaining amount of damages sustained by patentee varies with special circumstances of each case; Brickill v. Mayor, 60 Fed. 102, 8 U. S. App. 503, without special application. Referred to, arguendo, in Railway Co. v. Sayles, 97 U. S. 556, 24 L. 1054, and Root v. Railway Co., 105 U. S. 197, 26 L. 978, in general review of authorities, no special application. Explained in Herring v. Gage, 15

Blatchf. 127, 128, F. C. 6,422, holding, in present case, in determining amount of damages, question was not what saving defendant had made by using patented device over what he might have made by using other devices, but what saving he had made directly by using patented device. Cited in Emigh v. Baltimore, etc., Ry. Co., 4 Hughes, 273, 6 Fed. 285, holding, where there is an established license fee for use of a patented article, in case proof of profits is difficult, such fee may be taken as proper basis for estimating defendant's profits.

Distinguished in Manufacturing Co. v. Cowing, 105 U. S. 255, 26 L. 988, reversing S. C., 12 Blatchf. 251, F. C. 5,642, where, under peculiar state of facts, patentee was held entitled to recover from infringer difference between cost of producing article and amount received from sale thereof; Warren v. Keep, 155 U. S. 269, 39 L. 146, 15 S. Ct. 84, when patented invention is for a new article of manufacture, patentee is entitled to damages arising from the manufacture and sale of entire article. Said to be distinguished in Mulford v. Pearce, 14 Blatchf. 142, F. C. 9,908, although rule appears to be denied.

Patent for a process, made up of several constituent steps or stages, patentee not claiming to be inventor of such constituents, does not secure to him exclusive use of the constituents singly, p. 652.

Patents.— Interest should not be allowed on profits made by infringer of patent until final decree is made, since profits are measure of damages allowed patentee for invasion of his right and interest is not allowed on unliquidated damages, p. 653.

Cited and rule reaffirmed in Littlefield v. Perry, 21 Wall. 229, 22 L. 581, but holding further, there may be circumstances when interest should be allowed; Illinois Central Ry. Co. v. Turrill, 110 U. S. 303, 28 L. 155, 4 S. Ct. 6 (affirming S. C., 5 Biss. 351, F. C. 14,272), and Crosby Co. v. Safety Co., 141 U. S. 457, 458, 35 L. 816, 12 S. Ct. 55, where it was held equitable to allow interest from time of filing report by master, to whom case had been referred to ascertain amount of damages; Tilghman v. Proctor, 125 U. S. 160, 31 L. 672, 8 S. Ct. 907, Holbrook v. Small, 12 Fed. Cas. 326, and Brady v. Atlantic Works, 3 Fed. Cas. 1195, reaffirm the general rule; to same effect are Webster v. New Brunswick Co., 29 Fed. Cas. 559, Locomotive Truck Co. v. Penn. Ry. Co., 2 Fed. 682, and Creamer v. Bowers, 35 Fed. 208; National Box Co. v. Elsas, 81 Fed. 198, holding interest should not be allowed on unliquidated damages before verdict, judgment or decree is rendered. Cited, arguendo, in Root v. Railway Co., 105 U. S. 200, 26 L. 979, in general review of cases relating to patent law; Steam Cutter Co. v. Windsor Co., 17 Blatchf. 33, F. C. 13,335, no special application; Pulliam v. Pulliam, 10 Fed. 67, in discussing liability of executor for interest on funds coming into his hands.

Patents.— Profits allowed patentee from infringer are really damages, and unliquidated until decree is made, p. 653.

Cited, arguendo, in Kirk v. Du Bois, 28 Fed. 462, holding such damages are not extinguished by death of infringer.

Miscellaneous.— Cited as to nature of action for infringement of patent, in Babcock v. Pioneer Iron Works, 34 Fed. 341.

14 Wall. 653–661, 20 L. 896, THE KEY CITY.

Maritime lien.— Laches or delay in enforcement of maritime liens will, under proper circumstances, constitute a valid defense, p. 660.

Cited and relied on in The Columbia, 13 Blatchf. 523, F. C. 3,036, claimant having delayed three years in filing bill against vessel for injuries sustained in collision, the vessel in meantime having been mortgaged, it was held claim must be postponed to mortgage; to same effect, The Bristol, 11 Fed. 163, where vessel had passed to bona fide purchaser; The Brig Wexford, 7 Fed. 681, where facts were such that defense of laches was sustained; Southard v. Brady, 36 Fed. 561, where claim in admiralty would be barred at law by statute of limitations, it is, by analogy, barred on ground of laches; The Nebraska, 69 Fed. 1012, 34 U. S. App. 119, holding further, as to what acts will constitute a waiver of maritime lien; Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 188, 189, in holding Federal courts, in exercising admiralty jurisdiction, are not bound by State statutes. Referred to in Reed v. Insurance Co., 95 U. S. 33, 24 L. 351, no special application; The Queen of the Pacific, 61 Fed. 215, 216 (see also same case on rehearing, 78 Fed. 158), holding State statute of limitations does not apply to libel in rem to enforce maritime lien. See monographic note, 2 Am. St. Rep. 805.

Admiralty.— The period of time which must elapse to bar enforcement of a right in admiralty, must depend on the peculiar equitable circumstances of each case, p. 660.

Cited and applied in Harwood v. Railroad Co., 17 Wall. 81, 21 L. 559, holding, where bill to set aside judicial proceedings is filed five years after such proceedings were had, the cause of so considerable a delay should be set out; The Harriet Ann, 6 Biss. 15, F. C. 6,101, where seaman's lien for wages was held unenforceable after delay of two years, ship in meantime having passed to bona fide purchaser; to same effect is The Artisan, 8 Ben. 541, F. C. 567, and The Norfolk, 2 Hughes, 127, F. C. 10,297, claim for overdue wages does not necessarily become stale in twenty months; The Alaska, 33 Fed. 112, holding delay of eleven months in bringing suit for damages, the result of a collision, not laches, even though vessel against which libel was filed had passed into hands of purchasers without notice of claim; The Tiger, 90 Fed. 827, where a delay of seventeen months was held to have barred claim.

Notice.— Where two corporations unite their property, and form new corporation, putting in no money, the new corporation cannot avail itself of the doctrine applicable to purchaser without notice, p. 660.

Cited, arguendo, in The Alfred J. Murray, 60 Fed. 927, no special application. See note, 79 Am. Dec. 426; monographic note on assumption of liability, 59 Am. St. Rep. 550.

Distinguished in Bate Co. v. Gillett, 30 Fed. 688, holding corporation, buying out business of a firm, is not bound by injunction granted against firm, unless it has been made party to suit.

Maritime liens.— Where a lien is sought to be enforced to detriment of a purchaser for value, without notice of lien, the defense of laches will be valid under shorter time than when claimant is owner at time lien accrued, p. 660.

Rule reaffirmed in The H. N. Emilie, 70 Fed. 512, where lien for wages was enforced against prior mortgagees, the ship having remained under control of mortgagor. Cited, arguendo, in In re Herman, 9 Ben. 448, F. C. 6,405, without special application.

Miscellaneous.— Erroneously cited in Fitzgerald v. The H. A. Richmond, 9 Fed. Cas. 191, and The Rapid Transit, 11 Fed. 335. Cited incidentally in Bacon v. Chase, 88 Iowa, 530, 50 N. W. 26, Frenche v. Kitchen, 53 N. J. Eq. 39, 30 Atl. 816, and Marrow v. Brinkley, 85 Va. 62, 6 S. E. 609, in discussion as to laches which will bar claim in equity.

14 Wall. 661-670, 20 L. 757, DELMAS v. INSURANCE CO.

Courts.— Supreme Court has no power to review decision of highest State court, holding a contract void on general principles of public policy, p. 666.

Reaffirmed and followed in Tarver v. Keach, 15 Wall. 68, 21 L. 82, and Rockhold v. Rockhold, 92 U. S. 130, 23 L. 507, both holding Supreme Court without jurisdiction to review State decision, holding, upon principles of general law, trustee cannot be held responsible to cestui for loss of funds, if loss was occasioned by cestui's own laches; New York Life Ins. Co. v. Hendren, 92 U. S. 287, 23 L. 710, where State court refused instructions as to effect, under general public law, of sectional Civil War, on contract which was subject of suit; United States v. Thompson, 98 U. S. 589, 23 L. 983, and Bank v. McVeigh, 98 U. S. 333, 25 L. 111, both applying principle to a decision, based on general principles of commercial law, relating to effect of Civil War on notice required to be given to indorser of promissory note; Dugger v. Bocock, 104 U. S. 601, 602, 26 L. 848, holding Supreme Court had no jurisdiction to re-examine the decree of a State court, dismissing a bill brought by vendor of lands to have sale set aside on ground that payment was made in Confederate notes and bonds; San Francisco v. Scott, 111 U. S. 769, 28 L.

593, 4 S. Ct. 688, holding decision of California courts, as to power of alcalde in San Francisco, after conquest, but before adoption of State Constitution, to make grants of land, did not involve a Federal question; Chicago, etc., Ry. Co. v. Wiggins Ferry Co., 119 U. S. 624, 30 L. 523, 7 S. Ct. 402, and Lehigh Water Co. v. Easton, 121 U. S. 392, 30 L. 1060, 7 S. Ct. 919, reaffirm and follow the rule. Approved, arguendo, in New Orleans Water-Works v. Louisiana Sugar Co., 125 U. S. 34, 31 L. 613, 8 S. Ct. 750, without special application.

Courts.— Where State decision, relating to contracts, is based on constitutional or legislative enactment, Supreme Court may inquire whether such legislation violates the Federal Constitution by impairing obligation of contract, p. 667.

Cited and applied in Boyce v. Tabb, 18 Wall. 548, 21 L. 757, holding it within power of Supreme Court to review State decision, based on State law, holding contract to pay for slaves sold in 1861, without consideration. Approved, arguendo, in separate opinion, in Hall v. De Cuir, 95 U. S. 500, 24 L. 552.

Distinguished in Winona, etc., Ry. Co. v. Plainview, 143 U. S. 393, 36 L. 200, 12 S. Ct. 538, on ground that it did not appear State decision had given effect to legislative enactment, which impairs obligation of prior contract.

Appeal and error.— Under act of 1824, opinions delivered by Louisiana appellate court are part of the record on appeal in the Supreme Court, p. 667.

Cited on this point in New Orleans Water-Works v. Louisiana Sugar Co., 125 U. S. 27, 31 L. 611, 8 S. Ct. 746.

Courts.— Supreme Court, in determining whether State legislation impairs obligation of contract, may determine for itself whether contract alleged to have been affected was valid in its inception; in so doing, it is not concluded by the State decisions, p. 668.

Cited and relied on in University v. People, 99 U. S. 321, 25 L. 389, holding, in determining whether contract between university and State had been impaired by subsequent legislation, the Supreme Court might review that part of decision of State court holding such contract void ab initio; to same effect is Mobile, etc., Ry. Co. v. Tennessee, 153 U. S. 495, 38 L. 797, 14 S. Ct. 971, a similar case.

Courts.— Federal courts are bound by decisions of State courts construing their own statutes; also, so far as they establish rules of law affecting title to lands, or principles which have become settled rules of property, p. 668.

Cited in Patten v. Cilley, 46 Fed. 892, holding, in proceedings to establish wills, law of State should generally govern.

Distinguished in Sanford v. Portsmouth, 2 Flipp. 108, F. C. 12,315, holding Federal court not bound by decision of State court, holding

mandamus the only proper remedy upon municipal bonds; Hollingsworth v. Parish, 4 Woods, 284, 17 Fed. 112, where decision of State court was on question involving general principles of law.

Constitutional law.— Notes of Confederate States, in ordinary circulation as money, during Rebellion, constituted good consideration for a contract, and a judgment of State court, holding such contracts void, based on constitutional amendment declaring them invalid, impairs the obligation of a contract, p. 669.

Cited with approval in Louisiana State Lottery Co. v. Fitzpatrick, 3 Woods, 248, F. C. 8,541, holding courts will enforce contracts which had sanction of law when made; Young v. Mitchell, 33 Ark. 228, and Lewis v. Alexander, 51 Tex. 590, reaffirm fore part of rule; Whitfield v. Riddle, 52 Ala. 471, holding Confederate currency sufficient consideration to support a promissory note; Berry v. Bellows, 30 Ark. 211, where payment of debt in Confederate notes was held to have discharged debt. Approved, arguendo, in Baldy v. Hunter, 171 U. S. 395, 18 S. Ct. 892, where court holds transactions between persons residing within territory dominated by Confederate government, not invalid because they occurred under sanction of laws of that government; Van Hoose v. Bush, 54 Ala. 350, holding, further, as to when use of Confederate notes is illegal; Daughdrill v. Edwards, 59 Ala. 427. Cited in County Commissioners v. Colorado Seminary, 12 Colo. 499, 21 Pac. 491, in holding legislature could not impair clause in charter granted institution of learning, which provided such institution should be free from taxation; Succession of Womack, 29 La. Ann. 580, and Kennedy v. Briere, 45 Tex. 310, as authority for holding Confederate money had value during period of war.

14 Wall. 670–676, 20 L. 760, PROPELLER CO. v. UNITED STATES.

Shipping.— Contract by which the government hired tug at certain price per diem, tug to become government property after payments to a certain amount were made, held to be a contract of sale, not a mere affreightment; hence, upon loss of vessel, government was liable for difference between per diem hire to date, and total purchase price, pp. 675, 676.

Not cited.

14 Wall. 676–682, 20 L. 719, WILLARD v. PRESBURY.

District of Columbia.— Congress has power to authorize city of Washington to assess adjacent proprietors of lots for expenses of constructing and repairing streets; the tax need not be a general one on city, p. 680.

Cited and relied on in Spencer v. Merchant, 125 U. S. 355, 31 L. 767, 8 S. Ct. 926, and Bauman v. Ross, 167 U. S. 589, 42 L. 288, 17 S. Ct. 982, as authority for holding State legislatures may authorize this mode of taxation; Paulsen v. Portland, 149 U. S. 40, 37 L. 641,

18 S. Ct. 753, and Butler v. Worcester, 112 Mass. 555, the determination of a territorial district to be taxed for a local improvement is within province of legislative discretion; Williard v. Williard, 154 U. S. 568, 38 L. 1088, 14 S. Ct. 1215, a case involving same question as principal case; also Parsons v. District of Columbia, 170 U. S. 56, 42 L. 947, 18 S. Ct. 525, power of Congress to exercise exclusive jurisdiction in all cases within district, includes power of taxation; dissenting opinion in Norwood v. Baker, 172 U. S. 298, 19 S. Ct. 198, the majority holding this mode of assessment illegal where exactions from adjacent owner are in substantial excess of special benefits accruing to him; Rolph v. Fargo, 7 N. Dak. 668, 76 N. W. 251, 42 L. R. A. 657, holding it competent for legislature to direct that all expense of paving a city street shall be assessed against abutting property in proportion to frontage. See monographic note, 16 Am. St. Rep. 871.

The Citations in the foregoing an
the following Reports and all prece
series:

U. S.	174	Mo.
Law. Ed.	42	Mo
Fed. Rep.	96	Ne
U. S. Ap.	63	Ne
(excepting 58)		N.
Ala.	119	N.
Ariz.	1	N.
Ark.	65	N.
Cal.	125	N.
Colo.	25	N.
Colo. Ap.	12	N.
Conn.	71	O
Dak.	5	O
Del. Marv.	2	P
Fla.	39	R.
Ga.	106	S.
Ida.	2	S.
Ill.	181	T
Ind.	152	T
Ind. Ap.	22	T
Iowa	107	T
Kans.	60	U
Kans. Ap.	7	V
Ky.	100	V
La. Ann.	51	
Md.	88	
Me.	92	
Mass.	172	
Mich.	117	
Minn.	73	
Miss.	76	
Mo.	150	

with duplicate references to th
cases, including

Sup. Ct.	19
Atl.	43
Pac.	58
So.	25

motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

5. There may be united, with a motion to dismiss a writ of error or an appeal, a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

6. The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court. The motion-day shall be Monday of each week; and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

7.

LAW LIBRARY.

1. During the session of the court, any gentleman of the Bar having a case on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. It shall be the duty of the clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof, and also one dollar per day for each day's detention beyond the limited time.

2. The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments filed therein.

3. The marshal shall take charge of the books of the court, together with such of the duplicate law-books as Congress may direct to be transferred to the court, and arrange them in the conference-room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by anyone except the justices of the court.

8.

WRIT OF ERROR, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

in other cases; and if such representati
not voluntarily become parties, then t
party may suggest the death on the rec
thereupon, on motion, obtain an order
less such representatives shall become
within the first ten days of the ensuir
the party moving for such order, if d
in error, shall be entitled to have the
error or appeal dismissed; and if the
moving shall be plaintiff in error, he
entitled to open the record, and on heari
the judgment or decree reversed, if i
roneous: *Provided*, however, That a
every such order shall be printed in son
paper of general circulation within th
territory, or district from which the
brought, for three successive weeks,
sixty days before the beginning of the
the Supreme Court then next ensuing.

2. When the death of a party is su
and the representatives of the deceased
appear by the tenth day of the secon
next succeeding the suggestion, and n
ures are taken by the opposite party
that time to compel their appearance, t
shall abate.

3. When either party to a suit in a
court of the United States shall desire t
cute a writ of error or appeal to the S
Court of the United States, from an
judgment or decree, rendered in the
court, and at the time of suing out su
of error or appeal the other party to t
shall be dead and have no proper repr
tive within the jurisdiction of the court
rendered such final judgment or decree,
the suit cannot be revived in that cou
shall have a proper representative in som
or territory of the United States, the pa
siring such writ of error or appeal may
the same, and may have proceedings o
judgment or decree superseded or stayed
same manner as is now allowed by law i
cases, and shall thereupon proceed wit
writ of error or appeal as in other cases
within thirty days after the commencem
the term to which such writ of error or
is returnable, the plaintiff in error or ap
shall make a suggestion to the court, su
ed by affidavit, that the said party wa
when the writ of error or appeal was ta
sued out, and had no proper represen
within the jurisdiction of the court whic
dered said judgment or decree, so that t
could not be revived in that court, an
said party had a proper representative i
state or territory of the United State
stating therein the name and character o
representative, and the state or territo
which such representative resides; and,
such suggestion, he may, on motion, obt
order that, unless such representative
make himself a party within the first te
of the ensuing term of the court, the pl
in error or appellant shall be entitled to
the record, and, on hearing, have the jud
or decree reversed, if the same be erron
Provided, however, That a proper citati
citing the substance of such order sh
served upon such representative, either p
ally or by being left at his residence, at
sixty days before the beginning of the te
the Supreme Court then next ensuing: An

and annex to the same the bill of items taxed in detail.

7. In pursuance of the act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, five dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order, or other paper, twenty-five cents.

For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment or decree, one dollar.

For every search of the records of the court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent on the amount so received, kept, and paid.

For an admission to the bar and certificate under seal, ten dollars.

For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio.

For making a manuscript copy of the record, when required under rule 10, twenty cents per folio, but nothing in addition for supervising the printing.

For issuing a writ of error and accompanying papers, five dollars.

For a mandate or other process, five dollars.

For filing briefs, five dollars for each party appearing.

For every copy of any opinion of the court or any justice thereof, certified under seal, one dollar for every printed page, but not to exceed five dollars in the whole for any copy.

25.

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded, and to deliver a copy to the reporter as soon as the same shall be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

26.

CALL AND ORDER OF THE DOCKET.

1. The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket,

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(Rules U. S. Su

	Rule	Sec.	Page
Adjournment	27	—	906
Admiralty, record in	8	6	902
Appearance of counsel	9	3	903
for plaintiff, no	16	—	904
defendant, no	17	—	904
either party, no	18	—	904
Appeals in removal cases	32	—	907
Argument, oral	22	—	905
order of	22	1	905
time allowed for	22	3	905
on motions	6	2	901
printed	20	—	904
submission on	20	1	904
not received after submission	20	4	904
Assignment of errors	21	2, 4	905
Attachment for clerk's fees	10	8	903
Attorneys, admission of	2	1	901
oath of	2	2	901
Bill of exceptions	4	—	901
Briefs	21	—	905
contents of	21	2	905
time for filing by plaintiff in error or appellant	21	1	905
defendant in error or appellee	21	3	905
form of printed	31	—	907
not received after argument	20	4	904
Cases involving same question may be heard together	26	8	906
passed, how restored to call	26	9	906
dismissal of, in vacation	28	—	906
Certiorari	14	—	905
Citation, service of	8	5	907
Clerk	1	—	90
Clerk's fees, table of	24	7	90
attachment for	10	8	90
Conference-room library	7	3	90
Costs of printing record	10	2,6,7	90
how taxed	24	—	90
Costs, none recoverable in cases where United States is party	24	4	90
Counsel, admission of	2	1	90
appearance of	9	3	90
no appearance of	18	—	90
two only to be heard on argument	22	2	9
time allowed for argument	22	3	9
motions	6	2	9
Damages for delay	23	2	9
Defendant, no appearance of	17	—	9
Death of a party	15	—	9
defendant in error or appellee after judgment in lower court	15	3	9
Dismissal in vacation	28	—	9
Docketing cases	9	—	9
by plaintiff in error or appellant	9	1	9
defendant in error or appellee	9	2	9
Docket, call of	26	—	9
day-call	26	2	9
Errors, assignment of	21	4	
specification of	21	2	
Evidence, new, how taken	12	1	
in admiralty	12	2	
in the record, objections to	13	—	
Exceptions, bill of	4	—	
Exhibits of material	33	—	
Fees, table of clerk's	24	7	

The Citations in the foregoing annotations include all from the following Reports and all preceding them in each State or series:

U. S.	174	Mo. Ap.	79
Law. Ed.	42	Mont.	22
Fed. Rep.	96	Neb.	56
U. S. Ap. (excepting 58)	63	Nev.	23
		N. H.	67
Ala.	119	N. J. Eq.	56
Ariz.	1	N. J. L.	62
Ark.	65	N. M.	8
Cal.	125	N. Y.	159
Colo.	25	N. C.	123
Colo. Ap.	12	N. D.	7
Conn.	71	Ohio	60
Dak.	5	Or.	33
Del. Marv.	2	Pa.	192
Fla.	39	R. I.	19
Ga.	106	S. C.	54
Ida.	2	S. D.	10
Ill.	181	Tenn.	101
Ind.	152	Tex.	92
Ind. Ap.	22	Tex. Civ.	18
Iowa	107	Tex. Cr.	38
Kans.	60	Utah	18
Kans. Ap.	7	Vt.	70
Ky.	100	Va.	96
La. Ann.	51	Wash.	20
Md.	88	W. Va.	45
Me.	92	Wis.	102
Mass.	172	Wyo.	6
Mich.	117	Am. Dec.	100
Minn.	73	Am. Rep.	60
Miss.	76	Am. St. Rep.	70
Mo.	150	L. R. A.	45

with duplicate references to the Reporter System and later cases, including

Sup. Ct.	19	N. E.	53
Atl.	43	N. W.	80
Pac.	58	S. E.	33
So.	25	S. W.	53

RULES

OF THE

SUPREME COURT OF THE UNITED STATES.

JANUARY 7, 1884.

1.

CLERK.

1. The clerk of this court shall reside and keep the office at the seat of the national government, and he shall not practise, either as attorney or counselor, in this court, or in any other court, while he shall continue to be clerk of this court.

2. The clerk shall not permit any original record or paper to be taken from the court-room, or from the office, without an order from the court, except as provided by rule 10.

2.

ATTORNEYS AND COUNSELORS.

1. It shall be requisite to the admission of attorneys or counselors to practise in this court, that they shall have been such for three years past in the supreme courts of the states to which they respectively belong, and that their private and professional character shall appear to be fair.

2. They shall respectively take and subscribe the following oath or affirmation, *viz.:*

I, ——— ———, do solemnly swear [or affirm] that I will demean myself, as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

3.

PRACTICE.

This court considers the former practice of the courts of King's Bench and of chancery, in England, as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary.

4.

BILL OF EXCEPTIONS.

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

5.

PROCESS.

1. All process of this court shall be in the name of the President of the United States.

2. When process at common law or in equity shall issue against a state, the same shall be served on the governor, or chief executive magistrate, and attorney general of such state.

3. Process of subpœna, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return-day of the said process; and if the defendant, on such service of the subpœna, shall not appear at the return-day, the complainant shall be at liberty to proceed *ex parte.*

6.

MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

4. All motions to dismiss writs of error and appeals, except motions to docket and dismiss under rule 9, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief or argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky mountains, in which case the notice shall be at least thirty days. Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid, at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as prima facie evidence of service on counsel who reside without the District of Columbia. On proof of such service, the

motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

5. There may be united, with a motion to dismiss a writ of error or an appeal, a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

6. The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court. The motion-day shall be Monday of each week; and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

7.

LAW LIBRARY.

1. During the session of the court, any gentleman of the Bar having a case on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. It shall be the duty of the clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof, and also one dollar per day for each day's detention beyond the limited time.

2. The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments filed therein.

3. The marshal shall take charge of the books of the court, together with such of the duplicate law-books as Congress may direct to be transferred to the court, and arrange them in the conference-room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by anyone except the justices of the court.

8.

WRIT OF ERROR, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, a other proceedings, which are necessary to t hearing in this court, shall be filed.

4. Whenever it shall be necessary or prop in the opinion of the presiding judge in a circuit court, or district court exercising c cuit court jurisdiction, that original papers any kind should be inspected in this court up writ of error or appeal, such presiding jud may make such rule or order for the safe ke ing, transporting, and return of such origin papers as to him may seem proper; and th court will receive and consider such origin papers in connection with the transcript of th proceedings.

5. In cases where final judgment is rendere more than thirty days before the first day the next term of this court, the writ of erro and citation, if taken before, must be retur able on the first day of said term, and be serv before that day; but in cases where the judg ment is rendered less than thirty days befo the first day, the writ of error and citatio may be made returnable on the third Mond of the said term and be served before that day

6. The record in cases of admiralty and mari time jurisdiction, when under the requirement of law the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.

9.

DOCKETING CASES.

1. In all cases where a writ of error or an appeal shall be brought to this court from any judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court within the first six days of the term; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court within the first thirty days of the term; and if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed, upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered stating the case, and certifying that such writ of error or appeal has been duly sued out and allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of the court, and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the periods of time above limited and prescribed by this

rule, or by the defendant in error or appellee at any time thereafter during the term, the case shall stand for argument at the term.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

4. In all cases where the period of thirty days is mentioned in this rule, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, and Idaho.

10.

PRINTING RECORDS.

1. In all cases the plaintiff in error or appellant, on docketing a case and filing the records, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer, and supervising the printing, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, after March 1, 1884, the case shall be dismissed.

3. Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under rule 8, § 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

7. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of the said fees.

11.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceedings, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court, in order that a translation may be there supplied and inserted in the record.

12.

FURTHER PROOF.

1. In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any circuit court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: *Provided*, however, That nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

13.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

14.

CERTIORARI.

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari must be made at the first term of the entry of the case; otherwise the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

15.

DEATH OF A PARTY.

1. Whenever, pending a writ or error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as

in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: *Provided*, however, That a copy of every such order shall be printed in some newspaper of general circulation within the state, territory, or district from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a circuit court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in the circuit court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some state or territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some state or territory of the United States, and stating therein the name and character of such representative, and the state or territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous: *Provided*, however, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing: And *provided*, also, That in every such case, if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: And *provided*, also, That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

16.

NO APPEARANCE OF PLAINTIFF.

Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.

17.

NO APPEARANCE OF DEFENDANT.

Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff and to give judgment according to the right of the case.

18.

NO APPEARANCE OF EITHER PARTY.

When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

19.

NEITHER PARTY READY AT SECOND TERM.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff, unless sufficient cause is shown for further postponement.

20.

PRINTED ARGUMENTS.

1. In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; but twenty-five copies of the arguments, signed by attorneys or counselors of this court must be first filed.

2. When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

4. No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

21.

BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of the court, at least six days before the case is called for argument, twenty-five copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in the order here stated:

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty-five printed copies of his argument, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

22.

ORAL ARGUMENTS.

1. The plaintiff or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion: *Provided*, always, That a fair opening of the case shall be made by the party having the opening and closing arguments.

23.

INTEREST.

1. In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment is rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, interest shall not be allowed, unless specially directed by the court.

24.

COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below,

and annex to the same the bill of items taxed in detail.

7. In pursuance of the act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, five dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order, or other paper, twenty-five cents.

For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment or decree, one dollar.

For every search of the records of the court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent on the amount so received, kept, and paid.

For an admission to the bar and certificate under seal, ten dollars.

For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio.

For making a manuscript copy of the record, when required under rule 10, twenty cents per folio, but nothing in addition for supervising the printing.

For issuing a writ of error and accompanying papers, five dollars.

For a mandate or other process, five dollars.

For filing briefs, five dollars for each party appearing.

For every copy of any opinion of the court or any justice thereof, certified under seal, one dollar for every printed page, but not to exceed five dollars in the whole for any copy.

25.

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded, and to deliver a copy to the reporter as soon as the same shall be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

26.

CALL AND ORDER OF THE DOCKET.

1. The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the case shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court.

2. Ten cases only shall be considered as liable to be called on each day during the term, including the one under argument.

3. Criminal cases may be advanced by leave of the court on motion of either party.

4. Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

5. Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also by leave of the court, be advanced on motion of the attorney general.

6. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

7. No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court. Every case which shall have been called in its order and passed and put at the foot of the docket shall, if not again reached during the term it was called, be continued to the next term of the court.

8. Two or more cases, involving the same question, may, by the leave of the court, be heard together; but they must be argued as one case.

9. If, after a case has been passed under circumstances which do not place it at the foot of the docket, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request either may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct.

10. No stipulation to pass a case without placing it at the foot of the docket will be recognized, as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

27.

ADJOURNMENT.

The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon; and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

28.

DISMISSING CASES IN VACATION.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall in vaca-

tion, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

29.

SUPERSEDEAS.

Supersedeas bonds in the circuit courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs, if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

30.

REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

31.

FORM OF PRINTED RECORDS AND BRIEFS.

All records, arguments, and briefs printed for the use of the court must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume.

32.

WRITS OF ERROR AND APPEALS UNDER § 5 OF THE ACT OF MARCH 3, 1875.

1. Writs of error and citations under § 5 of the act of March 3, 1875, "to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the state courts, and for other purposes," for the review of orders of the circuit courts dismissing suits, or remanding suits to a state court, must be made returnable within thirty days after date, and be served before the return day.

2. In all cases where a writ of error or appeal is brought to this court under the provisions of that act, it shall be the duty of the plaintiff in error or the appellant to docket the case and file the record in this court within thirty-six days after the date of the writ of error, or the taking of the appeal, if there shall be a term of the court pending at that time, and if not, then during the first six days of the next term. If default be made in this particular, proceedings to docket and dismiss may be had as in other cases.

3. All such cases will be advanced on motion, and heard under the rules prescribed by rule 6 in regard to motions to dismiss writs of error and appeals.*

4. As soon as such a case is docketed and advanced, the record shall be printed, unless the parties stipulate to the contrary, and file their stipulation with the clerk.

5. In all cases where a period of thirty days is included in the times fixed by this rule, it shall be extended to sixty days in writs of error and appeals from California, Oregon, or Nevada.

33.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

(Promulgated January 7, 1884.)

*SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

Ordered, that § 3 of rule 32 be amended so as to read as follows:

3. All such cases will be advanced on motion. The motion may be made *ex parte*. If granted, the party on whose motion the case shall have been advanced may have the case submitted on printed briefs, on serving, with a copy of his brief, on the adverse party, a notice of intention to submit, such as is required by rule 6 to be given upon motions to dismiss writs of error and appeals.

(Promulgated May 5, 1884.)

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(Rules U. S. Supren

	Rule	Sec.	Page
Adjournment	27	—	906
Admiralty, record in	8	6	902
Appearance of counsel	9	3	903
for plaintiff, no	16	—	904
defendant, no	17	—	904
either party, no	18	—	904
Appeals in removal cases	32	—	907
Argument, oral	22	—	905
order of	22	1	905
time allowed for	22	3	905
on motions	6	2	901
printed	20	—	904
submission on	20	1	904
not received after submission	20	4	904
Assignment of errors	21	2, 4	905
Attachment for clerk's fees	10	8	903
Attorneys, admission of	2	1	901
oath of	2	2	901
Bill of exceptions	4	—	901
Briefs	21	—	905
contents of	21	2	905
time for filing by plaintiff in error or appellant	21	1	905
defendant in error or appellee	21	3	905
form of printed	31	—	907
not received after argument	20	4	904
Cases involving same question may be heard together	26	8	906
passed, how restored to call	26	9	906
dismissal of, in vacation	28	—	906
Certiorari	14	—	903
Citation, service of	8	5	902
Clerk	1	—	901
Clerk's fees, table of	24	7	906
attachment for	10	8	903
Conference-room library	7	3	902
Costs of printing record	10	2,6,7	903
how taxed	24	—	905
Costs, none recoverable in cases where United States is party	24	4	905
Counsel, admission of	2	1	901
appearance of	9	3	903
no appearance of	18	—	904
two only to be heard on argument	22	2	905
time allowed for argument	22	3	905
motions	6	2	901
Damages for delay	23	2	905
Defendant, no appearance of	17	—	904
Death of a party	15	—	903
defendant in error or appellee after judgment in lower court	15	3	904
Dismissal in vacation	28	—	906
Docketing cases	9	—	902
by plaintiff in error or appellant	9	1	902
defendant in error or appellee	9	2	902
Docket, call of	26	—	906
day-call	26	2	906
Errors, assignment of	21	4	905
specification of	21	2	905
Evidence, new, how taken	12	1	903
in admiralty	12	2	903
in the record, objections to	13	—	903
Exceptions, bill of	4	—	901
Exhibits of material	33	—	907
Fees, table of clerk's	24	7	906

Fee
Inte
Law
Man
Mot
Mot
Mot
Opi
Orig
Par
Pla
Pra
Pro
Rec
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Rep
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ORDER

IN REFERENCE TO

APPEALS FROM THE COURT OF CLAIMS.

JANUARY 7, 1884.

Rule 1.

In all cases hereafter decided in the court of claims in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:

1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.

2. A finding by the court of claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as a part of the record.

Rule 2.

In all cases in which judgments or decrees have heretofore been rendered, where either party is by law entitled to an appeal, the party desiring it shall make application to the court of claims by petition for the allowance of such appeal. Said petition shall contain a distinct specification of the errors alleged to have been committed by said court in its rulings, judgment or decree in the case. The court shall, if the specification of alleged error be correctly and accurately stated, certify the same, or may certify such alterations and modifications of the points decided and alleged for error as, in the judgment of said court, shall distinctly, fully and fairly present the points decided by the court. This, with the transcript mentioned in Rule 1 (except the statement of facts and law therein mentioned), shall constitute the record on which those cases shall be heard in the Supreme Court.

Rule 3.

In all cases an order of allowance of appeal by the court of claims, or the chief justice thereof in vacation, is essential, and the limitation of time for *granting* such appeal shall cease to run from the time an application is made for the allowance of appeal.

Rule 4.

In all cases in which either party is entitled to appeal to the Supreme Court, the court of claims shall make and file their finding of facts, and their conclusions of law therein, in open court, before or at the time they enter their judgment in the case.

Rule 5.

In every such case, each party, at such time before trial and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the finding of facts.

OCTOBER TERM, 1882.

Ordered, That Rule 1, in reference to appeals from the court of claims, be, and the same is hereby made applicable to appeals in all cases heretofore or hereafter decided by that court under the jurisdiction conferred by the act of June 16, 1880, c. 243, To provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the court of claims to hear the same, and for other purposes.

RULES OF PRACTICE

FOR THE

COURTS OF EQUITY OF THE UNITED STATES.

PRELIMINARY REGULATIONS.

1.

The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to hearing of all causes upon their merits.

2.

The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

3.

Any judge of the circuit court, as well in vacation as in term, may, at chambers, or on the rule days at the clerk's office, make and direct all such interlocutory orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor to appear and show cause to the contrary, at the next rule day thereafter, unless some other time is assigned by the judge for the hearing.

4.

All motions, rules, orders, and other proceedings, made and directed, at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all office-hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order-book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

5.

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso;* for filing exceptions; and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

6.

All motions for rules or orders and other proceedings, which are not grantable of course or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule day, and entered in the order-book, and shall be heard at the rule day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte,* and granted, as if not objected to, or refused, in his discretion.

PROCESS.

7.

The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the circuit court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the cause may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

8.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of assumpsit. If the decree be for the per-

formance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

9.

When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

10.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party in the cause.

SERVICE OF PROCESS.

11.

No process of subpœna shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

12.

Whenever a bill is filed, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpœna shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise, the bill may be taken *pro confesso*. Where there is more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpœna against all the defendants.

13.

The service of all subpœnas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

14.

Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpœna, *toties quoties*, against such defendant, if he shall require it, until due service is made.

15.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

16.

Upon the return of the subpœna as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

APPEARANCE.

17.

The appearance day of the defendant shall be the rule day to which the subpœna is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance day shall be the next rule day succeeding the rule day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order-book on the day thereof by the clerk.

BILLS TAKEN PRO CONFESSO.

18.

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill, in the clerk's office, on the rule day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order-book, that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer, to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

19.

When the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion

shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

FRAME OF BILLS.

20.

Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the circuit court of the United States for the district of ——: A. B., of ——, and a citizen of the state of ——, brings this his bill against C. D., of ——, and a citizen of the state of ——, and E. F., of ——, and a citizen of the state of ——. And thereupon your orator complains and says that," &c.

21.

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief, and if an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is required, it shall also be specially asked for.

22.

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

23.

The prayer for process of subpœna in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact so that the court may take order thereon, as justice may require upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

24.

Every bill shall contain the signature of counsel and annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

25.

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the state court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

SCANDAL AND IMPERTINENCE IN BILLS.

26.

Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, *in hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master, by any judge of the court, for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

27.

No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding, depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination.

AMENDMENT OF BILLS.

28.

The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill, in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filing blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material

point (as he may do of course) after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

29.

After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

30.

If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

DEMURRERS AND PLEAS.

31.

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant; that it is not interposed for delay; and, if a plea, that it is true in point of fact.

32.

The defendant may at any time before the bill is taken for confessed, or afterward with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded.

33.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the fact stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

34.

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period unless the court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

35.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill, upon such terms as it shall deem reasonable.

36.

No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

37.

No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

38.

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule day when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for that purpose.

ANSWERS.

39.

The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defense. Thus, for example, a bona fide purchaser, for a valuable consideration without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

40.

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

DECEMBER TERM, 1850.

Ordered, That the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the circuit courts, be, and the same is hereby repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

41.

The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively, 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3," etc.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

DECEMBER TERM, 1871.

Amendment to 41st Equity Rule.

If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under § 3 of the act of Congress of July 2, 1864.

42.

The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill.

43.

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say—

"1. Whether, etc.

"2. Whether, etc."

44.

A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

45.

No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

46.

In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer.

PARTIES TO BILLS.

47.

In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

48.

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

49.

In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for

the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

50.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiffs shall be at liberty to make the heir at law a party where he desires to have the will established against him.

51.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties it shall not be necessary to bring before the court as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

52.

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book, in the form or to the effect following (that is to say): "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

53.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description of parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

NOMINAL PARTIES TO BILLS.

54.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require to him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

55.

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party, by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction—either the common injunction or a special injunction—is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

56.

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same; which bill may be filed in the clerk's office at any time; and, upon suggestion of the facts, the proper process of subpœna shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

57.

Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason, a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead or answer thereto on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

58.

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

ANSWERS.

59.

Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a state or territory.

AMENDMENT OF ANSWERS.

60.

After an answer is put in it may be amended, as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter, and be resworn, at any time before a replication is put in or the cause is set down for a hearing upon bill and answer. But after replication or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by special leave of the court or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted the court or the judge granting the same may, in his discretion, require that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

EXCEPTIONS TO ANSWERS.

61.

After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file, in the clerk's office, exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

62.

When the same solicitor is employed for two or more defendants, and separate answers shall be filed or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

63.

Where exceptions shall be filed to the answer for insufficiency within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter, before a judge of the court, and shall enter, as of course, in the order-book, an order for that purpose; and if he shall not so set down the same for a hearing the exceptions shall be deemed abandoned and the answer shall be deemed sufficient; provided, however, that the court or any judge thereof may, for good cause shown, enlarge the time for filing exceptions or for answering the same, in his discretion, upon such terms as he may deem reasonable.

64.

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court or of a judge thereof upon his putting in such answer and complying with such other terms as the court or judge may direct.

65.

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court or the judge thereof, at the hearing upon the exceptions.

REPLICATION AND ISSUE.

66.

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court or a judge thereof shall, upon motion, for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

TESTIMONY—HOW TAKEN.

67.

After the cause is at issue, commissions to take testimony may be taken out, in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases, the commissioner or commissioners shall be named by the court, or by a judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.

DECEMBER TERM, 1854.

Ordered, That the sixty-seventh rule governing equity practice be so amended as to allow the presiding judge of any court exercising jurisdiction, either in term time or in vacation, to vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge thereof can now do by the said sixty-seventh rule.

DECEMBER TERM, 1861.

Ordered, That the last paragraph in the sixty-seventh rule in equity be repealed, and the rule be amended as follows: Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be ex-

amined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court, the examiner to be furnished with a copy of the bill and answer, if any; and such examination shall take place in the presence of the parties, or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted as near as may be in the mode now used in common-law courts. The depositions taken upon such oral examinations shall be taken down in writing by the examiner in the form of narrative, unless he determines the examination shall be by question and answer in special instances; and when completed, shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend; provided, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same; and the examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

The compulsory attendance of witnesses.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practised with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors, to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original deposition, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in the thirtieth section of the act of Congress, September 24, 1789.

Testimony may be taken on commission in the usual way, by written interrogatories and cross interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge.

DECEMBER TERM, 1869.

Amendment to 67th Rule.

Where the evidence to be adduced in a cause is to be taken orally, as provided in the order passed at the December term, 1861, amending the 67th General Rule, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties, or by leave of court first obtained, on motion, for cause shown.

68.

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the act of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of Congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.

69.

Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances; but, by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order-books, or indorsed upon the deposition or testimony.

TESTIMONY DE BENE ESSE.

70.

After any bill filed and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

FORM OF THE LAST INTERROGATORY.

71.

The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

CROSS-BILL.

72.

Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

73.

Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

74.

Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

75.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor, of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reasons for any delay.

76.

In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer were so brought in or used.

77.

The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office or by deposition, according to the acts of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

78.

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.

79.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, in the master's office, or by deposition, as the master shall direct.

80.

All affidavits, depositions, and documents which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master.

81.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary.

82.

The circuit courts may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court should direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the

amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

EXCEPTIONS TO REPORT OF MASTER.

83.

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order-book. The parties shall have one month from the time of filing the report to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or, if not, then at the next sitting of the court which shall be held thereafter, by adjournment or otherwise.

84.

And, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs; the costs to be fixed in each case by the court, by a standing rule of the circuit court.

DECREES.

85.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrolment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

86.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in subtance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof. it was ordered, adjudged and decreed as follows, *viz.*:" [Here insert the decree or order.]

GUARDIANS AND PROCHEIN AMIS.

87.

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami;* subject, however, to such orders as the court may direct for the protection of infants and other persons.

88.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

89.

The circuit courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

90.

In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules. but as furnishing just analogies to regulate the practice.

91.

Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

DECEMBER TERM, 1863.

92.

Ordered, That in suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

OCTOBER TERM, 1878.

INJUNCTIONS.

93.

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.

OCTOBER TERM, 1881.

94.

Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since, by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would

not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

The following provisions relating to equity practice are to be found in the act of 1st of June, 1872:

SEC. 7. That whenever notice is given of a motion for an injunction, out of a circuit or district court of the United States, the court or judge thereof may, if there appear to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion. Such order may be granted with or without security, in the discretion of the court or judge: *Provided*, That no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order except within the circuit to which he is allotted, and in causes pending in the circuit to which he is allotted, or in such causes at such place outside of the circuit as the parties may in writing stipulate, except in causes where such application cannot be heard by the circuit judge of the circuit, or the district judge of the district.

SEC. 13. That when in any suit in equity, commenced in any court in the United States, to enforce any legal or equitable lien or claim against real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer or demur to the complainant's bill at a certain day therein to be designated, which order shall be served on such absent defendant, if practicable, wherever found; or where such personal service is not practicable, such order shall be published in such a manner as the court shall direct; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards such absent defendant without appearance, affect his property within such district only.

INDEX.

(Rules of Practice in Equity.)

	Sec.	Page
Amendment of bills	28–30	912, 913
Answers and amendments thereto	39–46, 59, 60, 914, 915, 916	913
Appearance	17	911
Bills taken *pro confesso*	18, 19	911
Bills of revivor and supplemental bills	56–58	915
Bills by stockholders against corporations	94	919
Cross-bills	72	917
Demurrers and pleas	31–38	913
Decrees	85, 86	919
Exceptions to answers	61–65	916
Exceptions to report of master	83, 84	919
Form of last interrogatory	71	917
Frame of bills	20–25	912
Guardians and *prochein amis*	87–91	919
Injunctions	93	919
Nominal parties to bills	54, 55	915
Parties to bills	47–53	914, 915
Preliminary regulations	1–6	910
Process	7–10	910, 911
Reference to and proceedings before masters	73–82	918
Replication and issue	66	916
Scandal and impertinence in bills	26, 27	912
Service of process	11–16	911
Testimony, how taken	67–69	916, 917
Testimony *de bene esse*	70	917

RULES OF PRACTICE

FOR

THE COURTS OF THE UNITED STATES

IN

Admiralty and maritime jurisdiction, on the instance side of the court, in pursuance of the act of the 23d of August, 1842, chapter 188.

JANUARY 7, 1884.

1.

No mesne process shall issue from the district courts in any civil cause of admiralty and maritime jurisdiction until the libel, or libel of information, shall be filed in the clerk's office from which such process is to issue. All process shall be served by the marshal or by his deputy, or, where he or they are interested, by some discreet and disinterested person appointed by the court.

2.

In suits *in personam*, the mesne process may be by a simple warrant of arrest of the person of the defendant, in the nature of a capias, or by a warrant of arrest of the person of the defendant, with a clause therein, that if he cannot be found, to attach his goods and chattels to the amount sued for; or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or by a simple monition, in the nature of a summons to appear and answer to the suit, as the libelant shall, in his libel or information, pray for or elect.

3.

In all suits *in personam*, where a simple warrant of arrest issues and is executed, the marshal may take bail, with sufficient sureties, from the party arrested, by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory, or final, in the cause, and pay the money awarded by the final decree rendered therein in the court to which the process is returnable, or in any appellate court. And upon such bond or stipulation, summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

4.

In all suits *in personam*, where goods and chattels, or credits and effects, are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable upon the defendant whose property is so attached giving a bond or stipulation with sufficient sureties, to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court; and upon such bond or stipulation, summary process of execution shall and may be issued against the principal and sureties by the court to which such warrant is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

5.

Bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or any commissioner of the United States authorized by law to take bail and affidavits in civil cases.

6.

In all suits *in personam*, where bail is taken, the court may, upon motion, for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor; and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court, to be given, upon motion, and due proof thereof.

7.

In suits *in personam*, no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court, upon affidavit or other proper proof showing the propriety thereof.

8.

In all suits *in rem* against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, apparel, furniture, boats, or other appurtenances are in the possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal or other proper officer, if, upon the hearing, the same is required by law and justice.

9.

In all cases of seizure, and in other suits and proceedings *in rem*, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

10.

In all cases where any goods or other things are arrested, if the same are perishable, or are liable to deterioration, decay, or injury, by being detained in custody pending the suit, the court may, upon the application of either party, in its discretion, order the same or so much thereof to be sold as shall be perishable or liable to depreciation, decay, or injury; and the proceeds, or so much thereof as shall be a full security to satisfy the decree, to be brought into court to abide the event of the suit; or the court may, upon the application of the claimant, order a delivery thereof to him, upon a due appraisement, to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, in such sum as the court shall direct, to abide by and pay the money awarded by the final decree rendered by the court, or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.

11.

In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement, to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, as aforesaid; and if the claimant shall decline any such application, then the court may, in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court or otherwise disposed of, as it may deem most for the benefit of all concerned.

12.

In all suits by material-men for supplies or repairs, or other necessaries, the libelant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*.

13.

In all suits for mariners' wages, the libelant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or the master alone *in personam*.

14.

In all suits for pilotage the libelant may proceed against the ship and master, or against the ship, or against the owner alone or the master alone *in personam*.

15.

In all suits for damage by collision, the libelant may proceed against the ship and master, or against the ship alone or against the master or the owner alone *in personam*.

16.

In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only.

17.

In all suits against the ship or freight, founded upon a mere maritime hypothecation, either express or implied, of the master, for moneys taken up in a foreign port for supplies or repairs or other necessaries for the voyage, without any claim of marine interest, the libelant may proceed either *in rem* or against the master or the owner alone *in personam*.

18.

In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the property, in whosesoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by his own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be *in personam* against the wrongdoer.

19.

In all suits for salvage, the suit may be *in rem* against the property saved, or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service has been performed.

20.

In all petitory and possessory suits between part owners or adverse proprietors, or by the owners of a ship, or the majority thereof, against the master of a ship, for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.

21.

In all cases of a final decree for the payment of money, the libelant shall have a writ of execution, in the nature of a fieri facias, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate, of the defendants or stipulators.

22.

All informations and libels of information upon seizures for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is

brought and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return day of the process why the forfeiture should not be decreed.

23.

All libels in instance causes, civil or maritime, shall state the nature of the cause; as, for example, that it is a cause, civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be; and, if the libel be *in rem*, that the property is within the district; and, if *in personam*, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libelant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of due process to enforce his rights, *in rem* or *in personam* (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libelant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof.

24.

In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time, on motion to the court, as of course. And new counts may be filed, and amendments in matters of substance may be made, upon motion, at any time before the final decree, upon such terms as the court shall impose. And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libelant.

25.

In all cases of libels *in personam*, the court may, in its discretion, upon the appearance of the defendant, where no bail has been taken, and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation, with sureties, in such sum as the court shall direct, to pay all costs and expenses which shall be awarded against him in the suit, upon the final adjudication thereof, or by any interlocutory order in the progress of the suit.

26.

In suits *in rem*, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom or on whose behalf the claim is made is the true and bona fide owner, and that no other person is the owner thereof. And where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And, upon putting in such claim, the claimant shall file a stipulation, with sureties, in such sums as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or, upon an appeal, by the appellate court.

27.

In all libels in causes of civil and maritime jurisdiction, whether *in rem* or *in personam*, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation; and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner each interrogatory propounded at the close of the libel.*

28.

The libelant may except to the sufficiency, or fullness, or distinctness, or relevancy of the answer to the articles and interrogatories in the libel; and, if the court shall adjudge the same exceptions, or any of them, to be good and valid, the court shall order the defendant forthwith, within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.

29.

If the defendant shall omit or refuse to make due answer to the libel upon the return day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte*, and adjudge therein as to law and justice shall appertain. But the court may, in its discretion, set aside the default, and, upon the application of the defendant, admit him to make answer to the libel, at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor.

30.

In all cases where the defendant answers, but does not answer fully and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libelant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken *pro confesso* against the defendant, to the full purport and effect of the article to which it purports to answer, and as if no answer had been put in thereto.

31.

The defendant may object, by his answer, to answer any allegation or interrogatory contained in the libel which will expose him to any prosecution or punishment for crime, or for any penalty or any forfeiture of his property for any penal offense.

*Vide *post*, 49th rule, page 925.

32.

The defendant shall have a right to require the personal answer of the libelant upon oath or solemn affirmation to any interrogatories which he may, at the close of his answer, propound to the libelant touching any matters charged in the libel, or touching any matter of defense set up in the answer, subject to the like exception as to matters which shall expose the libelant to any prosecution or punishment, or forfeiture, as is provided in the thirty-first rule. In default of due answer by the libelant to such interrogatories, the court may adjudge the libelant to be in default, and dismiss the libel, or may compel his answer in the premises, by attachment, or take the subject-matter of the interrogatory *pro confesso* in favor of the defendant, as the court, in its discretion, shall deem most fit to promote public justice.

33.

Where either the libelant or the defendant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion, in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.

34.

If any third person shall intervene in any cause of admiralty and maritime jurisdiction *in rem* for his own interest, and he is entitled, according to the cause of admiralty proceedings, to be heard for his own interest therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required, by order of the court, to make due answer; and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required, upon filing his allegations, to give a stipulation, with sureties, to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court.

35.

The stipulations required by the last preceding rule, or on appeal, or in any other admiralty or maritime proceeding, shall be given and taken in the manner prescribed by rule fifth as amended.

36.

Exceptions may be taken to any libel, allegation, or answer for surplusage, irrelevancy, impertinence, or scandal; and if, upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged, at the cost and expense of the party in whose libel or answer the same is found.

37.

In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation as to the debts, credits, or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libelant; and if he shall refuse or neglect so to do, the court may award compulsory process *in personam* against him. If he admits any debts, credits, or effects, the same shall be held in his hands, liable to answer the exigency of the suit.

38.

In cases of mariners' wages, or bottomry, or salvage, or other proceedings *in rem*, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application, by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit, and, upon failure of the party to comply with the order, may award an attachment, or other compulsive process, to compel obedience thereto.

39.

If, in any admiralty suit, the libelant shall not appear and prosecute his suit, according to the course and orders of the court, he shall be deemed in default and contumacy; and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.

40.

The court may, in its discretion, upon the motion of the defendant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.

41.

All sales of property under any decree of admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

42.

All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out, except by a check or checks, signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book, containing a memorandum and copy of all the checks so drawn and the date thereof.

43.

Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceeding, to intervene *pro interesse suo* for a delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice.

And if such petition or claim shall be deserted, or, upon a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

44.

In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners, to be appointed by the court, to hear the parties and make report therein. And such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in reference to them, including the power to administer oaths to and to examine the parties and witnesses touching the premises.

45.

All appeals from the district to the circuit court must be made while the court is sitting, or within such other period as shall be designated by the district court by its general rules, or by an order specially made in the particular suit; or in case no such rule or order be made, then within thirty days from the rendering of the decree.

46.

In all cases not provided for by the foregoing rules, the district and circuit courts are to regulate the practice of the said courts respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty.

47.

In all suits *in personam*, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal, and the court in those cases only in which it is required by the laws of the state where an arrest is made upon similar or analogous process issuing from the state courts.

And imprisonment for debt, on process issuing out of the admiralty court, is abolished in all cases where, by the laws of the state in which the court is held, imprisonment for debt has been, or shall be hereafter, abolished, upon similar or analogous process issuing from a state court.

48.

The twenty-seventh rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless the district court shall be of opinion that the proceedings prescribed by that rule are necessary for the purposes of justice in the case before the court.

All rules and parts of rules heretofore adopted, inconsistent with this order, are hereby repealed and annulled.

49.

Further proof, taken in a circuit court upon an admiralty appeal, shall be by deposition, taken before some commissioner appointed by a circuit court, pursuant to the acts of Congress in that behalf, or before some officer authorized to take depositions by the 30th section of the act of Congress of the 24th of September, 1789, upon an oral examination and cross-examination, unless the court in which such appeal shall be pending, or one of the judges thereof, shall, upon motion, allow a commission to issue to take such depositions upon written interrogatories and cross-interrogatories. When such deposition shall be taken by oral examination, a notification from the magistrate before whom it is to be taken, or from the clerk of the court in which such appeal shall be pending, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, shall be served on the adverse party or his attorney, allowing time for their attendance after being notified not less than twenty-four hours, and, in addition thereto, one day, Sundays exclusive, for every twenty miles' travel; provided, that the court in which such appeal may be pending, or either of the judges thereof, may, upon motion, increase or diminish the length of notice above required.

50.

When oral evidence shall be taken down by the clerk of the district court, pursuant to the above-mentioned section of the act of Congress, and shall be transmitted to the circuit court, the same may be used in evidence on the appeal, saving to each party the right to take the depositions of the same witnesses, or either of them, if he should so elect.

51.

When the defendant, in his answer, alleges new facts, these shall be considered as denied by the libelant, and no replication, general or special, shall be allowed. But within such time after the answer is filed as shall be fixed by the district court, either by general rule or by special order, the libelant may amend his libel so as to confess and void, or explain or add to, the new matters set forth in the answer; and within such time as may be fixed, in like manner, the defendant shall answer such amendments.

52.

The clerks of the district courts shall make up the records to be transmitted to the circuit courts on appeals, so that the same shall contain the following:

1. The style of the court.
2. The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.
3. If bail was taken, or property was attached or arrested, the process of the arrest or attachment and the service thereof; all bail and stipulations; and, if any sale has been made, the orders, warrants, and reports relating thereto.
4. The libel, with exhibits annexed thereto.
5. The pleadings of the defendant, with the exhibits annexed thereto.
6. The testimony on the part of the libelant, and any exhibits not annexed to the libel.
7. The testimony on the part of the defendant, and any exhibits not annexed to his pleadings.
8. Any order of the court to which exception was made.
9. Any report of an assessor or assessors, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much

of the report as shows what results were arrived at by the assessor, are to be stated.

10. The final decree.

11. The prayer for an appeal, and the action of the district court thereon; and no reasons of appeal shall be filed or inserted in the transcript.

The following shall be omitted:

1. The continuances.

2. All motions, rules, and orders not excepted to which are merely preparatory for trial.

3. The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the district court was founded on some one or more of these; in which case, so much of either of them as may be involved in the exception shall be set out. In all other cases it shall be sufficient to give the name of the witness, and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and, in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

2. The clerk of the district court shall page the copy of the record thus made up, and shall make an index thereto, and he shall certify the entire document, at the end thereof, under the seal of the court, to be a transcript of the record of the district court in the cause named at the beginning of the copy made up pursuant to this rule; and no other certificate of the record shall be needful or inserted.

3. Hereafter, in making up the record to be transmitted to the circuit court on appeal, the clerk of the district court shall omit therefrom any of the pleading, testimony, or exhibits which the parties by their proctors shall by written stipulation agree may be omitted; and such stipulation shall be certified up with the record.

53.

Whenever a cross-libel is filed upon any counter-claim, arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security in the usual amount and form, to respond in damages, as claimed in said cross-libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given.

Supplementary rules of practice in admiralty, under the act of March 3, 1851, entitled "An Act to Limit the Liability of Ship-owners, and for Other Purposes."

54.

When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the 3d and 4th sections of the said act above recited, the said owner or owners shall and may file a libel or petition in the proper district court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the 4th section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice re-served through the postoffice, or otherwise, as the court, in its discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

55.

Proof of all claims which shall be presented in pursuance of said monition shall be made before a commissioner, to be designated by the court, subject to the right of any person interested to question or controvert the same; and, upon the completion of said proofs, the commissioner shall make report of the claims so proven, and upon confirmation of said report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expenses), shall be divided *pro rata* amongst the several claimants, in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

56.

In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act), provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both.

57.

The said libel or petition shall be filed and the said proceedings had in any district court of the United States in which said ship or vessel may be libeled to answer for any such embezzlement, loss, destruction, damage, or injury; or, if the said ship or vessel be not libeled, then in the district court for any district in which the said owner or owners may be sued in that behalf. If the ship has already been libeled and sold, the proceeds shall represent the same for the purposes of these rules.

58.

All the preceding rules and regulations for proceeding in cases where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf, shall apply to the circuit court of the United States where such cases are or shall be pending in said courts upon appeal from the district courts.

59.

In a suit for damage by collision, if the claimant of any vessel proceeded against, or any respondent proceeded against *in personam*, shall, by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued, and, if duly served, such suit shall proceed as if such vessel or party had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, to pay to the libelant and to any claimant or new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court upon the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in like cases from parties brought in under process issued on the prayer of a libelant.

INDEX.

(Rules of Practice in Admiralty.)

	Sec.	Page.
AMENDMENT.		
Information and libels	24	923
	51	925
ANSWERS.		
Contents of, in libels in causes of civil and maritime jurisdiction	27	923
Exceptions to, and disposition of exceptions	28	923
When further required	30	923
Prevented by sickness, etc	33	924
Privilege from answering	31	923
Personal answers of libelant on oath, when may be required, and proceedings thereto	32	924
New facts alleged in, considered as denied	51	925
Verification of	27	923
When unnecessary	48	925
APPEAL.		
From district to circuit court, time of	45	925
Oral evidence taken in district court, admissible on appeal	50	925
Contents of records transmitted to circuit court on appeal	52	925
ARREST AND ATTACHMENT.		
Suits *in personam*	2	921
Bond and sureties	3, 4	921
Bond—how given	5	921
Reducing amount	6	921
Insolvency of sureties	6	921
Warrant of arrest—order of court when necessary	7	921
BAIL.		
Bail, must be taken on arrest, in suits *in personam*	47	925
CROSS-BILL.	53	926
Security required	53	926
DEFAULT.		
Of defendant to answer	29	923
Of libelant to prosecute	39	924
Rescission of decree for default or contumacy	40	924
DEPOSITIONS.	49	925
DISPOSITION OF PROPERTY.		
Suits *in rem* against ships	8, 9	921
Proceedings in such suits	9	922
Perishable goods	10	922
Regaining property on payment into court or stipulation	11	922
Bringing of property into court	38	924
ELECTION OF REMEDIES.		
In suits by material men	12	922
ELECTION OF REMEDIES.		
For mariner's wages	13	922
For pilotage	14	922
For damages by collision	15	922
For assault or beating on high seas	16	922
On maritime hypothecation	17	922
On bottomry bonds	18	922
For salvage	19	922
EXCEPTIONS.		
When may be taken	36	924
EXECUTION.		
Satisfaction, how obtained by libelant in cases of final decrees for payment of money	21	922
FOREIGN ATTACHMENTS.	37	924
IMPRISONMENT—For debt abolished	47	925
Mesne **PROCESS**—Issuing and service of	1	921
PARTIES.		
Intervention of interested party, rights of	34	924
Parties interested in proceeds in registry, rights of	43	924
PETITORY AND POSSESSORY SUITS.		
Between part owners, adverse proprietors, &c., proceedings in	20	922
PLEADINGS.		
Contents of informations and libels of information upon seizures for breach of revenue, navigation or other laws	22	922
Contents of libels in instance cases, civil or maritime	23	923
PRACTICE.		
When practice may be regulated by courts	46	925
Under Act of Mch. 3, 1851, limiting liability of ship-owners, etc.	54–59	926
REFERENCES.	44	925
SALES.		
Sales of property under decree	41	924
Payment of proceeds into the registry	42	924
STIPULATIONS.		
Libels *in personam*—stipulations discretionary with court	25	923
VERIFICATION.		
Suits *in rem*—claim should be verified—who may make verification	26	923
Verification of answer—when not necessary	48	925
Libels in causes of civil and maritime jurisdiction—verification of answer	27	923

GENERAL INDEX

TO THE

FOUR VOLUMES CONTAINED IN THIS BOOK.

78, 79, 80, 81.

ABANDONED AND CAPTURED PROPERTY ACT.

1. By the abandoned and captured property act no titles were devested in the insurgent states unless in pursuance of a judgment rendered after due legal proceedings, except property used in actual hostilities.
United States v. Klein, 519
2. The government by that act constituted itself the trustee for those who are entitled to the proceeds of captured and abandoned property, with the exception above stated.
Idem. 519
3. The restoration of the proceeds became the absolute right of persons pardoned by the President, on application within two years from the close of the war.
Idem, 519
Armstrong v. United States, 614
Pargoud v. United States, 646
4. The proviso in the general appropriation act of 1870, which assumes to annul the effect of the President's pardon, in claims in the court of claims, can have no such effect.
United States v. Klein, 519
5. The President's pardon of Dec. 25, 1868, relieved claimants under said act from proof of adhesion to the United States, during the late Civil War.
Pargoud v. United States, 646
6. Under the abandoned and captured property act the right to recover is made out by proof of ownership of the abandoned or captured property, of right to the proceeds, and of the fact that the owner gave no aid or comfort to the Rebellion.
Carroll v. United States, 565
7. The ownership to be proved is that which existed at the time of capture or abandonment, and the right to the proceeds is that which existed at the time of the petition filed in the court of claims.
Idem, 565
8. Where a person claimed the ownership of the property at the time of its capture, as administratrix, and gave no aid or comfort to the Rebellion, she is entitled to recover the proceeds of such property in the court of claims although her intestate gave aid and comfort to the Rebellion.
Idem, 565
9. Where property was in possession of the officers of the government, under the captured and abandoned property act, it is presumed that they sold it and placed the proceeds in the Treasury, and the claimant can recover in the court of claims for the same.
United States v. Crusell, 821

ACTIONS.

See BANKS, 5, 6.
DUTIES, 2.
INSURANCE, 8, 12. 13, 14.
SALVAGE, 2.
TAXES AND TAX SALES, 3.

1. If property be tortiously taken or converted, the injured party may waive the tort and sue in *assumpsit*, and judgment in such action will bar a further action *ex delicto*.
May v. Le Claire, 50
2. Where converted property has assumed altered forms by successive investments, the owner may follow it as far as he can trace it and sue at law for the substituted property, or he may hold the wrongdoers liable for appropriate damages.
Idem, 50
3. Where a trustee has abused his trust, the *cestui que trust* may sue for the original or the substituted property, and if either has passed into the hands of a bona fide purchaser without notice, then he may recover its value in money.
Idem, 50
4. When certificates of bank stock are transferable on the books of the bank on their surrender, a bank which refuses to make such transfer to a purchaser, on request, is liable to an action for damages.
First Nat. Bank v. Lanier, 172
5. Action will not lie for price of goods sold in aid of the Rebellion.
Hanauer v. Doane, 439
6. Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts.
Bradley v. Fisher, 646

ADMINISTRATORS AND EXECUTORS.

See JURISDICTION, 32.
PARTIES, 10.
TRUSTS AND TRUSTEES, 4.

ADMIRALTY.

See BILL OF LADING, 7.

1. While the courts of admiralty are not governed, in cases for the enforcement of maritime liens, by any statute of limitation, yet laches or delay in their enforcement will often constitute a valid defense.
Young v. The Key City, 896
2. The delay which will defeat such a suit must, in every case, depend upon the peculiar equitable circumstances of that case.
Idem, 896
3. Where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense of laches will be held valid under shorter time, than when the claimant is the owner at the time the lien accrued.
Idem, 896

ADVERSE POSSESSION.

See EJECTMENT, 3. 4.

APPEAL AND ERROR.

See COURT OF CLAIMS, 3, 8, 14, 15.
EXCEPTIONS, 1.
JURISDICTION, *passim*.

1. Exceptions to the rulings of the court on motions to postpone the trial, and to change the venue, are not available on writ of error.
Cook v. Burniey, 29
2. Where the court below commits any substantial error in executing the mandate of this court, a second writ of error or appeal, as the case may be, will lie to correct the error.
Idem, 29
3. Decisions which rest in the discretion of the court below, cannot be re-examined in an appellate court upon a writ of error.
Idem, 29
4. A second writ of error brings up nothing for revision except the proceedings subsequent to the mandate.
Idem, 29

5. An instruction to the jury that it was the duty of the defendant to show that he had not been guilty of negligence, is error.
West. Transportation Co. v. Downer, 160
6. An instruction, which referred to the jury a matter which rested wholly in the discretion of the Postmaster-General, was erroneous.
United States v. Wright, 188
7. Where each party appeals, each may assign error; but where only one party appeals, the other cannot assign error in the appellate court.
The Maria Martin, 251
8. Appeals are subject to the same rules as writs of error, and if the record does not present any question of law for the revision of this court, the judgment of the circuit court must be affirmed, but the cause cannot be dismissed.
Wheeler v. Harris, 278
9. Facts found by a jury cannot be re-examined in this court.
Idem, 278
Fowler v. Rathbone, 102
10. A defendant who has a separate, distinct, personal judgment against him for money, in which the other defendants have no interest, has a right to prosecute a writ of error in his own name without joining them.
Germain v. Mason, 392
11. Where the plaintiffs in error, according to their own showing, have no right to recover in the action, the errors of the court below in admitting evidence and in the charge are no ground of reversal.
Barth v. Clise, 393
12. Where a party is present by counsel and goes to trial before the court without objection or exception, he has voluntarily waived his right to a jury, but if he is not present by himself or counsel it is error for the court to try the case without a jury.
Kearney v. Case, 395
13. In a case brought here by writ of error, this court can only reverse the judgment for errors of law apparent in the record.
Wadsworth v. Warren, 402
14. Where more than five years had elapsed from the close of the war before an appeal was brought the case will be dismissed.
Freeborn v. The Protector, 463
15. It is not error for a court to refuse to give an extended series of instructions, although correct in law, if the law arising upon the evidence has been given by the court with such fulness as to correctly guide the jury in their findings.
R. Co. v. Whitton, 57
16. A judgment will not be set aside because the charge of the court may be open to some verbal criticism, but which could not have misled a jury of ordinary intelligence.
Idem, 57
17. The granting or overruling of a motion for a new trial in the court below is not ground of error.
Home Ins. Co. v. Barton, 7
18. This court, sitting as a court of error, cannot pass, as it does in equity appeals, upon the weight or sufficiency of the evidence.
Dirst v. Morris, 7
19. In such case where there was no special finding of the facts, if a jury is waived and the court finds, generally for one side, the other has no address on error, except for the wrongful admission or rejection of evidence.
Idem, 7
20. This court cannot review a finding of a jury upon a question of fact.
Gregg v. Moss, 7
21. Where the charge puts the case to the jury on fair grounds, this court will not reverse on account of the charge.
Idem,
22. The rejection of evidence which did not injure a party, is not ground of error.
Idem,
23. The granting or refusing a motion for a new trial rests in the discretion of the court below with which this court will not interfere.
Erskine v. Hohnbach,
24. The objection to the sufficiency of a replication to put the averments of the plea in issue must be raised after verdict.
Idem,
25. This court will not reverse a judgment when the error has become immaterial, and the adverse party will be entitled to judgment if a new trial is granted.
Pugh v. McCormick,

GENERAL INDEX

TO THE

FOUR VOLUMES CONTAINED IN THIS BOOK.

78, 79, 80, 81.

ABANDONED AND CAPTURED PROPERTY ACT.

1. By the abandoned and captured property act no titles were devested in the insurgent states unless in pursuance of a judgment rendered after due legal proceedings, except property used in actual hostilities.
United States v. Klein, 519
2. The government by that act constituted itself the trustee for those who are entitled to the proceeds of captured and abandoned property, with the exception above stated.
Idem. 519
3. The restoration of the proceeds became the absolute right of persons pardoned by the President, on application within two years from the close of the war.
Idem. 519
Armstrong v. United States, 614
Pargoud v. United States, 646
4. The proviso in the general appropriation act of 1870, which assumes to annul the effect of the President's pardon, in claims in the court of claims, can have no such effect.
United States v. Klein, 519
5. The President's pardon of Dec. 25, 1868, relieved claimants under said act from proof of adhesion to the United States, during the late Civil War.
Pargoud v. United States, 646
6. Under the abandoned and captured property act the right to recover is made out by proof of ownership of the abandoned or captured property, of right to the proceeds, and of the fact that the owner gave no aid or comfort to the Rebellion.
Carroll v. United States, 565
7. The ownership to be proved is that which existed at the time of capture or abandonment, and the right to the proceeds is that which existed at the time of the petition filed in the court of claims.
Idem. 565
8. Where a person claimed the ownership of the property at the time of its capture, as administratrix, and gave no aid or comfort to the Rebellion, she is entitled to recover the proceeds of such property in the court of claims although her intestate gave aid and comfort to the Rebellion.
Idem, 565
9. Where property was in possession of the officers of the government, under the captured and abandoned property act, it is presumed that they sold it and placed the proceeds in the Treasury, and the claimant can recover in the court of claims for the same.
United States v. Crusell, 821

ACTIONS.

See BANKS, 5, 6.
DUTIES, 2.
INSURANCE, 8, 12, 13, 14.
SALVAGE, 2.
TAXES AND TAX SALES, 3.
1. If property be tortiously taken or converted, the injured party may waive the tort and sue in *assumpsit*, and judgment in such action will bar a further action *ex delicto*.
May v. Le Claire, 50
2. Where converted property has assumed altered forms by successive investments, the owner may follow it as far as he can trace it and sue at law for the substituted property, or he may hold the wrongdoers liable for appropriate damages.
Idem, 50
3. Where a trustee has abused his trust, the *cestui que trust* may sue for the original or the substituted property, and if either has passed into the hands of a bona fide purchaser without notice, then he may recover its value in money.
Idem, 50
4. When certificates of bank stock are transferable on the books of the bank on their surrender, a bank which refuses to make such transfer to a purchaser, on request, is liable to an action for damages.
First Nat. Bank v. Lanier, 172
5. Action will not lie for price of goods sold in aid of the Rebellion.
Hanauer v. Doane, 439
6. Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts.
Bradley v. Fisher, 646

ADMINISTRATORS AND EXECUTORS.

See JURISDICTION, 32.
PARTIES, 10.
TRUSTS AND TRUSTEES, 4.

ADMIRALTY.

See BILL OF LADING, 7.
1. While the courts of admiralty are not governed, in cases for the enforcement of maritime liens, by any statute of limitation, yet laches or delay in their enforcement will often constitute a valid defense.
Young v. The Key City, 896
2. The delay which will defeat such a suit must, in every case, depend upon the peculiar equitable circumstances of that case.
Idem, 896
3. Where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense of laches will be held valid under shorter time, than when the claimant is the owner at the time the lien accrued.
Idem, 896

ADVERSE POSSESSION.

See EJECTMENT, 3, 4.

APPEAL AND ERROR.

See COURT OF CLAIMS, 3, 8, 14, 15.
EXCEPTIONS, 1.
JURISDICTION, *passim*.
1. Exceptions to the rulings of the court on motions to postpone the trial, and to change the venue, are not available on writ of error.
Cook v. Burnley, 29
2. Where the court below commits any substantial error in executing the mandate of this court, a second writ of error or appeal, as the case may be, will lie to correct the error.
Idem, 29
3. Decisions which rest in the discretion of the court below, cannot be re-examined in an appellate court upon a writ of error.
Idem, 29
4. A second writ of error brings up nothing for revision except the proceedings subsequent to the mandate.
Idem, 29

5. An instruction to the jury that it was the duty of the defendant to show that he had not been guilty of negligence, is error.
West. Transportation Co. v. Downer, 160
6. An instruction, which referred to the jury a matter which rested wholly in the discretion of the Postmaster-General, was erroneous.
United States v. Wright, 188
7. Where each party appeals, each may assign error; but where only one party appeals, the other cannot assign error in the appellate court.
The Maria Martin, 251
8. Appeals are subject to the same rules as writs of error, and if the record does not present any question of law for the revision of this court, the judgment of the circuit court must be affirmed, but the cause cannot be dismissed.
Wheeler v. Harris, 278
9. Facts found by a jury cannot be re-examined in this court.
Idem, 278
Fowler v. Rathbone, 102
10. A defendant who has a separate, distinct, personal judgment against him for money, in which the other defendants have no interest, has a right to prosecute a writ of error in his own name without joining them.
Germain v. Mason, 392
11. Where the plaintiffs in error, according to their own showing, have no right to recover in the action, the errors of the court below in admitting evidence and in the charge are no ground of reversal.
Barth v. Clise, 393
12. Where a party is present by counsel and goes to trial before the court without objection or exception, he has voluntarily waived his right to a jury, but if he is not present by himself or counsel it is error for the court to try the case without a jury.
Kearney v. Case, 395
13. In a case brought here by writ of error, this court can only reverse the judgment for errors of law apparent in the record.
Wadsworth v. Warren, 402
14. Where more than five years had elapsed from the close of the war before an appeal was brought, the case will be dismissed.
Freeborn v. The Protector, 463
15. It is not error for a court to refuse to give an extended series of instructions, although correct in law, if the law arising upon the evidence has been given by the court with such fulness as to correctly guide the jury in their findings.
R. Co. v. Whitton, 571
16. A judgment will not be set aside because the charge of the court may be open to some verbal criticism, but which could not have misled a jury of ordinary intelligence.
Idem, 571
17. The granting or overruling of a motion for a new trial in the court below is not ground of error.
Home Ins. Co. v. Barton, 708
18. This court, sitting as a court of error, cannot pass, as it does in equity appeals, upon the weight or sufficiency of the evidence.
Dirst v. Morris, 722
19. In such case where there was no special finding of the facts, if a jury is waived and the court finds, generally for one side, the other has no redress on error, except for the wrongful admission or rejection of evidence.
Idem, 722
20. This court cannot review a finding of a jury upon a question of fact.
Gregg v. Moss, 740
21. Where the charge puts the case to the jury on fair grounds, this court will not reverse on account of the charge.
Idem, 740
22. The rejection of evidence which did not injure a party, is not ground of error.
Idem, 740
23. The granting or refusing a motion for a new trial rests in the discretion of the court below, with which this court will not interfere.
Erskine v. Hohnbach, 745
24. The objection to the sufficiency of a replication to put the averments of the plea in issue cannot be raised after verdict.
Idem, 745
25. This court will not reverse a judgment where the error has become immaterial, and the same party will be entitled to judgment if a new trial is granted.
Pugh v. McCormick, 789
26. It is error in the court to charge a jury that they may find a fact, when there is nothing but mere suspicion on which they can do so.
Ward v. United States, 792
27. Questions not decided in the state court, because not raised, will not be re-examined in this court.
Caperton v. Bowyer, 882
Cockroft v. Rose, 875
28. It is only under the 25th section of the judiciary act that this court takes cognizance of error committed in state courts.
Caperton v. Ballard, 885
29. There must be a Federal question, within the terms of that section, or this court cannot consider it.
Idem, 885
30. A judicial state record must be authenticated as required by the act of Congress, or the Federal question whether the same effect has been given, to it in another state as it has in its own, cannot arise.
Idem, 885

APPEAL AND ERROR, PRACTICE ON.

See BANKRUPTCY.
JURISDICTION, 1-4, 8, 12, 15, 19, 20, 24, 25 29, 33, 34, 35, 55.
1. Where questions under a law are certified to this court on division of opinion in the court below, and subsequently the law is repealed, no answer can be returned to the questions.
United States v. Tynen, 153
2. A suit in the name of the state, on the relation of an individual, is not a cause which has priority over other causes.
Miller v. The People, 259
3. Criminal cases will not be advanced on the calendar where the defendant is not in jail.
Ward v. Maryland, 260
4. A mere formal objection to a citation is waived by a full admission of service signed by counsel.
Bigler v. Waller, 260
5. To make the appeal a supersedeas, the security must be given within ten days from the rendering of the decree.
Idem, 260
6. Defects in the bond may be obviated by granting leave to file a new bond.
Idem, 260
7. Where the appellee dies after appeal, the administrator of the domicil may be admitted as the appellee in this court, although he was appointed in a different state from that in which the action was commenced.
Noonan v. Bradley, 279
8. Where the court is of the opinion that the writ of error or appeal has been taken out only for delay, it will affirm the judgment below with ten per cent damages in addition to interest.
Prov. Ins. Co. v. Huchbergers, 364
Hennessy v. Sheldon, 446
Peyton v. Heineken, 679
9. Where a plea is erroneously overruled on demurrer, if the same defense is in another plea, the judgment will not be disturbed.
R. Co. v. Bk. 385
10. A commission is ordered to take testimony of witnesses in regard to corruption of witnesses in court below in case of a judgment on libel for collision.
The Western Metropolis v. Low, 394
11. The assignee in bankruptcy of the plaintiff in error may have a case re-instated which was dismissed, if he applies the same term, and be substituted for the bankrupt as plaintiff in error, unless the court has no jurisdiction of the case.
Knox v. Bk. 287
12. An objection insisted upon for the first time in this court is ineffectual.
Rogers v. Ritter, 417
13. The distinction between law and equity must be preserved in Federal courts. Equity causes from the circuit of Louisiana must come here by appeal, and common-law causes by writ of error.
Walker v. Dreville, 429
14. Where a proceeding in equity for the foreclosure of a mortgage is brought here by writ of error, the writ will be dismissed.
Idem, 429
15. An allowance is necessary upon a writ of error to a state court.
Packet Co. v. Home Ins. Co. 463
16. Commissions to take testimony cannot be al-

lowed in this court, as of course. A good and sufficient reason therefor must be shown.
The Mabey v. Atkins, 473
17. Two appeals are not allowable in the same case on the same question, and this court will determine which of the two should be dismissed.
Wheeler v. Harris, 531
18. Where this court finds no error in the record, the judgment of the state court will be affirmed.
Plant v. Stovall. 538
19. The teste of the chief justice of the court is indispensable to a writ of error to the supreme court of Montana.
Wells v. McGregor, 538
Germain v. Mason, 689
20. It is sufficient reason for giving preference to cases in which a state is a party, that the money represented by the bonds sued for is part of the school fund, and is wanted for school purposes.
Huntington v. Texas, 550
21. A party cannot take advantage of rulings upon exceptions in his own favor, even if erroneous.
Bethell v. Mathews, 556
22. A statement of facts signed by counsel cannot be noticed upon error.
Idem, 556
23. In a writ of error to a joint judgment against several, all must join, or the writ will be dismissed.
Hampton v. Rouse, 593
24. A party wishing to move the dismissal of an appeal need not await the arrival of the term to which the record ought to be returned.
Ex parte Russell, 632
25. Where the record does not show that an appeal was asked for or allowed, and the appeal bond was not approved and there was no citation, the appeal will be dismissed.
Monger v. Shirley, 635
26. A bill of exceptions dated during the term at which the trial was had, although some days after the trial, is sufficient, if it show that the exceptions were taken at the trial.
French v. Edwards, 702
27. When the court is composed of a single judge or chancellor the writ of error may be allowed by him: in other cases it can only be allowed by the chief justice or chancellor of the state court, or by a justice of the Supreme Court of the United States.
Bartemeyer v. Iowa, 792
28. A writ of error may be prosecuted by one defendant, where written notice was given to the co-defendants and they declined to join.
O'Dowd v. Russell, 857
29. Where a judgment against a defendant was reversed in a state court, because he was held not entitled to the exemption which he claimed under the bankrupt act, and a judgment against his sureties was affirmed, because they were held not entitled to the benefit of his discharge, both judgments were final, and may be brought to this court by writ of error.
Idem. 857
30. A mistake in the date of a writ of error does not vitiate the writ, where it was duly issued and served.
Idem. 857
31. Where it does not appear from the record, that any copy of the writ was lodged in the clerk's office within ten days, nor when the bond was allowed and filed, the writ of error cannot operate as a supersedeas.
Idem, 857

ARMY.

A brigadier general is above the rank of brevet brigadier general.
United States v. Hunt, 739

ASSIGNMENT.

1. An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment.
Christmas v. Russell, 762
2. The transfer must be of such a character that the fund holder can safely pay the assignee, and is compellable to do so, although forbidden by the assignor.
Idem, 762
3. A bill of exchange or check is not an equitable assignment *pro tanto* of the funds of the drawer in the hands of the drawee, but an order to pay out of a specified fund is.
Idem, 762

ASSIGNEE.

See BANKRUPTCY, 2, 6, 8, 10.
CONTRACTS, 3.

ATTORNEYS.

1. An order of the criminal court of the District of Columbia, striking the name of an attorney from its roll, did not remove the attorney from the bar of the supreme court of the District.
Bradley v. Fisher, 646
2. The power of a court to remove attorneys should not be exercised without notice to the offending party, of the grounds of complaint against him, and affording him opportunity of explanation and defense.
Idem, 646
3. The obligation of attorneys is not discharged by merely observing the rules of courteous demeanor in open court, but includes abstaining from insulting language and offensive conduct out of court towards the judges, personally, for their judicial acts.
Idem, 646
4. A threat of personal chastisement made by an attorney to a judge out of court for his conduct during the trial of a cause pending, is good ground for striking the name of the attorney from the rolls.
Idem, 646
5. Such an order is a judicial act for which the judge is not liable to the attorney in a civil action.
Idem, 646

AUDITA QUERELA.

1. The writ of audita querela does not lie, where the party complaining has had a legal opportunity of defense and has neglected it.
Avery v. United States, 405
2. Audita querela is a regular suit in which the parties may plead and take issue on the merits; it cannot, therefore, be sued out against the United States.
Idem, 405

BAGGAGE.

See CARRIER, 5, 7.

BANKRUPTCY.

See CHATTEL MORTGAGE, 4.
1. No execution can issue on the judgment from which defendant is discharged in bankruptcy without order of the court and notice to him. He has no further interest in the suit, and cannot bring a writ of error thereon.
Knox v. Bk. 287
2. The assignee in bankruptcy, alone, can bring writ of error.
Idem, 287
3. By insolvency, as used in the bankrupt act, is meant inability of a party to pay his debts as they become due in the ordinary course of business.
Toof v. Martin, 481
4. The transfer to one creditor, of a large portion of a debtor's property, while he is insolvent, is conclusive evidence that a preference was intended in fraud of the bankrupt act, unless the debtor can show that he was at the time ignorant of his insolvency.
Idem, 481
5. A creditor has reasonable cause to believe a debtor insolvent, when such a state of facts is brought to his notice as would lead a prudent business man to the conclusion that the debtor is unable to meet his obligations as they mature.
Idem, 481
6. Where a fund was transferred by a firm, one of whom subsequently became bankrupt, a contest for the fund between the transferee and the assignee in bankruptcy cannot be determined by the court in bankruptcy in a summary way, but only by an action at law or in equity.
Smith v. Mason, 748
7. Strangers to the proceedings in bankruptcy, not served with process, and who have not voluntarily appeared and become parties thereto, cannot be compelled to come into court under a petition for a rule to show cause.
Idem, 748
8. Assignee in bankruptcy may recover proceeds of goods sold under judgment against bankrupt taken by confession when both parties knew of the insolvency.
Bk. v. Campbell, 832
9. Such judgment, though taken before June 1,

1867, but after the enactment of the bankrupt law, is an unlawful preference under the 35th section of that act.
Idem, 832
10. The assignee need not sue the sheriff, but may sue the bank which directed the levy and sale and holds the proceeds in its vaults.
Idem, 832
11. What is an unlawful preference under the bankrupt act?
Idem, 832

BANKS.

See ACTION, 4.
1. By the currency act of 1864, banking associations are prohibited from making any loan or discount on the security of their own capital stock.
Bk. v. Lanier, 172
2. A deposit is a loan of money, and is within said prohibition, whether interest be obtained or not.
Idem, 172
3. A contract pledging the stock of a national bank to it as security for loans is illegal.
Idem, 172
4. Congress evidently intended, by the law of 1864, to relieve the holders of bank shares from the restrictions imposed by § 36 of the act of 1863.
Idem, 172
5. National banks may be sued in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases.
Bethel Bk. v. Pahquioque Bk. 840
6. The act of the Comptroller of the Currency in appointing a receiver of a national bank does not work its complete dissolution, but the bank as a legal entity, continues to exist, and it may still sue and be sued, to close its business.
Idem, 840
7. The decision of the receiver disallowing a claim against the bank is not final, but is subject to review in the state court.
Idem, 840

BEQUESTS.

See WILL, 1.

BILL OF LADING.

1. The terms "dangers of lake navigation," in a bill of lading, include a peril from shallowness of the water at the entrance of a harbor.
Transportation Co. v. Downer, 160
2. Where danger might have been avoided by proper care and skill, the loss should be attributed to negligence of the carrier, notwithstanding an exception in the bill of lading.
Idem, 160
3. The bill of lading delivered contains the contract between the ship and the shipper.
The Thames v. Seaman, 804
4. Where the bill of lading stipulates for a delivery to order, the ship must deliver it to one who has the order of the shipper, and cannot deliver it to a stranger.
Idem, 804
5. It is no excuse for a delivery to the wrong persons, that the indorsee of the bills of lading was unknown or is absent, or cannot be found after diligent search.
Idem, 804
6. If, after inquiry, the consignee or the indorsee of a bill of lading for delivery to order cannot be found, the carrier must retain the goods until they are claimed, or store them on account of their owner.
Idem, 804
7. The agent of the absent owners may libel in admiralty, either in his own name or that of his principals.
Idem, 804
8. The transfer of a bill of lading carries with it the legal title to the property described in it.
The Telegraph v. Gordon, 807
The Vaughan v. Gordon, 807
9. A bill of lading is a receipt for the goods shipped and a contract to transport and deliver the same as therein stipulated.
The Delaware v. Oregon Iron Co. 779
10. So far as it is a receipt it may be contradicted by parol evidence; so far as it is a contract it cannot be so contradicted or varied.
Idem, 779
11. If the bill of lading is silent as to the mode of stowing the goods, it imports that the goods are to be carried under deck, and parol evidence that the shipper agreed that the goods should be stowed on deck, cannot be received.
Idem, 779

BILL OF REVIEW.

A bill of review may be maintained on the discovery of an agreement which was absent at the trial, where its absence was satisfactorily accounted for.
Easley v. Kellom, 890

BILLS, NOTES AND CHECKS.

See ASSIGNMENT, 3.
1. If there is any proof of fraud or illegality which can be left to the jury, such proof will cast on the plaintiff the onus of showing that he gave value for negotiable paper sued on.
Smith v. Sac Co. 102
2. Where bills of exchange were drawn accompanied with forged bill of lading, and were discounted by a bank and subsequently accepted and paid by the acceptors, they cannot recover back from the bank the money paid by them on the ground of the forgery of the bills of lading, of which the bank was ignorant at the time of this discount.
Hoffman v. Bank, 366
3. Promissory note given wholly or partly for price of goods in aid of the Rebellion is void in hands of one who received it knowing for what it was given.
Hanauer v. Doane, 439
4. Due-bills given for the price of such goods in the hands of a person knowing the fact, are not good consideration for a note.
Idem, 439
5. The issue of notes, as currency, by the city of Richmond, in April, 1861, was against the law and policy of Virginia, notwithstanding a clause in the city charter authorizing the borrowing of money.
Thomas v. Richmond, 453
6. When the issuing of bills as a currency by a city is contrary to positive law, and the *ultra vires*, no recovery can be had against the city, either on the bills themselves or for the money paid to the city for such bills.
Idem. 453
7. Laws which authorized and required the city to redeem these bills, passed by a legislature not recognized by the United States and in aid of the Rebellion, did not make such bills valid.
Idem, 453
8. Where, on the last day of grace, the indorsers wrote to the holder of the note that the maker was unable to pay the note, and added "but we hold ourselves responsible for its payment and shall see it done at any early day," held, that such letter was waiver of demand and notice.
Yeager v. Farwell, 476
9. Satisfactory proof of waiver of demand, notice, and protest of a note, is equivalent to a compliance with the requirement.
Pugh v. McCormick, 789

BONA FIDE PURCHASER.

See BONDS, 3, 11, 14.
1. One who has acquired his title by a quitclaim deed, cannot be regarded as a bona fide purchaser without notice.
May v. LeClaire, 50
Alexander v. Rodriguez, 406
2. A person who is lessee of real property, with the right to purchase the same at a fixed price, is not a bona fide purchaser without notice as against an unrecorded mortgage.
Idem, 406

BONDS.

See CONTRACTS, 7, 8.
CORPORATION, 2.
DISTILLERS, 1–4.
USURY, 1, 4.
1. A finding that the plaintiff became the holder by transfer before maturity does not imply that he purchased or received the coupons sued upon on any consideration whatever.
Smith v. Sac Co. 102
2. Where there is no proof on these points, the plaintiff can occupy no better position than the one to whom the bonds were originally delivered.
Idem, 102
3. Purchasers of bonds, in good faith, in the open market, supposing them to be valid obligations, are bona fide holders for value.
R. R. Co. v. Cowdrey, 199

4 Distiller's bond, conditioned to conform to all the provisions of the internal revenue act, is valid.
United States v. Mynderse, 241
5. The United States may maintain an action against the principal and sureties in such a bond, for violation of the requirements of §§ 39 and 45 of the internal revenue law of July 1, 1862.
Idem, 241
6. Where the law authorizes a corporation to sell its own bonds, the giving collateral security on such sale, is not inconsistent with the transaction being a sale.
R. Co. v. Bank, 385
7. Where a receiver of public moneys has given bond for the faithful performance of his duties, proof that he had been robbed of such money is no defense to a suit on such bond.
Boyden v. United States, 527
8. His liability is to be measured by his bond, and where that binds him to pay the money, a cause which renders it impossible for him to do so is of no importance.
Idem, 527
9. Where a marshal or receiver of public moneys was in default for not paying over public moneys for some time before they were prevented from payment by the public enemies, such prevention is no defense to an action on their bonds to recover such moneys.
Bevans v. United States, 531
Haliburton v. United States, 333
10. Where a county received in exchange for its bonds, a certificate of stock of a railroad company, and held it seventeen years and still holds it, the county is estopped from asserting that the conditions on which the bonds were to be issued had not been fulfilled.
Pendleton v. Amy, 579
11. Where one purchased municipal bonds in market overt, the presumption is that he acquired them before they were due; and that he paid a valuable consideration for them, and that he took them without notice of any defect which would render them invalid.
Lexington v. Butler, 800
12. Coupons and municipal bonds to which they are attached, payable to order and indorsed, or payable to bearer, are transferable by delivery, and are subject to the same rules as to title and rights of the holder, as negotiable bills of exchange and promissory notes.
Idem, 809
13. Their holders are protected from the defense of prior equities between the original parties, to the same extent as the holders of any other class of negotiable instruments.
Idem, 809
14. When a corporation has power under any circumstances to issue negotiable securities, the bona fide holder has a right to presume that they were issued under circumstances giving the requisite authority.
Idem, 800
15. A suit upon a coupon is not barred by the statute of limitations unless the lapse of time is sufficient to bar also a suit upon the bond, which in respect to the statute of limitations is a specialty.
Idem, 809

BOUNDARIES.
See STATES, 1–7.

BOUNTY LAW.
See TAXES AND TAX SALES, 14.

BURDEN OF PROOF.
See EVIDENCE, 8.
NEGLIGENCE, 1.

CARRIERS.
See BILL OF LADING, 1–11.
CONSIGNMENT, 1, 2.
INSURANCE, 13, 14.
1. Although a common carrier is not responsible for the destruction or loss of goods by the act of a public enemy, he is nevertheless bound to use due diligence to prevent such destruction or loss, and if his negligence contributed thereto, he will be liable.
Holladay v. Kennard, 390
2. The law requires a carrier to use ordinary care and attention and makes him liable for want of same.
Idem, 390
WALL. 11, 12, 13, 14.
3. Carrier is not excused from delivering goods stowed on deck without the consent of the shipper, although lost by perils of the sea.
The Delaware v. Oregon Iron Co. 779
4. The obligations and liabilities of a common carrier do not depend upon contract.
Railroad Co. v. Swift, 422
5. If a common carrier has good grounds for not receiving baggage or property, he must insist on them; if he receives same, his liability is the same as though no ground of refusal existed.
Idem, 422
6. A common carrier is an insurer of property, and his liability is not limited by the fact that the property was loaded by the owner, or that he accompanies it.
Idem, 422
7. Where a railroad company receives, on a passenger train, property of a passenger other than his baggage, it is liable as a common carrier, unless there be fraud or concealment.
Idem, 422
8. Surgical instruments, of a surgeon in the army, are baggage.
Idem, 422

CHARTER-PARTY.
1. If the charter-party let the entire vessel to the charterer, with a transfer of its command and possession, he will be considered as owner for the voyage.
Leary v. United States, 756
2. If the charter-party let only the use of the vessel, the owner at the same time retaining its command and possession, the charterer is a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed.
Idem, 756
3. Under a clause in the charter-party by which the government agreed that, in case the vessel should be destroyed or damaged by any extraordinary marine risk the owners should be indemnified, held, that a collision with a sunken anchor in the harbor was an ordinary risk for which the Government was not liable.
Idem, 756

CHATTEL MORTGAGE.
1. A chattel mortgage which was never deposited in the proper office is void, as against creditors, under the statute of Kansas.
Bank v. Hunt, 190
2. A chattel mortgage without seal is valid, unless a seal is required by statute.
Gibson v. Warden, 797
3. A chattel mortgage on partnership property executed by one of the partners is good, if the other partners authorized or acquiesced in its execution.
Idem, 797
4. A chattel mortgage is not void as to an assignee in bankruptcy in Ohio, which was executed before, but filed within four months before filing the petition in bankruptcy.
Idem, 797
5. As between the mortgagor and the mortgagee and subsequent mortgagees and purchasers with notice, a mortgage is valid from its delivery without filing.
Idem, 797
6. Where the mortgaged property has been converted into money, the lien of the mortgage follows the fund into the hands of an assignee, and binds it there.
Idem, 797

CITIZENS.
See CORPORATION, 3.

COLLECTORS.
Under the act of June 17, 1864, a collector is authorized to retain all fees paid him, not in excess of $2,500.
United States v. Ballard, 845

COLLISION.
See DAMAGES, 1, 3–5.
INEVITABLE ACCIDENT, 1–3.
MARITIME LAW, 7, 10.
1. Whether the lookout on the schooner was sufficient can make no difference, where the want of a proper lookout did not contribute to the disaster.
The Fannie v. The Forrester, 114
2. Cases of collision decided on the facts.
The Ocean Spray v. Erlandson, 286
The St. John v. Hasbrouck, 645

3. Where the decree of the court below in a case of collision found that both vessels were in fault, the one not appealing to this court cannot deny that she was in fault.
The Maria Martin v. Trans. Co. 251
4. Errors committed by one of two vessels approaching each other do not excuse the other from using every proper precaution to prevent a collision.
Idem, 251
N. H. Trans. Co. v. The Continental, 801
5. Although by agreement, a canal-boat was being towed at her own risk, nevertheless, the steamer towing the canal-boat is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss from a collision.
The Syracuse v. Langley, 382
6. Where the master of the vessel could not have prevented the accident at the moment it occurred, this will not excuse him, if, by timely measures of precaution, the danger could have been avoided.
Idem, 382
7. A custom not to have a lookout while reefing, does not justify the absence of a lookout in a case when the vessel was in close proximity to two other vessels.
Thorp v. Hammond, 419
8. One of several owners, who commanded, sailed and exclusively managed a vessel, and was the charterer, is responsible for a tortious collision with another vessel.
Idem, 419
9. That the other owners are also sued with him is no bar to a recovery against him, as it is in accordance with admiralty practice to decree against one of several respondents to a libel for a tort, and to discharge the others.
Idem, 419
10. Where both vessels were in fault, the damages must be divided.
The Sapphire v. Napoleon III. 127
Plentz v. The Ariadne. 542
11. In waters crowded with shipping, the duty of the lookout is of the highest importance, requiring indefatigable care and sleepless vigilance, and every doubt as to the performance of such duty, arising upon the evidence, should be resolved against the vessel owing such duty.
Idem, 542
12. The act of Congress of 1851, limiting the liability of ship-owners, includes collisions, as well as injuries to cargo.
Trans. Co. v. Wright, 542
13. If a collision happens between two vessels at sea, and one of them is at fault without the privity or knowledge of her owners, they will only be liable for the amount of their interest in the vessel and her freight.
Idem, 542
14. That amount, if insufficient to pay all the damages caused, will be proportioned *pro rata* among the owners of the injured vessel and of the cargoes of both vessels in proportion to their respective losses.
Idem, 542
15. This liability of the ship-owners may be discharged by their surrendering and assigning to a trustee the vessel and freight for the benefit of the parties injured, in pursuance of § 4 of the act, although these may have been diminished in value, by the collision or other casualty, during the voyage, and it seems if they are totally lost the owners will be entirely discharged.
Idem, 542
16. When a boat is anchored in the path of vessels, a light is indispensable; but it is not required where the boat is fastened to the shore, at a place set apart for such boats.
The Bridgeport v. Shaw, 787
17. Where the question of fault in a collision lies between a vessel at a wharf, out of the track of other vessels, and a steamer navigating a channel of sufficient width, the fault generally will be held to be with the steamer.
Idem, 787
18. Where those in charge of the vessel did not exercise due care and vigilance to ascertain the character of the approaching vessel, or adopt reasonable precautions to prevent a collision, both vessels were held in fault, and the damages apportioned between them.
N. H. Trans. Co. v. The Continental, 801
19. A consignee may file a libel in a court of admiralty of the United States, for injuries to the cargo caused by a collision.
The Vaughan v. Gordon, 807
20. Both vessels held in fault for the collision where, without the grossest negligence or mismanagement, there could be neither peril nor disaster.
Idem, 807
21. A steamer changing her proper course will be held liable for a collision occasioned thereby.
Conrad v. Hazlett, 821
22. Steamer meeting a sailing vessel, must keep out of the way, and nothing but inevitable accident, or the conduct of the sailing vessel can repel the presumption that the steamer was negligent, arising from the fact of collision.
Sears v. The Scotia, 822
The Fannie v. The Forrester, 114
23. The sailing vessel must keep her course, and do nothing to mislead.
Sears v. The Scotia, 822
24. A steamer is not bound to take any steps to avoid a collision until danger of collision may be apprehended.
Idem, 822
25. Where the measures taken by her to avoid a collision would have been successful but for the constant veering of the other vessel, she was not chargeable with fault.
Idem, 822
26. A ship cannot be condemned for doing that which by the laws of the country of its origin, or ownership, it was required to do nor secure an advantage by violation of those laws, unless it is beyond their domain when upon the high seas.
Idem, 822
27. The violation of maritime law by the injured vessel in carrying a white light, and carrying it in an improper place rendered her in fault, and deprived her of all remedy for a collision.
Idem, 822
28. Where two ships are running in the same direction, the ship astern, if she is sailing faster than the one ahead, must adopt the necessary precautions to avoid a collision.
The Cayuga v. Hoboken Land Co. 828
29. Where ships are running on intersecting lines, the one which has the other on her starboard side must keep out of the way of the other.
Idem, 828
30. A steamer in a crowded harbor is not liable for a collision, simply because she pursued an unusual course in going to her dock, if she used proper care and precaution.
The Java v. Oil Co. 834
31. She was not liable for a collision with a schooner which was entirely concealed from the view of the steamer by the intervention of another vessel until she suddenly came out from behind such vessel without warning.
Idem, 834
32. That a vessel was in charge of a pilot, is no defense to a libel for damages for a collision occasioned by her negligence.
The Merrimac, 873
33. If a steamship, with a tug on each side of her attempted to pass between a vessel which was grounded and a wreck, it was her duty to keep out of the way of the vessel.
Idem, 873
34. Where a collision occurs exclusively from natural causes, the loss must rest where it fell.
The Mabey v. Atkins, 881
35. This rule has no application to a case where negligence is shown to have been committed on either side.
Idem, 881

COMMERCE.

See NAVIGABLE WATERS, 1-4.

CONFISCATION.

1. The Confiscation Acts were legitimate exercise of the war power, and are constitutional.
Page v. United States, 135
2. The right to confiscate exists in a domestic or civil war.
Idem, 135
Tyler v. Defrees, 161
3. In a civil war, those are to be treated as enemies, who, although subjects of the lawful government, are residents of the territory under the control of the party resisting that government, and their property may lawfully be confiscated.
Idem, 135
4. Where confiscation proceedings come before the court collaterally as the foundation of the defendant's title no error can be regarded that does

not show want of jurisdiction in the court which rendered the judgment condemning the property.
Idem, 161
5. An effectual attempt at confiscation does not deprive chancery proceedings to sell property of legal validity.
Ludlow v. Ramsey, 216

CONSIDERATION.
See BILLS, NOTES AND CHECKS, 1, 3, 4.
CONTRACT, 9, 10.
ESTOPPEL, 2.

CONSIGNMENT.
1. The title to goods, delivered to carrier to be sent to commission merchants, in pursuance of an agreement that they shall sell the goods and pay their advances on them, passes to the consignees on delivery to the carrier.
Halliday v. Hamilton, 214
2. Trespass may be maintained by the consignees against attaching creditors of the consignor, who took and sold the goods.
Idem, 214

CONSTITUTIONAL LAW.
See CORPORATIONS, 8, 9, 11, 12.
DECREES AND JUDGMENTS, 3, 6.
JURISDICTION, 2, 3, 27, 34, 43, 54.
TAXES AND TAX SALES, 10, 12, 18.
VESTED RIGHTS.
1. The states cannot levy a duty of tonnage on ships or vessels.
Cox v. Lott, 370
Trade Co. v. The Collector, 376
2. The prohibition extends to ships or vessels employed in commerce between ports and places in the same state.
Idem, 370
3. A statute of a state, which prohibits the sale within a certain district of the state of goods other than agricultural products and articles manufactured in the state, by persons not residents in the state, without first obtaining a license and paying therefor, is unconstitutional.
Ward v. Maryland, 449
4. It is repugnant to the 2d section of the 4th article of the Constitution, which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.
Idem, 449
5. The constitutional provision of the United States and of the several states, which declares that private property shall not be taken for public use without just compensation, establishes this principle beyond legislative control.
Pumpelly v. Canal Co. 557
6. It is not necessary that property should be absolutely taken. Serious interruption to the common and necessary use of property will be equivalent to taking within the meaning of such constitutional provision, but remote and consequential injury will not be.
Idem, 557
7. The backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand or other material or artificial structure placed on land for the public benefit, is such a taking as, by the constitutional provision, demands compensation.
Idem, 557
8. Lands sold by the United States, with no reservation, bordering on a navigable stream, are within the protection of such constitutional principle.
Idem, 557
9. The clause of the Constitution of Georgia, of 1868, that no court shall have jurisdiction to try, or give judgment on, or enforce any debt, the consideration of which was a slave or the hire thereof, is void as to debts contracted previous to its adoption.
White v. Hart, 685
10. The reconstructed states have never been out of the Union.
Idem, 685
11. A state can no more impair the obligation of a contract by adopting a constitution than by passing a law.
Idem, 685
12. Where the contract was valid when made, any subsequent constitutional provision which makes it void is in violation of the Federal Constitution on the subject of impairing the obligation of contracts.
Delmas v. Ins. Co. 757

CONTRACTS.
See BILLS, NOTES AND CHECKS, 6, 8.
CARRIER, 4.
DURESS, 3, 4.
EVIDENCE, 19.
MARITIME LAW, 1, 5, 7, 8.
PATENT RIGHTS, 19.
PAYMENT, 1.
TAXES AND TAX SALES, 12, 13.
USAGE, 1, 2.
1. The construction given to a contract by the parties, is an aid that may always be called in when the meaning of the contract is ambiguous.
Steinbach v. Stewart, 56
2. A contract made by the Secretary of War with an officer of the Army of the United States, is not forbidden by the army regulation forbidding contracts by one army officer with another.
United States v. Burns, 388
3. Assignee of one half of such contract, though an army officer, can recover in court of claims his moiety, although the other contractor, by his disloyalty, is barred from recovery by the act of March 3, 1863.
Idem, 388
4. A contract to employ another to carry all the goods one has to transport between two points on a river does not impose an obligation to employ him to carry goods from a more distant point on the river, although in such transportation such goods pass between both points named in the contract.
Scott v. United States, 438
5. Where one made a contract with government to deliver to it sound cavalry horses, subsequent regulations by government for their inspection, are not alteration of the contract.
United States v. Wormer, 530
6. Where such contractor gave up his contract by reason of such regulations, he was not entitled to any damages for making preparations for its performance.
Idem, 530
7. Where a person receives a certain sum in bonds, which said sum he agreed to expend in purchase of lands at $5 per acre, he is bound to purchase lands with them, at their face value.
Kitchen v. Bedford, 637
8. His selling the bonds at six cents on the dollar and investing the proceeds in lands is not a fulfilment of the contract, and the purchaser, knowing the contract, must restore the bonds to the original owner.
Idem, 637
9. Neither the motive nor the expectation of result that induces one to enter into a contract, constitutes its consideration.
Philpot v. Gruninger, 743
10. A conveyance of property made to a firm, is an adequate consideration for a note of the firm, made by one of the firm.
Idem, 743
11. Where the United States hired a vessel at a fixed price per day, with the privilege of buying her at $40,000, and this sum might be paid by her *per diem* hire, in which case the vessel was to become the property of the government, the contract vested an equitable ownership in the government.
Propeller Co. v. United States, 760
12. Where the United States became insurer against war risks, and the vessel was destroyed by such risk before the freight earned amounted to the appraised value or price, the plaintiff's loss could not have exceeded what remained unpaid of that sum and he having already received that sum, can have no further claim.
Idem, 760

COPYRIGHT.
An agreement that certain publishers "shall have the copyright of reports of a court" gives the publishers the benefit of the act of Feb. 3, 1831, granting an additional extension of fourteen years.
Paige v. Banks, 709

CORPORATIONS.
See BONDS, 6, 10–14.
ESTOPPEL, 2.
PRINCIPAL AND AGENT, 4–6.
RELIGIOUS CORPORATIONS, 1–7.
TAXES AND TAX SALES, 7, 12, 13.
1. A corporation, although it may be permitted to transact business where its charter does not operate, cannot on that account acquire a residence there.
Ins. Co. v. Francis, 77

2. A municipal corporation may purchase back its own bonds.
New Albany v. Burke, 155
3. A corporation is a citizen of the state which created it.
St. Louis v. Ferry Co. 192
R. Co. v. Whitton, 571
4. A mortgage was properly executed as to bona fide holders for value, although the meetings of the directors by which the mortgages were authorized, were held out of the state.
Galveston R. v. Cowdrey, 199
5. A corporation doing business in a foreign territory, consents to be sued there.
R. Co. v. Harris, 354
6. One state may make a corporation of another state its own.
Idem, 354
7. Acts of Congress made the Baltimore & Ohio R. Co. suable in the District of Columbia.
Idem, 354
8. A statute amending a charter of a corporation passed with its assent and accepted by a corporate vote as an amendment to the charter, does not impair the obligation of the contract of the original charter.
Pennsylvania College Cases, 550
9. A provision in a charter that it shall not be altered in any other manner than by an act of the legislature, is equivalent to an express reservation to the state to make alterations in it.
Idem, 550
10. Where an act uniting two colleges was valid, and the two original corporations became merged in one, neither of them can thereafter sue for any cause of action.
Idem, 550
11. Contracts for scholarships between one of the colleges and individuals, before the colleges were united, would not inhibit the legislature from altering, modifying, or amending the charter of the corporation by virtue of a right reserved to that effect, or with the assent of the corporation.
Idem, 550
12. Charters may be altered, modified or amended in all cases where the power to do so is reserved in the charter or in some antecedent general law.
Idem, 550
13. Neither a grantor of land to a corporation, nor one who claims under him, can question its capacity to take the title after it has paid to such grantor full value for the property.
Myers v. Croft, 562

COUPONS.

See BONDS, 1, 15.

COURT OF CLAIMS.

See ABANDONED AND CAPTURED PROPERTY ACT, 4, 7, 9.
UNITED STATES, 1.
1. British subjects have the right to sue in the court of claims under the act relating to captured and abandoned property, as the American citizen has the right to prosecute his claims against the British government in its courts.
United States v. O'Keefe, 131
2. The acceptance of the amount of a claim against the government allowed by commissioners, and giving a receipt therefor in full, is a bar to a claim for further allowance by the court of claims.
United States v. Child, 300
3. This court will not dismiss an appeal from the court of claims upon the ground that a motion for a new trial had been made in that court; but will dismiss the appeal when a new trial has been granted.
United States v. Crusell, 384
4. A claim for the destruction of property by the United States naval forces, in bombarding a town, cannot be heard by the court of claims.
Perrin v. United States, 412
5. The employment and use of steamboats impressed into the public service, raised an implied promise on the part of the United States to reimburse the owner therefor, and the court of claims has jurisdiction of such claims.
United States v. Russell, 474
6. A rule of the court of claims, which required that the claimant should have first gone through the department which might have entertained the claim before he could prosecute in that court, is void.
Clyde v. United States, 479
7. Where a vessel, during the late war, transported a load of coal for the United States, by agreement, and was impressed to undertake another voyage; held, that the court of claims had jurisdiction of the claim under the contract, but not of the claim for the other voyage which was outside of the contract.
United States v. Kimball, 503
8. The court of claims may grant a new trial after a decision of a cause by this court on appeal, notwithstanding the filing of the mandate of this court.
Ex parte Russell, 632
9. The court of claims has not jurisdiction of a claim for the destruction of property by the military forces of the United States, during the war, in one of the states engaged in the Rebellion, nor of a claim for rent of a plantation, where the leasing was an incident only to the unlawful appropriation and spoliation of the plantation.
Pugh v. United States, 711
10. Where Congress directed the court of claims to rehear a claim which has been decided against by that court on account of the informality of the papers; held, that Congress intended that such court should wholly disregard such informality.
Cross v. United States, 721
11. Recovery cannot be had in the court of claims for injuries to a vessel occasioned by the tortious act of an officer of the government.
Morgan v. United States, 738
12. Where the United States hired a vessel to transport troops and munitions of war, the U. S. assuming the war risk, and the owners of the boat bearing the marine risk, the stranding of the boat in going over a bar was owing to a peril of the sea, and her owners, and not the government, must bear the loss.
Idem, 738
13. The peremptory order of the quartermaster to proceed to sea is outside of the contract, and no recovery can be had thereon by reason thereof in that court.
Idem, 738
14. On appeals from the court of claims, nothing can be reviewed but questions of law. The court of claims must find the facts.
Mahan v. United States, 764
15. If the court of claims refuses to find as prayed, the prayer and refusal must be made part of the record, so that this court can determine whether the question is one so necessary to the decision of the case that it will send it back for such finding.
Idem, 764

COURTS.

Although the judges of the supreme court of a territory are appointed by the President under an act of Congress, yet the courts they are authorized to hold are not courts of the United States.
Clinton v. Englebrecht, 659

COVENANT.

1. A verbal agreement between the parties to a deed made at the time of the delivery or previous thereto, that one of them should be released from the covenants contained in the deed, cannot defeat an action for an alleged breach of those covenants.
Wadsworth v. Warren, 402
2. The covenant "to warrant and defend" property for which a quitclaim deed is executed "against all claims, United States excepted," does not cover the interest of the United States nor preclude its acquisition by the covenantors or their heirs for themselves.
Davenport v. Lamb, 655
3. A covenant that if the grantors "obtain the fee simple" to property conveyed "from the government of the United States, they will convey the same" to the grantee, his heirs or assigns "by a deed of general warranty," only takes effect in case the grantors acquire the title directly from the United States, and does not cover the acquisition of the title of the United States from any intermediate party.
Idem, 655
4. In covenant of non-payment of rent, payable at different times, a new action lies as often as the respective sums become due and payable.
Cross v. United States, 721
5. Where the suit is for instalments of rent not due when a former suit was instituted, and they were not included in it in any stage of the proceeding, the plea of former recovery is no bar.
Idem, 721

CRIMINAL LAW.

1. Meaning of the words "false, forged, and counterfeit," in the 6th section of the act of Feb. 25, 1862.
United States v. Howell, 195
2. Under said section one can be legally convicted for altering or passing a forged or counterfeit note purporting to be a United States Treasury note issued under authority of said act.
Idem, 195
3. A criminal prosecution for a public offense is not a cause affecting persons who may be called to testify therein within the act of Congress of April 9, 1866.
Illyew v. United States, 638
4. Under such act, the United States circuit court has no jurisdiction of the crime of murder committed in the district of Kentucky, merely because two citizens who witnessed the murder were of the African race, and incompetent to testify in such state courts.
Idem, 638

CUSTOM.

See USAGE, 1-3.

DAMAGES.

See COLLISION, 10, 13, 14, 18, 32.
CONTRACTS, 6.
PATENT RIGHTS, 25.

1. The proper rule of damages where a cargo is lost *in transitu*, by a collision or other tort, is the value of the goods at the time and place of shipment.
The Vaughan v. Gordon, 807
The Telegraph v. Gordon, 807
2. Where a decree was right when rendered, it will not be disturbed, although the currency in which it was rendered has lessened in value since its rendition.
Idem, 807
3. Damages for collision will not be diminished on insufficient proof.
Conrad v. Hazlett, 821
4. Owners of vessels are not liable for damages from a collision beyond the amount of their interest in the ship and her freight.
The Cayuga v. Hoboken Land Co. 828
5. Damages in cases of collision are the same as in suits for injuries to personal property, and may extend to loss of freight, necessary expenses incurred in making repairs and unavoidable detention.
Idem, 828

DECREES AND JUDGMENTS.

See APPEAL AND ERROR, PRACTICE ON, 29.
CONFISCATION, 4.
EJECTMENTS, 2.
HOMESTEAD RIGHTS, 23.
JURISDICTION, 4, 5, 6, 9, 18, 22, 26, 29, 32, 34, 36, 41, 45, 51, 53, 54.
LANDS, 2, 3, 18.
PRACTICE, 19.

1. Where the residuary devisees of land are not before the court, it cannot decree the conveyance of real estate, but the legal representatives being before it, it can give a money decree against them, embracing the value of the land, which it might otherwise adjudge to be conveyed.
May v. Le Claire, 50
2. In revenue cases, default entered establishes facts averred in the libel or information and warrants a decree of condemnation if the information contains the necessary averments, and a jury trial is unnecessary.
Paige v. United States, 135
3. A judgment on a contract for the payment or delivery of a specified weight of pure gold, solvable in coined money, should be entered for coined dollars and parts of dollars.
Dewing v. Sears, 189
4. A judgment on a contract payable in coin may be entered for coined dollars.
Trebilcock v. Wilson, 460
5. The same legal effect must be given to a New York judgment in New Jersey, as would be given to it in New York.
Chew v. Brumagen, 663
6. Where, by the laws of New York, a trustee of an express trust may bring an action without making the *cestui que trust* a party, a judgment in such action is conclusive against the *cestui que trust*, not only in that state but in all other states.
Idem, 663
7. A decree of affirmance, without taxation of costs and without specifying the sum for which it is rendered, is not a final decree.
Wheeler v. Harris, 531
8. An order setting aside a sheriff's return to an execution, and awarding an alias execution is not a final judgment.
Wells v. McGregor, 538

DEEDS.

See BONA FIDE PURCHASER, 1.
DURESS, 1.
TAXES AND TAX SALES, 15, 17.

DELIVERY.

See BILL OF LADING, 4-6.
CONSIGNMENT, 1.

DEPOSITION.

See PRACTICE, 1.

DEVISE.

See WILL, 1-3.

DISTILLERS.

See BONDS, 4, 5.
DUTIES, 7.

1. Where a distiller gave a bond, conditioned that he would faithfully comply with all the provisions of law in relation to the duties and business of distillers, he is bound to pay the wages of the storekeepers placed by the government in charge of his distillery warehouse, although the Resolution of Congress requiring it was passed after the execution of his bond.
United States v. Powell, 726
2. A distillery warehouse is a bonded warehouse within the meaning of the joint resolution.
Idem, 726
3. Such distiller must pay the government for work done by the storekeepers, or for money paid for their *per diem* wages on Sunday.
Idem, 726
4. The sureties on such bonds are bound in the same manner as their principals.
Idem, 726
5. If certain spirits belonging to the government by forfeiture are voluntarily mixed with other spirits belonging to the same party and passed through the process of rectification in leaches, he cannot thereby deprive the government of its fair proportion of rectified spirits.
Idem, 726

DOWER.

A wife who has a right of dower only in the event that she survived her husband, has no present title to the land, either legal or equitable.
Dolton v. Cain, 830

DURESS.

See LIENS, 4.

1. A deed, obligation or contract, procured by means of threats to take the life of the person executing it, is inoperative and void.
Baker v. Morton, 262
2. Moral compulsion, produced by threats to take life or to inflict great bodily harm is sufficient to constitute duress.
French v. Shoemaker, 852
3. A contract signed because a party was in straightened circumstances, greatly embarrassed, and in pressing want of money, where the other party to it is not responsible for his necessities, is a voluntary act, and he is bound by its terms.
Idem, 852
4. Where such party signed a contract after he had ample time for inquiry, examination and reflection, neither a court of equity nor a court of law can release him from its obligations.
Idem, 852

DUTIES.

1. The act of July 14, 1862, levied "on all goods, wares, and merchandise of the growth or produce of countries beyond the Cape of Good Hope" a duty of ten per cent ad valorem, in addition to the duties imposed on such articles when imported directly from the place or places of their growth or production, leaving all other articles embraced in the first clause or the body of the section subject to the new duty therein prescribed.
Sturgess v. Draper, 255

LIMITATIONS.

See ADMIRALTY, 1-3.
EJECTMENT, 3, 4.
INSURANCE, 12.

1. The operation of the statute of limitations is suspended during war.
Levy v. Stewart, 86

2. The Indiana statutory limitation of six years in relation to suits at law, applied to an equity action.
New Albany v. Burke, 155

3. The effect of the war was to suspend the running of the statutes of limitation during its continuance in suits between citizens of the different belligerents, and also in suits by the United States.
U. S. v. Wiley, 211

4. The general rule, as above stated, was not changed by the act of Congress of June 11, 1864.
Idem, 211

5. This act requires all the time of the war, whether before or after its passage, to be deducted from the time the cause of action accrued. It applies to the Federal and state courts and is constitutional.
Idem, 211
Stewart v. Bloom, 176

6. State statutes of limitation do not apply to the state itself unless it is expressly designated, nor to the United States.
Gibson v. Chouteau, 534

7. The occupation of land of the United States before the issue of their patent, for the period prescribed by the statute of limitations of a state, for the commencement of action for the recovery of real property, is not a bar to an action of ejectment for the possession of such land founded upon the legal title subsequently conveyed by the patent.
Idem, 534

8. The statute of limitations is entitled to the same respect as other statutes, and should not be explained away.
U. S. v. Wilder, 681

9. A payment in full of an admitted contract cannot be converted into an acknowledgment of one which was denied.
Idem, 681

MANDAMUS.

1. A circuit court of the U. S. cannot issue a writ of mandamus as an original proceeding nor at all except when necessary to the exercise of its jurisdiction.
Bath Co. v. Amy, 539

2. Where the Secretary of the Treasury was not asked to pay money until the time limited by the law had expired, a writ of mandamus to compel payment by him will not be issued.
Ky. v. Boutwell, 631

3. Where a court declines to hear a case or motion, alleging its own incompetency to do so or that of the party to be heard, mandamus is the proper remedy.
U. S. v. Russell, 474

4. This court may issue writs of mandamus to any court of the United States, where such court, having jurisdiction, refuses to hear and decide a case, or where, having heard, it refuses to render judgment or enter a decree.
Ex parte Newman, 877

5. But the writ will not be issued where the party aggrieved may have a remedy by writ of error or appeal.
Idem, 877

6. The supervisory court will never by such writ prescribe what the decision of the subordinate court shall be, or control its judgment or discretion.
Idem, 877

MARINERS.

1. Mariners may bring suits to recover their wages, against the owner or master of the ship *in personam*, or they may proceed *in rem* against the ship or ship and freight, at their election.
Leon v. Galceran, 74

2. The mariner may proceed by libel in the district court or by an action at law either in the circuit court or in a state court, as in other causes of action cognizable in the state and Federal courts exercising jurisdiction in common-law cases.
Idem, 74

3. Claims of the kind create a lien upon the vessel under the laws of Louisiana similar to the lien which arises in such cases under the maritime law.
Idem, 74

MARITIME LAW.

See COLLISION, *passim*.
GENERAL AVERAGE.
LIENS, 1, 2.
MARINERS, 1-3.
PRIZE, 42.

1. Whether a contract is maritime or not maritime depends, not on the place where the contract was made, but on the subject-matter of the contract.
Ins. Co. v. Dunham, 90

2. Where the United States hired a vessel at a *per diem* compensation and the voyage was broken up by the perils of navigation, the owners of the vessel are only entitled to the agreed *per diem* compensation, and not to additional damages for the injury.
Reed v. United States, 220

3. The English maritime law is the maritime law of this country, so far as it is adapted to the condition of the country, and has not been modified by the proper national authorities.
Officers of Ships of War v. U. S. 505

4. Articles for which freight is paid are merchandise and part of the ship's cargo although used as dunnage.
Ins. Co. v. Thwing, 607

5. A warranty in a ship's policy, not to load more than her registered tonnage, will be broken by carrying more cargo in weight than such tonnage, although the excess be used as dunnage.
Idem, 607

6. Where coal is furnished to a vessel in a foreign port to enable her to make her voyage, the inference is that the credit was given to the vessel, unless it can be inferred that the master had funds, or that the owners had credit, and that the material man knew of this, or knew such facts as should have put him on inquiry.
The Patapsco v. Boyce, 696

7. An engagement to tow a ship does not impose an obligation to insure nor the liability of common carriers, but only ordinary care and skill.
The William H. Webb v. Barling, 774

8. The burden is upon him who alleges the breach of such a contract to show either that there has been no attempt at, or that there has been negligence or unskilfulness in, the performance.
Idem, 774

9. Where the steamer was discharged from arrest, on stipulation, the stipulators are bound only to the extent of the stipulation.
Idem, 774

10. Mistakes in the management of the ship, while attempting to escape from a peril into which she was brought by the tug, cannot excuse the tug.
Idem, 774

11. No single nation can change the law of the sea; it rests upon the common consent of civilized communities.
Sears v. The Scotia, 882

12. Where rules of navigation are accepted as obligatory by more than thirty of the principal commercial states of the world, they may be regarded as laws of the sea; of which fact this court may take judicial notice.
Idem,

MARSHALS.

See JURISDICTION, 16.

A seizure of stock by a marshal by "serving a notice of said seizure personally upon the vice president or president of a company," is a sufficient seizure.
Paige v. United States, 135

MASTER AND SERVANT.

See PRINCIPAL AND AGENT, 5-9.

MORTGAGES.

See CORPORATIONS, 4.
CHATTEL MORTGAGE, 1-6.
LANDS, 25.
PRACTICE, 7.

1. A mortgage of a railroad to be built, together with its superstructure, appurtenances, fixtures and rolling stock, covered these several items of property, as they came into existence.
R. Co. v. Cowdrey, 199

2. Where one furnishes iron to be laid into a railroad and allows it to go into and become part of the road, it is covered by such mortgage, and he has no lien which can displace it.
Idem, 199

3. Mortgagees of railroads are not entitled on a

foreclosure to the income and profits of the road, until they take possession of the road.
Idem, 199
4. The law upon the subject to the right to redeem by the mortgagor who has conveyed to the mortgagee the equity of redemption, is like that which governs a sale by the *cestui que trust* to his trustee.
Alexander v. Rodriguez, 406
5. To give validity to a sale by a mortgagor to a mortgagee, it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid what the property was worth.
Idem, 406
6. He must take no advantage of the fears of poverty of the other party. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence, if there is vice in the transaction.
Idem, 406
7. Where the mortgagee assured the mortgagor before and after the conveyance, that if he could sell so as to repay him the money secured by the mortgage, he would return the surplus money, or if he could sell a portion sufficient to re-imburse him, he would return the unsold portion, he cannot repudiate such assurances upon which his grantors were drawn in to convey.
Idem, 406
8. One who holds a portion of the title by deed from a part of the mortgagors is clothed with their rights, and is entitled to redeem such portion upon paying a proper proportion of the mortgage debt and interest.
Idem, 406
9. The rents, issues and profits and improvements made upon the premises must also be taken into the account.
Idem, 406
10. A mortgage by railroad company on all future acquired property is subject to any liens under which it comes into the company's possession.
R. Co. v. Mellen, 434
11. If the company give a mortgage for purchase money of property, such mortgage, whether registered or not, has precedence over the general mortgage, except when the property is annexed to a subject already covered by the general mortgage and becomes a part thereof; as, rails laid down.
Idem. 434
12. To redeem property from a mortgage sale, the whole mortgage debt must be tendered or paid into court.
Collins v. Riggs, 723
13. The money will be subject to distribution between the mortgagee and the purchaser at the mortgage sale, in such proportions as to re-imburse the latter his purchase money and pay the former the balance of his debt.
Idem, 723
14. Where a deed of trust or mortgage of real estate stipulates that in case of sale the trustee should give sixty days' notice in newspapers in Richmond and in the city of New York, a sale without such notice conveys no title, but is void.
Bigler v. Waller, 891
15. A purchaser at such void sale who entered in pursuance of his purchase, claiming title in himself by virtue thereof, is chargeable as a trustee, but a claim of title thereunder is not alone sufficient to charge him as such.
Idem, 891
16. Such purchaser is not responsible for the waste and destruction committed upon the land by the Confederate military forces in his absence, without his knowledge.
Idem, 891

MUNICIPAL CORPORATIONS.

See TAXES AND TAX SALES, 3, 18.

NAVIGABLE WATERS.

1. A river can only be deemed a navigable water of the U. S. when it forms, by itself or its connection with other waters, a highway, for commerce with other states or foreign countries.
United States v. The Montello, 191
2. If a river is only navigable between different places within the state, then it is not a navigable water of the United States, but only a navigable water of the state.
Idem, 191
3. The acts of Congress only require enrollment and license of vessels employed upon the navigable waters of the United States.
Idem, 191

NEGLIGENCE.

See BILL OF LADING, 12.
COLLISION, 5, 20, 35.
QUESTIONS OF LAW AND FACT, 4.
1. The burden of establishing negligence rests with the owner of the goods who sues a carrier for their loss.
West Transportation Co. v. Downer, 160
2. Contractors for building a railroad, carrying a passenger on construction train, liable for ordinary care and skill only.
Shoemaker v. Kingsbury, 432
3. Negligence is shown where a ship went to sea when the master of the tug which had her in tow, knew that it was not safe in view of the condition of the weather and tide.
The Mabey v. Atkins, 881

OFFICER.

See BONDS, 7–9.
INTERNAL REVENUE, 4.
Where the law requires a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he is liable in damages to the party injured. Mistake or honest intentions will not excuse him.
Amy v. Barkholder, 101

PARDON.

See ABANDONED AND CAPTURED PROPERTY ACT, 3, 5.
1. The President could annex to his offer of pardon of December 8, 1863, any conditions he should see fit; but after those conditions had been satisfied, the pardon and its connected promises took full effect.
United States v. Klein, 519
2. The proclamation of pardon and amnesty of President Johnson, of December 25, 1868, was limited to persons who participated in the late insurrection or Rebellion, and to the offense of treason against the United States or adhering to their enemies during the late Civil War.
Gay v. United States, 606
3. It did not, therefore, restore to a person not engaged in the insurrection, property forfeited under the non-intercourse laws.
Idem, 606
4. The proclamation of the President of Dec. 25, 1868, granting to every person who participated in the late Rebellion a full pardon with the restoration of all rights, blots out the offense.
Armstrong v. United States, 614

PARTIES.

See APPEAL AND ERROR, PRACTICE ON, 7, 11, 23, 28.
BANKRUPTCY, 2, 7, 8, 10.
COURT OF CLAIMS, 1.
JURISDICTION, 1, 19, 20, 33, 37, 44.
PLEADINGS, 2.
1. The owner of the property, although a resident within the Confederate lines and a rebel, may file an answer and defend proceedings for the forfeiture or confiscation and sale of the property, and sue out a writ of error to this court.
McVeigh v. United States, 80
Paige v. United States, 135
2. A bill in chancery will not be dismissed for want of proper parties, if the necessary parties can be supplied. But if this is impossible, the bill must be dismissed.
Bk. v. R. Co. 82
3. When there is a want of indispensable parties, which cannot be supplied without ousting the jurisdiction of the court, the bill should be dismissed.
Idem, 82
4. To a bill for the settlement of the partnership accounts all the members of the firm are indispensable parties.
Idem, 82
5. A foreign sovereign may prosecute in our courts.
The Sapphire v. Napoleon III. 127
6. Holders of railroad bonds of three different classes may sue in behalf of themselves and all other bond holders in each class according to their several priorities.
R. Co. v. Cowdrey, 199
7. Rule laid down as to necessary parties in chancery.
Bk. v. Campbell, 832
8. In a suit by a distributee of the estate of a decedent to recover a distributive share, it is not necessary to make parties all who are entitled to

distribution, nor can a decree be made in their favor.
Hook v. Payne, 887
9. If they should appear and claim an interest, if there are controverted matters between them and the administrator outside of the mere accounting to be made by him, this can only be decided on proper pleadings and regular hearing by the court.
Idem, 887
10. A bill to set aside a fraudulent receipt obtained by an administrator, from one distributee, and to recover the amount coming to him, is not a suit in which all other persons interested in the estate can be heard unless they are made parties.
Idem, 887

PARTNERSHIP.

See CHATTEL MORTGAGE, 3.
PARTIES, 4.
1. The property of a partnership belongs to the firm and not to the partners, each of whom is entitled only to a share of the surplus that may remain after payment of the partnership debts.
Bk. v. R. Co. 82
2. The right of an assignee of a partner is only an equity to share in such surplus.
Idem, 82
3. A promise by individual partners made in their individual names respecting a matter that has no connection with the firm business does not create a firm liability.
Forsyth v. Woods, 207
4. Partners are all liable to make indemnity for the tort of one of their number, committed by him in the course of the partnership business.
Stockwell v. United States, 491

PATENT RIGHTS.

See EVIDENCE, 1-3.
QUESTIONS OF LAW AND FACT, 2, 6.
1. Whiteley's patent for grain harvesters embraces every substantial element found in the construction and arrangement of the Dinsmore machine and is an infringement thereon.
Whiteley v. Kirby, 32
2. It is sufficient if the claim is co-extensive with the invention.
Seymour v. Osborne, 33
3. The commissioner's decision as to accepting a surrender of an original patent and granting a new patent, is final and conclusive.
Idem, 33
4. The claim may be construed in connection with the explanations contained in the specifications.
Idem, 33
5. The improvement is new and useful if the combination is new and the machine can be used for the purpose for which it was designed.
Idem, 33
6. He is the first inventor who first perfected the invention and adapted the same to use.
Idem, 33
7. Bona fide inventors of a combination may suppress every other combination, not substantially different from what they have invented and patented.
Idem, 33
8. A company who agrees to pay a sum as a royalty for the use of a patented machine, cannot, in an action to recover such sum, set up that the machine is not covered by the patent, unless the agreement was obtained by fraud, surprise or imposition.
Eureka Co. v. Bailey Co. 209
9. A fraud of the plaintiff by which the commissioner was misled and deceived and induced to reissue the patent cannot be set up in such action.
Idem, 209
10. The first claim in Dubois' patent for building piers is not for a process, but for a device or instrument to be employed in a process, the instrument being a floating coffer-dam.
R. Co. v. Dubois, 265
11. The second claim to the patent is for the use of the tube, no matter what its length, shape or material, nor of how many parts it consisted.
Idem, 265
12. A party is not estopped by his silence unless it has misled another to his hurt.
Idem, 265
13. Evidence in regard to the state of the art had no bearing upon the question whether the patentee was the first inventor.
Idem, 265
14. The adaptation of a mechanical instrument to a new use, is not a new invention, and is not patentable.
Tucker v. Spalding, 115
15. The act of July 20, 1870, does not change the patent law of Feb. 1861, which gives to parties in patent suits, a writ of error or appeal to the Supreme Court of the United States, without regard to the sum in controversy.
Phillip v. Nock, 567
16. The acts of Congress which authorize the grant of a patent for designs contemplate utility less, than that which gives a peculiar or distinctive appearance to the manufacture or article to which it is applied.
Gorham Mfg. Co. v. White, 731
17. It is the appearance to the eye that constitutes mainly if not entirely the contribution to the public which the law deems worthy of recompense, and identity of appearance or sameness of effect upon the eye is the main test of substantial identity of design.
Idem, 731
18. It is not essential to identity of design that the appearance should be the same to the eye of an expert. If, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same; if the resemblance is such as to deceive such an observer and sufficient to induce him to purchase one supposing it to be the other, the one first patented is infringed by the other.
Idem, 731
19. An assignment of an interest in an invention, secured by letters patent, is a contract and is to be construed so as to carry out the intention of the parties to it.
Pavement Co. v. Jenkins, 777
20. Assignment of a patent "to the full end of the term for which the letters patent are or may be granted" conveys both a present and a future interest including a renewal and extension of the patent.
Idem, 777
21. The proper mode of annuling a patent, when the ground of relief is fraud in obtaining it, is by bill in equity.
Mowry v. Whitney, 858
22. No suit can be brought to set aside, annul, or declare void a patent issued by the government, except where two patents have been granted for the same thing to different persons, or where there are conflicting claims to a patent unless brought in the name of the government or by the authority or permission of the Attorney General so as to be under his control.
Idem, 858
23. The novelty of Whitney's invention is not disproved by evidence that glass or speculum metal, or iron castings had been annealed and slow cooled, before it was made.
Idem, 860
24. His patent is not void for want of novelty of invention nor for want of utility; and the specification sufficiently describes the process invented and claimed.
Idem, 860
25. Patentee is only entitled to recover as damages for infringement, the profits actually made in consequence of the use of his process in making wheels. He cannot recover the profits made on the entire wheel.
Idem, 860
26. Where the patent is for an entire process, made up of several constituents, the exclusive use of them singly is not secured to the patentee.
Idem, 860

PAYMENT.

See COURT OF CLAIMS, 2.
1. A note for dollars payable "in specie" is payable in gold or silver dollars.
Trebilcock v. Wilson, 460
2. Where the amount of a claim against the government is disputed, the receiving as correct by the claimant, the amount made out by the government, and his giving a receipt in full, concludes him from making any further demand, and is a satisfaction of the claim.
United States v. Clyde, 479
3. Where a claim against the government was referred to a commission and the claimant participated in its proceedings and took the sum found to be due him without protest, he will be held to have accepted it in full satisfaction of his demand.
United States v. Justice, 753

PENSIONS.

The pension act of Feb. 23, 1853, does not confer a right to a pension commencing prior to its passage.
United States v. Mayes, 381

PILOTS.

1. Pilot regulations are regulations of commerce; and half pilotage is a necessary and usual part of every system.
Ex Parte McNeil, 624
2. State pilotage laws are constitutional and valid and are subject to the power of Congress over the matter.
Idem, 624

PLEADINGS.

See USURY, 4.
1. A plea in abatement after the defendants had pleaded to the merits, is too late.
Cook v. Burnley, 29
2. Where the parties to a suit in a state court were not the same as in the present case, the suit in the state court cannot be pleaded in abatement.
Idem, 29
3. Where the declaration avers that the defendant is a corporation created by an act of the legislature of the state of New York, and located and doing business in Mississippi, this is an averment that the defendant was a citizen of New York.
Ins. Co. v. Francis, 77
4. Demurrer does not reach back to the first error in the pleadings where the defect is one of form and not of substance.
R. Co. v. Harris, 354
5. By pleading over in bar, a party waives all pleas in abatement.
Idem, 354
6. Where a plea relies on a statute authority as a defense it must allege the facts which it asserts to be so authorized, and cannot allege generally that it complied with the statute.
Pumpelly v. Canal Co. 557
7. In an action upon coupons, pleas that the plaintiff is neither the owner, holder or bearer; and that the bonds belonged to a third person, and that the county did not make them are good on general demurrer.
Pendleton Co. v. Amy, 579
8. A plea in abatement is required only where the citizenship averred, is such as to support the jurisdiction of the court, and the defendant desires to controvert the averment.
R. & Coal Co. v. Blatchford, 179
9. In an action of trespass against a collector for a seizure of property by him, a replication to a special plea which, if true, would only have shown that the assessor had erred in his judgment in making the assessment, which could not have justified the collector in suspending the enforcement of the tax, tenders an immaterial issue.
Erskine v. Hohnbach, 745
10. The replication of *de injuria*, interposed to a plea, puts in issue the material averments of the plea.
Idem, 745
11. Where a demurrer to a plea was overruled, and the plaintiff did not reply, but judgment was entered upon the plea, another plea of *nil debet* became immaterial, and the judgment was properly entered for the defendant.
United States v. Ballard, 845

POSTMASTER-GENERAL.

By the act of Mar. 3, 1863, Congress constituted the Postmaster-General the sole judge of the allowance to postmasters under that act, and it is not competent for court or jury to revise his decision.
United States v. Wright, 188

PRACTICE.

See APPEAL AND ERROR, PRACTICE ON, *passim*.
COLLISION, 3, 19.
EXCEPTIONS, 1.
INSURANCE, 8, 9, 25.
1. Where there is no certificate to a deposition by the magistrate that he reduced the testimony to writing, or that it was done by the witness in his presence, such omission is fatal to the deposition.
Cook v. Burnley, 29
2. A crossbill, although sustainable if it were an original bill, must be dismissed if the original bill is.
Dows v. Chicago, 65
WALL. 11, 12, 13, 14.
3. Bill of exceptions need not be sealed.
Genneres v. Campbell, 110
4. For any error in relation to the facts a writ of error is not the proper remedy.
Idem, 110
5. The finding of the court in a case tried by it has the same effect as a verdict of a jury.
Idem, 110
6. In La. the practice of the state courts is the practice in the Federal courts.
Dunlop v. Zunts, 181
7. A sale of land in La. must be advertised according to the state practice, and if not, will be set aside.
Idem, 181
8. The right to a jury trial can be waived by express agreement in open court and by implied consent.
Idem, 181
Kearney v. Case, 395
9. Practice in trials by the court, and the method and extent of review, fully stated.
Ins. Co. v. Miller, 398
10. Matters of fact found by the circuit court cannot be re-examined here.
Idem, 398
11. The review, when the finding is general, is confined to the rulings of the court, and when the finding is special nothing is open to review except the inquiry whether the facts found are sufficient to support the judgment.
Idem, 398
12. Requests, which assume as facts matters dependent upon the evidence, which are not embraced in the findings of the circuit court, show no ground of reversal.
Idem, 398
13. The law of a territorial legislature, prescribing the mode of obtaining panels of grand and petit jurors, and challenges to them, is obligatory upon the district courts of the territory.
Clinton v. Englebrecht, 659
14. Where the instructions given were sufficient to dispose of the controversy, it is not error to refuse to give further instructions.
Armstrong v. Morrill, 765
15. No laches is to be imputed to the government and against it no time runs so as to bar the public rights.
Idem, 765
16. Parties may by stipulation waive a jury and submit the case to the court.
United States v. Distilled Spirits, 815
17. The judges are not required to submit a question to a jury unless there is evidence upon which a jury can properly find a verdict thereon.
Improvement Co. v. Munson, 867
18. If the charge of a judge is merely ambiguous the party dissatisfied with it should request to have it made clear before the jury leave the bar.
Idem, 867
19. Where a suit is revived against defendant's administrator, but not against his heirs, no decree can be made against the latter.
Bigler v. Waller, 891

PRE-EMPTION.

1. In contests for a right of pre-emption, that one of the claimants had filed a declaratory statement for another tract, where the land in question was not subject to private entry, does not deprive such claimant of his right, if it is otherwise perfect.
Samson v. Smiley, 489
2. By the 5th section of the act of 1843, the first settler has three months to make his declaration, and if this is not done within that time, anyone else who has settled on it before the first settler makes his declaration, shall have the better right.
Johnson v. Towsley, 485
3. If no other party has made a settlement or has given notice of such intention, then after three months, the party still in possession may make his declaration.
Idem, 485

PRINCIPAL AND AGENT.

See INSURANCE, 17, 21.
1. Knowledge of counsel in a transaction is notice to his client.
May v. Le Claire, 50
2. If the agent, at the time of effecting a purchase, has previous knowledge of any prior lien, trust or fraud, affecting the property, his principal is affected thereby.
Boyden v. United States, 167

3. When it is not the agent's duty to communicate his knowledge to his principal, as when it has been acquired confidentially as attorney, the principal is not bound by it.
Boyden v. United States, 167
4. An agreement made by an agent of a corporation, is a contract of the corporation, although made without any resolution of the board of directors, and though the seal used was the private seal of the agent, if the agent was authorized to execute it, or the company ratified his act.
Eureka Co. v. Bailey Co. 209
5. Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound thereby, although no previous authority exists, as if the requisite power had been given in the most formal manner.
Bronson's Ex'r v. Chappel, 436
6. If he had justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, he is estopped to deny it.
Idem, 436
7. Everything fairly within the scope of the powers exercised in the past may be done in the future until notice of revocation or disclaimer is brought home to those whose interests are concerned.
Idem, 436
8. The tortious act of the agent is the act of his principals, if done in the course of his agency, although not directly authorized.
Stockwell v. United States, 491
9. Whatever an agent does or says, in reference to the business in which he is at the time employed, within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case.
Idem, 491

PRINCIPAL AND SURETY.
See DISTILLERS, 4.
1. Suit may be brought in the state court against sureties in a bond given to release property from a writ of sequestration.
Leon v. Galceran, 74
2. The law will not enforce a promise to indemnify a surety on a bond for doing an act intended to enable his principal to commit a gross breach of trust.
Forsyth v. Woods, 207

PRIVATE RIGHTS.
1. When the government takes private property for public purposes, the government is bound to make full compensation to the owner.
United States v. Russell, 474
2. Where steamboats were impressed into public service from imperative military necessity, the government is bound to make full compensation to the owner for the services rendered.
Idem, 474

PRIZE.
1. No one can have any right or interest in any prize except by the grant or permission of the United States, and all captures made without their express authority inure to their benefit.
Officers, etc., Ships of War v. U. S. 505
2. Joint captures by the army and navy inure exclusively to the benefit of the United States.
Idem, 505

QUESTIONS OF LAW AND FACT.
See POSTMASTER-GENERAL.
1. What is a continuous possession, is a mixed question of law and fact.
Cook v. Burnley, 29
2. Whether a re-issued patent is for the same invention as that in the original patent or for a different one, is a question for the court in an equity suit.
Seymour v. Osborne, 33
3. Whether a cargo was damaged by stranding or an antecedent peril of the sea is a question of fact for the jury.
Fowler v. Rathbone, 281
4. Negligence is a question for the jury.
Holliday v. Kennard, 390
5. It is a question for the jury whether a contract had been delivered and accepted.
Wadsworth v. Warren, 402
6. In a suit at law for an infringement of a patent, the diversity or identity of two mechanical instruments, is a question for the jury and not for the court.
Tucker v. Spalding, 515
7. It is a question for the jury whether a personal injury was so serious as to make its non-disclosure avoid a policy of insurance.
Ins. Co. v. Wilkinson, 617
8. Whether the demands of the statute respecting notice of tax sales have been complied with, is a mixed question of law and of fact, and should be submitted to the jury.
Idem, 617
Cooley v. O'Connor, 446
9. Where plaintiff relies upon a written proposal and there is no evidence at all of a different verbal proposal, it is the duty of the court when requested to tell the jury there is none.
Ward v. United States. 792
10. It is the duty of the court to construe a writing in connection with the admitted facts concerning the relations of the parties to the transaction.
Idem, 792
11. It is for the jury to determine whether swearing in proof of loss on a policy was false and fraudulent.
Ins. Co. v. Weide, 894

RAILROADS.
See BONDS, 10.
CARRIER, 7, 8.
CORPORATIONS, 4, 7.
EVIDENCE, 8.
MORTGAGES, 1, 2, 3, 10, 11, 14.
NEGLIGENCE, 2.
Charter of a railroad company which authorizes the company to mortgage real estate applies to any real estate which the company might acquire in any way.
R. Co. v. Cowdrey, 199

RECEIPTS.
See COURT OF CLAIMS, 2.

RECEIVER.
See BANKS, 7.

RECORDING ACTS.
Where there is no proof that the mortgagee, when the mortgage was recorded, had any notice of a prior, unrecorded deed, the mortgage has priority.
Dirst v. Morris, 722

RELIGIOUS CORPORATIONS.
1. Rights of property, or of contract, of religious organizations are under the protection of the law, and the actions of their members subject to its restraints.
Watson v. Jones, 666
2. The trustees and elders of the Presbyterian Church hold possession of its property for the use of the persons who, by the constitution, usages and laws of the Presbyterian body, are entitled to that use.
Idem, 666
3. Their possession is a fiduciary possession, and they are liable to be dispossessed by the election of others in their places.
Idem, 666
4. Individuals may dedicate property in trust to the purpose of sustaining and propagating definite religious doctrines, and it is the duty of the court to see that the property, so dedicated is not diverted from such trust, and the majority of a congregation cannot carry the property to the support of other doctrines.
Idem, 666
5. Where a church is of a strictly congregational or independent organization, and the property held by such a church has no trust attached to it, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations.
Idem, 666
6. Where the local congregation is itself a member and under the government of a much larger and more important religious organization, and is bound by its orders and judgments, its decisions are final and binding on legal tribunals.
Idem, 666
7. Courts having no ecclesiastical jurisdiction cannot revise nor question ordinary acts of church discipline. Their only jurisdictional power arises from the conflicting claims of the parties to the church property and the use of it.
Idem, 666

REVENUE LAWS.

See DECREES AND JUDGMENTS, 2.

A removal of distilled spirits procured by false and fraudulent bond, is not a removal according to law, and spirits thus withdrawn from a bonded warehouse are liable to forfeiture.

Harrington v. United States, 167

RULES.

In Admiralty, Instance side of U. S. Courts. 921
" " Index to. 928
In Appeals from Court of Claims. 910
In Courts of Equity of the U. S. 909
" " " " Index to. 921
In United States Supreme Court. 900
" " " " " Index to. 908

SALES.

See BONDS, 1, 3, 6, 12.
FRAUDS, 1–3.

SALVAGE.

1. Where a master and crew abandoned the vessel for the safety of their lives, and her condition is one of great peril, another vessel has a right to interfere as a salvor.

Norcross v. The Laura, 813

2. And if the imperiled vessel is lost in the attempt to save her, the salving vessel is not liable for such loss if her master acted in good faith, and with reasonable judgment and skill.

Idem, 813

SEAL.

See CHATTEL MORTGAGE, 2.

SHERIFF.

See HABEAS CORPUS, 1.

STAMP ACT.

1. Stamps are not necessary on the extension of time for the payment of a note, and on the re-inscription of a mortgage.

Delmas v. Ins. Co. 757

2. The stamp act of July 14, 1870, empowers the collector to remit the penalty for omitting to stamp a note although such omission occurred prior to the passage of the act.

Pugh v. McCormick, 789

3. A stamp is not required to an indorsement of a note, nor to a certificate waiving demand, notice and protest.

Idem, 789

STATE LAWS AND DECISIONS.

See DECREES AND JUDGMENTS, 5, 6.
EVIDENCE, 9.
TAXES AND TAX SALES, 7, 10, 12–16.

1. A judgment of a state court upon a question is conclusive upon the same question in a subsequent suit in the U. S. circuit court between the same parties, and is pleadable in bar to the subsequent suit.

Caujolle v. Curtiss, 507

2. The construction of a state law upon a question affecting the titles to real property in the state, by its highest court, is binding upon the Federal court.

Williams v. Kirtland, 683

STATES.

1. The right of West Virginia to jurisdiction over the counties of Berkely, Jefferson, and Frederick can only be maintained by a valid agreement between the two states of Virginia and West Virginia, made with the consent of Congress.

Virginia v. West Virginia, 67

2. There was an agreement between such states that the counties of Berkely, Jefferson, and Frederick should become part of West Virginia, subject to the condition alone that the voters of said counties should consent.

Idem, 67

3. Congress, by act of Dec. 31, 1862, admitted West Virginia into the Union with the contingent boundaries provided for in its Constitution and in the statute of Virginia, and consented to the agreement of those states on that subject.

Idem, 67

4. The action of the governor of Virginia is conclusive of the vote of such counties to become part of West Virginia as between the states of Virginia and West Virginia.

Idem, 67

5. By the treaty between France, Spain, and England, the middle of the river Mississippi became the boundary line between Missouri and Kentucky.

Missouri v. Kentucky, 116

6. If Wolf Island, at the date of the treaty, or of the admission of Missouri into the Union, or at any intermediate period between these dates, was east of this line, it belonged to Kentucky.

Idem, 116

7. If the river has subsequently turned its course and now runs east of the island, the boundary between the states remains as before, and the island does not, in consequence of this action of the water, change its owner.

Idem, 116

STATUTES.

See APPEAL AND ERROR, PRACTICE ON, 1.

1. Where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the former, with new provisions, it will operate as a repeal of the former act.

United States v. Tynen, 153

2. Statutes in *pari materia* are to be construed together, and repeals by implication are not favored if the acts can reasonably stand together.

Harrington v. United States, 167

3. A statute is impliedly repealed by a subsequent statute only so far as the provisions of the subsequent statute are repugnant to it, or so far as the latter statute, making new provisions, is plainly intended as a substitute for it.

United States v. Henderson, 235

4. The meaning of general words in a statute must be restricted whenever it is found necessary to do so in order to carry out the legislative intention.

Reiche v. Smythe, 566

5. Where two acts of Congress are *in pari materia*, it will be presumed that if the same word be used in both, and a special meaning is given it in the first act, it was intended it should receive the same interpretation in the latter act.

Idem, 566

6. A state law may give a substantial right which may be enforced in the proper Federal tribunal.

Ex parte McNiel, 624

7. Statutory requirements intended for the protection of the citizen and to prevent a sacrifice of his property are not directory, but mandatory. The power of the officer in such cases is limited by the manner and conditions prescribed for its exercise.

French v. Edwards, 702

STREETS.

See TAXES AND TAX SALES, 18.

SUPERSEDEAS.

See APPEAL AND ERROR, PRACTICE ON.
JURISDICTION, 23.

SURVEYS.

See LANDS, 1, 17, 22–24.

TAXES AND TAX SALES.

See PLEADING, 6.

1. A bill in equity to restrain the collection of a tax will not be sustained, on the ground alone that the tax was illegal.

Dows v. Chicago, 65

2. It must appear, in addition, that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or throw a cloud upon the title.

Idem, 65

3. A suit will lie personally against members of a city council, for their refusal to obey a writ of mandamus from the U. S. circuit court commanding them to levy a tax to pay judgments in that court against the city.

Farr v. Thompson, 102

4. Congress cannot impose a tax upon the salary of a judicial officer of a state.

Boffington v. Day, 122

5. Ferry-boats belonging to an Illinois company, not taxable by the city of St. Louis.

St. Louis v. Ferry Co. 192

6. The act of July 20, 1868, imposing taxes on distilled spirits, tobacco, etc., applies to the country of the Cherokee Nation and is valid notwithstanding the treaty with that nation.

Boudinot v. United States, 227

7. A state may tax the shares of stockholders in national banking associations, within its limits.

Vanslyke v. Wisconsin, 240
Bagnall v. Wisconsin, 240

8. A certificate of sale of public lands for taxes is not void or inoperative because signed by only two or three commissioners.
Cooley v. O'Connor, 446
9. The act of 1862 contemplates a certificate of sale of land for taxes in cases where the United States becomes the purchaser.
Idem, 446
10. The Wisconsin statute of Apr. 10, 1867, that the holder of a certificate of tax sale should give notice to whoever might be found in possession of the land before taking a deed, does not impair the obligation of the contract made at the sale.
Curtis v. Whitney, 513
11. Goods imported from a foreign country are not subject to state taxation while remaining in the original cases, in the hands of the importer, unbroken and unsold.
Low v. Austin, 517
12. A state law, chartering a company, which provided that the property or shares of the company shall be exempt from taxation, constituted a contract between the state and the company, which is violated by taxing the franchise and rolling stock or shares of the company.
R. Co. v. Reid, 568, 570
13. A law offering to all persons and corporations a bounty for salt manufactured in the state, and exemption from taxation of the property used in its manufacture, is not a contract in such a sense that it cannot be repealed.
Mfg. Co. v. E. Saginaw, 611
14. Such a law is nothing but a bounty law, and may at any time be altered, amended or repealed.
Idem, 611
15. A tax deed executed under a statute, declaring that such deeds should be prima facie evidence of a good and valid title in the grantee, his heirs and assigns, did not dispense with the performance of all the requirements prescribed by law for the sale of the lands. It only shifted the burden of the proof of such performance from the party claiming under the deed to the party attacking it.
Williams v. Kirtland, 683
16. The provision of the California statute that the sheriff, in selling property upon a judgment recovered by the state against the property, for delinquent taxes, shall only sell the smallest quantity of the property which any purchaser will take and pay the judgments and costs, is mandatory upon the officer and not directory merely.
French v. Edwards, 702
17. The deed of an officer reciting a sale of property for taxes, to the highest bidder, when he was only authorized by the statute to sell the smallest quantity of the property which any one would take, and pay the judgment and costs, is void on its face.
Idem, 702
18. Congress may authorize Washington city to assess upon the adjacent proprietors of lots, the expense of repairing streets with a new and different pavement, or of repairing an old one.
Willard v. Presbury, 719
19. Where, under the act of 1863, in regard to tax sales a person bid a sum sufficient to pay the tax, interest and costs, the commissioner is not bound to make the land bring two thirds its value.
Turner v. Smith, 724
20. The statute does not require the tax commissioner to hunt up the owner nor to make the tax out of personal property.
Idem, 724
21. A rent charge was cut off and destroyed by the tax sale.
Idem, 724
22. An appeal to the commissioner of internal revenue from an assessment is a condition precedent to an action for the recovery of taxes paid, but not to any other action.
Erskine v. Hohnbach, 745
23. The assessment, duly certified, is the collector's authority to proceed, and if regular on its face and issued by a tribunal having jurisdiction of the subject-matter, constitutes his protection.
Idem, 745

TENDER.

See LEGAL TENDER ACTS, 1-4.

TERRITORIES.

1. The legislature of Montana territory has no power to pass any law which shall deprive the supreme and district courts of the territory of chancery as well as common-law jurisdiction.
Dunphy v. Kleinschmidt, 223
2. A chancery case in the territorial courts of Montana should have been tried by the modes of proceeding known to courts of equity.
Idem, 223

TRADEMARK.

1. A company has not an exclusive right to the use of the words "Lackawanna coal," as a distinctive name or trade-mark for the coal mined by it.
Canal Co. v. Clark, 581
2. Where rights to the exclusive use of the trade-mark are invaded, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another.
Idem, 581
3. One has no right to appropriate geographical names as a trade-mark, so as to restrain other producers of similar products in the same place, from the use of those words in describing their goods.
Idem, 581
Mem. For valuable discussion of this subject see argument of counsel in
Gorham Mfg. Co. v. White, 731

TREATIES.

1. Louisiana, as ceded to the United States in 1803, embraced the territory between the Mississippi and Perdido rivers.
United States v. Lynde, 230
2. The treaty of 1819 confirmed grants of land made in the Floridas, east of the Perdido; but not those made to the west of that river, unless made to actual settlers or made before the treaty of St. Ildefonso went into effect.
Idem, 230

TRESPASS.

See CONSIGNMENT, 2.

TRUSTS AND TRUSTEES.

See ACTIONS, 3.
MORTGAGES, 4, 14, 16.
1. Where the cashier of a bank used money of the bank to purchase real estate, the title of which was taken to his wife, the real estate will be decreed to be sold, at the suit of the bank, to repay the money.
Mann v. Bk. 188
2. To permit a mercantile firm, of which the administrator is a partner, to take the assets of the decedent's estate into its possession and to share in the disposition of them, is a gross breach of trust by the administrator.
Forsyth v. Woods, 207
3. The mere making of a trust deed, without any acceptance, express or implied, by the trustees, is not sufficient to vest in the trustee, the title to the land, and parol proof is admissible to show that the trust was never accepted.
Armstrong v. Morrill, 765
4. In a state where the law allows ten per cent per annum interest, a decree will not be reversed because it allows against a fraudulent administrator eight per cent interest with annual rests.
Hook v. Payne, 887

UNITED STATES.

1. A money judgment can be rendered against the United States by the court of claims and by no other court.
Case v. Terrell, 134
2. The Comptroller of the Currency cannot submit the rights of the government to litigation in any court, without some express provision of law.
Idem, 134

U. S. COURTS.

See EVIDENCE, 9.

USAGE.

1. Custom or usage may be received to ascertain and explain the meaning and intention of the parties to a contract, whether written or parol, the meaning of which could not be ascertained without the aid of such extrinsic, evidence, where the parties knew of the existence of the custom or usage and contracted with reference to it.
Robinson v. United States, 653
2. Parties who contract on a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary.
Idem, 653
3. Usage may be proved, by a single witness who

has full knowledge and a long experience on the subject.
Idem, 653

USURY.

1. Usury in a bond is governed by the place where payable.
R. Co. v. Bk. 385
2. A law against usury on loans will not prevent the purchase of securities at any price.
Idem, 385
3. Whether the transaction is a purchase of securities or a loan of money, is a question of fact.
Idem, 385
4. By the law of New York a corporation cannot plead usury to a bond payable in that state.
Idem, 385
5. It is not usury to fix as the rate of interest, that allowed at the place of performance of a contract.
Peyton v. Heinekin, 679
6. Charge for money paid by commission merchants for insurance is not usurious.
Idem, 679

VENDOR AND VENDEE.

See WILLS, 3, 4.

VESTED RIGHTS.

A party has no vested right in a remedy under an act of Congress to prevent Congress from modifying it or adding new conditions to its exercise.
Brainard v. Hubbard, 272

WAR.

1. Enemy creditors cannot prosecute their claims in time of war, but the restoration of peace removes the disability.
Levy v. Stewart, 86
2. The proclamation of intended blockade by the President gives the date when the Civil War began
WALL. 11, 12, 13, 14.
and the proclamation that the war had closed gives the date of its ending.
Freeborn v. The Protector, 463
3. The war did not begin or close at the same time in all the states. Different dates of its beginning and closing in the different states given.
Idem, 463
4. The treasury regulation forbidding all transportation of coin or bullion to any state or section declared by the President's proclamation to be in insurrection, was valid.
Gay v. United States, 606

WASHINGTON CITY.

See TAXES AND TAX SALES, 18.

WILL.

1. Where the testatrix made her last will in which she bequeaths certificates that are in the hands of her brother, certificates as to the bounty lands in the hands of the register of the land office are not included in such bequest.
Edmondson v. Bloomshire, 44
2. A probate in Louisiana of the will of a person who died domiciled in New York is valid until set aside in the Louisiana court, though the probate of the will in New York has been reversed in the supreme court of that state on which the Louisiana probate was founded.
Foulke v. Zimmerman, 785
3. Purchaser from the devisee of such will of real estate in Louisiana while the order of the Louisiana court establishing the will remains in force, is an innocent purchaser, and is not affected by a subject order setting aside the will, to which he is not a party.
Idem, 785
4. Such an order, founded on a judgment in New York declaring the will void, obtained by collusion between the devisee under the will and the heirs at law, cannot affect the purchaser from the devisee, made in good faith before such judgment.
Idem, 785

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